

**Renewing the Senate of Canada:
A Two-Phase Proposal**

By

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Abstract

As a key element of Canada's governance, the Senate has always played a crucial legislative, investigative and deliberative role. However, the time has come to build on the wisdom of the Fathers of Confederation to renew and modernize its 140-year old design. Renewal would occur in two phases. The first phase would involve parliament implementing incremental change to strengthen the Senate's democratic base. The second, more difficult, phase would involve elections, rebalancing the representation of provinces and confirming appropriate powers for an elected Senate.

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Senator Hays was born and raised in Calgary, Alberta, and continues to reside there. Appointed to the Senate by Pierre Trudeau in 1984, he has chaired a number of Senate committees, including the Special Committee on Senate Reform from June 2006 to October 2006. He was Deputy Leader of the Government from 1999 to 2001, Speaker of the Senate from 2001 to 2006 and Leader of the Opposition in the Senate from 2006 until 2007. His father, the late Honourable Harry Hays, P.C., was a Member of Parliament and Minister of Agriculture from 1963 to 1965, and served in the Senate from 1966 to 1982.

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1. Executive Summary

Introduction

1.1. The Senate of Canada is a key element of our country's governance. Even though it has continuously served regional interests and performed a crucial legislative and investigative role, its 140-year old design has become increasingly in need of renewal and modernization.

1.2. Despite the countless calls for Senate change, voiced almost since its creation, its legal foundation remains virtually as it was in 1867. Today, in an age of greater sensitivity to democratic values, the Senate could and should respond by seeking to bring about a modern appointment process and updating its constitutional basis. Moreover, the Senate would benefit from being more politically empowered and more assertive in the legislative process. As a result, senators would feel more justified in proposing amendments to House of Commons legislation and in representing provincial interests. Such reforms would be conducive to accommodating the difficult transition toward an elected Senate – the option most Canadians prefer.

1.3. The latest Senate reform initiative is one brought on by the Harper government's introduction of two proposals in 2006. The first was Bill S-4, which would limit the terms for new senators to eight years. The second was Bill C-43, which would create an election-type process to consult the electors of a province on their preference for Senate appointments. However, while these bills relate to the Conservative Party's 2006 election platform, they were not accompanied by a government policy paper or study, which would have provided context, and a discussion of the possibilities for achieving a fully reformed Senate.

1.4. Since the matter is before us again, the time is right for senators to express their views on how the Senate should be renewed. With their experience, long-term thinking and independence from the partisan issues of the day, senators understand their institution and its present and potential role better than anyone else. It will be a missed opportunity if they are not at the forefront of any initiative to improve their chamber.

1.5. In my view, Senate renewal must occur in two phases: the first deals with incremental changes, which parliament can adopt; the second, more difficult one, which must involve the provinces, deals with election, powers and seat allocation, as well as a process to facilitate and develop the necessary public and provincial support for these changes.

Phase One: A Senate Modernization Bill

1.6. The first phase would establish fixed terms for senators in an amended Bill S - 4. It would be followed by the adoption of a Senate Modernization Bill, which

would stand on its own merits, but also be a prelude to more fundamental reform. Such a bill would not require provincial approval, as it could confine itself to matters parliament can deal with alone under section 44 of the *Constitution Act, 1982*.

1.7. The bill would update the many outdated sections of the *Constitution Act, 1867* and eliminate those that no longer serve any public policy purpose. For instance, there is a particular need to reform the deadlock-breaking mechanism which, as now described in section 26, is of virtually no use in the day-to-day business of parliament. The bill should also make changes to the way the Senate Speaker is chosen and reform the traditional way senators are appointed. The current appointments process is not in step with the preference Canadians consistently express in polls to give the Senate a more democratic foundation. As well, pending more comprehensive reform, new procedures should be established drawing on the precedent of the House of Lords to create an independent Senate Appointments Commission.

1.8. Please refer to Appendices I, II, and III of this paper to consult the following documents: a Draft Senate Modernization Bill; sections of the *Constitution Act, 1867* dealing with the Senate; and sections of *the Constitution Act, 1982*, dealing with the amending formulas for the Constitution.

1.9. A complement to a phase-one renewal strategy, although largely symbolic, would be adoption of the resolution moved on June 27, 2006 by Senators Lowell Murray and Jack Austin to increase Western representation in the Senate. That motion proposes that the 24 seats in the Senate, currently representing the Western provinces division, be distributed among Manitoba, Saskatchewan and Alberta. As well, the Murray-Austin motion would make British Columbia a separate division and provide the province with 12 senators.

1.10. Though British Columbia and Alberta now represent about 23% of the total population of Canada, they hold only 10% of the Senate seats. There must be a more equitable and effective representation of provincial interests in the composition of the Senate, to reflect economic and demographic changes since the last major seat adjustment occurred 92 years ago.

Phase Two: Toward an Elected Senate – a Royal Commission and All-Party Discussions

1.11. The more ambitious second phase of renewal, which deals with election and other changes, must begin with a process to develop a proposal or alternative proposals. This step will be subjected to the rigours of the constitutional amending process involving the provinces and so these proposals must reflect the views of concerned governments, experts, and interested Canadians. To achieve this, the government of the day should be encouraged to appoint a royal commission with broad powers of consultation to receive input from affected stakeholders, expert witnesses and the public.

1.12. The conclusions drawn and recommendations made by the commission would be followed by all-party discussions at both the federal and provincial levels. These discussions would deal with the method for electing senators, the redesign of seat distribution, and probable changes to Senate powers. Such matters clearly fall under the amending formula described in section 42 of the *Constitution Act, 1982*, which requires approval as is set out in section 38 (requiring support from seven of the provinces with at least 50% of the population).

1.13. As a model to help guide us through this reform, we should look at how the United Kingdom is reforming the House of Lords. From the Wakeham Commission, to the tabling of white papers in parliament, to joint-committee studies and all-party discussions, the United Kingdom has thoroughly aired this issue and made considerable progress in reforming their upper house. Canada has much to learn from this example.

1.14. How we select senators is what must ultimately change. And in my view, they should be elected through a process like the one in Australia, which uses the Single-Transferable Voting (STV) system from multi-member constituencies. As well, a Senate Appointments Commission should be retained from Phase One of renewal and be authorized to appoint some of the senators if minority interests are not reflected in the election results. The Commission should also be authorized to recommend the appointment of a limited number of independent senators following the House of Lords example.

1.15. Seat allocation will have to be determined to the satisfaction of the provinces before we move on to an elected Senate. In my opinion, the distribution of seats should be based on provinces. The German Bundesrat model is helpful here: it uses larger, middle-size and smaller provinces (lander) which are allocated a similar number of seats according to the size and relative importance of the provincial units in their federation. I believe this to be the logical basis for determining seats in an upper house. However, to honour the spirit of the original confederation compact, no province should have fewer seats than necessary to respect the constitutional guarantees pertaining to the minimum number of seats it has in the House of Commons.

1.16. Finally, with respect to powers, I would propose that those of a renewed Senate remain basically as they are now in the constitution, with one exception: if the Senate is elected, it will be all the more important to build on Phase One reforms, and ensure that we design an effective deadlock-breaking mechanism with a House of Commons bias. This is key to the renewal of our appointed Senate and would become even more important in the case of an elected Senate.

Conclusion

1.17. I acknowledge that the political will to muster support from all stakeholders may not be easy to find. However, these proposals are an obvious pathway to: first, improve the quality of governance in Canada; and second, strengthen and re-invigorate the Senate. The journey to Senate reform has been long and arduous. Many proposals have been made along the way and they will have been worthwhile if the journey ultimately leads to parliamentary reform that Canadians accept and value. Indeed, such an achievement would address a long-standing sore point in our national politics.

2. Introduction

*Canada doesn't always work well in theory,
but it seems to work fine in practice.¹*

2.1 “Canada is a model for the international community,” is a refrain I have used time and again and heard from statesmen, diplomats, officials and dignitaries. While this is true, there is one noteworthy exception, which has always given me pause: our Senate. Indeed, I am reluctant to recommend our 19th century designed upper house to other countries, since I believe that we should seek to reform it at the earliest opportunity.

