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Tuesday, June 12, 2007

THE HONOURABLE NOËL A. KINSELLA
SPEAKER

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THE SENATE

Tuesday, June 12, 2007

The Senate met at 2 p.m., the Speaker in the chair.

Prayers.

THE LATE TROOPER DARRYL CASWELL

SILENT TRIBUTE

The Hon. the Speaker: Honourable senators, before we proceed, I would ask senators to rise and observe one minute of silence in memory of Trooper Darryl Caswell whose tragic death occurred yesterday while serving his country in Afghanistan.

Honourable senators then stood in silent tribute.

VISITORS IN THE GALLERY

The Hon. the Speaker: Honourable senators, I wish to draw your attention to the presence in the gallery of Ms. Mary Deros, who is a Montreal municipal councillor for the district of Park Extension. She is accompanied by Mr. Hagop Hagopian, a pillar of the Armenian community in Montreal. They are guests of the Honourable Senator Marcel Prud'homme, P.C.

Welcome to the Senate of Canada.

Hon. Senators: Hear, hear.

SENATORS' STATEMENTS

THE RIGHT HONOURABLE JOHN GEORGE DIEFENBAKER

FIFTIETH ANNIVERSARY OF ELECTION TO GOVERN

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I rise to draw your attention to an important date in Canadian history that occurred this past Sunday. Fifty years ago, on June 10, 1957, the Right Honourable John George Diefenbaker won the federal election. I vividly remember the day and the joyous celebration of my parents, lifelong Conservatives.

A well respected and successful lawyer in Saskatchewan, John Diefenbaker was a courageous, colourful and passionate man. He was a populist, a visionary and a man with strongly held views on the importance of human rights. His government, for instance, sold wheat to communist China for the first time, opening relations with that country.

He had a vision of the North and Canadian sovereignty. He called this vision "Roads to Resources," which the Liberal leader of the time, the Honourable Lester Pearson, derided as "roads from igloo to igloo."

His belief in human rights led to the Canadian Bill of Rights, which was passed by Parliament in 1960.

As Thomas Axworthy noted in an *Ottawa Citizen* op-ed piece in August 2002, the Canadian Charter of Rights and Freedoms would not exist today, "if Diefenbaker had not lit the way with his lifelong dedication to human rights."

His government gave status Indians the right to vote.

He appointed Ellen Fairclough as the first woman to serve in cabinet.

He led the charge within the Commonwealth to oppose South Africa's apartheid system.

• (1410)

He introduced simultaneous translation into Parliament, allowing parliamentarians to participate in the debates in the official language of their choice. He wanted all Canadians to feel at home in their own country.

Even though John Diefenbaker has had his share of critics, he should be celebrated as a great Canadian. It must be remembered, though, that he came to office facing an economic recession with no recovery plans in place and tough decisions to make — decisions that the previous Liberal government would not take.

One of the criticisms levelled at Mr. Diefenbaker, one of the most unfair, relates to his decision to cancel funding for the Avro Arrow, an expensive plane that no longer had any potential buyers. However, as Joseph Martin noted in Monday's *The Globe and Mail*:

> The fighter jet was technologically out of date and far too expensive; the previous Liberal government had decided to cancel it and planned to announce that decision after it won re-election.

To continue to spend money on the Avro would have made no fiscal sense, but that did not stop the CBC and others doing documentary after documentary on Diefenbaker killing the Avro.

Honourable senators, I would like to conclude by quoting John Diefenbaker in the debate on the Bill of Rights — a numbered one of which I have hanging on my wall, as it very much defines the man and sums up the democratic values that we all hold as Canadians:

> I am a Canadian, a free Canadian, free to speak without fear, free to worship God in my own way, free to stand for what I think right, free to oppose what I believe wrong, free to choose those who shall govern my country. This heritage of freedom, I pledge to uphold, for myself and all mankind.

Congratulations to a great man who played such a large role in a great period of our history.

CANADA'S PARTICIPATION IN AFGHANISTAN

Hon. Consiglio Di Nino: Honourable senators, as we heard, last night in Afghanistan a Taliban bomb took the life of a young Canadian soldier, Darryl Caswell, of the Royal Canadian Dragoons, of Petawawa, Ontario. Two other soldiers were injured in the same incident when their vehicle was hit by an improvised explosive device. The loss of this young man's life is tragic, and I know our thoughts are with him and his loved ones.

Honourable senators, in some circles, this incident has once again raised the issue of Canada's presence in Afghanistan, particularly the military one. Two stories appeared in the media this week, which may provide an answer. The first is about Roshan, meaning hope or light, a little cell phone company 50 per cent owned by the Agha Khan Fund for Economic Development, and how it is providing not only the ability to communicate, but also security and economic opportunities for Afghanistan's struggling people. To everyone's surprise, the charity-backed company boasts an astounding 1.3 million subscribers and continues to add some 60,000 customers a month. It employs some 900 people, 20 per cent of them women. The CEO said,

> We are more than a telephone company; we are helping rebuild our country.

In a place ravaged so long and so fiercely by the horrors of war, the emergence of this bright light is a testimony to the resilience of Afghans.

Honourable senators, the Canadian Forces have played and continue to play a major role in stabilizing the Kabul region, which allows these types of successes to occur.

The second story is a more heart-wrenching one, but no less relevant to Canada's presence there. It is the story of Zakia Zaki, a 35-year-old female journalist and human rights activist who was murdered while she slept with her young son — the second female journalist to be murdered last week in Afghanistan. What was her crime? Her crime was being a courageous woman who wanted to contribute to her community and her country in advancing the cause of women.

Honourable senators, the men and women of the Canadian Forces are prepared to put their lives on the line for the most honourable of causes, the protection of the rights of women like Ms. Zaki and their right to participate as equals in society.

That is something the Taliban disagree with; and when they can, they seek to impose their radical views through acts of intimidation and, all too often, by execution of the dissenters in cold blood.

I am sure honourable senators will agree with me that there are good and just reasons for Canada's participation in Afghanistan.

[*Translation*]

THE HONOURABLE DANIEL HAYS, P.C.

TRIBUTES

Hon. Jean Lapointe: Honourable senators, I would like to begin my tribute with an excerpt from a song made popular by the Compagnons de la Chanson:

> He was so big, so very tall, we thought he might well reach the sky.

That is how I saw the Speaker of the Senate when I was appointed.

• (1415)

A few weeks ago, I learned with regret and great sadness that our colleague — or I should say our good friend — Senator Daniel Hays, would be leaving us this summer to take on new challenges.

I will always remember how hard he worked and how dedicated he was to public service, both as Deputy Leader of the Government in the Senate and as Leader of the Opposition in the Senate.

But what has impressed me the most about this extraordinary man is his grace, his composure, his sensitivity and the way he occupied the chair as Speaker of the Senate with such distinction. Senator Hays is one of those exceptional people who speak passionately — whether at home or abroad, in English or in French — about the various issues facing our country.

I look to Senator Hays as a model, and I will continue to do so as long as I sit here. I am certain that I will never be as diplomatic as he is, but I will continue to draw inspiration from his subtlety and sophistication.

Thank you for everything, Senator Hays. I wish you a most peaceful rest with your charming wife Kathy, but I would particularly like to hope for your good health so that you can continue to inspire as many people as possible for many years to come.

Hon. Marcel Prud'homme: Honourable senators, I will not be here tomorrow, so I will not be able to pay tribute to our friend, Senator Hays, at that time. But what could I add after hearing Senator Lapointe's moving speech?

The Senate is losing a friend and a very qualified man. My personal experience goes back a long way, since I had the honour of being a member in the House of Commons with Senator Hays's father, the former mayor of Calgary and, thanks to Mr. Trudeau, I had the honour of being a delegate at the United Nations with Senator Hays's father, and so I was able to get to know him better. Then I had the honour of sitting with his son in the Senate and discovering with him a part of the world unfamiliar to me or to him. Other senators also accompanied Senator Hays, who really went beyond the call of duty to bring honour to our country, Canada, everywhere he went.

• (1420)

I do not think that he could have served his country and the Senate so well without the help of his wife, Kathy. In saluting him before I leave today, I would like him to convey our sincere gratitude to Kathy on our behalf. She has helped him in so many ways.

I am very honoured to see that just as I am finishing my tribute — which I would have liked to be more eloquent — our friend, Senator Hays, has arrived. I would like him to reread Senator Lapointe's statement, which I found so touching.

I know that he is, by nature, more reserved than I, but I would like him to know that when I use the word "friend." I do not use it lightly.

[*English*]

I want to thank Senator Hays very much for having given me his friendship over the years and for sharing with me so many good stories about his late father. As I said earlier, I had the honour of being a member of the House of Commons not only under Mr. Pearson but also under Mr. Trudeau, whom I had the honour of accompanying to the United Nations.

Honourable senators, Senator Daniel Hays has done a fantastic job on behalf of Canada. He has made Canada proud to have such a great servant.

[*Translation*]

I would call him a great servant of the state, and that is quite exceptional. To me, that is what he has been: a great servant of the state, with the capable help of his wife, Kathy, whom I salute today.

[*English*]

THE RIGHT HONOURABLE JOHN GEORGE DIEFENBAKER

FIFTIETH ANNIVERSARY OF ELECTION TO GOVERN

Hon. Lowell Murray: Honourable senators, I want to join with the Leader of the Government to mark the fiftieth anniversary of the election of the Diefenbaker government. Unfortunately, popular political legend tends to focus on the tumultuous later years of Mr. Diefenbaker's leadership. History also records that he recreated a truly national political party. He brought the West and Atlantic Canada in from the cold. His was a government that placed the aspirations of those regions at the centre of the national agenda.

Senator LeBreton mentioned the Bill of Rights. People otherwise marginalized in our society always regarded John Diefenbaker as their man, a champion of the underdog. One of the first acts of his government was to grant full voting rights to Aboriginals.

Mr. Diefenbaker led an activist and progressive government. He had campaigned against the miserly attitude of the St. Laurent Liberals towards old age pensioners and, despite a severe economic recession during his time in office, he maintained his commitment to social justice. When he went back into opposition, he was critical of Mr. Pearson's cooperative federalism, but in some ways he was its author. He had appointed his friend the eminent Saskatchewan jurist Emmett Hall to chair the royal commission that essentially designed what we now know as medicare. He dropped the requirement that a majority of provinces had to sign on before a national hospital plan could begin, thus kick starting its implementation; and he provided the first ever transfer of tax points, in this case to Quebec, so that the benefit of federal grants to universities could be extended to that province.

Honourable senators, Mr. Diefenbaker steered a resolutely independent course on foreign policy: Canada's continued relations with Cuba; our trade with China, mentioned by Senator LeBreton; the leadership in nuclear disarmament of his former minister Howard Green and their refusal to accept nuclear warheads for Bomarc missiles; his fight against apartheid in South Africa — these were significant contributions to international affairs, even if in some cases they set us against United States policy at the time.

[*Translation*]

We recall the problems that the French language posed for Mr. Diefenbaker and many other federal leaders at the time. However, I would like to emphasize that only the Official Languages Act has had a greater impact on the federal government's linguistic duality than the introduction by Mr. Diefenbaker's government of simultaneous interpretation in both Houses of Parliament.

[*English*]

Finally, a word about the Senate: Mr. Diefenbaker never even came close to achieving a majority in this house, but he remained respectful of the institution. In 1965, when the Pearson government moved to retire senators at age 75, Mr. Diefenbaker, while expressing scorn for some of the recent appointments to this place, expressed his admiration for much of the work that goes on here and urged Prime Minister Pearson to take advantage of the talent here by appointing more cabinet ministers from the Senate. He has left us much food for thought even 50 years later.

• (1425)

[*Translation*]

ROUTINE PROCEEDINGS

PUBLIC SECTOR INTEGRITY COMMISSIONER

CERTIFICATE OF NOMINATION OF MS. CHRISTIANE OUIMET TABLED

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, I have the honour to table, in both official languages, the certificate of nomination of Christiane Ouimet as Public Sector Integrity Commissioner.

AUDITOR GENERAL

MINISTER OF CANADIAN HERITAGE—
JUNE 2007 REPORT TABLED

The Hon. the Speaker: Honourable senators, I have the honour to table, in both official languages, the report of the Auditor General of Canada to the Minister of Canadian Heritage, dated June 2007.

[*English*]

STUDY ON VETERANS' SERVICES AND BENEFITS, COMMEMORATIVE ACTIVITIES AND CHARTER

INTERIM REPORT OF NATIONAL SECURITY
AND DEFENCE COMMITTEE TABLED

Hon. Colin Kenny: Honourable senators, I have the honour to table, in both official languages, the sixteenth report of the Standing Senate Committee on National Security and Defence, an interim report entitled, *An Enduring Controversy: The Strategic Bombing Campaign Display in the Canadian War Museum*.

The Hon. the Speaker: Honourable senators, when shall this report be taken into consideration?

On motion of Senator Kenny, report placed on the Orders of the Day for consideration at the next sitting of the Senate.

CONSTITUTION ACT, 1867

BILL TO AMEND—REPORT OF COMMITTEE

Hon. Donald H. Oliver, Chair of the Standing Senate Committee on Legal and Constitutional Affairs, presented the following report:

Tuesday, June 12, 2007

The Standing Senate Committee on Legal and Constitutional Affairs has the honour to present its

THIRTEENTH REPORT

Your Committee, to which was referred Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure), has, in obedience to the Order of Reference of Tuesday, February 20, 2007, examined the said Bill and now reports the same with the following amendments:

1. Page 2, clause 1 (short title): Replace the word "2006" with the word:

"2007".

2. Page 2, clause 2: Replace lines 8 to 16 with the following:

"29. (1) Subject to subsection (2), the place of a Senator in the Senate shall, subject to the provisions of this Act, be held for a term of fifteen years, and the term shall not be extended or renewed.

(2) The place of a Senator shall become vacant when the Senator attains the age of seventy-five years.

(3) Notwithstanding subsection (1) but subject to the provisions of this Act, the place of a Senator who is summoned to the Senate before the coming into force of the Constitution Act, 2007 (Senate tenure) shall continue to be held until the Senator attains the age of seventy-five years."

and with the following recommendation:

"That the bill, as amended, not be proceeded with at third reading until such time as the Supreme Court of Canada has ruled with respect to its constitutionality."

Attached as an appendix to this Report are the observations of your Committee on Bill S-4.

Respectfully submitted,

DONALD H. OLIVER
Chair

(*For text of observations, see Appendix, p. 2614*.)

The Hon. the Speaker: Honourable senators, when shall this report be taken into consideration?

On motion of Senator Oliver, report placed on the Orders of the Day for consideration at the next sitting of the Senate.

[*Translation*]

PUBLIC SECTOR INTEGRITY COMMISSIONER

NOTICE OF MOTION TO APPROVE NOMINATION
OF MS. CHRISTIANE OUIMET

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, I give notice that, at the next sitting of the Senate, I will move that, in accordance with Section 39 of the *Public Servants Disclosure Protection Act,* Chapter 46 of the Statutes of Canada, 2005, the Senate approve the appointment of Christiane Ouimet as Public Sector Integrity Commissioner.

APPROPRIATION BILL NO. 2, 2007-08

FIRST READING

The Hon. the Speaker informed the Senate that a message had been received from the House of Commons with Bill C-60, An Act for granting to Her Majesty certain sums of money for the federal public administration for the financial year ending March 31, 2008.

Bill read first time.

The Hon. the Speaker: Honourable senators, when shall this bill be read the second time?

On motion of Senator Comeau, bill placed on the Orders of the Day for second reading two days hence.

• (1430)

[*English*]

STUDY ON PRESENT STATE AND FUTURE OF AGRICULTURE AND FORESTRY

NOTICE OF MOTION TO ADOPT INTERIM REPORT OF AGRICULTURE AND FORESTRY COMMITTEE

Hon. Joyce Fairbairn: Honourable senators, I give notice that at the next sitting of the Senate, I will move:

> That the third report of the Standing Senate Committee on Agriculture and Forestry entitled *Agriculture and Agri-Food Policy in Canada: Putting Farmers First!* tabled in the Senate on June 21, 2006 be adopted.

QUESTION PERIOD

FINANCE

ATLANTIC ACCORD— OFFSHORE OIL AND GAS REVENUES

Hon. Jane Cordy: Honourable senators, my question is directed to the Leader of the Government in the Senate. Prime Minister Harper and other members of his cabinet have misled the Canadian people by saying there are no changes to the Atlantic accord. In fact, the Leader of the Government herself stated erroneously that the Atlantic accord was not changed in the budget. This Conservative government has made a mockery of federal-provincial relations. When will the Prime Minister and this Conservative government do the honourable thing and keep their promise to the people of Nova Scotia and Newfoundland and Labrador by honouring the Atlantic accord?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, as I stated in my answer to my honourable friend's question of last week, the government fully honoured the Atlantic accords signed by the previous government in November 2005. Everything that was in place at the time of those accords, including the equalization formula, has been honoured by the government. The truth of the matter is that what was in place before the budget was brought in is exactly what was in place afterwards. The provinces concerned had the opportunity to opt into the new formula if they wished. If they did not, the existing agreements would be honoured.

I believe that the Prime Minister stated correctly yesterday that this government does not break contracts, and if that were the case, why would that case not be made before the courts.

Senator Cordy: I find it unusual that the minister would say the government is fully honouring the accord. Minister Hearn said the details are still under review. In fact, this morning, I had a meeting with the Premier of Nova Scotia and with the Minister of Finance from Nova Scotia and asked them that question. I mentioned that the Prime Minister is saying that they are fully honouring the accord, and the comment to me was, "That is just not true."

We now have a new low in federal-provincial relations. If the Harper government breaks a promise the attitude is, "So sue me." Why should Nova Scotians have to go to court to get the Prime Minister to keep his word?

Senator LeBreton: Honourable senators, the accords were honoured. The equalization that was in effect when the agreement was signed by the previous government is in place. I believe the confusion here rests with people who are reading the agreement as signed by the previous government and the acknowledgement that it would respect the equalization formula in place. Certain people have tried to extrapolate the detail in the accord signed by the previous government and overlay onto it the results and the implementation of the O'Brien commission report.

• (1435)

The fact is that Nova Scotia has $95 million more because of the federal transfers than they had under the old agreement. As was stated, Nova Scotia had the opportunity to either remain with the Atlantic accord and the equalization formula or move to the new formula. They could not go back and forth, but they did have a year if they wished to return to the original accords.

Senator Cordy: The only confusion is with the Prime Minister.

EQUALIZATION PAYMENTS TO PROVINCES

Hon. Hugh Segal: Honourable senators, when Bob Rae, the nominated Liberal candidate in Toronto Centre-Rosedale, was Premier of Ontario, he expressed grave concern about any circumstance under which equalization financed by federal taxpayers in some of the have-provinces would provide for a circumstance where in other provinces the specific per capita fiscal capacity would be enhanced beyond the level of the contributing provinces. Mr. Rae found this circumstance deeply problematic.

Could the leader indicate whether in her view it was ever the intent of any government to produce that kind of distortion in the fundamental principle of equalization, which is equalizing opportunity between have and have-not, not reversing the cycle?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, that is correct in terms of Minister Flaherty's budget. This whole question of equalization has gone on for years and years. By implementing and bringing in many of the recommendations of the O'Brien commission, which I hasten to point out was commissioned by the provinces to make recommendations —

Some Hon. Senators: No, no.

Senator LeBreton: It was commissioned by the Martin government, but the provinces —

Senator Rompkey: They had their own.

Senator LeBreton: — but the Martin government and the provinces discussed many times the O'Brien commission and they could not come to an agreement.

At the end of the day, governments have to show leadership. The national government has to show leadership and it was not a broken promise. As a matter of fact, it was brought to my attention this morning that the Standing Senate Committee on

National Finance, chaired by the Honourable Senator Day, and having as members senators such as James Cowan, Grant Mitchell and William Rompkey, in December 2006, in its seventh report, made recommendations, including recommendation number 4, which states:

> The federal government include 100 percent of natural resource revenues in the measurement of provincial fiscal capacity. No distinction should be made between renewable and non-renewable natural resource revenues.

That report was presented in this chamber and makes the same points as Senator Segal. In this case, the accords and the equalization payments were honoured, which some people do not want to accept. The fact is the Prime Minister and the government have quite correctly stated that we do not break contracts. This contract was not broken; this government does not break contracts. That was actually something done by the previous government on the helicopters, and action was taken against that government.

Senator Cordy: Promises made, promises broken.

Senator LeBreton: This promise has not been broken; it is a promise made and a promise kept. The government must show leadership in the name of fiscal balance and fairness.

ATLANTIC ACCORD—OFFSHORE OIL AND GAS REVENUES—ECONOMIC DEVELOPMENT PAYMENTS

Hon. James S. Cowan: Honourable senators, at any given time, there are any number of economic development agreements in place between the federal, provincial and territorial governments; agreements that ensure the development of our aerospace, automobile and other manufacturing industries.

• (1440)

My question is to the Leader of the Government in the Senate. Can she identify any economic development payments, other than the offset payments under the Atlantic accord, which are subject to a clawback under this Conservative budget?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I can cite one example of economic development payment, the Atlantic accord and the rights of those provinces to their offshore oil and gas revenues.

It is very clear that the government, as we were leading up to the preparation for the budget in March 2007, was cognizant of the commitment to Newfoundland and Labrador and Nova Scotia and that we would honour the Atlantic accord as signed by the previous government with no cap and with the equalization formula then in place. That was a commitment we made, and it was a commitment we kept.

Senator Cowan: Is the minister saying that the budget does not contemplate a clawback of the offset payments under the Atlantic accord?

Senator LeBreton: I am saying that the Provinces of Newfoundland and Labrador and Nova Scotia have a choice. They can either stay with the accord —

Senator Cordy: That is not the question.

Senator LeBreton: — negotiated with the previous government without a cap and with equalization then in place, or they can choose to opt in to the new equalization formula which, obviously, would be subject to the conditions of the new formula.

Senator Cowan: Honourable senators, I asked the Leader of the Government in the Senate last week about a legal opinion that would support her position, and I assume she is endeavouring to locate that.

I want to refer her to section 4 of the Atlantic accord which talks about the offset payments under an equalization formula as it existed at the time. Section 8 refers to the legislation that implemented the Atlantic accord at the time the calculation is being made. There is no suggestion that the phrase refers to the equalization period solely at the time that the Atlantic accord was signed. The first time that suggestion is made is in the budget document on page 115 where it says that they have a choice of operating under the previous equalization system until their existing offshore agreements expire. That is clearly and factually in contradiction to the Atlantic accord. I would ask for comment.

Senator LeBreton: Honourable senators, in the original accord signed by the previous government, the fact is that when they were referring to the accord at the time it was signed, equalization payments were in effect. That argument is the one Bill Casey used, and it is his interpretation.

The federal government and the other provinces — British Columbia, Alberta, Manitoba, Ontario, Quebec, Prince Edward Island and New Brunswick — were very happy to finally have the recommendations of the O'Brien commission so that hopefully this year-to-year debate over equalization will end.

The fact is, in the cases of Newfoundland and Labrador and Nova Scotia — and we also hear about Saskatchewan, but Saskatchewan is the big winner in this. No province, whether they stayed with the old formula or went to the new one, would receive less money. They are receiving more money.

Senator Cowan: See you in court.