2.2 While the view that the Senate is clearly in need of reform is widely shared, the difficulty has always been a lack of broad support for any one option for giving it a more democratic foundation.

2.3. Our constitution prescribed that the Senate would always be one of Canada’s key institutions of governance. As a complementary house of parliament, the Senate was given essential responsibilities to: i) revise legislation; ii) provide an ongoing forum for policy discussion; iii) provide a check and balance on the general conduct of government; iv) represent regional interests in national policy making; and v) speak to linguistic issues and minority interests. Unparalleled in legal powers among second chambers within parliamentary systems, it stands unique among legislative assemblies throughout the world.² Yet, remarkably, none of its members are elected; instead, they are appointed on the advice of the Prime Minister of the day. As well, it is one of the few legislatures whose constitutional basis has remained largely unchanged since it was created.

2.4. The Senate should be at the forefront of any renewal initiative; it should not rely on federal and provincial governments to carry the burden of its reform. The federal and provincial executive governments are unfamiliar with the Senate’s workings, its contributions to good government, and its potential to do more. Moreover, senators should not be perceived as a barrier to a full discussion of what form Senate renewal might take. With their experience, long-term thinking and relative independence from the partisan issues of the day, senators understand what is at stake in incremental reform. They are better placed than anyone to produce a basic vision on the kind of institutional change the Senate requires. Senators should contribute to, indeed should lead, any discussion on how their chamber can be improved.

¹ See Graham Fox and Donald G. Lenihan, *Where Does the Buck Stop?* (Ottawa: Public Policy Forum, 2006), p.23.

² See F.A. Kunz, *The Modern Senate of Canada: A Re-Appraisal* (Toronto: University of Toronto Press, 1967), p. 337.

3. The Wisdom of the Fathers

...if we had an ideal House of Commons...it is certain we should not need a higher Chamber.³

3.1. The Fathers of Confederation wisely rejected the idea of a unicameral system. They knew that a one-house assembly would not be able to legislate effectively in a federation as large as Canada. In their view, it was impossible for a single house to ensure sufficient pause in the legislative process to allow full consideration of government or private-member proposals. Nor could a single house adequately fulfill the expectation that, in legislative debate and political caucuses, there would be sufficient diversity of regional and minority opinion, since such views were not always found in a first-past-the-post, representation-by-population electoral system.

3.2. More importantly, a unicameral system provided no independent check on majority party government in terms of accountability and abuse of power. The Fathers recognized the importance of bicameralism to a federal system of government and agreed that the Parliament of Canada would have two independent houses. Each very different from the other, the two houses would work together on a complementary basis to ensure a stable and effective government.

3.3. Canada's parliamentary system was to follow the Westminster model where an elected lower house was complemented by a non-elected upper chamber, each having different roles and functions. The lower house members would have short terms, a maximum of five years, to be followed by a general election. Financial legislation would initiate there and supply was to be the sole gift of the Commons. The House of Commons was meant to be partisan, the locus of passionate debates on great issues of the day. The cabinet was to be drawn principally from its members and the government was to depend on the confidence of the House of Commons alone.

3.4. Senators on the other hand, since they were appointed, were to be much less partisan in their deliberations. They were to serve parliament for a much longer time to provide independent thinking and long-term focus. Senators did not represent local constituencies, but instead the great territorial regions with each division having equal membership. The Maritime Provinces, Quebec, Ontario, and, as the country grew, the West, would each have 24 seats. There was confidence that, like the House of Lords, the Senate would not oppose the will of the people; instead, it would act as an independent watchdog on the Commons.

³ Walter Bagehot, quoted in S.D. Bailey, *The Future of the House of Lords*, (London: Hansard Society, 1954), p. 21.

4. The Background to Senate Reform

*Few studies of the Senate do not talk about, if they are not devoted to, its reform. Indeed, 'Reform of the Senate' must be one of the hoariest topics in Canadian politics.*⁴

4.1 Despite the wisdom shown one hundred and forty years ago in the basic design of the Senate, there is now, in my opinion, a compelling need to update and modernize our second chamber. Notwithstanding the many remarkable examples of the good work the Senate does, particularly with regard to committee investigations,⁵ opinion polls have consistently demonstrated that Canadians favour reforming the Senate by giving it a stronger democratic foundation. Canadians increasingly believe that appointments to such a constitutionally important institution as the Senate should not be made at the sole discretion of the Prime Minister. Highlighting this concern, parties led by Prime Ministers since 1945 have seldom garnered more than 50% of the popular vote in general elections.⁶

4.2 The quest to renew the Canadian Senate is not a new phenomenon. In his book *Voice of Region: The Long Journey to Senate Reform in Canada*⁷, Randall White notes that the call for Senate reform started early. The first debate on reforming the Senate began in 1874 when a motion was proposed that “the present mode of constituting the Senate is inconsistent with the Federal principle in our system.” It was followed in 1906 by another debate in which it was proposed that “the constitution of the Senate

⁴ David E. Smith, “The Improvement of the Senate by Nonconstitutional Means,” in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston: Canadian Centre for Management Development and McGill-Queen’s University Press, 2003), p. 229.

⁵ The present investigative role performed by senators has been recognized by many observers. Senate committees are held in high regard and undertake important public policy studies which are often of the highest parliamentary standard. The 1991 Beaudoin-Dobbie Joint Committee on a Renewed Canada applauded the Senate’s investigative role and recommended its continuation in a reformed institution. Many senators are experts in their fields. They come from diverse backgrounds, are active in representing minority interests, have an independent mindset and make committee work their first priority. The studies they have produced on poverty, the mass media, science policy, soil at risk, health care, euthanasia and assisted suicide, national finance and security and defence are second to none. See Gary O’Brien, “The Impact of Senate Reform on the Functioning of Committees,” *Canadian Parliamentary Review*, Spring, 2007, pp. 16-18.

In addition, many senators have taken individual initiatives to show the importance of the Senate’s many contributions to public policy development. See for example, Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston: Canadian Centre for Management Development and McGill-Queen’s University Press, 2003).

⁶ In the twenty general elections held since 1945, the governing party has obtained less than 50% of the popular vote 80% of the time. The actual breakdown is as follows: in four general elections, the governing party obtained 50% of the popular vote or more; in eight general elections the winning party obtained between 40% and 50% of the vote; and in eight general elections, the governing party obtained less than 40% of the vote.

⁷ Randall White, *Voice of Region: The Long Journey to Senate Reform in Canada* (Toronto: Dundurn Press, 1990)

should be brought into greater accord with the spirit of representative and popular government.” Sir Robert Borden is said to have mulled over an elected Senate in 1914. There were many demands for its complete abolition in the 1930s.

4.3. From the mid-1960s to the early 1990s, a number of efforts were made to change the constitutional design of the Senate. An important constitutional amendment affecting the Senate⁸ took place in 1965, when the federal parliament passed a bill limiting the term senators could serve from life to 75, in effect following the precedent set for the retirement of judges. In 1969, Pierre Trudeau brought forward a white paper essentially focusing on a German model of a provincial house to replace the Senate. In 1972, the Molgat-MacGuigan joint committee of the Senate and the House of Commons tabled a report calling for the federal government to appoint half the senators from lists submitted by the provinces. In 1978, the Trudeau government introduced Bill C-60 which proposed that the Senate be replaced by a “House of the Federation” to be comprised of 118 members, half of whom would be appointed by the House of Commons after each general election, and the other half appointed by the legislative assembly of each province. In 1978, the Trudeau government asked the Supreme Court among other questions, whether parliament acting without provincial approval could alter the Senate. In its decision called the *Upper House Reference*,⁹ the court answered that it could do so unless the proposals changed fundamental features or essential characteristics touching on certain aspects of its traditional role. In such cases, it would need support from the provinces.