• (1445)

ATLANTIC ACCORD—OFFSHORE OIL AND GAS REVENUES—BUDGET 2007—SUPPORT OF CONSERVATIVE CAUCUS

Hon. Wilfred P. Moore: Honourable senators, my question is directed to the Leader of the Government in the Senate. In light of Nova Scotia Premier Rodney MacDonald's demands of Nova Scotia senators to "delay the budget bill," will the members of her Nova Scotia caucus be defending this deceitful document, or will they be defending the people of Nova Scotia by voting against this Harper budget?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, the senators on this side from Nova Scotia are fully cognizant of what was in the Atlantic accord. We have made a very good case to them about what exactly it was that we agreed to with those provinces,

and we have honoured those agreements. I believe that Premier MacDonald and Premier Williams have obviously interpreted this another way, which is their right.

The fact is that the government did not break an agreement. That is not something this government would do or intends to do.

I happened to hear the Premier of Newfoundland and Labrador on CBC radio on Saturday. It is absolutely reprehensible for a premier of any province to go on the radio calling people liars, making the case that this money was taken away from Newfoundland and Labrador and given to Quebec. It is a divisive statement that is not true. While Danny Williams might have been able to threaten to pull down the Canadian flag and bully Paul Martin, he will not get away with it with this government.

Senator Moore: If these Nova Scotia senators choose the people of Nova Scotia over this duplicitous Prime Minister, will the Leader of the Government be offering the same ironclad offer of protection the Minister of Foreign Affairs offered his counterparts in the other place, or should they just move to their freshly reassigned seats now and save the whip some paperwork?

Senator LeBreton: The fact is I have every confidence that my colleagues understand what the government has been trying to do and is doing. I have every confidence that they both will be my seatmates after the budget has been voted on.

PUBLIC WORKS AND GOVERNMENT SERVICES

DEPARTMENT OF NATIONAL DEFENCE
NON-COMPETITIVE CONTRACTS

Hon. Sharon Carstairs: Honourable senators, my question is directed to the Minister of Public Works.

Senator Milne: He is here.

Senator Carstairs: He is always here for Question Period, let us be honest. He felt a little lonely over there, so I have made it my business to prepare questions every day in order to make him feel more comfortable in this place, since we probably will not have him in Parliament for much longer.

Honourable senators, instead of using Business Access Canada and a public database of federal contracts awarded by the Department of Public Works and Government Services for the Department of Finance Canada, it has been found that more than 40 per cent of DND contracts were classified as non-competitive and that the percentage in dollar value had more than doubled. Can the Minister of Public Works explain why this is happening on his watch?

Hon. Michael Fortier (Minister of Public Works and Government Services): Honourable senators, I am happy to explain why we are spending more money equipping our military with the proper assets. They have been denied these types of assets for too long.

Some Hon. Senators: Hear, hear!

Senator Fortier: It is quite appropriate that we provide them with the equipment.

With respect to the report — which I have not read, but I have read a summary — obviously what is important is how people analyze and interpret procurement methods to get these assets, whether they are military assets or for another department, vaccines or even furniture. An ACAN, or Advance Contract Award Notice — which I am told is really the trigger point in the report — is viewed by Treasury Board as a competitive tool, and I agree with that. ACANs has been around for a long time.

• (1450)

Actually, I think they offer a unique opportunity for us to collapse the delay in acquiring assets. In some cases, I have seen it take 188 months to get a particular asset to the military. In using ACANs, if we think there is one manufacturer, we identify it, but at the same time we offer potential competitors an opportunity to raise their hand and say that they also manufacture this type of asset. It has happened in the past.

Honourable senators, the reality is that the use of ACANs is not as widespread as one would make you believe. When we use ACANs, we ensure, through the assistance of the professionals at Public Works, that we believe there is only one manufacturer out there that can manufacture the equipment, but we also allow time for others to prove us wrong. Before we showed up, there were cases where people had been able to demonstrate that they actually manufactured a tool or asset that we did not think was available outside of this one specific party.

I think the system works well. We will continue to be as competitive as possible.

I wish to remind honourable senators that with respect to the purchase of the Boeing C-17 aircraft, we did use an ACAN. We believe that we paid five to seven per cent less than anyone else who has ever bought a C-17.

Senator Carstairs: With the greatest respect to the minister, that does not explain why non-competitive contracts have increased from 35 per cent to almost 41 per cent of the overall contracts. It also does not explain why the Minister of Defence, who in his previous life was a lobbyist and had contracts with five of the 10 global defence contractors, is not being scrutinized to a much greater degree in issuing these non-competitive contracts. It does not pass the smell test. Would the minister explain that to the members of this Senate?

Senator Fortier: I hasten to remind the honourable senator that we do not agree on definitions; let us agree to disagree. ACANs are competitive, so we could have this "back and forth" for a long time. If you take the ACAN nut out of the study, I am told, the number of truly sole-source contracts comes down significantly.

Under Treasury Board policy, there are exceptions where there is no choice but to sole source a contract, such as in the case of emergencies or where someone has an intellectual property right to a particular piece of software.

With respect to the minister, he has disclosed to the Ethics Commissioner all of his past activities. We are very pleased to have him on our team. He brings to the table much experience on the military front. He is adored by the troops and has done a superb job as Minister of Defence.

Senator Carstairs: Honourable senators, we are dealing with a fundamental issue. We had sole sourcing on 35 per cent of the contracts. Now we have sole sourcing under my honourable friend's watch of almost 41 per cent of the contracts. What has changed to make it so much more necessary today than it was a year ago to go to sole source contracting?

Senator Fortier: I assume the honourable senator is quoting from the report, and this is data with which I would disagree. This is not sole sourcing; an ACAN is not a sole-source contract. If the ACAN is taken out of the picture, she will realize that actually a *de minimis* number of these situations have taken place over the past 18 months, since I have been around. If she looked at it over the past 10 years, for example, she would not find this stretch of 16 to 18 months to be any different from what we have experienced during similar stretches of time.

We are doing a good job. The department is doing a good job. We are getting good deals for taxpayers and, more importantly, we are providing the military with the equipment it desperately needs.

[*Translation*]

Hon. Roméo Antonius Dallaire: Honourable senators, between 1985 and 1989, I was responsible for all materiel procurement for the Army. Pursuant to the supplementary measures in the White Paper published in 1987 under Prime Minister Mulroney, same procurement did take place, despite the fact that the white paper was gutted by the 1989 budget. Needs were identified at the time and we had to go directly to the source of those needs based on what was available.

• (1455)

A summary could have been provided, like the one you gave on the C-17 procurement contract, to prove to people that we were not being had, that the price paid was a preferred price, a lower price, a reasonable price compared to the price others could have paid for the same equipment.

Are you able to share with us concrete facts that could reassure us that we are not being had by the vendor?

Senator Fortier: Honourable senators, the system is transparent and the price paid for the C-17s was announced when the contract was signed. These documents are public. Someone like you, who is well versed in this industry, could compare the prices to what other countries have paid — we know this because we have experts at the Department of Public Works who work with people at the Department of National Defence who have a good idea of what countries are paying for this type of asset.

As far as the ACAN tendering process is concerned, I can assure you that it works well. The manufacturer also needs to know that the client — us in this case — has a plan B and we will not pay an unreasonable price to procure these planes.

We have to use a procurement strategy and the contract award notice, but we must always have a backup plan in case there is a stumbling block in the negotiations with the manufacturer, who, of course, knows he is the only one because he was designated by the government.

So far, in my experience, the department has been striking this balance quite well, whether for military, medical or high technology procurement. I am therefore confident in the system currently in place.

[*English*]

INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

KELOWNA ACCORD—COMMENTS BY MINISTER

Hon. Jim Munson: Honourable senators, I would like to get back to the world of accordians. I have a question to the Leader of the Government in the Senate, which has to do with the Kelowna accord.

Recently the Honourable Terry Stratton rose during debate and proclaimed that there is no accord; it does not exist. He went on to say that the Prime Minister wisely chose the most qualified candidate to serve as Minister of Indian Affairs and Northern Development and federal interlocutor for Metis and non-status Indians, that the varied career of the honourable member of Calgary Centre-North enabled him to amass considerable expertise in Aboriginal matters. He was talking about Jim Prentice.

Honourable senators, I am heartened to see the honourable senator heap so much praise on the minister; so he must understand my confusion when I hear him contradict this very same man, who appeared on APTN during the last federal election campaign proclaiming loudly that he was the "party spokesman on the Kelowna accord." He said, "Let us be perfectly clear for the viewers of your network, we are supportive of Kelowna."

Who speaks for the party on Kelowna, the minister or our honourable colleague?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, the fact is the meetings at Kelowna in November 2005 were attended by our then-critic, now, the Minister of Indian Affairs and Northern Development, the Honourable Jim Prentice. In the press statement that followed the Kelowna meetings it was not called an accord. The honourable senator can check that. It was called an "accord" some time later, by Toronto's *The Globe and Mail*. It was then that the phrase "the Kelowna accord" made it into the political dialogue.

The fact is, as Senator Munson knows, there was no accord. There was no signed accord; there was no fiscal framework developed around the so-called accord. The Minister of Indian Affairs and Northern Development has made great strides and has a great deal of credibility in this area. Honourable senators will know how seized he is of these files and his wealth of knowledge on these matters when he makes an announcement later today.

• (1500)

Senator Munson: The minister can say what she has to say, but the words of Mr. Prentice are on the record as proclaiming loudly that he was the "party spokesman on the Kelowna accord." Those are his words. He also said, "Let us be perfectly clear for the viewers of your network, we are supportive of Kelowna."

Senator LeBreton: As I just said in response to the honourable senator, the Kelowna meetings became the Kelowna accord in the media and in public, even though no accord was signed. Minister Prentice was quite correct in that he was and is the spokesperson for the party on all matters in respect of Indian and Northern Affairs Canada. He has stated many times the intent of the meetings in Kelowna are fully supported by the government.

[*Translation*]

DELAYED ANSWER TO ORAL QUESTION

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, I have the honour of presenting a delayed answer to a question raised on April 17, 2007, by Senator Dallaire regarding Veterans Affairs, Vimy Ridge Celebrations—French translation on commemorative plaques.

VETERANS AFFAIRS

VIMY RIDGE CELEBRATIONS—FRENCH TRANSLATION ON COMMEMORATIVE PLAQUES

(*Response to question raised by Hon. Roméo Antonius Dallaire on April 17, 2007*)

This Government is committed to both of Canada's official languages and is responsible for equal treatment of both the French and English languages in all Government transactions and in the translation of all products that are used and/or displayed by the Government.

The panels in question were a small part of a much larger display. All other information displayed at the Vimy Information Centre was created by the Government of Canada in both official languages and is of high quality.

On April 5, 2007, as soon as the Minister of Veterans Affairs was made aware of the errors in the French text, errors which he called "totally unacceptable", he acted swiftly and had the panels removed.

Veterans Affairs takes very seriously its responsibility to reflect the linguistic duality of Canada. Canada's official languages must be properly displayed at all Government of Canada sites, including the Canadian National Vimy Memorial in France. Veterans Affairs Canada (VAC) will continue to ensure that material displayed at sites that are the responsibility of the Department meet the Federal legislation, and in the future, will ensure that there is heightened quality control of the translation for all items to be displayed.

The action taken by the Department as a result of the identification of the errors will result in high quality translated products for public display as VAC continues to work with Canadians and other citizens of the world, to keep alive the memory of the achievements and sacrifices made by those who served Canada in times of war, military conflict and peace.

[*English*]

THE SENATE

TRIBUTE TO DEPARTING PAGES

The Hon. the Speaker: Honourable senators, before proceeding to Orders of the Day, from today until the end of the week we will be saying farewell to departing pages and wishing them good luck for the upcoming year.

Having served the Senate of Canada for the past two years, our proud Albertan, Amy Marlene Robichaud, is honoured for the exceptional and challenging experience serving in the Senate. This fall, Amy will resume her studies in Public Administration at the University of Ottawa while also serving as President of the English Debating Society.

Second, Rachel Dares, from Toronto, Ontario, has served as a page while completing her Honours Bachelor of Journalism degree at Carleton University. She is grateful to have shared this learning experience with such a good team. Rachel's future plans include travelling and working abroad as a reporter, going skydiving, learning new languages and getting her scuba licence.

Third, Jamie Mouawad, from Moncton, New Brunswick, is bidding farewell to the Senate Page Program retaining many good memories. Her two years of serving in this place have been a rewarding experience. Jamie has graduated with honours in International Studies and Modern languages at the University of Ottawa and will be pursuing studies in law and human rights.

ORDERS OF THE DAY

SALES TAX AMENDMENTS BILL, 2006

THIRD READING—DEBATE ADJOURNED

Hon. Michael A. Meighen moved third reading of Bill C-40, to amend the Excise Tax Act, the Excise Act, 2001 and the Air Travellers Security Charge Act and to make related amendments to other Acts.

The Hon. the Speaker: Is there debate, honourable senators?

On motion of Senator Tardif, debate adjourned.

CANADA ELECTIONS ACT
PUBLIC SERVICE EMPLOYMENT ACT

BILL TO AMEND—MOTION IN AMENDMENT—
REPORT OF COMMITTEE ADOPTED

On the Order:

> Resuming debate on the motion of the Honourable Senator Oliver, seconded by the Honourable Senator Nolin, for the adoption of the twelfth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-31, to amend the Canada Elections Act and the Public Service Employment Act, with amendments), presented in the Senate on June 5, 2007;
>
> And, on the motion in amendment of the Honourable Senator Nolin, seconded by the Honourable Senator Johnson, that the twelfth report of the Standing Senate Committee on Legal and Constitutional Affairs be not now adopted but that it be amended:
>
> (*a*) by deleting amendment No. 1;
>
> (*b*) at amendment N^{o} 7, by replacing the text after "*Page 16, clause 40*:" with the following:
>
> "Replace lines 30 to 39 with the following:
>
> **"40. The *Public Service Employment Act* is amended by adding the following after section 50:**
>
> **50.1** Despite subsection 50(2), the maximum period of employment of casual workers appointed in the Office of the Chief Electoral Officer for the purposes of an election under the *Canada Elections Act* or a referendum held under the *Referendum Act* is 165 working days in one calendar year."'; and
>
> (*c*) by renumbering amendments 2 to 11 as amendments 1 to 10.

Hon. Lorna Milne: Honourable senators, I am pleased to speak today to the twelfth report of the Standing Senate Committee on Legal and Constitutional Affairs in respect of Bill C-31, to amend the Canada Elections Act and the Public Service Employment Act. As Senator Nolin pointed out last week, this bill was a collaborative effort in response to a report of the Standing Committee on Procedure and House Affairs in the other place that was supported by all parties represented on that committee.

My main concern when I first reviewed this bill was the change that was made by the committee studying this bill in the other place to allow the date of birth of electors to be on voter lists that would be eventually distributed to offices of all political parties across Canada. While I can understand why this information would be useful to candidates in political parties, some members of your committee felt that its utility would be far outweighed by the risk for abuse that this change would have created for Canadians concerned with crimes associated with identity theft.

Bill C-31 makes a number of changes to the way in which data is collected and maintained in the National Register of Electors. It also allows the Chief Electoral Officer at Elections Canada to share more information with his provincial counterparts. In addition, Bill C-31 allows returning officers to update the National Register of Electors between elections instead of the current regime whereby returning officers are permitted to update the NRE during elections.

Honourable senators, it is in the hiring of workers before, during and after election periods that I wish to focus my remarks on today. In the original version of this bill, clauses 40 and 41 would amend the Public Service Employment Act. It was explained by officials accompanying Minister Van Loan during his appearance before your committee on May 10, 2007, that these clauses would allow, by regulation, the term of casual election workers to be extended beyond the current 90-day period to some unstated period of time.

When asked directly whether these clauses were specifically intended for election workers and whether they would give the Chief Electoral Officer the ability to hire the same people twice if there happened to be two elections in one year, Ms. Natasha Kim, Senior Policy Advisor for Legislation and House Planning at the Privy Council Office, replied with a simple, "yes." However, this is not what we learned a few days later from the Professional Institute of the Public Service of Canada.

• (1510)

The representatives of PIPSC advised members of your committee that these clauses would affect the entire federal public service, not just Elections Canada, a fact later confirmed by the President of the Public Service Commission, Maria Barrados, when she appeared before the committee. This at a time when it has been widely reported that of the 45,000 people hired by the federal government in 2005, only 15,000 were permanent or term positions. Also, Ms. Barrados told us that she negotiated an agreement that none of these temporary workers would or could be hired for longer than 165 days. However, this supposed limit was nowhere to be seen in the actual bill.

Honourable senators, this apparent contradiction put some members of your committee in a quandary. A number of members felt they wanted to assist the Chief Electoral Officer by extending the term that election workers could remain hired by Elections Canada in those instances where there is more than one election in a calendar year, but not at the price of changing the way the entire public service hires its casual workers. Therefore, members of your committee voted to remove clauses 40 and 41 of Bill C-31.

I do not believe it was ever the intent of the committee to present an obstacle to the holding of fair and credible elections, so I was pleased to learn that an alternative would be presented at report stage by the government. This alternative, the amendment put forward by Senator Nolin, narrows the scope of the clauses applying to the Public Service Employment Act in order to specifically target the extended employment of casual workers only at Elections Canada and only for a total of 165 days. The present allowable total of 90 days will remain in place for all other government departments.

I support Senator Nolin's amendment for two reasons. First, I believe it will allow Elections Canada to operate without worrying about losing experienced casual staff due to a provision in the Public Service Employment Act that was designed to apply

to the entire Public Service of Canada. This amendment will allow the Chief Electoral Officer and his staff to meet the challenges that Senator Nolin spoke of in his speech on June 6 and to continue to ensure the proper functioning of our democratic system of elections.

The second reason I support the amendment proposed by Senator Nolin is due to its scope. The amendment is meant to apply specifically to workers hired by the Office of the Chief Electoral Officer to run elections and referendums. The wording of this amendment will prevent the Public Service Commission and other government departments from using this provision to substantially alter the way in which casual workers are entering and maintaining employment in Canada's public service.

While the existing system of hiring public servants may not be perfect, I doubt if it was ever the intention of the Standing Committee on Procedure and House Affairs in the other place to address this broader employment issue when considering legislative changes to the Canada Elections Act.

To close, honourable senators, I wish to take this opportunity to thank all of those senators who took part in the proceedings of the Standing Senate Committee on Legal and Constitutional Affairs on Bill C-31. Their input was invaluable in evaluating the series of complex issues that are addressed in this bill.

After reviewing the bill and the suggested amendment by Senator Nolin, I encourage honourable senators to support the change he has proposed for the reasons that I just stated. This is an important piece of legislation that I hope will allow future elections to be conducted more smoothly and allow Canadians to continue to be proud of their electoral system.

The Hon. the Speaker *pro tempore***:** If there is no further debate, is it your pleasure, honourable senators, to adopt the motion in amendment?

Motion in amendment adopted.

The Hon. the Speaker *pro tempore***:** We will now proceed to the main motion, the twelfth report of the Standing Senate Committee on Legal and Constitutional Affairs on Bill C-31, as amended.

Is it your pleasure, honourable senators, to adopt the motion, as amended?

Motion, as amended, agreed to and report adopted.

The Hon. the Speaker *pro tempore***:** Honourable senators, when shall the bill be read a third time?

On motion of Senator Nolin, bill placed on the Orders of the Day for third reading at the next sitting of the Senate.

STUDY ON USER FEE PROPOSAL FOR INTERNATIONAL YOUTH PROGRAM

REPORT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE COMMITTEE ADOPTED

The Senate proceeded to consideration of the thirteenth report of the Standing Senate Committee on Foreign Affairs and International Trade (User Fee Proposal—International Youth Program), presented in the Senate on June 6, 2007.

Hon. Consiglio Di Nino moved the adoption of the report.

The Hon. the Speaker *pro tempore***:** Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and report adopted.

INTERNATIONAL BOUNDARY WATERS TREATY ACT

BILL TO AMEND—SECOND READING—DEBATE ADJOURNED

Hon. Pat Carney moved second reading of Bill S-225, to amend the International Boundary Waters Treaty Act (bulk water removal).—(*Honourable Senator Carney, P.C.*)

She said: Honourable senators, Canadians are under the illusion that our precious freshwater resources are protected from our neighbours. My grandfather, John Joseph Carney, who homesteaded in the Okanagan in the 1890s, was under the same illusion. He was wrong.

John Joseph's log cabin was built on an arid side hill overlooking the sun-scorched Ellison Valley, cattle country back then, before the orchards and the vineyards. The homestead's prime asset was a big bubbling spring, called the Punch Bowl, nestled amid a thicket of willows next to the cabin.

When the issue of water rights was introduced, John Joseph was indignant. Why did he need a licence for a water source next to his home? He complained to his wife, Bridget, but at her urging he saddled up his horse, Billy, and rode to town to apply for the licence.

The son of Irish immigrants, John Joseph liked his rye whiskey. He stopped at a bar for refreshments and to debate the issue with his drinking buddies. He did not get to the water office in time. His neighbour did. He won the rights to the Punch Bowl right next door to the Carney home. That was the end of the homestead.

I have told the Senate this before. When old John Joseph died, there was no grain in the barn, no cattle on the range; there was nothing because he had no water for the homestead. Water rights and water licences became gut issues for our family. A couple of weeks ago I drove past the old homestead. I did not trespass, but the willow thicket is there. I was unable to determine if the punch-bowl still had its water.

When I served as the Minister Responsible for the Canada-U.S. Free Trade Agreement, in 1986, I monitored water issues like a hawk. My chief negotiator, Simon Reisman, was an early proponent of a scheme, the North American Power and Water Alliance, called NAPAWA, that would dam virtually every river in Alaska and British Columbia and divert water down B.C.'s 500-mile Rocky Mountain Trench south to Texas, California and Mexico. It would be the largest engineering project in the world. Canadian opposition sunk NAWAPA. The reference to water in the FTA is minimal. It is contained in Tariff Schedule 22.01,

which deals with natural or artificial mineral waters, aerated waters not containing added sugar, sweetening matters or flavours. At some point, the ambiguous phrase "ice and snow" was added.

• (1520)

The FTA and its sequel NAFTA, which included Mexico in the pact, also includes the provision that if any commodity such as water becomes a tradable good, Canada could be required to award U.S. and Mexican companies national treatment. Essentially, Canada would be obligated to provide Americans and Mexicans the same access Canadians enjoy to our fresh water resources if water ever became a tradable good.

Clearly, the safeguard is to prohibit bulk water exports, which the Mulroney government did with its National Water Policy that has since been upheld by the Harper government. However, a policy is not law and can be changed without parliamentary process. That is why in 2001, as Conservative critic in the Senate, I became concerned about Bill C-6, an act to amend the International Boundary Waters Treaty Act introduced by the Liberal government.

This sleeper of a bill, presented as a prohibition of bulk water removals, passed through the House of Commons without anyone noticing the bill actually permitted bulk water removals where no such permission then existed. Liberal Senator Corbin from New Brunswick claimed that Bill C-6 would establish in law "an unambiguous prohibition of bulk water removal in waters under federal jurisdiction."

Specifically, although Bill C-6 was cast as a housekeeping bill to give legislative context to the treaty and to clarify the government's opposition to the removal of bulk water, in fact it was drafted in a manner whereby it could actually be used to permit bulk water removals.

The intent of Bill C-6 was never contained in the legislation itself but merely suggested in regulations, which we as legislators know, can be changed without Parliament.

First among its flaws, the bill did not define bulk water in the legislation. It prohibited something that it did not define. The definition was subsequently included in the regulations, which can be changed, and banned the removal of more than 50,000 litres per day in a continuous flow, which is about a truck tanker of water.

Second, there were exceptions to the prohibition on bulk water removals. Under certain conditions, the Minister of Foreign Affairs could licence such bulk water removals by regulation. Numerous experts consistently shared my concerns about Bill C-6 during the proceedings before the Standing Senate Committee on Foreign Affairs and International Trade.

For instance, trade lawyer Barry Appleton said:

> If the bill were to deal with fresh water issues as part of an overall strategy, I would say that Bill C-6 is flawed. Rather than create the opportunity to develop some environmentally sustainable comprehensive water policy, this bill has created a mechanism to actually license, in certain circumstances, water going from Canada to the United States. I am sure that is not the intention; however, under the wording of this bill, it is clearly the effect.

Dr. Howard Mann, another expert in this field, said:

> There is a serious risk . . . Once exports begin, the government, federal or provincial, cannot arbitrarily deny further exports . . . You are into the game as soon as you start down that road.

University of Calgary law professor, Nigel Bankes, said:

> I think the answer is yes to the question of whether Bill C-6, which gives discretionary power to the Governor-in-Council and also to the regulatory process, be used to licence the export of bulk water from boundary waters. Would removal of waters for irrigation purposes to the United States be allowed in this case if you could show, by an environmental assessment or other means, that it did not affect boundary levels?

Some of my Conservative colleagues, including at that time Senator Murray, a Conservative at that time, sought to introduce amendments to Bill C-6 to respond to these concerns but to no avail.

I am pleased to introduce Bill S-225 to finally address the perceived weaknesses in the existing act. It will provide strengthened protection of our fresh water, which is increasingly our most precious resource.

Bill S-225 is short and simply seeks to amend the International Boundary Waters Treaty Act to prohibit the bulk removal of boundary waters from the water basins in which the boundary waters are located. The prohibition applies to all boundary waters as defined in the International Boundary Waters Treaty Act. Limited exceptions to the prohibition for specified uses, such as firefighting, are set out in the act. However, regulation-making authority to specify other exceptions to the prohibition is no longer provided, and that is very important. It is even more important that the bill also requires that certain proposed regulations to the act be laid before each House of Parliament and that those regulations may not be made if either House adopts a motion disapproving the proposed regulations.

Clause 1 amends section 10 of the existing act by defining the phrase "removal of boundary waters in bulk" as opposed to the regulations, where the phrase is currently defined. I have stated that regulations are easily changed while legislation is not. I use the same definition that is currently in the regulations, which is the removal of more than 50,000 litres of water, treated or untreated, per day from boundary waters by any means of diversion, whether by pipeline, canal, tunnel, aqueduct or channel. However, it does not include taking a manufactured product that contains water, such as water and other beverages in bottles or packages, outside the water basin.

Clause 2 amends section 13 of the act and provides the prohibition against the removal of bulk water. It prohibits the removal of boundary waters in bulk, whether through use or diversion, except where the former is "for use in a conveyance, including a vessel, aircraft or train," or, as I mentioned, for "firefighting or humanitarian purposes on a short-term and non-commercial basis."

For these purposes in the application of the treaty,

> . . . the removal of boundary waters in bulk is deemed, given the cumulative effect of such removals, to affect the natural flow or level of the boundary waters on the other side of the international boundary.

Clause 3 addresses the issue of parliamentary participation where, under the existing act, the Governor-in-Council on the recommendation of the minister enjoys wide authority to regulate, for example, by defining any word or expression used in sections 11 to 26 pursuant to paragraph 21(1)(*c*).

Proposed new section 21(3) of Bill S-225 requires that any such proposed regulation be tabled before each House of Parliament for examination, after which it might be referred to the appropriate committee of that House. Subsequently, the committee may, within 30 sitting days, report to the House that it disapproves of the proposed regulation, in which case a motion to concur with the report shall be put to the House in accordance with the procedures.

Finally, the proposed regulation may be made if no report disapproving the proposed order is presented or if the motion to concur in the report is denied.

It has been suggested by the Department of Foreign Affairs and International Trade that the Statutory Instruments Act already allows Parliament to review regulations. This act only allows the Standing Joint Committee on Scrutiny of Regulations to examine regulations that have already come in force once they are a *fait accompli*. There is no mechanism to compel a regulation changing the meaning of "removal of boundary waters in bulk" to be brought to the attention of Parliament before it is passed. It is not unusual for such a process before this committee to take up to 18 years.

While it is true that the removal of water in bulk is prohibited, it is only to the extent as it is defined in the regulations. The 50,000 litres could become 1 million litres through regulations, without parliamentary overview.

It seems to come down to semantics because section 21(1) allows the Governor-in-Council, on the recommendation of the minister, to make regulations or changes to the present regulations and, thus, the definition of the expression "removal of boundary waters in bulk" may be drastically modified at any time without engaging parliamentarians.

• (1530)

There are other interpretations of the current wording of the International Boundary Waters Treaty Act in dealing with the regulations as well, so Bill S-225 presents a golden opportunity to debate all these issues. It should be considered with an open mind.

Earlier today, I met with officials from the Department of Foreign Affairs and International Trade to discuss the proposed bill. I found their views fascinating, if sometimes confusing, and look forward to hearing them elaborate their concerns when the bill reaches committee stage.

Essentially, these officials state the proposed bill is unnecessary. They reject the premise that the International Boundary Waters Treaty Act as amended in 2001 is flawed. In fact, they argue that it provides "a very high level of protection," to quote from the letter written by Deputy Minister Leonard Edwards. Therefore, they find no need for the amendments I propose.

Here is their reasoning on bulk water issues: The IBWTA does not deal with the issue of bulk water exports at all. Instead, it prohibits the removal of bulk water, subject to certain exceptions, from boundary basins within Canada. Since such removals are prohibited, they argue, the issue of exports does not arise. Again quoting from the deputy minister's letter, "This approach was taken rather than an export ban specifically to ensure that water would not trigger NAFTA requirements."

This treatment of water as a resource in its natural state rather than a tradable commodity is widely recognized by world trade regulations in other jurisdictions, they argue. It is my understanding that this is correct to the present time, but it is subject to challenge.

The IBWTA applies only to basins that comprise the boundary between Canada and the U.S., they argue. This is confusing to me, since the act applies to the Canadian portion of the Great Lakes-St. Lawrence Basin, the Hudson Bay Basin and the Saint John-St. Croix Basin. I was unaware that the international boundary runs through Hudson Bay, but officials explained that the Lake of the Woods, which is bisected by the international boundary, is deemed to be included in the Hudson Bay Basin. However, this reasoning does not apply to Lake Champlain, which the Canadians say is a boundary water and the Americans say is a river. You can see the ambiguities caused by the present legislation.

International rivers, such as the Columbia and Kootenay in my home province of B.C., are not covered by the IBWTA because they are not boundary waters but transboundary waters. They are, in fact, bulk water exporters themselves because they flow between the two countries. These transboundary waters are covered by other international treaties, officials say.

The provinces have the jurisdiction over water basins within their boundaries, and all provinces have legislation dealing with bulk water removal with the exception of New Brunswick, which has a policy in place banning bulk water exports, they argue, and plans to introduce legislation, which is what they said several years ago.

My concerns in regard to the wide discretionary powers of the minister under the IBWTA to licence exemptions to ban the removal of bulk water are unfounded, officials say, because such licences must be within the spirit of the act. However, the spirit of the act provides for licensing, I counter-argue.

My suggestion is that the definition of "removal of boundary waters in bulk" should be written into the legislation rather than left to regulations, which can be changed without recourse to Parliament, but officials say this would prevent the definition to be altered or to reflect changing technology, such as the use of bladders to hold water, and to allow the government to respond quickly to possible transgressions in the law. In fact, they could

add a clear and unspoken reason, which is that officials do not like laws by parliamentarians; they prefer regulations by officials. In fact, I reject their rejection because legislation can be passed very quickly, should the need arise, and the regulatory process can take months or years, as we have seen.

Finally, they suggest that the necessary oversight of regulations is already in place through the existing Statutory Instruments Act. To me, this is an alarming red flag because, as I have mentioned, senators familiar with this process know it takes place after the fact and can take years to conclude. There is no standard timeline.

Officials argue that the department, six years after the original amendments were made, is now taking steps to strengthen the further licensing regime by the IBWTA to the "Law List Regulations" made under the Canadian Environmental Assessment Act. This would mean that any project requiring a licence under the International Boundary Waters Treaty Act would automatically trigger an environmental assessment when certain standards have been met. Those who have been the subject of this process will find it unpredictable at best.

In fact, there are several precedents for parliamentary oversight of regulations made pursuant to an act. It is this kind of parliamentary oversight that we are requesting in Bill S-225. Such regulations would deal with the key issues of what constitutes a use, an obstruction, diversion or work for the purposes of this act, the definition of any word or expression used in sections 11 to 26 that is not defined in the act, and the exceptions to the application of subsections 11(1) and 12(1).

I have asked the officials to address the concern of many Canadians by strengthening the International Boundary Waters Treaty Act by ensuring that future Parliaments, representing all Canadians, would have oversight of any regulations and changes to regulations that could open the door to bulk water exports now and in the future. Canadians want to be part of that debate, but they are excluded from it under existing law.

To show honourable senators the complexity of this issue, I will quote from John Manley, who was the Minister of Foreign Affairs when the original amendment to the International Boundary Waters Act was made back in 2001. He said:

> . . . any credible policy approach to the issue of bulk water removal must address two important elements. First, the management of Canadian waters involves multiple jurisdictions. Second, any approach should take into consideration the many factors, man-made and natural, which exert significant stresses on our water resources.
>
> To pretend that one government can solve the issue with a wave of the legislative wand, or that the issue may be simply reduced to one aspect, such as "water export", in the words of some critics, is unrealistic, ineffective and undermines the goal we all share.

Except it is not very clear under this legislation what the goal is that we all share.

I have concluded that honourable senators should support this bill and give it second reading so we can refer it to committee for a detailed examination of the issue raised in this speech.

Hon. Jerahmiel S. Grafstein: Would the honourable senator allow a question or two?

Senator Carney: Certainly.

Senator Grafstein: Honourable senators, I congratulate the senator on this comprehensive look at this very important subject matter. I agree with her that there is tremendous confusion and overlapping responsibilities in legislation both at the federal and provincial levels. I commend her for this speech, and I think we should get the bill to committee as soon as possible so we can have an intensive exploration of what I consider to be a confusing and muddled area when it comes to the export of bulk water. I agree with her in principle.

Having said that, this is only one side the equation, and the other side of the equation happens to be the Americans. When we talk about a border and a treaty, we are talking about having two parties to tango. The question is: How can my honourable friend be satisfied that if this measure is adopted a similar measure or similar procedure would be available in the United States to ensure that there is no leakage in the objective we all seek, which is to ensure that bulk water is not allowed without federal or at least governmental approval?

Senator Carney: Honourable senators, I cannot do that. As Minister Manley said in his original speech on second reading, there are something like eight Great Lake states and Ontario and Quebec involved in some of these issues, and we simply do not know. The answers of the bureaucrats that the other issues have been dealt with in other international treaties, such as the Colombia River act, do not give me much comfort because we are not really familiar with all of those.

• (1540)

I believe that an examination of my amendment would give us an opportunity to do a full overview of what our treaties are covering, namely, fresh water, boundary waters, transborder water, and even your interest in domestic fresh water so that we can find out what the protections are. There is little point in our having removal bans on our side of the border, say in the case of the Great Lakes, if there is not parallel legislation in the United States. The officials tell me that some states have reached agreement on parallel legislation; others have not. However, that is not known to the general public. This is an opportunity to explore this issue before it becomes a crisis.

Senator Grafstein: Honourable senators, let us assume that the bill was passed, the federal government was committed and we sorted out the jurisdictional responsibilities; that is, it was clear cut that there was a prohibition from the Canadian side on water. At the current time, my understanding is that at least one major water bottler comes to Canada, gets a pipe, draws out water, and then cleanses it or mineralizes it, or whatever it does, and then packages it in water that we use here in the Senate from time to time.

Let us assume for the moment that we are not successful in the overall objective of providing a safe and tight system to prevent bulk exports. How would this bill stop that activity, assuming the Americans would not agree? I am talking here about on our side of the border.

Senator Carney: Honourable senators, as I said, the FTA does permit bottled water to cross the borders, so it is not considered a bulk water removal. Again, one of my problems is that bulk water is not defined anywhere. That is one of the critical issues.

There is no intent in my bill to stop transborder shipments of bottled water for human consumption. However, I do want to ensure that any regulations which go into effect which licence bulk water removals are scrutinized by Parliament to ensure that such removals are within the intent of this act.

On motion of Senator Segal, debate adjourned.

INCOME TAX ACT

BILL TO AMEND—THIRD READING

Hon. David Tkachuk moved third reading of Bill C-294, to amend the Income Tax Act (sports and recreation programs). —(*Honourable Senator Nancy Ruth*)

He said: Honourable senators, this bill has been around in one form or another for several parliamentary sessions. I wish to thank the members of the committee and, in particular, the committee chair, Senator Day, and the deputy chair, Senator Nancy Ruth, for expeditiously moving this proposed legislation through the committee. I also thank Senator Mahovlich, along with the member of Parliament for Prince Albert, Brian Fitzpatrick, for being so tough and focused on this endeavour. Bill C-294 is a fairly innocuous bill, but one that will have a salutary impact on many of our young athletes, both men and women.

To my mind, this bill rights a wrong that was done when the government decided to tax allowances for room and board. I am sure all young athletes will be grateful for the good work done by honourable senators in this place.

The Hon. the Speaker *pro tempore:* Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and bill read the third time and passed.

IMMIGRATION AND REFUGEE PROTECTION ACT

BILL TO AMEND—SECOND READING—DEBATE ADJOURNED

Hon. Yoine Goldstein moved second reading of Bill C-280, to amend the Immigration and Refugee Protection Act (coming into force of sections 110, 111 and 171).—(*Honourable Senator Comeau*)

He said: Honourable senators, Bill C-280, to amend the Immigration and Refugee Protection Act, is extraordinarily simple. It contains only one paragraph. That paragraph envisages the coming into force of sections 110, 111 and 171 of the Immigration and Refugee Protection Act. These provisions establish a refugee appeal division, a new division within the Immigration and Refugee Board. These sections of the Immigration and Refugee Protection Act were intended to create a refugee appeal division but have never been brought into force and the new appeal mechanism has never been established.

Behind this apparent inactivity by a number of governments, including, I must say to my regret, Liberal governments, lies a rather complex tale. It is said that politics makes strange bedfellows. Never was the truth of that dictum clearer than in this instance, because I find myself sponsoring in this chamber a private member's bill that was introduced by the Bloc Québécois in the other place. I find myself making little effort to explain inactivity on the part of previous Liberal governments, but I am assuaged by the fact that I am also condemning inactivity on the part of this government.

I have spoken to two previous ministers of immigration and to two former adjudicators who all asserted that the entire system with respect to refugees and refugee admission and determination should be changed, but, regrettably, that will not happen any time soon. Honourable senators, let us make the changes we can make, although, admittedly, this is not the ideal solution.

Here is the rather complex story. In 1951, the United Nations adopted the UN Convention relating to the Status of Refugees. Canada is a party to this convention. In accordance therewith, Canada cannot directly or indirectly return refugees to a country where they will be persecuted. Article 33 of the United Nations convention sets out the responsibilities of states for protecting refugees as follows:

> 1. No Contracting State shall expel or return . . . a refugee in any manner whatsoever to frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

• (1550)

As sensitive as a refugee issue always is, it is rendered all the more sensitive where the refugee in question lands in a situation where his or her freedom would be threatened, were he or she to be returned to another country, generally, the country of origin, but not always.

To its credit, Canada has set up an Immigration and Refugee Board pursuant to the Immigration and Refugee Protection Act, which received Royal Assent in November 2001 and came into force on June 28, 2002. That statute, which was then a new piece of legislation, was intended to streamline the refugee claimant determination process.

Faced with anywhere from 23,000 to 38,000 annual requests for refugee status and the asylum that comes with it, the Refugee Protection Division was overloaded with resulting unacceptable delays in the treatment of refugee claims.

That was a situation which was clearly not tolerable; delays in the treatment of claims create a significant hardship to refugee claimants and their families, and although Canada's treatment of refugee requests during the Second World War was abominable, in more recent years the refugee claims determination process has improved considerably to create a good, if not stellar, record with respect to treatment of refugee claims.

The intention of the 2001 statute was to streamline the process. Under the Immigration Act of 1985, refugee claims were heard by two-member panels. In the event of a split decision, the decision favourable to the refugee claimant was, in most cases, deemed to be the decision of the board.

The streamlining envisaged by the new statute was that thenceforth the hearing would take place not before two members, but before a single member, thereby theoretically doubling the number of claims that could be heard in a given period of time by the same number of personnel. However, because of the increased possibility of error, as only one board member was hearing each claim, the statute provided for the creation of a Refugee Appeal Division, where decisions could be reviewed and, in appropriate circumstances, decisions could be reversed for the benefit of the refugee claimant.

While the reduction of the members of a panel from two to one was immediately proclaimed and put into effect, the safeguard provisions, establishing an appeal division which would compensate for occasional errors, was never proclaimed. Responding to questions in this respect at the beginning of 2004, former Immigration Minister Judy Sgro said the following:

> It's important that people who seek protection in our country receive it as quickly as possible. To introduce at this particular time the appeal system that you were referring to would have completely, I think, brought the system to a halt.

Precisely a year later, then Minister of Immigration Mr. Joseph Volpe said:

> It takes too long for decisions to be made and too long for decisions, once they are made, to have an effect. Simply by adding another layer of review or appeal to what we already have will do nothing to address the shortcoming, in fact, it may make it worse. My decision therefore is not to implement the Refugee Appeal Division.

With great respect to both those ministers, as well as to the current minister, who similarly refuses to implement the appeal division, none of them have the right or had the right to ignore the will of Parliament and, in any event, their reasoning, with respect, is faulty.

When Bill C-11, the bill which set up the Refugee Appeal Division, was passed, Peter Showler, then the chair of the Immigration and Refugee Board, gave the following testimony:

> In contrast to the present model, where claims are normally heard by two-member panels, the vast majority of protection decisions will be made by a single member. Single-member panels are a far more efficient means of determining claims. It is true that claimants will no longer enjoy the benefit of the doubt currently accorded them with two-member panels, and I think that should be noted. However, any perceived disadvantage is more than offset by the creation of the refugee appeal division, the RAD, where all refused claimants and the minister have a right of appeal . . .

The government of the day reduced the board's compensation from two to one on the promise and undertaking that a Refugee Appeal Division would be established. Indeed, the statute did establish that division, but that part of the statute was never proclaimed in force.

Honourable senators, this lack of proclamation breaks faith with the people of Canada and ignores the will of Parliament. While refugee claimants who do not succeed with their claims have the right to seek judicial review by the Trial Division of the Federal Court, that review cannot substitute a court decision for the refugee board decision. All it can do is send the decision back for reconsideration, again, by a single-member board. Honourable senators, that is unjust, and this bill seeks to correct that injustice. If we cannot provide refugee claimants with every reasonable possibility of asserting refugee status, and if de facto refugee claimants are given a single kick at the can, a single hearing before a single adjudicator, with no further recourse from a practical perspective, our system is condemning some legitimate refugees to torture and to death.

Canada should never countenance injustice. I respectfully urge honourable senators to support this bill.

On motion of Senator Comeau, debate adjourned.

STUDY ON RECENT REPORTS AND ACTION PLAN CONCERNING DRINKING WATER IN FIRST NATIONS' COMMUNITIES

REPORT OF ABORIGINAL PEOPLES COMMITTEE ADOPTED

On the Order:

> Resuming debate on the motion of the Honourable Senator St. Germain, P.C., seconded by the Honourable Senator Gustafson, for the adoption of the eighth report of the Standing Senate Committee on Aboriginal Peoples entitled: *Safe Drinking Water for First Nations*, tabled in the Senate on May 31, 2007.—(*Honourable Senator Tardif*)

Hon. Jerahmiel S. Grafstein: Honourable senators, I rise to comment on this report, and I would like to commend the chairman and the deputy chairman of the Standing Senate Committee on Aboriginal Peoples for proceeding with this study, the report of which is entitled, *Safe Drinking Water for First Nations*.

The report is frightening and chilling, but it is not the first of such reports. Reports have piled up that address the horrible treatment, lack of concern and negligent omission of duties to deal with safe drinking water in Aboriginal communities.

Safe drinking water is not just an issue for the Aboriginal communities, honourable senators. As I pointed out previously in my bill, which is now in the other place seeking to amend the Food and Drugs Act by adding clean drinking water, this situation has been ongoing for some time. It is only now that the issue of clean drinking water, as it affects our health system, is coming to a port of convergence.

Seven years after the horrible scandal of Walkerton, seven years after legislation and money and so on, the provincial government in Ontario decided they would do something simple that could have been done years ago, namely, test for lead in water systems. They discovered, to their absolute horror, that the drinking water at Queen's Park, the legislature, was infected with lead. Lead-infected water is cancerous. When people concern themselves about the rise of cancer in this country, whether it is

breast cancer, internal cancers of any nature or prostate cancers, one of the fundamentals is lead. After seven years of regulation, promises and so on, we find lead in the provincial legislature.

I do not want to point the finger at just the Aboriginal communities or the department or ministry responsible for the scandal in my own province. Drinking water is a problem across Canada: British Columbia, Alberta, Saskatchewan, Manitoba, Quebec and the Maritimes.

Last week Senator Nolin repeated that there is a constitutional barrier to cleaning up this problem; there is not. There is no question whatsoever when it comes to the Aboriginal communities that the federal government has clear, direct and undiluted responsibility. However, when I read this report, it chills my spine. The report states:

> In 1995, an assessment carried out by the Department of Indian Affairs and Northern Development (DIAND) and Health Canada found that about 25 per cent of water systems on-reserve posed potential health and safety risks to First Nations people in the affected communities.

• (1600)

The report goes on to state:

> In 2001, a follow-up assessment revealed that almost three quarters of drinking water systems on-reserve posed significant risk. Most recently, in March 2007, the Department of Indian Affairs and Northern Development released a progress report on First Nations drinking water indicating that the water systems of 97 First Nations communities are classified as high risk.

There is an interesting debate in the report about regulating, paying for infrastructure with the money from regulation, diverting money from infrastructure. In the end, the report says let us have another study.

Honourable senators, I do not think we have to study this issue any longer. We need legislation. I urge every senator to read this report. It is a chilling report. On the one hand, Health Canada says that every Canadian citizen should, as a question of health, drink eight glasses of water every day, but in the Aboriginal communities, if they drank it, they would be ill.

Who is responsible here? We are a house of regions. I have raised this issue over and over again. I have another bill that I hope we will refer to committee. It deals with upstream resources to preserve water, and it is delayed here again. I will persist though and we will go on. In the meantime, children will die, women will die and men will die; if they do not die, they will be injured. Senator Keon knows what I am speaking about. There is a direct connection between lead and cancer that is unquestioned. That is not the only chemical in the Aboriginal community. That is just one of many chemicals.