4.4. With the 1982 patriation of the constitution, a new amending formula was adopted, as well as constitutional language setting out conditions needed to make changes to the Senate. Many constitutional and legal experts believe the specificity of these changes overtake much of the Supreme Court’s ruling in *The Upper House Reference*. The 1982 amending procedures explicitly mentioned what Senate reforms could not be made by parliament acting alone. These are listed in section 42 and include: (i) the powers of the Senate; (ii) the method of selecting senators; (iii) the number of senators each province is to have; and (iv) the residence qualifications of senators.

4.5. Other aspects of the Senate could be changed under section 44, which gives the federal parliament the general power of “amending the Constitution of Canada in

⁸ A very important institutional change was made on October 18, 1928 when women first became qualified for appointment to the Senate. The instrument of this change was not a formal constitutional amendment, but a decision of the Judicial Committee of the Privy Council. See *Edwards v. Attorney-General for Canada* [1930] A.C. 124.

⁹ *Reference Re: Legislative Authority of Parliament to Alter or Replace the Senate*, [1980] 1 S.C.R. 54 In part, the Supreme Court was giving its interpretation of the amendment approved at Westminster as the *British North America Act, 1949 (no.2)*, which gave the Parliament of Canada power to amend the British North America Act, except as regards provincial matters and subjects, and certain constitutional guarantees. Prime Minister Louis St. Laurent, who proposed the amendment, felt that parliament should be in the same position with respect to the parts of the constitution that were purely federal, as the legislatures of the provinces had been since 1867 with respect to parts that were purely provincial. See Gordon Robertson, *Memoirs of a Very Civil Servant: Mackenzie King to Pierre Trudeau* (Toronto: University of Toronto Press, 2000), p. 82)

relation to the executive government of Canada or the Senate and House of Commons.” Also under the 1982 changes, the Senate gave up its veto over constitutional amendments to section 38, and was left with a six-month veto. It retains its veto over constitutional amendments that are within the power of parliament, such as those governed by section 44.

4.6. Western Canada has, for a number of years, taken a keen interest in Senate reform. In 1982 for example, the Government of Alberta issued a discussion paper entitled *A Provincially-Appointed Senate: a New Federalism in Canada*, which called for strengthening western representation in national institutions. In 1985, the Alberta Legislature’s Select Special Committee on Upper House Reform proposed a triple-E Senate (elected, equal and effective). It claimed that Canada was weakened by the Senate’s lack of political legitimacy and authority and recommended a Senate modeled after those in the United States and Australia.

4.7. In 1984, the Molgat-Cosgrove Joint Committee recommended that the Senate be elected, have new powers and that there be a redistribution of seats. In 1985, the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) called for electing the Senate on a proportional representation basis. In 1985, in response to the Senate’s treatment of Bill C-11, the *Borrowing Authority Act*, the Mulroney government tabled a resolution to amend the constitution to curb the Senate’s powers. It called for the replacement of the Senate’s absolute veto over legislation with a 30-day suspensive veto over money bills and a 45-day suspensive veto over all other legislation. Although the government claimed it had the support of a number of provinces to do this, the matter was dropped.

4.8. In 1987, under the proposed Meech Lake Constitutional Accord, an interim arrangement was agreed to, whereby provincial governments would have a say alongside the federal government in choosing senators. The proposal was that a new senator would have to be acceptable to both the federal government and the government of the province that senator would represent. The traditional appointment method was returned to when the Meech Lake Agreement failed.¹⁰

4.9. In 1991, the Mulroney government released a white paper called *Shaping Canada’s Future Together*, which dealt with, among other matters, the reform of Canada’s national institutions. The white paper was referred to the Beaudoin-Dobbie Joint Committee, which held hearings and tabled a report making a number of

¹⁰ It should be recalled that on April 18, 1988 on a government motion for the adoption of the Meech Lake Agreement, the Leader of the Opposition, Senator Allan MacEachen, proposed an amendment that included a provision for electing senators. The amendment was adopted by the Senate on April 21, 1988. The amendment read in part: "Where a vacancy occurs in the Senate, and until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section 42 of the *Constitution Act, 1982*, the government of Canada shall, within six months after the vacancy occurs, call an election in the province or territory to which the vacancy related for the purpose of filling the vacancy, and, notwithstanding the provision of section 29 of the *Constitution Act, 1867*, for a term of nine years." See *Senate Journals*, April 21, 1988, p. 2321.

recommendations.¹¹ The 1991 Charlottetown Accord, in part developed from Beaudoin-Dobbie and agreed to by the federal and provincial governments, put forward a comprehensive proposal for Senate reform, including that senators be elected either by the public or by the provincial assemblies. This, too, failed when the Charlottetown Accord was defeated in a national referendum.

4.10. On May 30, 2006, the Harper government introduced Bill S-4, to limit the term new senators can serve to eight years. The legislation was silent on whether term limits would be renewable: a contentious point. The Prime Minister, when appearing before the Special Committee on Senate Reform, expressed the view that the legislation was to be interpreted as providing renewable terms. On December 16, 2006, the government introduced Bill C-43, which provides for consultations with electors on their preferences for Senate appointments. The bill specifies that the consultation will be held concurrently with elections under the *Canada Elections Act* and that a preferential voting system would be used. These initiatives, while relating to the Conservative Party's platform in the 2006 election, were not preceded by a government policy paper, all-party discussions or public input.

4.11. While Leader of the Opposition in the Senate, I chaired the Special Committee on Senate Reform, which looked at the subject-matter of Bill S-4, as well as a resolution moved by Senator Lowell Murray and seconded by Senator Jack Austin to address Senate under-representation from British Columbia and Alberta. The committee had a relatively short lifespan, being appointed on June 21, 2006 and reporting on October 26, 2006. However, it heard from many witnesses, including the Prime Minister of Canada, three provincial ministers, eminent political scientists and law professors. The committee provided an important forum for the most current views on Senate reform, specifically on problems and challenges that future reform faces, but, above all, on the importance for Canada that it be renewed.

4.12. Following the tabling of the Special Committee report on Senate Reform, Bill S-4 was given second reading by the Senate on February 20, 2007. It was then referred to the Standing Senate Committee on Legal and Constitutional Affairs for further study and possible amendment. That committee heard from a number of witnesses, particularly with respect to S-4's constitutionality and its relationship to Bill C-43. As of the writing of this discussion paper, the committee has yet to report.

¹¹ I had the privilege of serving on this committee. As a newly appointed senator, it was my introduction from a parliamentary to the issues of constitutional reform. My views of the Senate at the time were reflected in speeches I gave on June 15 and June 18, 1992 and demonstrate how my thoughts on Senate renewal have evolved. See *Senate Debates*, pp.1719-1722, 1806 and 1810-1815.

5. Phase One: Renewal under the Section 44 Amending Formula – Proposal for a Senate Modernization Bill

*There is nothing more difficult to take in hand,
more perilous to conduct, or more uncertain in its success, than
to take the lead in the introduction of a new order of things.*¹²

5.1. Proceeding with Senate reform must be done cautiously. As the Machiavelli quote implies, when you embark upon an important quest like changing the Senate, you take on a heavy burden. Canada is one of the world's great successes and our political institutions must take considerable credit for this, including the Senate. However, while many urge Senate reform because it is outdated, I believe, from personal experience, that the Senate is worth reforming because of its strengths. In proceeding, we should keep in mind the words of the Hippocratic Oath "First, Do No Harm." We must try to minimize any unintended consequences of changing one of our country's key institutions. I reject the creative destruction approach to Senate reform, or more likely, abolition, recommended by some.

5.2. There should be two paths to Senate renewal: first, a more limited one dealing with incremental changes, which in my view parliament alone can adopt; and second, a broader one to address more comprehensive reforms that will involve the provinces. The first phase would establish fixed terms for senators in an amended Bill S-4. It would be followed by adoption of a Senate Modernization Bill and, though it would stand on its own merits, it would be a prelude to more fundamental reform. This Modernization Bill would: (i) update those sections of the *Constitution Act 1867*, which are antiquated and may serve no public policy purpose; (ii) reform the traditional way of appointing senators presently based on the sole prerogative of the Prime Minister; and (iii) change the way the Speaker of the Senate is appointed (see Appendix I).