The report's first recommendation reads as follows:

> That the Department of Indian Affairs and Northern Development provide for a professional audit of water system facilities, as well as the independent needs assessment, with First Nations representation, of both the physical assets and human resource needs of individual First Nations communities in relation to the delivery of safe drinking water prior to the March 2008 expiration of the First Nations Water Management Strategy —

— which I think is a joke —

> — That, upon completion of the independent needs assessment, the Department dedicate the necessary funds to provide for all identified resource needs of First Nations communities in relation to the delivery of safe drinking water;
>
> That a comprehensive plan for the allocation of monies from said funds be completed by June 2008; and
>
> That, upon completion of the comprehensive plan, the Department provide a copy to this Committee and appear before it to report on its contents.

Good. On the face of it, that recommendation is lovely, but it will not do the job. We have done this over and over again in this chamber, and it will not do the job.

Therefore, what is the suggestion? I do not think any senator should stand and criticize another committee without coming up with at least an alternative solution. Before I offer my suggestion to the committee, though, I will read out the names of the committee members.

The chairman is the Honourable Gerry St. Germain. The deputy chairman is the Honourable Nick Sibbeston. Senator Larry Campbell, Senator Lillian Dyck, Senator Aurélien Gill, Senator Leonard Gustafson, Senator Elizabeth Hubley, Senator Sandra Lovelace Nicholas, Senator Robert Peterson, Senator Hugh Segal and Senator Charlie Watt are all members of the Aboriginal Committee. As well, there are *ex officio* members: the government leader, Senator Marjory LeBreton or, in her place, Senator Gerald Comeau; Senator Céline Hervieux-Payette or, in her place, Senator Claudette Tardif. In addition to that, Senator Lorna Milne has been a most honourable part-time member of the committee.

Everyone has been involved with this particular report. Here is what I think we should do: pass a private member's bill; no more reports. Put a private member's bill on the floor of the Senate and I will support it. The bill should be very simple. Account for your negligence for the last five years and tell us why you cannot do it tomorrow.

Senator Cools: Today.

Senator Grafstein: Today.

I commend all senators for participating in this report and I will support it. However, it is just another report, and it will not at all advance the existing crisis in our Aboriginal communities. I, for one, do not want to leave this chamber, leave this Senate, and have on my conscience that I at any time contributed to either the death or the maiming of a woman, a child, or a person in Canada. If we do not move, I can tell you that we will all be culpable.

Hon. Roméo Antonius Dallaire: Will the senator accept a question?

Senator Grafstein: Yes.

Senator Dallaire: My daughter is in South Africa working with an NGO that is bringing clean water to a whole bunch of villages in the southwest. The NGO is funded by a variety of sources in Canada, many businesses and other private foundations that are providing money to meet a millennium objective of bringing clean water to the developing world. We signed on to moving a significant capability into bringing clean water to the developing world by 2015.

We also know that CIDA is pumping a whole bunch of money into doing exactly that same thing in the developing world. Given this committee report and the colonial perspective in which we still view our First Nations, why not have CIDA send money into the NGO community and have them sort out the problem? Should we not, in fact, get Canadian NGOs and the Canadian population far more involved in the state of health and the ability of Aboriginal communities to survive and not simply count on governments that keep passing the buck?

Senator Grafstein: I agree with the honourable senator. He echoes my own views. When I was able to convince the Senate to move to third reading my bill to amend the Food and Drugs Act, that was exactly my argument. In Canada we ship portable systems not just to Africa through CIDA but to Afghanistan. The army does it. They use the engineers to set up the portable systems. I wonder why in our brilliance we could not do that for our Aboriginal communities here in Canada. CIDA has billions of dollars.

This is another outrageous thing we do. We are prepared to help poor and impoverished developing nations, but we have within this country two countries. There are two Canadas. There is the Canada of Toronto and Montreal and Vancouver, the urban communities in which we all participate, and then there are the Aboriginal communities. That is the second Canada. There is the rich Canada and there is the underdeveloped Canada. There is no reason why we cannot take the money from there and move it over to there, because it is only a question of money and will.

Let me make it even easier. I look at our great colleague and brilliant friend, Senator Keon. One of the great problems in Canada is the Canada Health Act and the funding of that act. The problem is that our safety net is moving quickly forward and it is almost subsuming the largest chunk of our federal, provincial, and even municipal budgets. Why would we not want to prevent health problems caused by a lack of clean drinking water? That would save billions of dollars.

Professor Schindler, whom I asked to assist me with my research, said we could save billions of dollars a year if we had clean drinking water in every community across Canada, which we do not have. *A fortiori*, the argument is even stronger when it applies to Aboriginal communities.

This situation is a scandal, a disgrace. Unless this Senate rises with one mighty voice and says enough is enough, it will not change. Senator Dallaire will be gone, I will be gone and Senator Keon will be gone, but the Aboriginal community will still be sick and weak and tired and deformed because of our negligence.

Senator Dallaire: The instrument that the honourable senator speaks of that the engineers use, called an "Endlater," will provide clean water for a population of approximately 1,000 to 1,500 on a continuous basis, and it is a stand-alone system. It works as long as it has a supply of diesel fuel and a bit of maintenance.

• (1610)

We could buy them at $1 million each, the upper end of the scale, install them in villages across the country and ensure there is a good maintenance contract. Why can we not move to the military and have them gain experience by doing it and taking on a responsibility like that, like the Corps of Engineers does on reserves in the United States?

Senator Grafstein: The honourable senator has echoed my comments in this chamber many times. My hope is that the committee might consider how easy it would be to set up these new systems. We are talking about new technology that is easy to set up, easy to train and easy to implement to save lives and make people healthy in Aboriginal communities. It is easy.

I say to myself: Why have we not recommended it? Why has minister after minister not done it? We have heard every Prime Minister in the last 20 or 30 years say that they will clean up the drinking water problem in Aboriginal communities. Senator Watt and Senator Adams know that and are sick and tired of listening to it. They have heard it over and over again.

We had one great Prime Minister — my great Prime Minister — Jean Chrétien. He was minister of Aboriginal affairs for nine years, yet no progress. When he became Prime Minister, he promised. He killed my bill and then promised it in the next budget; that promise was not fulfilled. Then the next Prime Minister promised it in the next budget. This government has promised it in this budget; still no progress.

What does it take? It is simple. It is easy to do. It is easy to make Aboriginal communities, at this level at least, healthy and well.

I apologize, honourable senators. I get emotionally upset about this issue because it has been seven long years and I do not see any progress. I see my colleagues nodding in agreement.

I see my time is almost up and would ask leave to continue.

The Hon. the Speaker: Senator Grafstein is asking leave of the Senate to continue. Is it agreed, honourable senators?

Hon. Senators: Agreed.

Hon. Gerry St. Germain: Honourable senators, I was in a press conference that brings good news to this place, because the government just officially announced that it is implementing most of the recommendations in negotiations on specific claims. That is a tribute to all senators. I have worked closely with seven senators from the opposition side, and the results have been phenomenal. The results are there. The government, by 2008, will have an independent body in place.

This announcement goes to the heart and soul of what the honourable senator is talking about with respect to water. I agree with him. Safe, potable drinking water for our Aboriginal peoples should not even be a question.

I am encouraged by the statements of Senator Dallaire that the technology is available. I am sure the honourable senator is aware of it.

I want all senators to rest assured that if we do our work diligently and as a team, we can get results. This announcement is living proof of it. Why should water not be next? Minister Prentice has taken the water issue seriously. He has improved the plight of those affected.

Senator Grafstein is correct; government after government has languished on the sidelines and watched this situation deteriorate, which is unacceptable. I have said it before: We will never be a great country. As great as we are today in the world, we will never be a truly great country until we have reconciled the problems that exist with our First Nations people.

I would like to ask the honourable senator: Is this new technology being utilized at the present time? I apologize that I could not be in the chamber during his speech because I was at the press conference. I advised him earlier I would read his speech, but I would like to ask him that question now.

Senator Grafstein: The honourable senator sent me a note, and I appreciate that. The senator advised me that he would be elsewhere. I would not have proceeded without his presence, but he allowed me to move on with the debate.

Senator Dallaire knows from his experience, and I know from my anecdotal experience, that cost-efficient technology could be in place, easily managed and transported. We do it in Afghanistan. The Americans do it in Iraq. We do it in Africa. The technology is available from Germany and Canada.

Senator Corbin: They did it after the tsunami.

Senator Grafstein: We have seen it done across the world.

Perhaps the honourable senator can answer this question: Why is this technology not used to help the Aboriginal communities? Why is there not a war for water? Not a war against poverty: a war to bring clean drinking water to our Aboriginal peoples. I am with the honourable senator: Keep punching and I will try to keep punching as well.

Senator St. Germain: It is not about us. It is about our First Nations people, and it is about time we got the job done. I can guarantee that if we all work together, if we produce focused reports that people can act on — not a helter-skelter or shotgun approach but more of a rifle approach — it will happen.

I want to thank honourable senators, especially Senator Grafstein for his particular interest in Aboriginal water issues, the studies he has done, and the integrity he has brought to this debate by offering a non-partisan view.

Hon. Wilbert J. Keon: Honourable senators, this is not new technology. Reverse osmosis has been around for 25 or 30 years, and I do not know what the barrier has been.

Honourable senators, we need this bill. Just because other things are happening does not mean it is not necessary.

The Public Health Agency of Canada will table its first annual report this year. It has to report to Parliament once a year and has to report about public health problems, and this is public health problem number one.

The honourable senator could continue his interest, and I certainly will too. The honourable senator may know I am looking at population health, and clean water is one of the specific issues. We should be sure that the Public Health Agency of Canada reports to Parliament once a year on any location in Canada where the drinking water is not potable.

Senator Grafstein: I examined an interesting approach to see if I could get public officials — elected, appointed and bureaucrats — to fulfill their responsibilities.

Harry Truman was asked the question: What is the job of the President of the United States? In Truman's immortal words: My job is to get people to do the work that they were hired to do in the first place.

Let us start with public officials and the Minister of Health. I am being non-partisan when I say that, in that it applies to every Minister of Health, federal and provincial. The Minister of Health, under the Canada Health Act, has responsibility for public health in this country. This bill will help. Why did ministers and deputy ministers responsible for public health not take this problem seriously, either at the health level or the ministry responsible for Aboriginal affairs? It was because their feet were not put to the fire.

Had my bill not been passed by the Senate, I was contemplating a class action against the Minister of Health and the officials who had reports on their desks and refused to publicize them because they were critical of the situation. I wanted to bring civil and criminal law to bear against negligent public conduct. Senator Baker is not here, but there is some question as to whether that would have a basis in law. I believe that it would have a basis in law. That was going to be my last gasp before I left the Senate, had my bill not passed.

• (1620)

Public officials are supposed to believe in responsible government, whether they are elected or bureaucrats. I do not believe they do when it comes to this matter. All we can do is continue to prod them until they fulfill the responsibilities that they were elected and appointed to do.

Hon. Gerald J. Comeau (Deputy Leader of the Government): On a point of order. Are we still on debate? My view, at this point, is that the speaker's watch must be awfully out of order.

The Hon. the Speaker: Things are perfectly in order. I do have a new watch.

We are on the debate. Senator Keon initiated the debate. We are on comments and questions on Senator Keon's intervention. I now recognize Senator St. Germain, who has a comment and question of Senator Keon.

Senator St. Germain: Honourable senators, the question is to Senator Keon. In the discussions that have been taking place, one of the huge challenges with the 630 First Nations that we have in

the country is the capacity to supervise the facilities of which Senator Dallaire and Senator Grafstein spoke. The people must have the capacity to run these particular facilities and to run them on a 24-hour basis. The Circuit Rider Training Program trains operators to run these water facilities. One of the greatest challenges at the moment is to have properly trained people on the ground in these often remote areas.

Does the honourable senator have any suggestions as to how to expedite the process of educating and putting human resources on the ground to facilitate this capacity void that exists in these reserve communities? This issue is something that we studied closely during the course of our study.

This study brought in officials, the expert panel, the Auditor General and various other groups that had been directed by the minister to find out what the problem was. Harry S. Truman once said that there are no great men, only ordinary men, ordinary men who rise to great occasions.

We need a man or a woman like that at this time. There is no question that Senator Andreychuk ranks among the top.

Perhaps Senator Keon could offer some insight as to how we can deal with the aspect of capacity.

Senator Keon: Honourable senators, in the hearings we have had so far on population health, which deals with the issue of the First Nations, the Metis and Inuit, there is a strong desire for them to control their own destiny, their own affairs on the ground at the local level.

The matter that Senator Dallaire spoke about is not rocket science. Anyone can run those machines. It is incumbent upon the Public Health Agency of Canada, which has the responsibility to Aboriginal peoples, to see that their health is not threatened. It is incumbent upon that agency — I will speak to them about it; I know most of them quite well — to institute an inspection program. The federal government, the body responsible for the health of First Nations, should put this equipment in place. It is peanuts.

Senator Dallaire: There is nothing wrong with our country using assets that are national. The Canadian army is a national asset. We build those things to be, as I said earlier on, "soldier-proof." That means that no one could destroy it. The maintenance has to be sound and simple and the training to achieve and maintain it is also quite simple. We cannot spend a lot of time doing this. Why not have a Canadian corps of engineers that has a national mandate to assist in the infrastructure? I am sure that we can work out the deals with private industry so they are not stepping on someone else's shoulders. That gives depth to the military to do the jobs overseas and gives significance to the military in this country to assist in continuing events. Would the honourable senator not think that is an option?

Senator Keon: Of course, I do not have to tell the honourable senator what the American army has done; they are responsible for the highway and bridge system in America. They do all kinds of things. I think it would be great for the Canadian army to do more of that because they have to do it anyway when they go abroad.

The Hon. the Speaker: It was moved by Senator St. Germain, seconded by Senator Gustafson, that this report be adopted now. Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and report adopted.

STUDY ON NATIONAL SECURITY POLICY

AMENDED REPORT OF NATIONAL SECURITY AND DEFENCE COMMITTEE—DEBATE CONTINUED

On the Order:

> Resuming debate on the consideration of the fourth report (interim), as amended, of the Standing Senate Committee on National Security and Defence, entitled: *Managing Turmoil, The Need to Upgrade Canadian Foreign Aid and Military Strength to Deal with Massive Change*, tabled in the Senate on November 21, 2006.—(*Honourable Senator Banks*)

Hon. Wilfred P. Moore: This is an important report and I see the item is at day 15 in the *Order Paper*. Others may want to speak to the matter — I believe Senator Banks does — so I will adjourn the matter in his name in order to rewind the clock.

The Hon. the Speaker: Is that agreed, honourable senators?

Hon. Senators: Agreed.

On motion of Senator Moore, for Senator Banks, debate adjourned.

[*Translation*]

QUESTION OF PRIVILEGE

MOTION TO REFER TO STANDING COMMITTEE ON RULES, PROCEDURES AND THE RIGHTS OF PARLIAMENT—DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Tkachuk, seconded by the Honourable Senator Angus,
>
> That all matters relating to this question of privilege, including the issues raised by the timing and process of the May 15, 2007 meeting of the Standing Senate Committee on Energy, the Environment and Natural Resources and their effect on the rights and privileges of Senators, be referred to the Standing Committee on Rules, Procedures and the Rights of Parliament for investigation and report; and
>
> That the Committee consider both the written and oral record of the proceedings.—(*Honourable Senator Comeau*)

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, I would like to join the debate on Senator Tkachuk's motion to refer his question of privilege to the Standing Committee on Rules, Procedures and the Rights of Parliament for investigation and report.

If I may, I would first like to thank my honourable colleagues, who were kind enough to give me the weekend to reflect on the matter. As you will recall, I moved to adjourn the debate on Thursday of last week and we did not know if the motion would be adopted. As honourable senators know, a motion to adjourn the debate is not subject to debate or amendments, and the matter must be settled immediately. This is pursuant to the *Rules of the Senate* and it is therefore up to the Senate to decide if the motion to adjourn will be adopted or defeated.

It is this kind of motion that appears to be at the root of the current situation. I see no need to go over the entire issue once again, however, I will point out that the recorded division on May 15, 2007, was the last item listed on that day's Order Paper.

To get to the topic before us, the fact remains that senators cannot be in two places at once. Our work in this chamber depends on the senators being right here. We ask that they be present in the chamber. I do not plan on going into detail, but I would like to say that this requirement can sometimes be a challenge to the whips and leaders of both sides.

If senators now must leave early to protect their right to participate in committee meetings, the Senate will suffer.

It is up to each one of us to ensure that this does not happen. We must do so for both those sitting here today and for our successors.

Can we really do nothing and accept that this chamber of sober second thought, defender of minority rights, is about to abdicate its role and raison d'être in the legislative process?

• (1630)

If we fail to defend the privileges of one senator today, then senators will no longer be able to trust the Senate to make the right decision rather than the most expedient one. It will mean denying everything we stand for.

Honourable senators, a speaker seldom rules that a prima facie case of privilege exists. Consequently, the burden of proof tends to be reversed.

It is up to those who are opposed to this motion to prove that this is not a question of privilege.

They must explain the concept of privilege and tell us that it does not apply to this particular case and that the circumstances do not constitute a breach of privilege.

They might say that, in their opinion, committee proceedings take precedence over the work of this chamber and perhaps cite past speakers' rulings to prove their point. But I doubt they would find any.

They might also say that it is not unreasonable to deprive senators of their right to take part in committee work. But I doubt they could convince this chamber.

Honourable senators, it is not enough to say that the rules were observed. We all agree that the rules were observed. Nevertheless, there was still a breach of privilege. The implication is that there are shortcomings either in the rules or in their application. This determination naturally falls within the mandate of the Standing Committee on Rules, Procedures and the Rights of Parliament.

The motion asks that the Senate refer this question of privilege to the Committee for investigation and report. It is that simple.

I know that the senators who are directly concerned in this matter — Senators Cochrane, Tkachuk and Angus — believe that the Standing Committee on Rules, Procedures and the Rights of Parliament can and should recommend that the May 15 proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources be declared null and void. They also believe that Bill C-288 should be referred to committee for a proper clause-by-clause review, with both sides represented. Lastly, Senator Angus is proposing that the Senate go into Committee of the Whole to conduct a detailed study of this bill.

These are all possibilities this chamber could choose, but the Standing Committee on Rules, Procedures and the Rights of Parliament could not do the same. The committee can only recommend one of these possibilities or other options to the chamber. But that is where its authority ends. It can only make a recommendation. Those who suggested that there is a conspiracy to order the Standing Committee on Rules, Procedures and the Rights of Parliament to apply these provisions are seeing a non-existent plot that would be impossible to pull off.

Need I remind my honourable colleagues that the great Liberal majority in this chamber is also found in all the committees, including the Standing Committee on Rules, Procedures and the Rights of Parliament? There are very few ways for us in the minority to force anything on the majority.

Honourable senators, something very serious has happened, which affects the very functioning of this chamber and the functioning of our committees. We cannot just dismiss it, claim it is for the best, act as if nothing happened and hope that everything will return to normal.

People in a minority situation always have a better sense of the issues than the members of the majority do. We have a problem, and it has to be resolved.

Honourable senators, majorities come and go. Are you really sure you want to create a precedent for our successors? What we do today will be used as a reference in the future. I hope we can raise the bar high enough and that it is not too late.

As Senators Banks and Carstairs have pointed out, it is quite possible that, in the past, committees began their deliberations a little earlier. But I doubt that things ever unfolded the way they did in the case before us today or with the consequences we are experiencing.

Honourable senators, privilege goes well beyond the rules. If there appears to be a conflict between the two, then privilege must prevail. I am of the opinion that there was a breach of privilege. Even if you do not entirely agree, I believe we must at least give the Standing Committee on Rules, Procedures and the Rights of Parliament the mandate to look at the issues surrounding this matter.

That is why I encourage you to think very carefully about possible solutions to prevent these types of problems in the future and allow us to have a Chamber and committees that work well. I encourage you to proceed with the future referral of this motion to the Committee on Rules, Procedures and the Rights of Parliament for consideration and recommendations. I thank you for your attention and invite you to give it a good, long thought before making a final decision.

On motion of Senator Cowan, debate adjourned.

[*English*]

THE SENATE

MOTION TO URGE CONTINUED DIALOGUE BETWEEN PEOPLE'S REPUBLIC OF CHINA AND THE DALAI LAMA—MOTION IN AMENDMENT—DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Di Nino, seconded by the Honourable Senator Andreychuk:
>
> That the Senate urge the Government of the People's Republic of China and the Dalai Lama, notwithstanding their differences on Tibet's historical relationship with China, to continue their dialogue in a forward-looking manner that will lead to pragmatic solutions that respect the Chinese constitutional framework, the territorial integrity of China and fulfill the aspirations of the Tibetan people for a unified and genuinely autonomous Tibet;
>
> And on the motion in amendment of the Honourable Senator Carstairs, P.C., seconded by the Honourable Senator Corbin, that the motion be not now adopted but that it be amended immediately following the word "of" in the first line by eliminating all the words in the rest of the motion and by replacing them with the following:
>
> > "Canada and in particular the Foreign Affairs Minister to have discussions with the Foreign Minister of the People's Republic of China regarding the Dalai Lama and the aspirations of the Tibetan people."—(*Honourable Senator Di Nino*)

Hon. Consiglio Di Nino: Honourable senators, I have taken some time to reflect on the amendment made by Senator Carstairs. I would like to thank her for activating the debate on this motion.

Like Senator Prud'homme, I, too, have strong feelings about this issue. Let me begin by saying that I believe strongly in the proposition that we can and indeed must speak out against injustices and wrongdoings by whomever they are perpetrated and wherever they may occur.

Honourable senators, the world has had and, sadly, still has greedy and power-hungry tyrants, bullies and despots who prey on defenceless and weaker members of society and who mostly rule by fear and repressive methods. Justice and the rule of law in many places are either nonexistent or too weak to be effective.

The victims of these injustices look for hope from those of us who live in free and democratic societies. We must not deny them. On their behalf, we must keep the flame of hope alive.

What is truly marvellous and encouraging to me is that today's technology allows people in the remotest parts of the world to receive messages of support through cyberspace. For someone my age, that is like a dream world. I know this is happening in Tibet. This motion, together with dozens of others across the globe, has probably been relayed to Tibetans in Tibet. They will know they are not alone and not abandoned.

Honourable senators are in a privileged position and have the unique opportunity to participate in the public policy process, which includes expressing our position on issues. Each of our voices carries with it certain authenticity, which adds value to an issue; but, collectively, the voice of the Senate of Canada has enormous influence, even if only morally. We have often used our collective voice in defence of those who suffer injustices or who are unable to defend themselves, both for domestic and international issues. We would be prepared to stand in solidarity with those who are denied fundamental rights, to shine light on wrongs and abuses everywhere in the world. It is our duty to the principle of being our brother's keepers.

A very good example is Senator Dallaire's motion on Darfur. Honourable senators may remember that, on March 27, Senator Cools raised a point of order objecting to the form of this motion. In the course of her remarks, she said:

> I wish to be clear that I am not speaking on the merits, the righteousness or the contents of this motion. I am adopting no position on the motion's merit; I am confining myself to its form.

• (1640)

On April 24, the Speaker ruled that the motion was in order. He said, "Both Canadian and UK practice suggest that there is sufficient flexibility to allow for motions of the kind proposed."

Indeed, I can point to several recent examples from Commonwealth jurisdictions whose parliaments addressed the Chinese government directly on the issue of Tibet. On February 26 of this year, a motion was tabled in Scotland. It read, in part, "That the Parliament urges the government of the People's Republic of China and the representatives of Tibet's government in exile . . ."

Three weeks ago, on May 18, an Early Day Motion was tabled in the British Parliament. It too called on the Chinese government to make a positive gesture toward the Tibetans, and it too is worded in a mild, non-confrontational manner. It ". . . urges the government of the People's Republic of China and the Dalai Lama to resume and continue the dialogue . . ."