5.3. Adoption of the Murray-Austin motion to increase Western representation in the Senate would be a helpful complement to a renewal strategy. That motion, moved in the Senate on June 27, 2006, proposes that the 24 seats in the Senate, currently representing the Western provinces division, be distributed among Manitoba, Saskatchewan and Alberta. As well, the Murray-Austin motion would make British Columbia a separate division and provide the province with 12 senators. Adopting this motion, while largely symbolic, would clearly demonstrate the need for compromise and fairness, as well as reflect the spirit of the original confederation compact. Moreover, it would require the House of Commons and provincial legislatures to reflect on the importance of Senate renewal as a key component of improved governance in Canada.¹³

¹² Niccolo Machiavelli, *The Prince*.

¹³ An amendment was proposed to the Murray-Austin motion by Senator David Tkachuk on December 11, 2006. This amendment, which I do not agree with, proposed increasing the number of seats awarded to British Columbia from 12, as recommended by Murray-Austin, to 24. In my opinion, this would go against the principle described so well by Senator Pierre-Claude Nolin in his speech to the Senate on February 13, 2007 of "pragmatic balance." The awarding of a full complement of divisional seats all at once has not been the historical experience of Senate representation after 1867. Originally, the Senate was composed of 72

5.4. In my view, the constitution allows the federal parliament to act alone in adopting a Senate Modernization Bill. However, if there is sufficient doubt about its constitutional viability, consideration would have to be given to a request that the Government of Canada refer the bill to the Supreme Court for its opinion before, or as a condition for, proceeding.

A. Updating the *Constitution Act, 1867*

5.5. On December 14, 2006, the Senate asked the Rules, Procedures and the Rights of Parliament Committee to examine the current provisions of the *Constitution Act, 1867* that relate to the Senate and the need and means to modernize such provisions. I moved the motion urging this study because the constitution contains a number of sections that use archaic language and prescribe cumbersome procedures that are clearly in need of update.¹⁴ For the sake of convenience, I will deal with them in the order in which they appear in the constitution.

5.6. Age and Citizenship Qualifications. The provisions setting a minimum eligibility of 30, may continue to be applicable for senators appointed for a fixed, non-renewable term, as suggested in an amended Bill S-4. However, in a Senate Modernization Bill that has established a Senate Appointments Commission, this section should be made to conform to the qualification requirement to be a Member of Parliament; namely, to be a qualified voter. The Senate Appointments Commission, which I will discuss in paragraph 5.23 below, would ensure that new senators are not appointed too early or too late in life.

5.7. Subsection 23(2) goes on at length about the qualifications of a senator in terms of a “natural born subject of the Queen” or a person naturalized by the “Parliament of Canada after the Union” The wording is archaic and, the proposal is that to qualify as a senator one need only be a Canadian citizen.¹⁵

members and its size increased as the country grew and changed geographically and demographically. In the first forty years of Confederation, a series of arrangements to provide representation to Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan brought the total number of Senate seats to 87. For example, in 1870, Manitoba was given two seats. In 1871, British Columbia was awarded three seats. In 1905, Alberta and Saskatchewan were each given four seats. Only in 1915 was the *British North America Act* amended to create a fourth division of the Western provinces with 24 seats. Newfoundland entered confederation in 1949 with six seats and the three territories of Yukon (in 1975), The North-West Territories (in 1975) and Nunavut (in 1999) each have been awarded one seat. See Senate of Canada, *A Legislative and Historical Overview of the Senate of Canada* (2001).

¹⁴ This order of reference follows up the comments made by the Special Committee on Senate Reform in its First Report in October 2006 on the subject-matter of Bill S-4. The committee felt that other issues of Senate reform also needed to be addressed in the near future. These included: (i) correction of the loss of representation for Nunavik in Northern Quebec; (ii) an examination of section 26 of the *Constitution Act, 1867*, the deadlock-breaking mechanism; (iii) a review of the rules of absenteeism; (iv) a review of the property qualification of senators; (v) the possible election of the Senate Speaker; and (vi) the development of a model for a modern elected Senate. The issue of a new interim method of appointing senators should not be excluded from this proposed comprehensive review.

¹⁵ It should be remembered that in 1867 the legal definition of Canadian citizenship did not exist. The *Canadian Citizenship Act* was not adopted until 1946. Canada was the first British Commonwealth country

5.8. Property Qualifications. Subsections 23(3), (4) and (6) require that every senator should own property that has a value of \$4,000 clear of mortgages, etc. In the case of Quebec, to qualify, the senator shall have his or her property in the electoral division for which the senator is appointed or be resident in that division. It has been suggested that neither the property nor the residence qualifications can be amended by parliament alone, since section 42 of the amending formula requires that changes to the residence qualifications of senators require provincial agreement. However, section 31 of the *Constitution Act, 1867*, which deals with the disqualification of senators, refers to a senator ceasing “to be qualified in respect of property or of residence.” The use of the word “or” suggests that the Fathers of Confederation distinguished between the two types of qualifications, and I believe that, with the exception of those provisions that relate to senators appointed from the province of Quebec, it is within parliament’s powers under section 44 to delete any reference to a property qualification, in particular because there is no modern public benefit to such a requirement.

5.9. Quebec Provisions. I note that the provisions for Quebec are quite distinctive, and the references to the 24 electoral districts in 1867 included only the southern area of the present province. Residents of northern Quebec are today formally without an assured means of having representation in the Senate, since the boundaries of Quebec’s senatorial districts were not adjusted as the province grew, for instance to include the region known as Nunavik. As Senator Charlie Watt has noted: “... it is clearly unacceptable that still today, 100 years later, Nunavik is not legally represented in the Senate ... It is an essential characteristic of the upper chamber that all Canadians are represented in the Senate.”¹⁶ This anomaly should be corrected. The section could be amended, perhaps along with a Senate Modernization Bill, pursuant to section 43 of the *Constitution Act, 1982*, which deals with the amendment of provisions relating to some but not all provinces and requires only resolutions from parliament and the legislature of the province affected. In addition, the residency requirement for Quebec senators could, if the province agreed, be modernized following the same procedure.

5.10. Resolving Legislative Disputes. Section 26, which describes the appointment of additional senators beyond the 24 from each region, is the only provision which addresses breaking a deadlock between the Senate and the House of Commons. It allows four or eight members to be added to the Senate representing equally the four divisions of Canada. It is not effective and virtually of no use in dealing with disagreements which arise between the two houses during normal parliamentary sessions. I suggest creation of a new section head-noted “resolving legislative disputes.” This would set out a process requiring the greater use of conferences between the Senate and the House of Commons. Senators would obviously have to consult closely with the House of Commons, but various mechanisms have been suggested in the past to allow for joint meetings to resolve any such deadlock. Under current procedures, if the House of

to establish its own citizenship. See David J. Bercuson and Barry Cooper in Janet Ajenstat (ed.), *Canadian Constitutionalism, 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992) p.20.

¹⁶ *Senate Debates*, November 21, 2006.

Commons or the Senate insist on amendments and refuses a request for a free conference, the other chamber is left with the only option of rejecting the measure outright. I would suggest that an amendment be made to stipulate that, if there is a disagreement on a government bill whereby the Senate or the House insists on its amendments, a conference shall be established to prepare a report to be either approved or rejected by both Houses within a specific period of time.

5.11. Such a procedure would encourage senators to be more assertive in proposing amendments to Commons legislation. In modern times, the Senate has amended less than ten percent of the legislation from the other place. Senators can do better than this. They have good ideas and should initiate alternative policy positions so they can be properly vetted. Tension between the two houses can, from time to time, be a good thing as competition of ideas can lead to better legislation. However, conflicts between the two houses should rarely result in obstruction, stalemate or deadlock. There must be procedures in place where disagreements can be more efficiently resolved.

5.12. **Mandatory Retirement.** Section 29 provides for the mandatory retirement of a senator at the age of 75. This section can be dealt with in a way analogous to section 23(1). As previously mentioned, a Senate Appointments Commission should ensure that senators are not appointed too late in their lives.

5.13. **Attendance.** Under subsection 31(1), the place of a senator is vacated if he or she fails to appear for two consecutive sessions. Although this section has become the basis of some of the *Rules of the Senate*, the Senate still needs power to develop clearer rules to have a satisfactory way of dealing with chronic absence for whatever reason. Section 33 states that any question respecting the qualification of a senator or a vacancy in the Senate shall be heard and determined by the Senate. A Senate Modernization Bill should specify that the Senate can determine, from time to time, the attendance requirements necessary for a senator to retain his or her place.

5.14. As a cautionary measure, any attendance requirements should guard against abuse of such a rule for political or personal reasons. I would suggest that an extraordinary-majority, for example 60% of senators, would be needed to establish a rule dealing with the loss of a senator's place.

5.15. **Dual Citizenship.** Subsection 31(2) essentially says that a senator's place be vacated if a senator becomes a dual citizen. It should be remembered that when the *Constitution Act, 1867* was drafted, the concept of citizenship was considerably different than it is today. The idea of dual citizenship did not exist, as the assumption was that you could be loyal to only one country at a time. As we know, a person can acquire citizenship in another country without applying or doing any positive act. For instance, in some cases, by marrying a citizen of a particular country, one automatically becomes a citizen of that country. If there are circumstances in which dual citizenship is allowed under the laws of Canada, it should not be an impediment to Senate membership as it is not now an impediment to membership in the House of Commons.

5.16. **Bankruptcy.** Subsection 31(3) says that a senator must vacate his or her seat if the senator “is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter.” I agree that bankruptcy should remain a condition of disqualification, as it is clear what constitutes bankruptcy. However, what constitutes insolvency is not as clear. Consideration should be given to retaining the references to bankruptcy, but dropping those that relate to insolvency or being a public defaulter.

5.17. **Felonies and Infamous Crimes.** One subsection that definitely requires modernization is 31(4) which specifies that the seat of a senator attainted of treason or convicted of felony or any infamous crime must be vacated. The crime of treason is still in the Criminal Code, although very rarely invoked. The concepts of felonies and misdemeanours were replaced in the *Canadian Criminal Code* by indictable offenses and summary offences. Generally speaking, in 1867, felonies were graver crimes, perhaps punishable by death, which resulted in forfeiture of the perpetrator’s lands and goods to the Crown. It would seem reasonable to replace the word felony with “indictable offence” which includes treason.

5.18. The concept of “infamous crime” found in subsection 31(4) is even harder to translate into modern terms. Crimes involving public fraud or the corruption of public justice or public administration tend to be classified as infamous crimes. If a senator violates the public trust, I recommend that the senator’s place be vacated. I propose leaving it to the Senate to decide if the public trust is breached.

5.19. **When Vacancies Occur.** Subsection 31(5) requires a seat to be vacated if a senator no longer meets the property or residence qualifications. The residence qualifications cannot be addressed except by the general amending formula, but, as I have discussed, it is interesting that subsection 31(5) refers to “property or residence qualifications.” Consideration must be given to removing the outdated reference to “property.”

5.20 **Filling Vacancies.** Section 32 refers to Senate vacancies and the Governor General’s obligation to summon a qualified person when one occurs. The section is silent about how long the seat can remain vacant. Professor David E. Smith notes that “...there have been instances when significant numbers of seats have been left vacant for extended periods of time. As the Senate has only 105 members, even three or four vacancies at one time represent a considerable loss of personnel.”¹⁷ This section should be modernized. There is a provision in the *Canada Elections Act*, that when a seat in the House of Commons becomes vacant, a by-election is held within 180 days after the Chief Electoral Officer is notified of the vacancy. Similar time limits for filling vacancies should be included in a Senate Modernization Bill. The Prime Minister should be required to put forward the name of a candidate to the Governor General, to fill a vacancy, within 180 days.

¹⁷ Smith, *op. cit.*, p. 262.

5.21. **Oath of Allegiance.** Finally, there is the language of the oath of allegiance contained in the fifth schedule to the Act. I think the time is ripe for senators to swear an oath of loyalty to Canada, in addition to the one they swear to Her Majesty the Queen.

B. A New Way of Selecting Senators

5.22. While changing the tenure of senators is a stand-alone initiative, it inevitably raises the issue of how senators are to be selected. If Senate renewal is to achieve its full potential, amending the way senators are selected must be addressed, as well. The ultimate objective is to elect senators, since election is what Canadians, when polled, consistently support. However, the direct election of senators constitutionally involves the provinces and must await federal-provincial discussions. Until such discussions take place, and as an interim measure, we should adopt a reformed appointment process. I agree with the suggestion made by Professor Richard Simeon before the Special Committee on Senate Reform that “we may want to start with a reformed appointment process which might address some of the democratic legitimacy problems, while avoiding others.”¹⁸

5.23. Following the current Westminster model¹⁹ an independent Senate Appointments Commission reporting to the Prime Minister should be created to vet all nominations, to ensure that the standards of propriety are upheld, and to establish criteria for Senate appointments, such as making sure that senators not be appointed too early or too late in life. The nomination of judges has been vetted by independent commissions for some time now. Under the *Accountability Act*, order-in-council appointments are to be reviewed by an independent commission. Until there is more comprehensive reform, a new procedure should be established drawing on the precedent of the House of Lords. This process would require a Prime Minister, whose party has a secure majority of senators in the Senate, to involve at least the Leader of the Opposition in the House of Commons before putting forward names of senators. After finalizing that list, the Prime Minister would then submit it to the Governor General. This would ensure senators better represent the expressed view of voters in the most recent election. As long as the Senate remains an appointed chamber, it is appropriate that the Prime Minister share the nominations.²⁰

¹⁸ Special Committee on Senate Reform, *Proceedings*, 4:61

¹⁹ The House of Lords Appointments Commission is an independent advisory body, which recommends non political-party appointments and vets all nominations of individuals to sit in the House of Lords. The Prime Minister decides the overall number of new peers created and the balance between the parties. The Appointments Commission is responsible for vetting all nominations but does not assess the suitability of those nominated by the political parties, which is a matter for the parties themselves. The Appointments Commission advises the Prime Minister of any concerns about propriety and it is the Prime Minister who then passes on the nominations from other parties to the Queen. See United Kingdom, Department of Constitutional Affairs, *House of Lords: Reform* (February, 2007), p.40. <http://www.commonleader.gov.uk/output/Page351.asp#>

²⁰ As we know, this has not been the Canadian tradition. In the appointments made to the Senate by Prime Minister Mackenzie King, only two of the 103 were not Liberals. Under Prime Minister St. Laurent, only three of the 55 appointments were not Liberals. Under Prime Minister Diefenbaker, only one of the 37 appointments were not Progressive Conservatives. Under Prime Minister Pearson, only one of the 39

5.24. In addition, the Senate Appointments Commission should be authorized to recommend through the Prime Minister the appointment of a certain number of independent senators. This would ensure the presence of a significant number of senators not aligned to any political party. Some combination could be agreed to. For example, the Prime Minister and the Leader of the Opposition could be allocated 80% of the nominations. The remaining 20% of Senate membership could be nominated by the Senate Appointments Commission.

5.25. There can be two options for changing the way senators are nominated. The first would be for the Prime Minister of the day to agree to follow a practice akin to that currently used at Westminster whereby the Prime Minister accepts the nominations of the Appointments Commission for independent senators and consults with the Leader of the Opposition with respect to partisan appointments from the Opposition. Changing the traditional procedure for nominating senators is not unprecedented. As noted earlier, during the time the 1987 Meech Lake Agreement was being ratified, a new non-statutory procedure for nominating senators was agreed to by Mr. Mulroney, whereby the ultimate choice had to be acceptable to both the federal government and the government of the province the senator represented. A number of senators were appointed under that procedure, which lapsed when Meech Lake failed. The second option would be to introduce legislation under the section 44 amending formula specifically requiring that the Prime Minister shall consult with the Leader of the Opposition and the Senate Appointments Commission in relation to the appointment of senators once a government has a secure majority of members in the Senate. Such a provision has been included in clause 4 of the draft Senate Modernization Bill, which is found in appendix one of this paper.