I have the full text of these motions should honourable senators wish to see them.

Honourable senators, for the record, let me share some additional thoughts driving my wish to bring this motion to a successful conclusion. Since 2002, envoys of the Dalai Lama have met with Chinese officials on five occasions. However, in

five years, the discussions have not moved beyond an exchange of positions and an agreement to continue discussions. As I said before, His Holiness has been unequivocal in accepting a solution within the framework of the Chinese Constitution. He has eschewed independence time and again. He is not calling for the removal of all military troops. He is not calling for the removal of settlers and he is not calling for the remaking of borders. He has conceded the maximum possible in leading the longest-standing, peaceful, non-violent movement for justice in modern history. It is time for Beijing's leadership to reciprocate and place on the negotiating table reasonable proposals to put an end to this tragic story and reach an honourable solution.

A responsible state respects the rights of all its citizens. Autonomy, genuine autonomy that is, must be extended to all Tibetans. Granting such a status is not only an issue of international expectations, human rights and justice; it supports China's self-interest in unity and the credibility of its claim to be a harmonious multi-ethnic state. Honourable senators, this is not merely the cause of a leader in exile; it is a struggle for justice of an entire people.

On February 7, I mentioned this motion was part of a worldwide initiative. Let me share with you a few brief updates. On February 15, the European Parliament, a body representing 27 countries, passed a lengthy resolution on Tibet. On the same day, with unanimous consent of all parties, a motion was passed in the other place. That is not surprising since this is not a partisan issue in Canada or in any other open democracy. In fact, legislatures across Europe, in the United States and in parts of Asia have spoken out in motions, statements, and hearings. Actions have been taken in the Parliaments of Switzerland, Austria, Poland, Liechtenstein, Sweden and France. We received word that legislatures in Australia, several African countries, India and at least one South American country are engaging their colleagues and governments to do more. It is likely that other countries are speaking out on behalf of Tibet.

On March 10, the forty-eighth anniversary of the 1959 Tibetan national uprising, thousands of people around the world rallied in support of Tibet. In Germany, almost 800 Tibetan flags were flown in town halls and regional capitals across the country. More than 300 Tibetan flags were raised in the Czech Republic, including outside the office of the environment minister. As the Speaker of the U.S. House of Representatives, Nancy Pelosi, said on that day, ". . . we must never forget the people of Tibet in their ongoing struggle."

Her comment echoed a statement made in the UN General Assembly over four decades ago by the Irish representative Frank Aiken, who asked:

> . . . how many benches would be empty here in this hall if it had always been agreed that when a small nation or a small people fell into the grip of a major power, no one could ever raise their case here; that once they were a subject nation, they must always remain a subject nation.

Last week in Australia, His Holiness the Dalai Lama said that in the next 15 years, without some intervention, the Tibetan culture in Tibet will begin to disappear. Also last week, at the G8 summit, Prime Minister Harper engaged Chinese President Hu Jintao on the issues of democratic reforms and human rights, among others. Prime Minister Harper also acknowledged the positive developments in China during the past 25 years.

I agree with His Holiness that time is running out for the Tibetan culture but I also agree with the Prime Minister that the Chinese authorities are more open today to some influence than ever before. The upcoming 2008 Olympics in Beijing and the world attention this will bring makes it a great time to renew efforts to encourage Beijing to reach an honourable compromise on the Tibetan issue.

Honourable senators, this motion was carefully reflected upon and it has been carefully worded. It has been shared with representatives of the Dalai Lama and many colleagues around the world. It reflects the latest developments in the process of dialogue between the Chinese and Tibetans, some of which His Holiness' representative shared with us when he appeared before a subcommittee in the other place in November. It is meant to send a clear but non-confrontational signal to support bridge-building between the two parties. It is part of a worldwide parliamentary initiative in which much thought and effort has been invested. It has clear and substantive meaning behind it. In particular, it calls on both sides to seek a pragmatic solution that respects the Chinese constitutional framework and the territorial integrity of China and fulfills the aspirations of the Tibetan people.

Honourable senators, despite the Speaker's clear ruling, the existing precedents and all of my foregoing remarks, in a spirit of compromise I am prepared to seek accommodation in offering a subamendment to Senator Carstairs amendment. In doing so, the motion addresses the Government of Canada rather than the Government of the People's Republic of China and His Holiness the Dalai Lama. I hope this will satisfy honourable senators who have concerns with the form of the motion.

MOTION IN SUBAMENDMENT

Hon. Consiglio Di Nino: Therefore, honourable senators, I move:

> That the motion in amendment be amended immediately following the words "Canada and in particular the Foreign Affairs Minister, to" by eliminating all subsequent words and replacing them with the following:
>
> > . . . encourage the Government of the People's Republic of China and the Dalai Lama, notwithstanding their differences on Tibet's historical relationship with China, to continue their dialogue in a forward-looking manner that will lead to pragmatic solutions that respect the Chinese constitutional framework, the territorial integrity of China and fulfill the aspirations of the Tibetan people for a unified and genuinely autonomous Tibet.

The Hon. the Speaker: Honourable senators, on the subamendment to the amendment of Senator Carstairs, it is moved by the Honourable Senator Di Nino, seconded by the Honourable Senator Cowan for Senator Cordy, that the motion in amendment be amended immediately following the words, "Canada and in particular the Foreign Affairs Minister to . . ."

An Hon. Senator: Dispense!

The Hon. the Speaker: Debate, honourable senators?

Hon. Anne C. Cools: I defer to the Deputy Leader of the Opposition in the Senate.

Hon. Claudette Tardif (Deputy Leader of the Opposition): I move the adjournment of the debate.

On motion of Senator Tardif, debate adjourned.

• (1650)

THE SENATE

MOTION URGING GOVERNOR GENERAL TO FILL VACANCIES IN SENATE—DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Moore, seconded by the Honourable Senator Phalen:
>
> That an humble Address be presented to Her Excellency the Governor General praying that she will fill the vacancies in the Senate by summons to fit and qualified persons.—(*Honourable Senator Murray, P.C.*)

Hon. Lowell Murray: Honourable senators, the issue that is raised by this motion, as well as by the inquiry launched some time ago by our colleague Senator Banks, is whether the Prime Minister is breaching constitutional convention by not proceeding to fill vacancies in the Senate. At what point would he breach that convention and, once breached, what is the remedy for the breach?

I indicated the other day that I would support Senator Moore's motion mainly because I share his concern for the continued vitality of the Senate as a working part of our parliamentary institutions, but I do not share his apparent confidence that the remedy he suggests would be effective any time soon. However, I shall vote for it.

I want to draw to the attention of honourable senators, because I intend to refer to them, a couple of documents from the Library of Parliament on this general subject. One is entitled "Notes on Vacancies in the Senate" and was authored by Michael Dewing of the Political and Social Affairs Division in 1999. The other is entitled "Issues Related to Senate Vacancies," authored by Penny Becklumb of the Law and Government Division. This is a document that I asked to be prepared and was produced last month on May 17, 2007. I presume the first document is widely available. If any permission of mine is needed to allow honourable senators or anyone else access to the second document, I hereby give that permission. These documents and some interesting appendices to them contain narratives, historical data with regard to Senate vacancies and some analysis of the argument regarding conventions.

With regard to vacancies, there are, I think, 11 or 12 of them in the Senate as we speak. I thought I would take honourable senators through the number of vacancies that had accumulated during various Parliaments. Going back to the Parliament of 1930-35, under the government of the Right Honourable R.B. Bennett, there was an accumulation of 19 vacancies. From 1935 to 1940, 14 vacancies accumulated; 1940 to 1945 saw an accumulation of 18 vacancies; 1945 to 1949, an accumulation of 11 vacancies; by 1953, the number of vacancies has increased to 23; in 1955, the number of vacancies reached 21. Mr. Diefenbaker, when he came into office, inherited 14 vacancies, which he proceeded to fill, naturally, since the number of Progressive Conservatives in the Senate was down to seven when he took office. Under Mr. Pearson's government, the number of vacancies rose, but not to those previous levels. Under Prime Minister Trudeau, by 1970, there were 13 vacancies. Following the 1974 election, there were 12. He left nine vacancies for Prime Minister Clark in 1979, and Mr. Clark filled those vacancies and two more that occurred. It was during the 1980-84 Trudeau administration, his final majority mandate, that the number of vacancies reached 21 by mid-December 1983. The number of vacancies remained below five during most of Prime Minister Mulroney's first term in office, but they were up to 14 again by mid-August 1990. They seldom reached those levels under the Chrétien administration.

With regard to the length of vacancies, I have a note that between 1963 and 1999, the average Senate vacancy had lasted 418 days. The average would probably be higher now. However, I should indicate by way of placing on the record the precedents for length of vacancies. I think there has been one vacant here now for 14 months, my friend Senator Moore says.

Let me give honourable senators some precedents. The seats to which Senator Frith of Ontario was appointed, in 1977; Senator Anderson of New Brunswick, in 1978; Senator Barootes, in 1984; and Senator Macquarrie, in 1979 had all been vacant for more than four years. The seat to which Senator Steuart was appointed from Saskatchewan, in 1976, had been vacant for more than five years. Seats to which Senator Bud Olson of Alberta and Senator Roméo LeBlanc of New Brunswick had been appointed had been vacant for more than six years. The seat to which the Honourable Duff Roblin of Manitoba was appointed, in 1978, had been vacant for 8.4 years.

The point I am making, and I think it is germane to my honourable friend's motion, is that there are plenty of precedents for today's situation, both in the number of vacancies and in the length of them.

The new elements that Senator Moore has brought into the debate are, first, the stated refusal of the present Prime Minister to fill Senate vacancies. He has already filled one. He intends to fill another at the end of June when Senator Hays departs. However, these are exceptions that he has explained. In general, his statement is that he would not be appointing senators. The question is, at what point can you take his refusal, a statement of that kind, to court, or really do very much about it since it is by instrument of advice from the Prime Minister to the Governor General that honourable senators are appointed.

The second issue that is underlined by Senator Moore, and it will be of growing relevance and importance as time goes on if the status quo is maintained, is the regional issue and the effect of a refusal to fill vacancies on the regional balance that is supposed to exist in the Senate.

My friend has mentioned his own province of Nova Scotia, where I believe there are three vacancies at the moment, and the consequent under-representation of the entire Maritime region. I looked at two other provinces which I think create a more serious or potentially serious problem. British Columbia, which is already underrepresented here, with only six senators, has only five sitting as we speak because there is one vacancy. Within five years, three honourable senators from British Columbia will have retired, and British Columbia will be down to two of the six senators to which it is entitled. The same thing holds true for Newfoundland and Labrador. There is one vacancy there now, so there are five sitting senators. There will be three retirements and, by the end of 2012, there will only be two senators left from Newfoundland and Labrador. That assumes that everyone else remains in good health or does not take an early retirement. The regional situation could be exacerbated as time goes on if Mr. Harper stays in office and maintains his position.

• (1700)

With regard to conventions, this is a difficult one. I think it is fair to say that the remedy for breached constitutional conventions is really political, and therefore not too well-defined. Where the political remedy might lie, I do not know. Perhaps it is with the Governor General, with Parliament, or, as my document from the Library of Parliament suggests, with public opinion or the electorate.

There was an attempt — and this is directly related to what Senator Moore is trying to do with his motion — way back in 1955, on the part of a distinguished Liberal senator, a former long-time parliamentarian in both Houses and a former minister in Mackenzie King's government, to introduce, as a private member's initiative, a constitutional amendment to provide that it be mandatory to fill every vacancy in the Senate within six months. Senator W. D. Euler was the sponsor.

Senator Segal: He was very well known.

Senator Murray: Yes. He was from your part of the country, I believe, the Kingston area. He had been Minister of Trade in Mackenzie King's government. He received a lot of support for the idea in the Senate. There were some very eminent legal scholars who spoke to the matter. As far as I can make out from the debate, while most of them supported the spirit of his motion — in the same way that I support the spirit of Senator Moore's motion — they were dubious about making it stick if the constitutional amendment were to pass.

The late, great Senator Roebuck, who was here when I arrived on the Hill 40 odd years ago, was one of those who spoke. Senator Farris of British Columbia said that no lawyer would stake his reputation upon the proposition that this means that the vacancy shall be filled some three, five, or even seven years after it occurs. The question is entirely one of what is a reasonable term. Senator Farris himself, a supporter of the motion, pointed out that, "No penalty can be provided for the failure of the Governor General to carry out the mandate of the Constitution."

Senator Salter Hayden, whom some of us served under when he was Chairman of the Standing Senate Committee on Banking, Trade and Commerce, said any change to the system would have to be by force of public opinion because "I know of no provision in the law under which an application can be made for a mandamus against the Crown for failure to proceed under this section of the British North America Act."

Senator Hugessen, another prominent senator, noted that, "It would be absurd to impose a penalty on the Governor General for not doing something which everyone recognizes is not a personal act of his own but one which he can only take upon the advice of his advisers."

Senator John Connolly, who some of us know as a former colleague here, agreed with Senator Hugessen, saying that, "The proposed new injunction to the Governor General would not be mandatory. It could be no more than directive. No writ of mandamus and no comparable judicial process can run against the Crown. This is long-settled law." He pointed out that the Governor General was already in violation of the Constitution for failing to fill vacancies within a reasonable time, yet there was no legal sanction for this condition.

Honourable senators, I leave that for your consideration and invite you to obtain copies of those documents, reflect on them and, perhaps, even read the debate to which I referred.

There has been some suggestion that what the Prime Minister is doing — or, rather, not doing — is part of a grand strategy on his part; that is, to let vacancies accumulate over a period of time and to create a crisis in the Senate, at which point he believes — this is attributed to him — that one or two provinces will then move to hold elections. There will then be a cascade of elections and, presto, he will have his new Senate.

Senator Segal: Unsubstantiated!

Senator Murray: There are a number of problems with this, quite apart from the fact that we would be reforming a Senate without making any change, even in the regional distribution.

The first problem is that the provinces that go ahead to hold so-called senatorial elections will find themselves in the same position that Alberta was in when it came to drafting a law that is intra vires their legislature. I told the Senate 17 years ago, on advice, that the Alberta law under which future Senator Brown and former Senator Waters were sent here was ultra vires the Alberta legislature, and not just in one or two respects but from stem to stern; and that there were provisions in the Alberta law that would be ultra vires of the federal Parliament if we tried to do it on our own. Other provinces who try will run up against the same drafting problems. Someone will appeal, the fat will be in the fire again and no one will be any further ahead.

The second issue is that Quebec — and perhaps others — has taken the position for some time that it is in favour of indirect elections, not direct elections. Mr. Harper has not shown much sympathy for this option. Whenever the subject came up, Quebec wanted to have senators elected by their National Assembly.

I see the clerk standing to indicate that my time is up.

The Hon. the Speaker: Honourable senators, is it agreed that the Honourable Senator Murray have more time?

Hon. Senators: Agreed.

Senator Murray: The third problem is that the proposed federal law, Bill C-43, is also subject to possible court action by Ontario and Quebec. Indeed, those provinces have put us on notice. If this is part of a grand strategy on Mr. Harper's part, it seems to be going nowhere. I say as I have said before: The only crisis that is developing is a crisis of governance that directly affects the Conservative government and party in this chamber.

Senator Day and Senator Corbin took umbrage when the Prime Minister spoke about needing a Senate to do the business of the government. I would disagree with them to this extent: We have to do the business of the government. Government bills take precedence on our Order Paper and, by convention, in our committee. There is need of a critical mass of government supporters in the Senate to facilitate and support the government's agenda. The government cannot expect the opposition or even independent senators here to accept that responsibility. It is not theirs.

I make the point that I think I have made before: Before we find ourselves with only seven supporters of the Conservative Party left, the Prime Minister owes it to his government, to his caucus, and to the people who voted for his party to be able to move ahead with his agenda. I understand his views about term limits and elections, and so on, but the immediate solution at hand is to appoint a dozen people who are 65 years of age or over, pending some more comprehensive reform.

Hon. Leonard J. Gustafson: Will the honourable senator accept a question?

Senator Murray: Yes, of course.

Senator Gustafson: From what I am hearing at the grassroots level, people are demanding change in the Senate and that there be some answers. I have people coming to me who are not political in that sense, yet they want to see changes in the Senate.

One of the biggest issues is regional representation. A province like B.C., with 4 million to 5 million people, has only six senators. We heard from the honourable senator the other day about the problems that exist in Quebec. In the mind of the honourable senator, how can this be settled in a way that will be of benefit to all Canadians?

Senator Murray: Honourable senators, if some of Senator Gustafson's friends are complaining about the Senate or demanding changes in it, I hope they preface their questions by saying that they hope he will long continue here to do the good work that he is doing on their behalf.

• (1710)

Senator Austin and I have a constitutional amendment before the Senate now which will increase western representation. That constitutional amendment is stuck somewhere with Her Majesty's Loyal Opposition. It would be a great step forward if they would bring it forward for a vote as soon as possible.

Hon. Norman K. Atkins: What is the honourable senator's view of the pressure that is being applied on the Senate — regardless of political affiliation — by the House of Commons to rubber-stamp legislation that comes to this place?

Senator Murray: I have learned to become impervious to those pressures. It has been a late conversion, I admit. Not enough attention is paid to our role as a revising chamber, quite apart from the large policy issues that may arise from time to time. One of them will be before us shortly — Bill C-52, the budget implementation bill — that raises problems as to what we should do if we are opposed to it or to various elements of it.

Many bills come before us that badly need revision, and our committees do that work. Members of the House of Commons, and in particular of the government, far from being resentful, should thank us for the work that we and our colleagues in committees do in that respect.

The Hon. the Speaker: Senator Murray's extra five minutes have expired.

Hon. Anne C. Cools: Could he have more time?

The Hon. the Speaker: Continuing debate.

On motion of Senator Tardif, debate adjourned.

[*Translation*]

STUDY ON ISSUES RELATED TO NATIONAL AND INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

MOTION TO REQUEST GOVERNMENT RESPONSE ON REPORT OF HUMAN RIGHTS COMMITTEE— ORDER STANDS

On the Order:

> Resuming debate on the motion of the Honourable Senator Andreychuk, seconded by the Honourable Senator Stratton,
>
> That, pursuant to rule 131(2), the Senate request a complete and detailed response from the Government, with the Minister of Foreign Affairs being identified as the Minister responsible for responding to the twelfth report of the Standing Senate Committee on Human Rights, entitled: *Canada and the United Nations Human Rights Council: At the Crossroads*.—(*Honourable Senator Corbin*)

Hon. Eymard G. Corbin: Honourable senators following my comments at the time of adjournment last Thursday, I note that Senator Andreychuk is unavoidably absent and I move that the debate be adjourned until the next sitting.

On motion of Senator Corbin, debate adjourned.

[*English*]

POST-SECONDARY EDUCATION

INQUIRY—DEBATE SUSPENDED

On the Order:

> Resuming debate on the inquiry of the Honourable Senator Tardif calling the attention of the Senate to questions concerning post-secondary education in Canada.—(*Honourable Senator Hubley*)

Hon. Lillian Eva Dyck: Honourable senators, it is my pleasure today to join the debate on the inquiry of the Honourable Senator Tardif on questions concerning post-secondary education. I would like to focus my remarks today on Aboriginal people, and in particular I want to focus on Aboriginal people in Saskatchewan.

To give honourable senators a brief outline over the next minute or so, it is my intention to go through a number of statistics with regard to the gaps in Aboriginal people's education compared to the non-Aboriginal population and then enter into a general discussion and to look at some of the numerous reports that have been published on the gaps in post-secondary education.

To begin, I will provide some basic information to honourable senators about which I am sure you are aware. The Statistics Canada 2001 census indicated that 3 per cent of the Canadian population was Aboriginal: In Saskatchewan that was about 14 per cent; in Saskatoon, about 9 per cent.

To put these figures into context, it is interesting to note that the visible minority population is 14 per cent.

BUSINESS OF THE SENATE

The Hon. the Speaker: Honourable senators, pursuant to the house order we must suspend and begin to ring the bells. After the vote, we will continue where we left off with the honourable senator.

Honourable senators, the house will be suspended for the vote that is ordered at 5:30 and the bells will now begin to ring for 15 minutes.

Let the record show that I have been given permission to leave the chair.

Call in the senators.

• (1730)

KYOTO PROTOCOL IMPLEMENTATION BILL

THIRD READING—MOTIONS IN AMENDMENT AND SUBAMENDMENT—DEBATE CONTINUED

On the Order:

Resuming debate on the motion of the Honourable Senator Mitchell, seconded by the Honourable Senator Trenholme Counsell, for the third reading of Bill C-288, An Act to ensure Canada meets its global climate change obligations under the Kyoto Protocol;

And on the motion in amendment of the Honourable Senator Tkachuk, seconded by the Honourable Senator Angus, that Bill C-288 be not now read a third time but that it be amended:

(*a*) in clause 3, on page 3, by replacing line 19 with the following:

"Canada makes all reasonable efforts to take effective and timely action to meet";

(*b*) in clause 5,

(i) on page 4,

(A) by replacing line 2 with the following:

"to ensure that Canada makes all reasonable efforts to meet its obligations",

(B) by replacing line 6 with the following:

"ance standards for vehicle emissions that meet or exceed international best practices for any prescribed class of motor vehicle for any year,", and

(C) by adding after line 13 the following:

"(iii.2) the recognition of early action to reduce greenhouse gas emissions, and",

(ii) on page 5,

(A) by replacing line 9 with the following:

"(*a*) within 10 days after the expiry of each",

(B) by replacing line 23 with the following:

"first 15 days on which that House is sitting", and

(C) by replacing lines 26 and 27 with the following:

"each House of Parliament is deemed to be referred to the standing committee of the Senate and the House of Commons that";

(*c*) in clause 6, on page 6, by adding after line 29 the following:

"(3) For the purposes of this Act, the Governor-in-Council may make regulations restricting emissions by "large industrial emitters", persons that the Governor-in-Council considers are particularly responsible for a large portion of Canada's greenhouse gas emissions, namely,

(*a*) persons that are part of the electricity generation sector, including persons that use fossil fuels to produce electricity;

(*b*) persons that are part of the upstream oil and gas sector, including persons that produce and transport fossil fuels but excluding petroleum refiners and distributors of natural gas to end users; and

(*c*) persons that are part of energy-intensive industries, including persons that use energy derived from fossil fuels, petroleum refiners and distributors of natural gas to end users.";

(*d*) in clause 7,

(i) on page 6,

(A) by replacing line 32 with the following:

"that Canada makes all reasonable attempts to meet its obligations under", and

(B) by replacing line 38 with the following:

"ensure that Canada makes all reasonable attempts to meet its obligations", and

(ii) on page 7, by replacing line 4 with the following:

"(3) In ensuring that Canada makes all reasonable attempts to meet its";

(*e*) in clause 9,

(i) on page 7, by replacing line 33 with the following:

"ensure that Canada makes all reasonable attempts to meet its obligations", and

(ii) on page 8,

(A) by replacing line 3 with the following:

"Minister considers appropriate within 30 days", and

(B) by replacing line 7 with the following:

"(1) or on any of the first fifteen days on which";

(*f*) in clause 10,

(i) on page 8,

(A) by replacing line 9 with the following:

"**10.** (1) Within 180 days after the Minister",

(B) by replacing line 11 with the following:

"tion 5(3), or within 90 days after the Minister", and

(C) by replacing line 38 with the following:

"(*a*) within 15 days after receiving the", and

(ii) on page 9,

(A) by replacing line 6 with the following:

"Houses on any of the first 15 days on", and

(B) by replacing line 9 with the following

"(*b*) within 30 days after receiving the advice,";

(*g*) in clause 10.1, on page 9,

(i) by replacing line 17 with the following:

"and Sustainable Development may prepare a",

(ii) by replacing line 32 with the following:

"report to the Speakers of the Senate and the House of Commons", and

(iii) by replacing lines 34 and 35 with the following:

"Speakers shall table the report in their respective Houses on any of the first 15 days on which that House".