C. Setting Term Limits for Senators

5.26. The tenure of senators should be for a fixed term of between 10 and 15 years. Such a change will permit a greater turnover of senators, allow senators to stay more in tune with changing public opinion, and be a step toward a more comprehensive renewal of the Senate. My view, which is consistent with that of the Special Committee on Senate Reform, is that section 44 of the constitution allows the government to change the tenure of senators without involving the provinces. The basic rule, set out in *The Upper House Reference*, would seem to be that a change in tenure is within the powers of parliament, as long as it does not change a fundamental feature or essential characteristic of the Senate. The *Constitution Act 1982* strengthens the role of parliament such that it is, in my opinion, within parliament's power to change senators' terms unless the change is an attempt to do indirectly that which falls within section 42 of that act.

appointments was not Liberal. Under Prime Minister Trudeau, 11 of the 81 appointments were not Liberals. Prime Minister Clark made eleven appointments to the Senate and all were Progressive Conservatives. Under Prime Minister Mulroney, only two of the 51 appointments were not Progressive Conservatives. Under Prime Minister Chrétien only three of the 75 appointments were not Liberals. Under Prime Minister Martin, five of the 17 appointments were not Liberals.

5.27. In my opinion, the eight-year tenure, envisioned by the Harper government's Bill S-4, better suits an elected Senate, but is too short for our existing appointed Senate. Although a number of witnesses who appeared before the Special Committee on Senate Reform supported the eight-year tenure, introducing too brief a term might encourage a constitutional challenge. A 10- to 15-year period, preferably 12, would, in my opinion, be a better term. Interestingly enough, a 12-year term was recommended by the distinguished Senator Michael Kirby who supported the concept of a term limit in his farewell speech.²¹ Prime Minister Harper has indicated some flexibility in the length of tenure involved, and I think 12 years may well be acceptable. A 12-year period is roughly equivalent to three parliamentary terms.

5.28. An equally important issue is whether a reappointment should be allowed. It is closely tied into the more general issue of Senate reform. If senators are to be elected, there is much merit in them being available for subsequent terms. As long as senators remain appointed the term should not be renewable. I believe non-renewable terms are desirable in that they reinforce senators' independence and downplay the pressure of partisan politics.

D. Choice of Senate Speaker

5.29. The Speaker is the Senate's chief presiding officer and is mandated under the rules to preserve order and decorum. He or she should have the demonstrated confidence of senators. It is worthy to note that the House of Lords, as part of its reform, amended its procedures to allow for the election of their Speaker. In Canada, it would be preferable that the Senate Speaker not be appointed only on the advice of the Prime Minister, as is presently the case. Senators may wish to try to change this convention or procedure in an informal way by making their own preference for Speaker known to the Prime Minister through a secret ballot and requesting that that senator be appointed. An alternative would be to proceed in a more formal way with an amendment of section 34 of *Constitution Act, 1867* which deals with the appointment of the Speaker. I see no reason why this could not be done through the section 44 amending process.

²¹ As recorded in the *Debates* on October 5, 2006 Senator Kirby told the Senate: "I support limiting the number of years one can serve in the Senate. Anyone, whether in public or in private life, who does the same job for a long time, inevitably gets stale. I think a term on the order of 12 years is reasonable."

6. Phase Two: Renewal under the Section 42 Amending Formula

*In truth, the British House of Lords and the Canadian Senate are the exceptions – the constitutional aberrations, if you wish –in Commonwealth constitutionalism, where the clear trend is either to abolish upper houses or to legitimate them by election.*²²

6.1. As noted in paragraph 4.3, section 42 lists four matters that require both the consent of the federal parliament and resolutions of the legislative assemblies of at least two thirds of the provinces that have at least fifty percent of the population if they are to be amended. Such amendments envision fairly fundamental changes and should not be approached without a full public discussion or a thorough study to minimize unexpected or unintended consequences.

A. The Need for a Royal Commission and All-Party Discussions

6.2. The more ambitious second phase of renewal dealing with election and other changes must begin with a process to develop a proposal or alternative proposals. Because this step will be subjected to the rigours of the constitutional amending process, the proposals must reflect the views of concerned governments, experts, and interested Canadians. To launch this process, the government of the day should be encouraged to appoint a royal commission with broad powers of consultation to receive input from expert witnesses, affected stakeholders and the general public.

6.3. Canadians are not alone in wanting a more modern second chamber. The United Kingdom is also facing the need to bring fundamental change to the House of Lords and it appears progress is being made in achieving it. Since 1997, the Labour government of Tony Blair has addressed the issue in a serious way. From the Wakeham Commission, to the tabling of several white papers in parliament, to joint-committee studies and all-party discussions, the United Kingdom has thoroughly aired this issue and even made considerable progress in reforming their upper house.

6.4. With the passage of the *House of Lords Act, 1999* the U.K. Parliament took an important step in changing the composition of the Lords by removing all hereditary peers, save for a representative group of 92. It then moved on to the second stage of addressing whether the Lords will be fully elected, fully appointed or whether there will be a hybrid house, with a mixture of elected and appointed peers. It is interesting to note that, since adoption of the *House of Lords Act, 1999*, removing all but a representative vote from hereditary peers, the chamber looks upon itself as stronger, more legitimate and more representative than before its reform. As a result, it has been more aggressive in its treatment of legislation coming from the House of Commons.²³

²² Edward McWhinney, *Canada and the Constitution, 1979-1982* (Toronto: University of Toronto Press, 1982), p. 21.

²³ See the testimony of Meg Russell, Senior Research Fellow, University College, London before the Standing Senate Committee on Legal and Constitutional Affairs, March 22, 2007.

6.5. The final form the new House of Lords will take is not clear. On March 7, 2007, the British House of Commons voted that the Lords be completely elected. A week later on March 14, the Lords voted overwhelmingly for a fully appointed upper chamber. The Labour government, however, favours a hybrid house. As the white paper on Lords reform issued in February 2007 said, “It is difficult in a modern democracy to justify a second chamber where there is no elected element and in which the public has no direct impact into who sits in it.”

6.6. The Senate of Canada should emulate the U.K. example and encourage the government of the day to appoint a royal commission on Senate reform. This commission would receive input from expert witnesses and the general public, and it would be followed by all-party discussions at both the federal and provincial levels. Proposals could be developed which could deal with the selection of senators, the distribution of seats and the powers a renewed Senate might have. It is impossible to anticipate the result of these studies and negotiations. However, as a contribution to any discussion on the more comprehensive changes required, I would like to put forward my thoughts on these subjects.

B. Electing Senators

6.7. I believe the Senate must have a broader democratic foundation and that it should be elected. The system used for Senate elections should be different than the plurality one followed for the House of Commons. Senators should be elected through a process like the one in Australia, which uses the Single-Transferable Voting (STV) system from multi-member constituencies. It is interesting to observe that in British Columbia and Ontario the recently appointed citizen assemblies on electoral reform both recommended the adoption systems based on proportional representation. Such systems are felt to be more equitable, as they tend to boost the number of women and visible minorities in the legislature and align a party’s seats to its proportion of popular vote.²⁴

6.8. Pursuant to the *Constitution Act, 1867*, the province of Quebec is divided into senatorial divisions. The Quebec model is useful, since it is already present in Canada. It is based on the idea of selecting senators from specific areas within the province, and a modified version of it may be used for electing senators. Quebec’s senatorial division boundaries are in need of redrawing, since they do not include the northern areas or, indeed, the whole province. These boundaries could be re-drawn with the province divided into a number of multi-member constituencies large enough to allow an electoral system based on STV to operate. Ontario, also being a large province, similarly could be divided into senatorial constituencies. For STV to work, there has to be a sufficient number of senators to elect to allow voters to rank their preferences for candidates and have these preferences used in deciding winners. It appears that four to six seats to be filled at each election is an adequate number upon which to base an STV system.

²⁴ See the British Columbia Citizens’ Assembly on Electoral Reform, Final Report, 2004 and the Ontario Citizens’ Assembly on Electoral Reform, Public Consultation Reports, 2007.

6.9. Ontario and Quebec should have four senatorial divisions, with six senators representing each division. Prince Edward Island, which now has only four senators, would be a single senatorial division with four seats. Nova Scotia and New Brunswick, which each have 10 senators, would both have two senatorial divisions, with five senators each. Until seats are redistributed, every other province would be one senatorial division with six Senate seats. Given that an STV system cannot work for the Yukon, Northwest Territories or Nunavut, if they each have only one senator, a different electoral system, could be used there to select senators.

6.10. While open to other suggestions, my own preference would be that senators be elected for eight-year terms and to find some way for one-half of the senators to face election every four years. While it is important that the Senate stay in tune with the desires of the electorate, its demonstration of independent thinking and long-term focus would be more effective if changes to Senate membership were staggered. The terms should be renewable. Since any Senate reform needs to give special attention to the representation of aboriginal peoples, official languages and visible minorities, persons with disabilities and women, special procedures must be put in place to add to the Senate membership. The Senate Appointments Commission could be authorized to appoint some additional senators after each election, if such interests are not reflected in election results. Care would have to be taken to show that the appointment process is not abused for political advantage.

C. Redesigning Senate Seats

6.11. I have argued that seat allocation will have to be determined to the satisfaction of the provinces before any other phase-two reform can proceed. Any doubt on this point is laid to rest by the reasoning of Gordon Gibson in his comment on this matter.²⁵ He makes the point that if the Senate becomes elected without addressing seat allocation and power beforehand, the vested interest of certain provinces in holding power would make it exponentially more difficult after the Senate is elected than before.

6.12. I am concerned that Western Canada is under-represented in the Senate. However, most of the reform proposals that have come forward maintain the concept of regions, or divisions, rather than provinces. For the last twenty years, there has been serious disagreement on whether Senate representation should be based on regions or

²⁵ “In the “horror show” scenario of a fully elected and legitimate Senate, with full powers and existing provincial representation, there would, indeed, be pressure for a fast constitutional amendment to ease the pain—and the one most likely to be agreeable to everyone as the least bad option to get rid of the “horror show” as quickly as possible would be simple abolition. This of course, is not the incrementalist intent but it is the very likely “unintended consequence.”

The worst outcome of all would be if the probable unanimity requirement for abolition was frustrated by just a few smaller provinces profiting from the unacceptable situation, as could well happen. Then what?

The alternative approach is to work towards a complete reform of the Senate, to be done as a piece, via constitutional amendment...” Gordon Gibson, “Challenges in Senate Reform: Conflicts of Interest, Unintended Consequences, New Possibilities,” A Fraser Institute Occasional Paper, Public Policy Sources Number 83, September 2004. p. 27.

provinces. I personally prefer representation by province, and note that, as early as 1980, the minutes of a federal-provincial meeting of the Continuing Committee of Ministers on the Constitution said that most provinces agreed that Senate representation should be based on provinces.

6.13. I am impressed by the comments of Professor Philip Resnick from the University of British Columbia, who appeared before the Special Committee on Senate Reform. He talked of a population criterion, which would involve large, middle-sized and small provinces (and perhaps one very-small province). The German Bundesrat model is helpful here since the country's landers are allocated a similar number of seats according to their size and relative importance in the federation. Ontario and Quebec have populations of roughly 12,160,000 and 7,546,000. Despite the difference, these are both plainly big provinces. Next are British Columbia and Alberta with populations of 4,114,000 and 3,290,000, respectively. Below that are a series of smaller provinces with a population of roughly 500,000 to 1,000,000, with Newfoundland as the smallest (506,000) and Manitoba as the largest (1,149,000). Prince Edward Island has roughly 136,000 people and the Territories vary between 42,000 and 30,000.

6.14. I admit that I don't know how to square the problem of some small provinces now having 10 senators, while some mid-sized provinces have only six. However, in the spirit of compromise, I am certain that we can resolve this problem. I believe that the province of Manitoba in 1980 suggested a formula giving sixteen senators to Ontario and Quebec, twelve to British Columbia, ten to Alberta, eight each to Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Newfoundland, four to Prince Edward Island, and two each to the territories. I am not suggesting this is a solution, but only noting that these ratios suggest that, with good will, finding a solution is possible. As well, I am very sympathetic to the spirit of the original confederation compact that no province should be awarded fewer seats than what was agreed to in 1867. Also, I am sympathetic with the guarantees found in the *Representation Act, 1985*, which provides that no province will have fewer seats in the House of Commons than it had in 1976, or during the 33rd Parliament when the *Representation Act* was passed. Such guarantees should be regarded as the basic "floors" and new proposals should build from there. Just such a proposal was brought forward by the Harper government on May 11, 2007, to increase House seats for Ontario, British Columbia and Alberta.²⁶

D. The Powers of a Renewed Senate

6.15. As we know, governments are constitutionally compelled to maintain the confidence of the House of Commons to stay in power, and supply is the sole gift of the Commons. In any reformed system, the primary role of the House of Commons must be maintained as its members will accept nothing less. On the other hand, it is important that the views of the Senate be taken seriously. These two objectives may appear to be at cross purposes, but I believe adequate rules could be put in place to encourage compromise. I draw attention to the testimony of Professor C.E.S. Franks, before the

²⁶ See Bill C-56, *An Act to Amend the Constitution Act, 1867* (Democratic Representation) introduced in the House of Commons May 11, 2007.

Special Committee on Senate Reform, commenting on the necessity of clarifying the procedural rules as to when the Senate can use its powers as we move toward an elected Senate.²⁷

6.16. I would propose that the powers of a renewed Senate remain basically as they are described in the constitution, with the exception that an effective deadlock-breaking mechanism be developed, one with a bias in favor of the House of Commons. This will clearly be helpful in the negotiations leading to an elected Senate. The convening of joint sittings of both houses is used in a number of bicameral institutions and could be an option for the Canadian parliament. As mentioned earlier, a reformed procedure using free conferences would be useful for resolving many of the disagreements on legislation and would remove some of the uncertainty within the legislative process. It would be unfortunate if the Senate's powers were too severely curbed. Restrictions, such as giving the Senate a relatively short suspensive veto on legislation or removing its right to deal effectively with tax or borrowing authority legislation, would hinder the Senate. They would limit the ability of senators to represent national and provincial interests or act as an important check on the executive. At the same time, the process must ensure relative stability when parliament deals with legislation, and that the House of Commons retains its primary role.

E. Transition to a Renewed Senate

6.17. Consideration will have to be given on how to manage the transitional period where elected members are introduced and current members continue to serve. Since most senators accepted their appointments on the expectation that they would serve until their mandatory retirement age of 75, it may be unfair to force them to leave at an earlier time. A range of options should be prepared based on expected election dates, the retirement date of senators, and staggered Senate elections. These options could include an interim constitutional arrangement to temporarily increase the size of the Senate to allow for both appointed and elected senators to serve together until all current senators leave. It may be instructive to see how a reformed House of Lords plans to manage its transition period and how it will adapt to its reforms.

²⁷ Senate Committee on Senate Reform, *Proceedings*, 1:29

7. Conclusion

...there would be no use of an Upper House if it did not exercise...the right of opposing or amending²⁸ or postponing the legislation of the Lower House...

7.1. In this paper, I have attempted to lay out my own views on what I see as the path Senate renewal should take. I believe the Fathers of Confederation had a sound idea in wanting an upper house which was different from, and complementary to, the House of Commons. However, after 140 years it is time that the Senate undergo update and modernization.

7.2. Implementation of these proposals, or something like these proposals, will, I believe, improve the quality of governance in Canada. Establishing term limits for senators and reforming the traditional appointment process, while we await the ultimate reform of electing senators, will strengthen the Senate. Its existing roles of examining Commons legislation, scrutinizing the executive and carrying out policy investigations will be re-invigorated. Reforming the deadlock mechanism – at present virtually of no use in the day-to-day activities of parliament – will encourage senators to be more proactive in dealing with Commons legislation.