On the subamendment of the Honourable Senator St. Germain, P.C., seconded by the Honourable Senator Di Nino, that the motion in amendment be amended by deleting amendment (*b*)(i)(B) and relettering amendment (*b*)(i)(C) as amendment (*b*)(i)(B).

Motion in subamendment negatived on the following division:

YEAS
THE HONOURABLE SENATORS

Andreychuk
Carney
Comeau
Di Nino
Eyton
Gustafson
Johnson
Keon
LeBreton
Meighen
Nancy Ruth
Nolin
Oliver
Segal
St. Germain
Stratton
Tkachuk—17

NAYS
THE HONOURABLE SENATORS

Adams
Atkins
Bryden
Callbeck
Campbell
Carstairs
Chaput
Cook
Cools
Corbin
Cordy
Cowan
Dawson
Down
Dyck
Eggleton
Fairbairn
Fitzpatrick
Fox
Fraser
Goldstein
Grafstein
Hays
Hervieux-Payette
Joyal
Lavigne
Losier-Cool
Mahovlich
Merchant
Mitchell
Moore
Munson
Murray
Peterson
Phalen
Ringuette
Robichaud
Rompkey
Smith
Tardif
Trenholme Counsell
Watt
Zimmer—43

ABSTENTIONS
THE HONOURABLE SENATORS

Nil

The Hon. the Speaker: Accordingly, the subamendment is defeated.

BUSINESS OF THE SENATE

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, I seek leave of the chamber to postpone all remaining items on the Order Paper and Notice Paper until the next sitting of the Senate. I seek leave that the items retain their position and I ask that Senator Dyck's inquiry remain standing in her name.

The Hon. the Speaker: Is there unanimous agreement, honourable senators?

Hon. Senators: Agreed.

The Senate adjourned until Wednesday, June 13, 2007, at 1:30 p.m.

APPENDIX
(*See p. 2588.*)

Bill S-4, An Act to amend the *Constitution Act, 1867* (Senate tenure)

Observations to the Report of the Standing Senate Committee on Legal and Constitutional Affairs

Introduction

> **"Suppose you appoint them for nine years, what will be the effect? For the last three or four years of their term they would be anticipating its expiry, and anxiously looking to the administration of the day for reappointment; and the consequence would be that a third of the members would be under the influence of the executive."**
>
> **--- George Brown, 1865**[1]

George Brown, a member of John A. Macdonald and George-Étienne Cartier's coalition government for the then province of Canada, went on to describe in his speech how their aim was to fashion an Upper House which would be "a thoroughly independent body – one that would be in the best position to canvass dispassionately the measures of this house and stand up for the public interest in opposition to hasty or partisan legislation."

It is clear from the Confederation Debates that the framers of Canada's Constitution did consider the option of a nine year renewable term for appointed senators but concluded that it would threaten the independence of the Upper Chamber from the executive – in other words, from the Prime Minister and his cabinet. Consequently, the Fathers of Confederation rejected a fixed renewable term and chose instead, for both the Senate and Canada's new Supreme Court, appointment for life. In the early 1960's, the term for the members of both institutions was changed to appointment until the age of 75.

Bill S-4, while brief in length, proposes a major change to the current practice at least in so far as the Senate is concerned. New senators would be appointed on the recommendation of the Prime Minister to eight year renewable terms, with no mandatory retirement at the age of 75. Two closely interrelated questions immediately came to mind. Would essential features of our parliamentary democracy, as constructed at the time of Confederation, be affected, and is this a change to our Constitution which can legally be made by the federal Government acting alone through Parliament without the involvement of the provinces?

[1] Legislative Assembly, February 8, 1865

The place of the Senate within the governing framework of Canada was arguably the most important and contentious issue faced by the framers of our Constitution. Though there were some, particularly those from the most populous region, Upper Canada (Ontario), who would have preferred a unicameral parliament, a second chamber was critical for those from the less populous regions. As George Brown described it: "Our Lower Canada (Quebec) friends have agreed to give us representation by population in the lower house, on the express condition that they shall have equality in the upper house. On no other condition could we have advanced a step."[2] Alexander Mackenzie, who went on to serve as our second Prime Minister, observed: "The most important question that arises relates to the constitution of the upper house."[3]

In addition to the equality of representation from the three regions of the country (Maritimes, Quebec, Ontario), there was also a debate about whether senators should be appointed or elected, with the view of John A. Macdonald finally prevailing: "There is, I repeat, a greater danger of an irreconcilable difference of opinion between the two branches of the legislature, if the upper be elective, than if it holds its commission from the Crown."[4]

In the end, the compromise reached called for a Senate with equal representation from the three regions, made up of members who were appointed for life terms by the executive. That this was a compromise designed to achieve unanimity among the participants was underscored by Alexander Mackenzie, who said: "While it is my opinion that we would be better without an upper house, I know the question is not, at the present moment, what is the best possible form of government, according to our particular opinions, but what is the best that can be framed for a community holding different views on the subject."[5]

To follow Alexander Mackenzie's line of thought, the two key questions at the present moment for the members of this Committee are whether the measures contained in Bill S-4 bring us closer to the "best possible form of government" and whether there is a constitutional obligation for the federal government to take into account the views of those in our federal community, namely the provinces, who may hold a different opinion about what is proposed? These are the questions which informed the work of this Committee.

Bill S-4 arises out of the June 2006 election promise of the Conservative Party to "begin reform of the Senate by creating a national process for choosing elected senators from each province and territory".

The new Conservative Government began that reform by introducing Bill S-4 on May 30, 2006, choosing to deal with the issue of tenure of new senators before advancing changes to their method of selection.

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[2] Legislative Assembly, February 8, 1865

[3] Legislative Assembly, February 23, 1865

[4] Legislative Assembly, February 6, 1865, Macdonald's preference for an appointed upper chamber was based on his experience with the parliament for the United Canadas where the two elected chambers often found themselves in deadlock.

[5] Legislative Assembly, February 23, 1865

The subject matter of the bill was referred to a Special Senate Committee on June 28, 2006, which recommended in principle defined term limits for new senators and concluded that "there appears to be no need for additional clarity on the constitutionality of Bill S-4…". However, following the presentation of the Committee's Report, the Government introduced, on December 13, 2006, Bill C-43, the Senate Appointment Consultation Act. This new development in the federal Government's Senate reform initiative led some senators, as well as a number of constitutional scholars and provincial authorities, to reconsider their earlier analysis of Bill S-4, particularly as concerned its constitutionality. Consequently, this Committee, building on the work of the Special Committee, has given closer attention to the evolving constitutional issues, and the principles defined in the ruling of the Supreme Court in 1979, known as the *Upper House Reference.*

I. 8-Year Term Appointments

The core of Bill S-4 is the proposal to provide fixed eight-year terms for new senators. In 1979, the Supreme Court of Canada was asked whether it was within the legislative authority of Parliament to enact legislation changing the tenure of members of the Senate. The Court said:

> "At some point, a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as "the sober second thought in legislation". The [1867 Constitution] Act contemplated a constitution similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life. The imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate. **However, to answer this question we need to know what change of tenure is proposed.**"[6] (emphasis added)

It would appear from this statement that some Senate tenure terms would be constitutional – but others would not. None of the witnesses who testified before the Committee was able to state where the dividing line is to be found. Even the Government's legal counsel, Warren Newman, General Counsel, Constitutional and Administrative Law Section of Justice Canada, acknowledged that certain changes, such as a reduction to one year, would not pass constitutional muster, thereby acknowledging on behalf of the Government that its ability to make changes to Senate tenure under section 44 is not absolute. But no one could identify the critical dividing line.

Henry S. Brown, a constitutional lawyer with Gowling Lafleur Henderson, provided the Committee with a lengthy written opinion and also testified in person. He pointed out that in the *Upper House Reference*, the Supreme Court said that Parliament is not permitted unilaterally (i.e. without the involvement of the provinces) to make alterations which would "affect the

[6] *Authority of Parliament in relation to the Upper House (Re)*, [1980] 1 S.C.R. 54, 76-77.

fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional representation and provincial representation in the federal legislative process".[7]

A second test that must be met is whether the proposed reduction in the term of office "might impair the functioning of the Senate in providing what Sir John A. Macdonald described as 'the sober second thought in legislation'." [8]

Mr. Brown emphasized that:

> "the Supreme Court specifically referred to the independence of the Senate as forming part of its fundamental features. The Court said that the 'intention was to make the Senate a thoroughly' – and I emphasize the word 'thoroughly' – 'independent body which would canvass dispassionately the measures of the House of Commons' and that this was 'accomplished by providing for the appointment of members of the Senate with tenure for life.'"[9]

There are therefore three critical characteristics that must be maintained in any proposed change of tenure: (1) the Senate's thorough independence; (2) the Senate's capacity to provide sober second thought; and (3) the Senate's role as a means of provincial and regional representation.

Witnesses raised a number of concerns about the proposed 8-year term that related to these constitutional issues, including the fact that the term would allow a two-term Prime Minister to appoint every single senator in the Chamber. This would profoundly undermine the Senate's ability to fulfil its role as "a thoroughly independent body" of sober second thought. Virtually every expert who testified before us agreed that this is a significant problem.

Indeed, the Premier of New Brunswick, Shawn Graham, wrote on April 20, 2007 to say:

> "An additional concern of the Government of New Brunswick regarding Bill S-4 in its current form is the ability of any Federal Government in power for at least two full mandates to completely replenish the ranks of the Senate using an as yet undefined process. This follows directly from the proposed reduction in the tenure of Senators to only 8 years. Again here, this can only lead to a dilution of the independence of regional representation in the Senate. For a Province like New Brunswick, it is difficult to conceive how such a proposal could be favourable to its interests."[10]

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[7] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 29, 2007, Issue No. 24:81-82, quoting from the Supreme Court's opinion.

[8] *Id.*, 24:82.

[9] *Ibid.*, quoting from the Supreme Court decision in the *Upper House Reference*.

[10] Submission from Shawn Graham, Premier of New Brunswick, dated April 20, 2007, p. 7.

As noted above, under the *Upper House Reference* an alteration which would "affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional representation and provincial representation in the federal legislative process" is beyond the jurisdiction of Parliament acting unilaterally to enact. Premier Graham certainly believes this to be such an alteration.

Other important issues were also raised questioning the merits of the proposed 8-year terms. Several witnesses spoke of the value in having Senators who, by virtue of their long careers in the Senate, have acquired expertise in particular subject areas as well as in the procedural rules of the Senate – the so-called "Deans" of the Senate. There was concern that the long-term perspective now applied in the Senate would be impaired or lost.

A witness raised the issue that the proposed term would reduce the stability of the Senate, noting that "the present tenure virtually ensures that the Senate will exercise a powerful potential oversight and curtailment function for several years after the governing party is replaced in the House of Commons....This may result in a significant change in the Senate's overview function, and will certainly mean that the resulting Senate is no longer 'thoroughly independent' as required by the Supreme Court of Canada in *Re Upper House*."[11]

We were also impressed by the thoughtful comments from those who have closely studied the British House of Lords. Reform of that House has been the subject of extensive thought, study and debate for a decade. The proposal now under consideration is that peers should sit for 15 years, the equivalent of three electoral cycles of the European Parliament, with one-third being replaced every five years. This 15-year term would not be renewable.

Gerard Horgan, a Canadian political scientist currently teaching at the International Study Centre for Queen's University in the United Kingdom, described the findings of the Royal Commission on Reform of the House of Lords (the "Wakeham Commission") which reported in 2000, as follows:

> "The Commission's aspirations for the membership of the House of Lords in many instances paralleled those expressed for the Canadian Senate. For instance, the Commission took the view that long tenure would, 'encourage members to be independent minded and take a long-term view, discourage the politically ambitious from seeking a place in the second chamber, contribute to a less partisan style of debate, and allow members time to absorb the distinctive ethos of the second chamber and to learn how to contribute most effectively to its proceedings.'

[11] Brown Submission, p. 34.

> Given those aspirations and having taken into account the possible disadvantages of long tenure, the Commission concluded that members should serve for the equivalent of three electoral cycles, a term of 12 to 15 years. In addition, the Commission noted that it did consider a term based on two electoral cycles but that it 'concluded that terms of this length would be too short for the purposes of creating the kind of second chamber which we envisage.'
>
> .....
>
> In summary, then, first, the principled argument for at minimum a three-to-one ratio of Lords to Commons terms was made by the Wakeham Commission. Second, although the last word on Lords reform is a long way from being written, the force of the argument for a term of significant length for the U.K. upper chamber has been sufficient to gain government support for a 15-year term. Third, given the possibility of selecting only a portion of provincial senatorial contingents at each consultative election, one of the possible objections to a significant term for senators is obviated.
>
> To close, I would just say that what I have hoped to do with my submissions and remarks is to provide honourable senators with evidence that there are reasoned arguments in favour of significantly longer terms for upper chambers. However, and I say this not out of a motivation to flatter but because I believe it is true, on these issues, you, senators, are the true experts. If I as a researcher wanted to know how long it takes a new member to understand the ethos of the Senate, I would come and ask you. In the case of this legislation, it is as important that you look to your own experience as it is that you hear from people like me." [12]

Dr. Meg Russell of University College London similarly urged consideration of longer terms:

> "In terms of maintaining the ethos of the independence and much of what people value about the House of Lords, many people have argued that long term lengths are important. As Professor Horgan has said, the royal commission recommended 15 years. The government has also recently recommended 15 years." [13]

[12] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs,* March 22, 2007, Issue No. 23:103-105.

[13] *Id.,* 23:105.

Lord Howe, a Conservative member of the House of Lords, testified that in his opinion, "15 years should be a minimum length of tenure." [14]

We agree. Our amendment to Bill S-4 changes the proposed 8-year term, which we believe would not meet the Supreme Court's test for constitutionality, to a 15-year term, which we believe would be more likely to meet the constitutional test.

II. Non-Renewable Appointments

The proposal in Bill S-4 that the new term appointments for Senators should be open to renewal by the Prime Minister of the day was a source of much concern for many witnesses. The Bill itself is silent on the question of renewability. However, the Right Honourable Stephen Harper told the Special Senate Committee on Senate Reform that, "By its silence, you can presume that there would be the possibility of renewal."[15]

Both the Leader of the Government in the Senate, when she spoke to Bill S-4 in the Senate Chamber, and Prime Minister Harper, when he appeared before the Special Senate Committee on Senate Committee, were clear that the decision to permit renewal of the Senate appointments was designed with a view to senators being elected. However, to date, the Government has not proposed a constitutional amendment for an elected Senate. Bill S-4 does not address this in any way.

The overriding issue for many witnesses was the impact of renewability on the independence of a new Senator. Prime Minister Harper dismissed these concerns, saying:

> "In my assessment of whether senators would alter their behaviour in light of a renewable term, I tend to dismiss that. In my experience, whether members of either House are willing to work with the government is determined first and foremost by their party affiliation. That is not likely to change whether the terms are renewable or otherwise. That is my take on human nature as it pertains to the legislative process."[16]

Although this may be an accurate description of what takes place in the House of Commons, the situation in the Senate is somewhat more nuanced. In fact, there is a strong tradition in the Senate of independent voting. This is borne out by statistics. Professor Andrew Heard of Simon Fraser University told our Committee that he conducted a study of voting patterns in the Senate in the period 2001 to 2005. He testified:

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[14] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs,* March 28, 2007, Issue No. 24:12.

[15] *Proceedings of the Special Senate Committee on Senate Reform*, September 7, 2006, Issue No. 2:12.

[16] *Ibid.*

> "There is a perception, at least, that, over time, senators have more freedom of personal action than individual MPs do. There has been little statistical or empirical work on this, so I did a study that covered the period of 2001 to 2005.... I looked at 125 formal divisions involving 122 members of the Senate and 7,700 votes. This is only a fraction of the votes, because, as you realize, many votes are settled on a voice vote, and those include a formal recorded vision but no idea of who was in fact dissenting from the vote. I took the record of votes where individual senators are recorded abstaining, voting for or against a bill, and I wanted to see how often they vote against their caucus position and how often they abstain. **It was quite clear that there is a wide practice of independence among senators in a relative sense, certainly relative to the House of Commons.**" [17] (emphasis added)

Professor Heard was adamant that permitting terms to be renewed would seriously impact the independence of senators:

> "I do have a serious concern about the possibility of renewal terms. The possibility of a prime minister deciding which of the senators deserve to be reappointed to a new term seriously raises questions about the potential voting patterns of senators who wish to be reappointed. In this respect, I believe that renewable terms would have the potential to seriously impact the independence of senators voting." [18]

Other witnesses agreed. Professor Jennifer Smith, Chair of the Department of Political Science at Dalhousie University, testified that a renewable term diminishes the independence of the appointee and thus affects the Senate's function as the chamber of sober second thought. In her considered opinion, it also engages the Senate's function of federal representation, because the appointee's independence is compromised by the prospect of the renewable appointment. As such, it affects the character of the Senate as established at Confederation.

Professor David Smith of the Saskatchewan Institute of Public Policy expressed similar views:

> "A provision for renewable appointment would make a senator who desired renewal susceptible to influence from the Prime Minister, who would continue to make the nominations to the Governor General. Ambition and a view to future opportunities would assume far greater significance than they have today in the calculations that members of the upper house bring to their work. That comment is not intended as a criticism of such behaviour but as a statement of political life that would now apply to the Senate." [19]

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[17] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 21, 2007, Issue No. 23:45.

[18] *Id*, 23:46.

[19] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, April 25, 2007, Issue No. 25:33.

However, it must be pointed out that while there was a clear consensus among the witnesses who appeared that renewability would undermine the independence of the Senate, there were views expressed that raised concerns with non-renewability when combined with a relatively short fixed term. Professor Smith, for example, told the Committee:

> "A provision for non-renewable appointment for a fixed term would result in a chamber characterized by continual turnover. The features now cited as the Senate's strengths of experience, knowledge and perspective would disappear. More than that, rather than Senate membership coming at the end of an individual's career, it could come at its inexperienced beginning. For example, a person in their thirties appointed to the Senate for eight years would be in a position to seek a seat in the House of Commons by the time she or he was 40. If that were the case, Senate tenure might be seen as easily as prefatory to a period in the Commons as it is now seen to follow time in the lower house or in another occupation. In other words, the relationship between the two chambers would be reversed and the independence that now attaches to senators, whose political ambitions are at an end, would be compromised." [20]

The Committee recognizes as well that there are dual militating objectives. So long as Senators continue to be appointed, then allowing for reappointments could significantly undermine a senator's independence, striking at the very core of the constitutional role and responsibility of the Chamber in which they would serve. If, however, there is at some point a change to elect Senators, then a prohibition against a second (or third) term could undermine the accountability that is at the core of elections.

We also received strong representations on the issue of renewability from the Premier of New Brunswick, who noted that a renewable term

> "...would allow the Prime Minister to improve the accountability of Senators through the suggested advisory electoral process, assuming that the federal Government proceeded with such a change. It is through elections that the population can truly express their approval with the work done by their Senate representatives. If the Senators could hold office for one term only, then elections would not improve their accountability. In the Government of New Brunswick's opinion, this is one feature of the proposal that is likely to reduce the effectiveness of the Senate as a representative institution. There is also the likelihood that reappointment would increase party line loyalties. A Senator will invariably have to vote according to the values and position of the Federal Government in power if s/he wishes a reappointment. This can only lead to an increased pressure on the Senators to abandon the interests of their regions in favour of adherence to the agenda of the government in the House of Commons. This would effectively compromise the ability of the Senate to act as a "Chamber of sober second thought".

[20] *Ibid.*

> It should also be noted that the apparent ability of the Federal Government to reappoint Senators, if Bill S-4 becomes law, when combined with the apparent removal of the current age limit of 75, means that such individuals could remain in office longer than what is currently allowed under s. 29 of the *Constitution Act, 1867*." [21]

The Premier of Newfoundland and Labrador recently wrote to Prime Minister Harper, with a copy to your Committee's chair, to express his Government's concerns with Bill S-4. He said the bill's "potential for re-appointment would have a limiting effect on the independence of Senators, leaving future appointees beholden to the Prime Minister, and under pressure to curry favour with the Prime Minister so as to enhance the likelihood of re-appointment. This Bill, if enacted, would therefore diminish the independence of the Senate, its ability to act as a "chamber of sober second thought", and its effectiveness in providing representation for regional and provincial interests."[22]

In Britain, the proposals are clearly for one non-renewable 15-year term in the House of Lords. Lord Tyler, Liberal Democrat member of the House of Lords, told us:

> "Most important of all, if we are to have the degree of independence from party control in future, whether it is from an elected base or from some form of nomination from the parties, we want people, once they come into the second chamber, whether we call it the Senate or whatever, to feel as free from party emphasis, party influence, party pressure as they can be." [23]

We agree with the many witnesses and other representations which raised concern that the prospect of reappointment could significantly undermine the independence of Senators, and therefore the Senate as a whole. Few would argue that the independence of the Supreme Court of Canada would not be affected if the current tenure of its members – namely, appointment to the age of 75 – were altered to provide for 8-year terms, renewable at the sole discretion of the sitting Prime Minister (whose legislation and policy initiatives often come before the Court). The independence of Parliament's second Chamber is no less important to our system of government. Accordingly, we have amended Bill S-4 to provide expressly that the 15-year term appointment for new Senators may not be renewed.

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[21] Submission from Shawn Graham, Premier of New Brunswick, dated April 20, 2007, p. 6-7.

[22] Letter from Danny Williams, Q.C., Premier of Newfoundland and Labrador, dated May 30, 2007, p. 1.

[23] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 28, 2007, Issue No. 24:12.

III. 75-Year Age Limit

The *Constitution Act, 1867* originally provided for Senators to be appointed for life. This was considered the best guarantee of independence from the Government, similar to that afforded members of the judiciary. This provision was amended in 1965, to provide for tenure up to the age of 75. This amendment followed a similar change of tenure for members of Canada's judiciary.

Bill S-4 would remove that upper age limit, thus allowing Senators to be appointed and remain in office for their appointed 8-year term, even if that term takes the individual beyond the age of 75. For example, the Prime Minister could choose to appoint someone at the age of 73, and have that person serve the 8-year term, even though they would be in the Senate until the age of 81. As proposed, a Prime Minister could appoint a new Senator at the age of 75, 80 or even older, because there would no longer be any upper age limit. (The Bill, however, leaves intact the constitutional requirement that a Senator be at least 30 years old.)

Although not many witnesses who appeared before us addressed this issue, those who did were almost uniformly opposed to the proposal. For example, Professor Andrew Heard noted that since 1965 (when the 75-year retirement age was established), almost 23 per cent of senators have died before their end of term. He then continued:

> "There is a larger consideration about how the chamber has to cope with this reality of people at an advanced age. It is not just the fact that people die at a much more frequent rate than MPs. In the same period, only 3 per cent of MPs have died, compared to 23 per cent of senators. It also has an impact on the Senate's work because of a number of senators being ill, having to take extended time off or perhaps not work as full hours as they would otherwise. Doing away with mandatory retirement would run the risk of further impacting the work of the Senate with these age-related issues. I see little reason to proceed with it, and I am concerned about the consequences of abolishing mandatory retirement."[24]

Other witnesses also recommended keeping the mandatory retirement age of 75, arguing it encourages a greater diversity of viewpoints in the Senate.

Your Committee was also struck by the contrast between the proposal in Bill S-4 and current efforts in progress now in the United Kingdom to reform the House of Lords. We held two hearings by teleconference from London, one with academics closely familiar with the House of Lords, and the second with three members of that House. Dr. Meg Russell, a close observer of the House of Lords both as an academic (now at University College London) and a consultant to the British Government and the Royal Commission on House of Lords reform in 1999, told our Committee:

[24] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 21, 2007, Issue No. 23:44.

> "We are in a rather different position from you. Obviously, you have already moved away from life tenure and toward retirement age 75. We have not got that far. For us, any move to less than life is quite a significant one." [25]

The Lords who testified spoke strongly in favour of a retirement age. Lord Howe of Aberavon, a Conservative, said, "We [the House of Lords] might need to set a retirement age because otherwise we have a predominantly elderly house. I am sure we need a kind of retirement system."[26]

Baroness Deech, a Crossbencher (independent member), said:

> "It is more important to have a retirement age than to have a particular length of tenure. Whatever the length of tenure is, it should be such that you are not tempted to use your periods in the upper house as a springboard to a lucrative position in business or as prelude to being elected to the lower house. In other words, it should be a period of time toward the end of a career, without people being too old. To have a retirement age of 75 or something like that is a good idea -- perhaps an age comparable to that of judges. If judges stay wise until the age of 70 or 75, then I think senators can do so as well." [27]

Canadian judges are required to retire at the age of 75. Most Canadians retire from their work at the age of 65. In view of Professor Heard's statistical analysis, removing the current age limit could effectively return the Senate to a Chamber to which members are appointed for life.

We believe that it would be a step backward for the Senate to remove the provision requiring retirement at age 75. This may become appropriate if the Constitution is amended to provide for elected members of the Senate. However, no such proposal has been put forward by the current Government.

Removal of the 75-year age limit would likely have an effect on the nature and quality of the work of this Chamber, and undoubtedly also on the attitude of Canadians toward this Chamber. If, as we were told by the Government, a goal of this Bill is to ensure that the Senate experiences a renewal of ideas and perspectives, we are not convinced that removing the 75-year mandatory retirement is the optimal path to that goal. We refrain from speculating on the reason for this Government proposing this change while leaving the minimum age of 30 unchanged. There is no minimum age for the House of Commons.

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[25] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 22, 2007, Issue No. 23:105.

[26] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 28, 2007, Issue No. 24:12.

[27] *Id*, 24:13.

We believe the amendment in 1965, that required Senators, like judges, to retire at the age of 75, was an appropriate improvement for the work and contribution of the Senate as a whole. We have heard no testimony that provides a convincing reason why this now should be revoked, but we have heard compelling testimony that the limitation should remain. Accordingly, we have amended Bill S-4 to maintain the constitutional provision requiring retirement of Senators at the age of 75.

IV. Concerns as to the Constitutionality of Bill S-4

During Second Reading debate of Bill S-4, the major concern of many senators was whether Parliament has the authority to adopt this constitutional amendment unilaterally pursuant to section 44 of the *Constitution Act, 1982*. This issue was considered by the Special Senate Committee on Senate Reform, which conducted a subject matter study of Bill S-4 as one part of its review of Senate Reform issues. Although that Committee concluded that changes to tenure could be accomplished through a reliance on section 44, a number of critical questions remained unresolved for many senators concerning the constitutionality of the Bill. This was the major reason for referring the Bill to the Standing Committee on Legal and Constitutional Affairs for further examination. The constitutionality of Bill S-4 was therefore a primary focus of our hearings. We sought to determine whether Parliament has the authority on its own to adopt the constitutional amendment set out in Bill S-4, or whether under the Constitution, this amendment in fact requires the agreement of the provinces.

Amending Formulae

The *Constitution Act, 1982* sets out four procedures whereby constitutional amendments may be adopted. The general procedure for amending the Constitution of Canada is set out in section 38. It permits amendments where authorized by each of the Senate and House of Commons, and by the legislative assemblies of at least 2/3 of the provinces that have at least 50 per cent of the population of all the provinces (the so-called 7/50 amending formula). Sections 41, 43 and 44 then set out three other amending procedures, for particular constitutional amendments. Section 41 enumerates certain amendments that require unanimous agreement among the Senate, House of Commons and the legislative assemblies of all the provinces. Section 43 relates to amendments that apply to one or more, but not all the provinces.

The position of the Government is that Bill S-4 may properly be passed under section 44. That section states in full:

> s. 44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

As described above, section 41 refers to certain amendments which require unanimity, while section 42 deals with amendments which can only be made under the 7/50 amending formula set out in section 38.

Section 42(1) of the *Constitution Act, 1982,* reads as follows:

> s. 42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
>
> (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
> (b) the powers of the Senate and the method of selecting Senators;
> (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
> (d) subject to paragraph 41(d), the Supreme Court of Canada;
> (e) the extension of existing provinces into the territories; and
> (f) notwithstanding any other law or practice, the establishment of new provinces.

Historical Background

Until 1982, the primary constitutional document was the *British North America Act of 1867*, now referred to as the *Constitution Act, 1867*. When it was enacted in 1867 by the British Parliament (interestingly, passed first by the British House of Lords and subsequently by the British House of Commons), there was no thought of providing a method of amending it other than through a subsequent Act of the United Kingdom Parliament.[28] As a result, there were a number of instances when the British Parliament was asked to adopt what one scholar described as "rather technical bills", such as the Canadian Speaker (Appointment of Deputy) Act, 1895, which clarified the power of the Canadian Parliament to provide for a deputy speaker in the Senate. As the scholar observed, "This was not a satisfactory arrangement."[29]

In 1949, the *British North America Act* was amended to permit the Parliament of Canada on its own to make certain amendments to the Constitution. The relevant provision was s. 91(1). It provided, in relevant part:

> s. 91. ..., it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,

[28] *Amending Canada's Constitution*, James Ross Hurley (1996), p. 7. There were minor exceptions, as described by Hurley. These are not relevant to the present issue.
[29] *Id.*, p. 12.

> (1) The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

Before this section was repealed in 1982 and replaced by section 44, quoted above, section 91(1) was used five times. Notably for present purposes, it was used in 1965 to amend the provision that then gave Senators tenure for life by imposing compulsory retirement at age 75. The Supreme Court characterized all five of the amendments under s. 91(1) as "federal 'housekeeping' matters".[30]

***The Upper House Reference*[31]**

In 1978, the Canadian Government, led by the Right Honourable Pierre Trudeau, referred a series of questions to the Supreme Court of Canada to determine whether the federal Parliament could pass legislation under s. 91(1) to abolish or to effect certain reforms to the Senate. One of the questions asked whether it was within the legislative authority of the Parliament to enact legislation "to change the tenure of members of [the Senate]".

In its December 21, 1979 opinion, known as the *Upper House Reference*, the Court devoted considerable attention to the historical background that led to the creation of the Senate, quoting at length from the Confederation debates that detailed the purpose of the Senate, including the need to protect sectional [now referred to as regional] and provincial interests. The Court noted the role of the Senate in providing, as Sir John A. Macdonald had characterized it, "the sober second thought in legislation." The Court said, "In creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life."[32]

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[30] *Authority of Parliament in relation to the Upper House (Re)*, [1980] 1 S.C.R. 54, 65 (hereinafter the *Upper House Reference*).

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

[32] *Id*, at p. 77.

The Court rejected the suggestion that section 91(1) could be used to abolish the Senate, and summed up its response to the various specific Senate reform questions as follows:

> "...[I]t is our opinion that while s. 91(1) would permit some changes to be made by Parliament in respect of the Senate as now constituted, it is not open to Parliament to make alterations which would affect **the fundamental features, or essential characteristics**, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three provinces in order to meet the requirement of the proposed federal system. It was that Senate, created by the Act, to which a legislative role was given by s. 91. In our opinion, **its fundamental character cannot be altered by unilateral action by the Parliament of Canada** and s. 91(1) does not give that power."[33] (emphasis added)

On the particular question whether Parliament could act unilaterally under s. 91(1) to change the tenure of members of the Senate, the Court said:

> "At present, a senator, when appointed, has tenure until he attains the age of seventy-five. **At some point, a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as "the sober second thought in legislation".** The Act contemplated a constitution similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life. The imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate. **However, to answer this question we need to know what change of tenure is proposed**."[34] (emphasis added)

Discussion

The *Upper House Reference* was decided in 1979; the Constitution was patriated in 1982, at which time s. 91(1) was repealed and the amending formulae consisting of sections 38, 41, 43 and 44 were enacted. One of the questions before us was whether the *Upper House Reference* continues to apply as good law, or whether it was superseded by the passage of the *Constitution Act, 1982*. Put another way, was section 44 intended to give Parliament new powers, or was it intended to substantially reproduce the former subsection 91(1)?

The current Government put forward Bill S-4 arguing that those alterations which, using the language of the Supreme Court, " 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," and therefore require provincial consent, have all been codified in section 42 of the *Constitution Act, 1982*. In other words, if a proposed change to the Senate is not enumerated in section 42, then it may be effected by Parliament acting unilaterally under section 44. This position was stated on behalf of the Government to our Committee by

[33] *Id*, at p. 78-79.

[34] *Id.*, at p. 76-77.

Matthew King, Assistant Secretary to the Cabinet, Legislation and House Planning, Privy Council Office:

> "It is the government's position that the chosen approach, namely, to amend section 29 of the Constitution Act, 1867, using section 44 of the Constitution Act, 1982, is entirely constitutional.
>
> The government's view is based on its opinion that the elements of Senate reform that require the use of the general amending formula, the so-called 7/50 amending formula are clearly set out in section 42 of the 1982 Act, those being section 42(b), the powers of the Senate and the method of selecting senators, and section 42(c), the number of members by which a province is entitled to be represented in the Senate and the residency qualification of senators.
>
> As tenure is not one of the elements specified in section 42, it is the Government's position that Parliament has the power to enact Bill S-4 through the use of section 44."[35]

This position is buttressed by the preamble to Bill S-4, which uses the language of the *Upper House Reference*, saying:

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

However, as Joseph Magnet, a constitutional law professor at the University of Ottawa, told us very clearly:

> "To some extent, the "whereas" clauses provide some insight as to the purpose. The "whereas" clauses refer to the democratic principle. They also try to provide some supports – may I say, perhaps a little self-servingly – to try to bring the Bill S-4 amendment into the understood permissible limits of the old section 91(1). In other words, the "whereas" clauses say that a purpose is to preserve the essential characteristics of the Senate as a chamber of sober second thought. The "whereas" clauses say that specifically. It is an interesting and helpful statement but it is not overriding."[36]

The overwhelming weight of testimony that our Committee heard supported the proposition that the *Upper House Reference* continues as good law, and that section 44 does not provide Parliament with any greater amending powers than existed under the former subsection 91(1). For example, Professor Magnet told the Committee:

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[35] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 21, 2007, Issue No. 23:9.

[36] *Id*, 23:49.

> "The whole idea of the patriation bill was to leave things as they were, except to patriate the Constitution and the Charter of Rights and Freedoms with an amending formula. The patriation bill was specifically justified as not increasing the powers of Parliament. Section 31 of the Constitution Act, 1982, makes this intention plain. It says, "nothing in this charter extends the legislative powers of Parliament." That intent carries by design to section 44, in which, although not in the Charter, the marginal notes make clear that nothing changes.
>
> The upshot of this is that section 44 is no larger in scope than the old section 91(1). Section 44, in my respectful opinion, cannot support legislation that would change the fundamental features or the essential character of the Senate. Contrary to some of the opinions senators have heard, it is my advice that if a court sees in Bill S-4 the first step in changing these fundamental features, section 44 will not necessarily support it. Section 44 does not give Parliament increased powers to change the essential characteristics of the Senate except for the four matters mentioned in section 42(*b*) and (*c*)."[37]

Other constitutional experts testified to the same conclusion, including constitutional law Professor John McEvoy of the University of New Brunswick, who supported his position with excerpts from the historical record of deliberations at the time of consideration of the *Constitution Act, 1982*. He told us of a motion that was introduced in 1981 by the Honourable Jake Epp to specifically exclude the Senate from the unilateral federal amending power (the section that would become section 44) altogether. Explaining his purpose, Mr. Epp stated:

> "This amendment would assure that the role and scope of the Senate could not be changed simply through the House or a federal initiative."

Professor McEvoy told us that Mr. Epp withdrew this amendment only after he was assured by the Minister of Justice that this amendment was unnecessary, as the federal amending power was limited in scope, applying only to internal issues such as a change in quorum in the Senate. He said:

> "The significance of this historical record is that the stated intention at the time of consideration of what became the *Constitution Act, 1982* – at least as expressed before the 1981 Special Joint Committee on the Constitution, co-chaired by Senator Joyal – was to maintain the status quo."[38]

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[37] *Id.*, 23:51-52.

[38] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 22, 2007, Issue No. 23:82.

Professor Andrew Heard pointed out a critical problem with the current Government's reasoning that if something is not specifically enumerated in sections 41 or 42, then it may be amended unilaterally by Parliament under section 44. Professor Heard had testified before the Special Committee on Senate Reform. That Committee stated in its report that Professor Heard believed that section 44 permits Parliament to act alone in reducing Senate tenure. When he appeared before our Committee, however, Professor Heard told us that he had reconsidered, and changed his opinion since testifying previously. He presented a powerful argument.

Professor Heard pointed out that section 42 cannot be an exhaustive list of those items that cannot be unilaterally changed by Parliament, as a number of critical items are absent. For example, the old section 91(1) explicitly provided that the federal amending power could not be used to change the requirement that there must be an election at least every five years. That is not listed anywhere in the amending powers of the 1982 Constitution. Similarly, the right to vote in a federal election is not addressed in any of the amending formulae. Both matters arguably are amendments "in relation to the... House of Commons" that are not specifically listed in section 41 or 42 as requiring provincial consent. Yet it would be absurd to argue that Parliament has the right to pass an amendment that would give it the right to stay in power for 10, 20 or 30 years without a general election, or to limit the right to vote, for example to the majority party's supporters. As Professor Heard said:

> "If one took the argument that section 44 literally only has the exceptions applied in sections 41 and 42, then Parliament could do away with the five-year limit. It could, in theory, perhaps, do away with the right to vote and being candidates. **No Supreme Court will accept that and that is precisely my point: They will read further context into the limits that are imposed in that literal reading of section 44.**"[39] (emphasis added)

Henry Brown, Q.C., of the law firm Gowling, Lafleur Henderson, and constitutional law Professor Errol Mendes agreed with Professor Heard's argument. His logic is compelling and we agree, as well.

The next question, then, is: is Bill S-4 a permitted exercise of unilateral federal authority under section 44, within the limits described by the Supreme Court in the *Upper House Reference*? Here again, the overwhelming weight of expert evidence heard by our Committee concluded that there are significant constitutional concerns as to whether this bill can properly be passed by Parliament alone, without the involvement of the provinces.

An important factor for several constitutional experts was the Government's introduction of Bill C-43 in the House of Commons on December 13, 2006. That Bill would provide for "consultative elections" to determine electors' preferences for the appointment of senators to represent a province. At the time that the subject matter of Bill S-4 was considered by the Special Committee on Senate Reform, the Prime Minister, the Right Honourable Stephen Harper, testified before that Committee and stated his Government's belief "that the Senate

[39] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 21, 2007, Issue No. 23:76.

should be elected".[40] He also declared his Government's intention to "introduce a bill in the House of Commons to create a process to choose elected senators. This bill will further demonstrate how seriously the government takes the issue of serious Senate reform."[41]

No bill was introduced during the Special Committee's study, and therefore could not be considered by that Committee. Bill C-43 was only tabled in the House of Commons almost two months after the Special Senate Committee concluded its study on the subject matter of Bill S-4.

The Government's position is that Bills S-4 and C-43 should not be considered together, but rather each on its own. Mr. Matthew King of the Privy Council Office told us:

> "It is the view of the Government that these bills [S-4 and C-43] are not tied one to the other. Rather, the Government has made it clear that the two bills stand alone and each should be considered on their own merit."[42]

We appreciate that the Government wishes us to consider Bill S-4 on its own, separate from Bill C-43. However, the testimony of constitutional law experts made it clear that a court would likely proceed differently by looking closely at all the initiatives for Senate reform.

Professor Magnet, who was clear that he was simply presenting his best impartial advice, took us through a careful analysis of how a court would approach the question of the Bill S-4's constitutionality, should it be seized of it. He said:

> "First, a court would use the tested and true method of constitutional analysis referred to in so many of the Supreme Court of Canada precedents. The court would ask: What is the object and purpose, the pith and substance, the legal and practical effect of this amendment?"[43]

To answer this question, Professor Magnet looked at a number of factors, including the substance and preamble to Bill S-4, the history of Senate reform proposals, and Prime Minister Harper's statements before the Special Committee on Senate Reform. He then testified:

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[40] *Proceedings of the Special Senate Committee on Senate Reform*, September 7, 2006, Issue No. 2:9.

[41] *Id*, 2:8.

[42] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 21, 2007, Issue No. 23:10.

[43] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 21, 2007, Issue No. 23:49.

> "This makes it clear that Bill S-4 is part of more to come. All of this will tempt a court to see Bill S-4 as part of an overall design with an object and purpose, a pith and substance to change, step by step, the regional representation, first, by changing tenure; second, by providing for election; and, as Prime Minister Harper said, lastly, by trying to create, probably through constitutional amendment, a change in provincial representation."[44]

Professor Magnet told the Committee that in his opinion, a Court would consider this to fall outside the scope of those amendments permitted under section 44. He said, "Section 44, in my respectful opinion, cannot support legislation that would change the fundamental features or the essential character of the Senate. Contrary to some of the opinions senators have heard, it is my advice that if a court sees in Bill S-4 the first step in changing these fundamental features, section 44 will not necessarily support it."[45]

He concluded:

> "I believe there is a real risk that Bill S-4 will not survive constitutional scrutiny. I believe there is a real risk. I do not say it will not survive, I simply say there is a real risk that it will not survive; and I cannot be more precise than that."[46]

Professor Magnet's testimony was persuasive for Roger Gibbins, the President and Chief Executive Office of Canada West Foundation, who has been one of the longest-standing advocates of Senate reform in Canada. He appeared before our Committee (as he had appeared before the Special Committee on Senate Reform) arguing strongly in favour of Bill S-4. However, after listening to Professor Magnet, Mr. Gibbins told our Committee:

> "I am still reeling somewhat from Professor Magnet's comments because he raised concerns in my mind about the constitutionality that were not there earlier in the day. He made the argument, quite persuasively, that if the court sees this as the first step, it would likely strike it down. At least, that is the bottom line that I read.
>
> If that message sinks in and if it stands up, and it sounded pretty persuasive today, then going the Supreme Court reference [route] may make sense. More fundamentally, it is an invitation to the Supreme Court to shut the process down.
>
> I am caught here. I am not sure what to do because I always believed that some element of Senate reform is necessary to strengthen the ties that Canadians have to their national Parliament, and to have this debate simply shut down and not have another government touch it for another generation or two would have adverse consequences for the country.

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[44] *Id.*, 23:50.

[45] *Id.*, 23:52.

[46] *Ibid.*

> I am torn on this. I would say that the test you have heard this evening has introduced more serious questions in my mind about the constitutionality of what we are doing, and I find that deeply depressing, but also somewhat convincing."[47]

Professor Errol Mendes, another professor of constitutional law, agreed with Professor Magnet:

> "It is generally known that Bill S-4 is only a precursor to a larger attempt to have future appointments to the Senate come under a federally regulated advisory elections framework. **In my view, if the two statutes or two attempts are linked, it profoundly is unconstitutional.**
>
> In my view, this is an attempt to do what cannot be done directly without the clear instructions of section 42 and the general amending formula. Keep in mind that the patriation reference decision in 1981 informed the then Prime Minister, Pierre Trudeau, that he would breach constitutional convention if he repatriated the Constitution without the substantial consent of the provinces yet the Supreme Court of Canada halted that attempt and the rest is history.
>
> In the development of the federal advisory elections of the Senate, we have a much more serious attempt linked to Bill S-4. This does indirectly what cannot be done directly, both under constitutional conventions and under the Constitution Act 1867 and 1982, without the involvement of provinces and provincial consent.
> ...
> **In conclusion, with all the arguments I have presented, there is good reason to suggest that Bill S-4 should be withdrawn until further study is undertaken to understand what is really at stake in this piecemeal and dubious attempt to reform the Senate so that it is consistent with the principles of modern democracy**."[48] (emphasis added)

Provincial governments similarly conclude that the two bills must be considered together. The Honourable Marie Bountrogianni, Minister of Intergovernmental Affairs and Minister responsible for Democratic Renewal for the Government of Ontario, wrote that:

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[47] *Id.*, 23:56-57.

[48] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 29, 2007, Issue No. 24:63-64.

> "I agree with the legal and constitutional experts who testified before your Committee that Bills C-43 and S-4 should be considered together, rather than in isolation. Bill S-4 and Bill C-43 are inextricably linked. Without term limits, Senators would be effectively elected for life; without elections, the Prime Minister's appointment power would be excessive. Together, the inevitable changes occasioned by these pieces of legislation would fundamentally alter the functioning of Parliament by changing the essential character of the Senate. Yet, the federal government introduced legislation without meaningfully consulting provinces or obtaining provincial consent."[49]

The Government of Quebec recently wrote to your Committee, and told us that with the introduction of Bill C-43,

> "[T]he federal government's intentions are now known. Bill S-4 can no longer be taken in isolation. It must now be considered in light of Bill C-43, for its effect is different depending on whether the current method of selecting senators stays the same or is changed.
>
> Were it not for Bill C-43, the fixed eight-year term should be non-renewable, for reasons of independence. On the other hand, if the Senate becomes an elected chamber, as contemplated by Bill C-43, then the renewable character of the term becomes an important accountability mechanism.
>
> Since Bill S-4 does not oppose the renewability of the eight-year term, we can therefore recognize that there is an organic link between Bill S-4 and Bill C-43. The two bills are thus to be seen as two components of a single federal legislative initiative whose overall objective is 'to create an elected Senate', to use Prime Minister Harper's phrase. The apprehensions expressed by the Government of Quebec in September 2006 with regard to the federal government's intentions are confirmed with the addition of Bill C-43.
>
> **This context leads the Government of Quebec to reconsider its support for Bill S-4 because it can no longer be considered a limited measure. It is a measure that is now part of a broader initiative revealed by Bill C-43.**"[50] (emphasis added)

The Government of Quebec also raised questions about the relationship between the proposed reforms to the Senate and Bill C-56, an Act to amend the Constitution Act, 1867 (Democratic representation), which the federal government tabled in the House of Commons on May 11, 2007. The Government of Quebec wrote:

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[49] Letter from Dr. Marie Bountrogianni, Minister of Intergovernmental Affairs and Minister Responsible for Democratic Renewal, Government of Ontario, dated May 30, 2007.

[50] Submission from 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, dated May 31, 2007, pp. 4-5.

> "Although the Senate of Canada has been unable to fully meet the objectives that underlay its creation, it nonetheless remains an integral component of the compromise that gave birth to Canada in 1867, and it is closely tied to the balance of the federation in general and to the balance of the forces at play in the Parliament of Canada in particular.
>
> Even in matters concerned with the composition of the House of Commons, the federal context has an influence. Indeed, proportionality there cannot be reduced to a simple mathematical fact. It must follow from a subtle trade-off between various factors, one being the need for Quebeckers as a nation to maintain an effective place within federal institutions so that their voices can be usefully heard in the governance of our country.
>
> Bill C-56, which would reduce Quebec's weight in the House of Commons, is in this context another major source of concern with respect to the current federal initiatives in the institutional sphere. This is another bill whose withdrawal was requested by a unanimous resolution adopted by Quebec's National Assembly on May 16, 2007.
>
> The federal government's legislative objectives for the Senate also may prompt demands concerning the distribution of seats in the Senate. This is a matter which, from the standpoint of the Government of Quebec, and as it pointed out before the Special Senate Committee, the interests at play have deep roots which touch upon Canadian duality and the very origins of the federation.
>
> It must always be remembered that the overall balance of representation in the federal Parliament was a crucial issue for Quebec in 1867 and continues to be one for the Quebec of today."[51]

Professor Emeritus Alan Cairns urged us to view Bill S-4 as only the first of a three-stage process of Senate reform – tenure, consultative elections, and redistribution of seats. He told us:

> "This forces senators to make a very complicated judgment. They must decide, among other things, if stage one is an acceptable fallback position if stage two does not get proceeded with because it gets defeated in one or the other House. There is, therefore, the complicated conundrum that it is intellectually possible to support stage one because you support it as a basis for succeeding with stage two but oppose it as a stand-alone provision.

[51] Id., pp. 8-9.

> The problem is that senators lack the choice simultaneously to oppose it as a stand-alone provision but to support it because they like stage one and stage two when they are bound together. Stage two obviously changes the role of the Prime Minister and changes the nature of those that get elected.
>
> The report of the earlier committee argued that Bill S-4 is "not linked to prospective advisory election legislation in a way that precludes its consideration as a stand-alone measure." However, the proceedings of the previous committee made it very clear that many witnesses argued that Bill S-4 by itself was unacceptable without an advisory election process.
>
> We have to ask ourselves the question, then, as we decide how to vote on stage 1: Suppose there is no stage two implementation; have we then improved the system? By itself, I would argue that **stage one not followed by some version of stage two has negative consequences because it would simply increase the power of the Prime Minister in the appointing process** by the rapid turnover which he would have completely under his control for successive eight-year periods."[52] (emphasis added)

However, even viewing Bill S-4 on its own, as the Government would wish, there are still concerns that it exceeds the authority of Parliament under section 44, and requires the involvement of the provinces. For example, constitutional law professor John McEvoy testified:

> "The decision to alter Senate tenure to eight years, whether or not open to a second term on an individual basis, is of such importance that, in my view, it goes beyond a matter of interest to the federal Parliament alone. It is not an internal modification to the Senate; it is a structural change that should involve a level of provincial consent. The historical and structural approaches to constitutional interpretation support this conclusion. It is a change that should be considered along with reform of the method of selection."[53]

Professor McEvoy was also clear that in his view, the proposed changes in Bill S-4 would affect the Senate's role as a body of regional representation, because that role is an integral part of its roles as a revising body and body of inquiry:

> "Regional representation, inquiry role and revising role are three symbiotic parts of the role of the Senate. A regional representative is not only to represent the views of that particular region in one single role, but in all of its roles. The voice of the Senate is very important, and I would disagree with the premise that one should divide the Senate into those three distinct roles. They are symbiotic."[54]

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[52] *Id.*, March 28, 2007, Issue No. 24:36-37.

[53] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 22, 2007, Issue No. 23:85-86.

[54] *Id.*, 23:93.

Professor Don Desserud of the University of New Brunswick testified:

> "My points are simple; I have two to make. First, I believe that this amendment does not fall under section 44 and does fall under section 42. Second, I think comparisons to previous amendments, which reduced the tenure of senators by imposing the 75-year retirement age, are not directly comparable to this one....
>
> Section 42 says that amendments in relation to the powers and methods of appointments of senators use the general amending formula – the seven-50 rule. It does not say amendments that drastically change the powers or amendments that improve the powers; it says amendments in relation to the powers.
>
> ... I do not see how changing the tenure of senators to fixed eight-year terms can be seen as anything but a change in the powers of the Senate." [55]

Professor David E. Smith of the Saskatchewan Institute of Public Policy, who has written extensively on the Senate of Canada, told us:

> "On September 20, 2006, I appeared before the Special Senate Committee on Senate Reform to discuss Bill S-4 on Senate tenure. In those remarks, I said that I thought that the fundamental character of the Senate of Canada, to be inferred from the criteria for appointment established at Confederation: that is, age and property qualifications of nominees; life tenure, originally; a fixed number of senators; and that enunciated 90 years later by the Supreme Court of Canada in its Senate reference opinion that that criterion is independence. Any proposal to alter the Senate, whose effect would compromise the Senate's independence and which, at the same time, has not met some standard of provincial concurrence for amendment of the Constitution -- a set of circumstances, I believe, that echoes those leading to the reference opinion itself in 1980 -- would undermine the essential characteristic of the upper house in my view.
>
> The government maintains that the proposed change to a fixed term of eight years for senators in place of a mandatory retirement age of 75 may be implemented by Parliament acting alone under section 44 of the Constitution Act, 1982. Honourable senators have heard contradictory testimony from constitutional experts as to the soundness of that position. **My own view is that a fixed term for senators -- whether renewable, or elected or appointed, challenges the principle of independence that the Fathers of Confederation sought to entrench in the structure of the Senate and which the Supreme Court of Canada reiterated in 1980.**"[56] (emphasis added)

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[55] *Id.*, 23:87.

[56] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, April 25, 2007, Issue No. 25:32-33.

Professor Jennifer Smith, Chair of the Department of Political Science at Dalhousie University, was blunt in her characterization of the potential impact of Bill S-4:

> "I am not certain about whether it is constitutionally valid under section 44 for the Parliament of Canada to make this change. The reason I say that is simply because I can imagine the argument on the other side. I can imagine the argument that might be presented to a court and how they might come to the conclusion that an eight-year renewable term has enough of an impact on the functioning of the Senate that it gets to the power of the Senate and, therefore, **you are arbitrarily changing what is, after all, a foundational institution of Confederation. That is like pulling a rug out from under the people of Canada**. That is an issue."[57] (emphasis added)

And in fact, this is an issue of significant concern to a number of provincial governments. Several of the governments which have written to us expressed their disagreement with the unilateral attempt by the current Government to reform the Senate.

The Premier of New Brunswick, Shawn Graham, wrote to our Committee on April 20, 2007. He said:

> "The Government of New Brunswick has carefully considered the proposed amendment [Bill S-4] and is not able to support this amendment in its current form. **The Government of New Brunswick does not accept the conclusions of the [Special Senate Reform] Committee that the Government of Canada has the constitutional authority to unilaterally proceed with this proposed change to the tenure of Senators. Our review of jurisprudence on this issue, contained in the attached position paper, supports the view that the provinces must give consent to any change that affects representation in the Senate.**
>
> Without other substantive changes to the Senate, the limitation of the tenure of Senators to eight years is more likely to reduce the effectiveness of this forum for regional and sectoral interests in Parliament than to improve it. The absence of any detail regarding the selection of Senators and their eligibility to be reappointed (or not) is also an area of concern.

[57] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 28, 2007, Issue No. 24:41.

> **The genius of the Canadian Constitution is the careful balance that has been struck between the more populated and less populated regions of the country as well as between the rights of the majority and the protection of minorities. While a term limit of eight years might be appropriate as part of a comprehensive reform of the Senate, a piecemeal and unilateral approach by the Government of Canada to Senate Reform has the potential to lead to a highly unsatisfactory and divisive result**."[58] (emphasis added)

The concerns expressed by Premier Graham are shared by the Government of Ontario. The Honourable Marie Bountrogianni, Minister of Intergovernmental Affairs and Minister Responsible for Democratic Renewal, Government of Ontario, wrote recently to your Committee, expressly endorsing the constitutional and other concerns outlined by Premier Graham in his letter.[59]

Minister Bountrogianni had testified before the Special Committee on Senate Reform. After making it clear that Senate reform is not a priority for the Ontario Government, she said:

> "When the Senate was established at the time of Confederation, it was established on the basis of appointed senators, lifetime tenure, and regional equality, rather than representation by population. **Clearly, changing <u>any of these pieces</u> is a significant departure from the intended role of the Senate, that of "chamber of sober second thought," and requires a full national discussion and the consent of the Canadian public**."[60] (emphasis added)

In her recent letter to your Committee, Minister Bountrogianni reiterated her Government's reservations regarding the unilateral nature of the federal government's proposed Senate reforms, saying, "I believe it is appropriate under our constitutional federal system that significant changes to federal institutions are agreed to by both partners – the federal government and the provinces. All Premiers, in a July 28, 2006 communique, agreed that 'the Council of the Federation must be involved in any discussion on changes to important features of key Canadian institutions such as the Senate and the Supreme Court of Canada.'"[61]

Specifically with respect to Bill S-4, Minister Bountrogianni wrote:

> "Turning to the reforms proposed in Bill S-4, the Government of Ontario generally endorses the constitutional and other concerns outlined by Premier Graham in his letter of April 20, 2007 to your Committee. Piece-meal and unilateral Senate reform has "the potential to lead to a highly unsatisfactory and divisive result." I note that

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[58] Letter from Shawn Graham, Premier of New Brunswick, dated April 20, 2007.

[59] Letter from Dr. Marie Bountrogianni, Minister of Intergovernmental Affairs and Minister Responsible for Democratic Renewal, Government of Ontario, dated May 30, 2007.

[60] *Proceedings of the Special Senate Committee on Senate Reform*, September 21, 2006, 5:50.

[61] Letter from Dr. Marie Bountrogianni, Minister of Intergovernmental Affairs and Minister Responsible for Democratic Renewal, Government of Ontario, dated May 30, 2007.

similar concerns regarding an incremental reform approach were raised by the Governments of Saskatchewan and Newfoundland and Labrador.

Bill S-4, on its own, would dramatically alter the real functioning of the Senate, detracting from its traditional role as an independent chamber of sober second thought. The Bill is silent on the issue of term renewals, which means that Senators could become unduly beholden to the Prime Minister if seeking a new term. They may be prone to follow the dictates of the Prime Minister, who, by the end of two terms in office, could conceivably have filled the Senate with members of his own party.

The Prime Minister's new power to appoint every member of the Senate over eight years would significantly expand his appointment power and impair the independent functioning of the upper chamber. The result would be a partisan institution with nearly co-equal powers to the House of Commons and an institution that would be more likely to exercise those powers in order to please or obstruct a government, creating an untenable situation.

In addition, the Government of Ontario is concerned that the federal government has also introduced Bill C-43, the *Senate Appointment Consultations Act*. Bill C-43 establishes a new process for selecting senators in the form of so-called "advisory" elections. The Prime Minister himself has not hesitated to link the two pieces of legislation as part of his broader Senate reform agenda. I agree with the legal and constitutional experts who testified before your Committee that Bills C-43 and S-4 should be considered together, rather than in isolation.

Bill S-4 and Bill C-43 are inextricably linked. Without term limits, Senators would be effectively elected for life; without elections, the Prime Minister's appointment power would be excessive. Together, the inevitable changes occasioned by these pieces of legislation would fundamentally alter the functioning of Parliament by changing the essential character of the Senate. Yet, the federal government introduced legislation without meaningfully consulting provinces or obtaining provincial consent.

...

The Government of Ontario has concerns about the constitutionality of Bill S-4 and Bill C-43 and notes that serious questions on this point were also raised by a variety of legal scholars and political scientists before both your Committee and the Special Committee."[62]

[62] Ibid.

The Premier of Newfoundland and Labrador, Danny Williams, Q.C., wrote to the Prime Minister to express his Government's view that Bill S-4 and Bill C-43 "represent attempts to alter the Constitution of Canada so as to significantly change the powers of the Senate and the method of selecting Senators within the meaning of Section 42(1)(b) of the *Constitution Act, 1982*. Such constitutional amendments may not be made by acts of Parliament alone, but also require resolutions of the legislatures of at least two-thirds of the provinces that have, in the aggregate, at least fifty per cent of the population."[63] He said:

> "The choices that we make about our national institutions are fundamental choices about how Canadian society represents itself through sovereign government. These choices should not be made lightly. They will have long-lasting effects on the way that our society is governed and the operation of the Federation. Any changes should be carefully considered by both constitutional orders of government in the context of a national public debate. The current piecemeal and unilateral approach does not suffice. There are many reasons to believe that Bills S-4 and C-43, if passed, will have numerous unintended and negative consequences. They also only address some of the aspects of the Senate that could be reformed. I understand that you have taken this approach because the threshold for changing the Constitution is so high. But it is so by design; constitutions are the basic rules that shape our democracy and should not be easy to change. Constitutional change should take place after careful and thorough consideration.
>
> Changes to an essential national institution like the Senate should involve government-to-government consultation. You will recall that this is the position upon which all Premiers agreed at the Council of the Federation meeting in St. John's last July. However, there have been no indications that government-to-government consultations are planned, much less any attempt to seek the endorsement of provincial legislatures for the reforms proposed.
>
> In light of the concerns outlined above, the Government of Newfoundland and Labrador requests that your Government withdraw Bills S-4 and C-43. While we would prefer that you not reinitiate your Senate reform initiative, if you do it should be in the form of a comprehensive reform package, developed through formal government-to-government consultation, and with reference to the general constitutional amending formula in section 38(1) of the *Constitution Act, 1982.*"[64]

The Premier of Nunavut, Paul Okalik, recently wrote to your Committee making it clear that his Government believes that Senate reform, including the proposed change to an 8-year term, should proceed through a single, comprehensive reform process involving the provinces and territories. He wrote:

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[63] Letter from Danny Williams, Q.C., Premier of Newfoundland and Labrador, dated May 30, 2007.

[64] *Ibid.*

> "I feel it is critical that the provinces and territories be involved in any constitutional reform and this is particularly true of Senate reform.
>
> The Government of Nunavut believes that there are several issues which should be examined with respect to Senate reform. The Government of Nunavut is interested in making representations and working with the Government of Canada and the other provinces and territories to make the Senate more effective and representative. In particular, the representation in the Senate for northerners is something which requires attention.
>
> **However, such reform, including the proposal for a fixed 8 year term for Senators set out in Bill S-4, is best addressed through a single, comprehensive reform process which is consistent with the Constitution.**"[65]

The Government of Quebec was unequivocal in its assessment of the impact of the reforms to the Senate proposed by the current federal Government. Minister Pelletier (an acknowledged constitutional law expert) wrote that, "The transformation of the Senate raises some fundamental issues for Quebec and the Canadian federation in general.... The federal bills on the Senate do not represent a limited change."[66] He later noted, "In short, the Senate exists in a complex and coherent constitutional environment that is tied to considerations underlying the federal compact and the balance of intergovernmental relations."[67]

The Quebec Government was blunt in its view of the required course of action with respect to Bill S-4:

> "In summary, the Government of Quebec considers that the federal legislative initiative represented by bills S-4 and C-43 is liable to modify the nature and role of the Senate, in a manner which departs from the original pact of 1867.
>
> Such changes are beyond the unilateral powers of the Parliament of Canada. They instead require a coordinated constitutional amendment formula, which in turn requires the participation and consent of the provinces.
>
> The well-known legal rule that one may not do indirectly what cannot be done directly fully applies to the amendment process that is in question here with bills S-4 and C-43.

[65] Letter from Paul Okalik, Premier of Nunavut, dated May 18, 2007.

[66] Submission from 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, dated May 31, 2007, p. 6.

[67] *Id.*, p. 7.

> The Government of Quebec is not opposed to modernizing the Senate. But if the aim is to alter the essential features of that institution, the only avenue is the initiation of a coordinated federal-provincial constitutional process that fully associates the constitutional players, one of them being Quebec, in the exercise of constituent authority.
>
> The Government of Quebec, with the unanimous support of the National Assembly, therefore requests the withdrawal of Bill C-43. It also requests the suspension of proceedings on Bill S-4 so long as the federal government is planning to unilaterally transform the nature and role of the Senate."[68] (emphasis added)

The only provincial government on record as supporting Bill S-4 is that of Alberta. The Government of Saskatchewan, while acknowledging that it has received legal advice that Bill S-4 could be enacted pursuant to section 44 of the *Constitution Act, 1982*, nevertheless has repeated several times that it does not support an incremental approach to reforming the Senate "and does not support Bill S-4".[69]

The Government of British Columbia wrote to your Committee saying first that Senate and constitutional reform are not a high priority for that Government; British Columbia favours abolishing rather than reforming the Senate; failing that, "substantive changes would be required to make the Senate a truly effective body that would enrich our federal parliamentary system and fairly represent British Columbia's role in the federation." Minister van Dongen told us that his Government recognizes that there are differing views on the appropriate constitutional amending process, and "British Columbia does not have strong views on either the substance of the bill [S-4] or its constitutional implications at this time."[70]

In summary, your Committee received representations opposing the proposed unilateral Senate reforms contained in Bill S-4 from the governments of the two largest provinces in Canada and the governments of two of the smallest provinces and one territory. In total, these governments represent significantly more than 50 per cent of the population of the country, and three out of the four regions described in our Constitution. Only one province has come forward supporting the Bill. Other provinces have expressed at best ambivalence and more generally opposition to the proposed incremental approach.

As was reiterated by the Supreme Court of Canada in the *Upper House Reference*, a fundamental, indeed critical role of the Senate of Canada is to protect and defend regional and provincial interests against the combination of majorities in the House of Commons. As Sir John A Macdonald said during the Confederation debates at the Quebec Conference, quoted by the Supreme Court of Canada:

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[68] *Id.*, p. 11.

[69] Letter from Harry Van Mulligan, Minister of Government Relations for Saskatchewan, dated May 29, 2007. See also his prior correspondence dated March 21, 2007 and September 22, 2006.

[70] Letter from John van Dongen, Minister of State for Intergovernmental Relations for British Columbia, dated May 30, 2007.

> "To the Upper House is to be confided the protection of sectional [now referred to as regional] interests: therefore is it that the three great divisions are there equally represented for the purpose of defending such interests against the combinations of majorities in the Assembly."[71]

We believe the concerns expressed by these governments must be afforded considerable weight. If we do not represent the interests of our regions and provinces now, when what is at stake is the very institution established to defend those interests, then we give justification to those critics who question our continued value in Canadian parliamentary democracy.

Conclusion

The overwhelming weight of testimony that our Committee heard supported the conclusion that there are significant constitutional concerns if we proceed as proposed by the current federal Government and pass Bill S-4 pursuant to the amending powers set out in section 44 of the *Constitution Act, 1982*. Experts in Canadian constitutional law have cautioned that this is not a matter for unilateral federal amendment, but rather is one that requires the consent of the provinces. And indeed, several provincial governments have written to express their considered view that this is not a matter for unilateral federal action, but rather a constitutional amendment to which they must be party.

As a legislative committee of the Senate, a revising body, we believe it is our duty within the Canadian parliamentary structure to amend bills brought before us to the best of our ability. In that spirit, we have amended Bill S-4 in our best effort to correct those elements that we believe would render it clearly unconstitutional. However, we know that serious concerns remain whether the Bill, even as amended, falls within the legislative authority of Parliament. Furthermore, in amending the particular provisions of the Bill, we were conscious that we were making alterations which arguably "would affect the fundamental features or essential characteristics" given to the Senate at Confederation. The Supreme Court of Canada was very clear in its 1979 decision:

> "At some point, a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as "the sober second thought in legislation"."[72]

We have exercised our best efforts to provide a term of office that will not impair the functioning of the Senate – however, we recognize, as did the Government of then-Prime Minister Trudeau, that this is not a matter for any Government or any Parliament to decide; this is a matter of the Constitution of Canada, and should be referred for consideration to the Supreme Court of Canada. In 1979, the Supreme Court invited the Government to return and tell the Court what change of tenure is proposed. We believe the Court got it right, and that is the proper procedure to be followed.

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[71] *Upper House Reference*, p. 67.

[72] *Id.*, at p. 76.

Constitutional law professor Errol Mendes testified that if Bill S-4 were passed, with fixed-term senators then appointed, and legislation subsequently passed by Parliament and these new senators, "**there would be constitutional chaos**" if Bill S-4 were then found to be unconstitutional.[73] The Government's lawyer, Warren J. Newman, subsequently wrote to your Committee, seeking to distinguish the Supreme Court jurisprudence upon which Professor Mendes relied. The irrefutable fact, however, is that no one can say with certainty what the Court would hold the consequences to be. "Constitutional chaos" remains a serious concern.

The stakes are high. This is not a situation where we can accede to the Government's wish for speedy Senate reform, and wait to find out later whether the Government was right, or whether in fact the many constitutional experts who expressed concern about the constitutionality of this bill were right.

We therefore urge the Government to take the time necessary to do it right as it moves to change the constitutional arrangement negotiated at the time of Confederation. We ask the Government to refer Bill S-4 as we have amended it to the Supreme Court of Canada. This is what many of the witnesses who appeared before us recommended; this is what we have concluded is the prudent thing to do.

We appreciate that the Prime Minister and his Government are anxious to move quickly on Senate reform. But we believe, and we trust that the Prime Minister would agree, that the Constitution is more important. There is no real, objective urgency that demands passing this Bill quickly. Conversely, the stakes if we get it wrong are significant indeed – as Professor Mendes characterized the potential consequences, "constitutional chaos."

Several supporters of Bill S-4 have said that they accept the bill's reforms to the Senate at least in part in the hope that the reforms introduced by the Bill would so destabilize the status quo that further, comprehensive reform of the Chamber would become obviously necessary. Roger Gibbins has written that he supports the Bill as a means of "destabilizing the status quo to the point where Canadians say, 'This is a mess, and we've got to sort it out.'"[74]

Professor Gerard Horgan told us:

> "The advantage of what is being done with the incremental reform, as I see it, is that it is introducing instability into the system. Right now we have what most people would think of as a stable suboptimal system. By introducing these incremental reforms, it will perhaps cause instability and drive the process forward." [75]

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[73] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 29, 2007, 24:65.

[74] Testimony of Roger Gibbins in the *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 21, 2007, Issue No. 23:58; see also Mr. Gibbins' testimony in the *Proceedings of the Special Senate Committee on Senate Reform*, September 19, 2006, 3:7.

[75] *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, March 22, 2007, Issue No. 23:108.

Your Committee believes that changes to any country's constitution should be guided by a desire to ameliorate existing tension and not to exacerbate them, and this is how we have approached our work on the examination of Bill S-4.

We are convinced that the only way to ensure that the approach that the Government has taken on Senate reform is indeed constitutional is for the Government to refer Bill S-4 as we have amended it to the Supreme Court of Canada on a constitutional reference.

We also note the strong concerns expressed by a number of provincial governments and constitutional experts concerning the constitutionality of Bill C-43, and the "inextricable linking" (in the words of the Government of Ontario) between that Bill and Bill S-4. We believe that the constitutional reference should therefore include Bill C-43 along with Bill S-4, as we have amended it.

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