7.3. In Phase Two, changes implemented in Phase One will have to be revisited, since the dynamic and structures of an elected legislative body are different. Taking the difficult step of electing senators, with a redesign of seats and modified powers protecting the traditional role of the House of Commons, will improve provincial representation in the federal decision-making process.

7.4. As stated, I am impressed by the determined effort being shown by the parliamentarians of the United Kingdom to reform the House of Lords. As we have seen, they have moved to reform their upper chamber in an incremental way. Through the passage of the *Parliament Acts* of 1911 and 1949, they first addressed the powers of the upper house. Then in the late 1990s, with the removal of all but 92 of the hereditary peers, they made a fundamental change in its composition. Today, they are moving to changes in the method of selection. We, in Canada, should also proceed incrementally, but our approach will necessarily differ because we are a federation.

7.5. Our most serious challenge is that, unlike the parties in the British House of Commons, there is no agreement among our political leaders, either at the federal or provincial level, on where we want to go. Many would prefer not to make it a priority or discuss it at all. Yet it is a very important issue, of interest to the Canadian public, and it must be faced at some point. As noted above, the Senate is a key institution of governance and changes to it should not occur without far-reaching analysis. What is required is a royal commission on Senate reform with public input to be followed by all-party discussions and discussions with the provinces so we can find a path to a new

²⁸ John A. Macdonald, *Parliamentary Debates on Confederation of British North American Provinces* (Quebec, 1865; Ottawa, 1951), p. 36.

institutional design of the Senate. The likelihood of the ideas discussed in this paper being embraced and followed will require a political will that will not be easy to find.

7.6. However, the journey to Senate reform is a long and arduous one. And all the proposals along the way—be they Pierre Trudeau’s Bill C-60, the parliamentary committee reports of Molgat-MacGuigan, Molgat-Cosgove and Beaudoin-Dobbie, Stephen Harper’s proposals and, indeed, this paper—will not have been in vain if the journey ultimately leads to comprehensive reform. In the end, as with many Canadian achievements, success will depend on the Canadian genius for understanding and compromise that has served us so well. When Senate reform finally succeeds, it will address a long-standing sore point in our national politics.

8. Afterward

June 27, 2007

I have faith in a better future, because I have faith that most human beings want to do the right thing.²⁹

8.1. There are four matters that I would like to draw to the attention of readers of my May 25, 2007 Discussion Paper (“the Paper”), relating to what has happened in the Senate since its publication. They are i) my appearance before the Standing Committee on Rules, Procedures and the Rights of Parliament (“the Rules Committee”); ii) an update on legislative activity on Bill S-4 An Act to amend the Constitution Act, 1867 (Senate tenure)(“the Bill”) in the Legal Affairs Committee and a discussion of its report in the Senate; iii) the inconsistent opinions on whether parliament has the authority to deal with changing the term of Senate appointments as in the Bill; and iv) the good question posed by Senator Serge Joyal: What’s next?

1. Appearance before the Standing Committee on Rules, Procedures and the Rights of Parliament

8.2. I was pleased to have an opportunity to share my views on modernizing the Senate with the Rules Committee on May 29, 2007. The committee has been asked by the Senate to examine and report on the provisions of the *Constitution Act, 1867* that relate to the Senate and propose changes to modernize them by means of the appropriate amending formula and through modifications of the *Rules of the Senate*.

8.3. The presentation was well received, although with reservations. Some felt that an elected Senate would lead to an American-style congressional system of checks and balances. In replying to this misgiving, I noted that, in my opinion, election does not mean doing away with our parliamentary system of government. An elected Senate would play an important role in the decision-making process but that role would have to be cognizant of where we are today. We would necessarily retain some of the practices whereby the House of Commons is the primary decision-maker and where the provinces have a countering role at the federal level through the various means that have evolved to date or that have existed since 1867.

8.4. I noted that the second-phase proposals to develop support for election and the re-balancing of provincial seats in the Senate would have to first meet the difficult test of the amending formula, requiring approval of the House of Commons and seven out of 10 provinces, representing fifty per cent of the population. Agreements from these parties would, in my opinion, preclude adoption of a U.S. system of governance and would as well necessitate moderating the Senate’s powers. An elected Senate of Canada would continue to be very different from the one in the United States.

²⁹ See Lois Hole, Lieutenant Governor of Alberta, 2000-2005, in *Lois Hole Speaks*. (Edmonton: The University of Alberta Press, 2007) p.6.

8.5. Questions were also asked about improving attendance, permitting dual citizenship for senators, the strategy of incremental vs. comprehensive reform, the representation of minorities, the all-important creation of a Senate Appointments Committee and the requirement that the Prime Minister recommend appointments of independent senators and opposition senators under certain circumstances, as well as other issues. The verbatim discussion of the meeting can be found on the parliamentary website at <http://www.parl.gc.ca>. The paper was tabled in the Senate on May 29, 2007 and is available as Sessional Paper No. 1/39-878S or for the time being at my parliamentary web site at www.sen.parl.gc.ca/dhays.

2. An update on legislative activity on the Bill in the Legal Affairs Committee and a discussion of its report in the Senate

8.6. The Bill was referred to the Legal Affairs Committee on February 20, 2007, following its adoption in principle at second reading by the Senate. The Legal Affairs Committee held six meetings on the bill and heard from over twenty witnesses. These included representatives of the Privy Council Office, the Department of Justice, a number of law and political science professors and, through video conference, peers from the British House of Lords. The verbatim transcripts of these meetings are found in issues 23-25 of the Legal Affairs Committee and are also available on the Parliament of Canada's website.

8.7. The Legal Affairs Committee received submissions on the bill's constitutionality from provincial and territorial governments including the governments of Alberta, Ontario, Quebec, New Brunswick, Saskatchewan, British Columbia and Nunavut. The views of the provinces varied. The Alberta Government is on record as supporting the Bill. Saskatchewan stated that the consent of the provinces was not required for the Bill as the constitutional amendment to effect a change in the length of term for Senate appointments is a matter for the Parliament of Canada, pursuant to section 44 of the *Constitution Act, 1982*.³⁰ New Brunswick, on the other hand, stated that, in its view, the provinces must give consent to any change that affects representation in the Senate and objected to "piece-meal and unilateral" Senate reform.³¹ The Ontario Government agreed with the New Brunswick position and expressed the view that the Bill was linked to Bill C-43, which was introduced in the House of Commons on December 13, 2006.³² In its submission, the Ontario Government argued that "Bill S-4 and Bill C-43 are inextricably linked... 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

³⁰ Letter from Harry Van Mulligan, Minister of Government Relations, Government of Saskatchewan, dated May 28, 2007.

³¹ Letter from Shawn Graham, Premier of New Brunswick, dated April 20, 2007.

³² C-43 would in effect require consultative elections to determine electors' preferences for the appointment of senators to represent a province.

the legislation without meaningfully consulting provinces or obtaining provincial consent.”³³

8.8. The Government of Quebec also objected to the constitutionality of the Bill, reversing its earlier support. While it stated that it “is not opposed to modernizing the Senate” it considered “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, they say, are beyond the powers of the Parliament of Canada. They instead require following a coordinated constitutional amending process, which in turn requires the participation and consent of the provinces.”³⁴

8.9. Senate Counsel asked lawyer Henry S. Brown of Gowling Lafleur Henderson to provide an opinion concerning Parliament’s legislative competence to enact the Bill under section 44 of the *Constitution Act, 1982*. Mr. Brown appeared before the Legal Affairs Committee on March 29, 2007. He gave his opinion that the opinions of the Supreme Court in the *Upper House Reference* of 1980 remain valid and applicable to the scope of parliament’s power to enact laws in relation to the Senate pursuant to section 44. He told the committee “this is because both section 91(1) and section 44 are worded essentially identically, they both have the same subject matter and, most tellingly, because section 44 was introduced into parliament less than two years after the court’s opinion the *Upper House Reference*. The *Upper House Reference* therefore forms part of the historical – and recent historical – background to the enactment of section 44 and is likewise relevant in terms of construing the context and purpose of section 44.”³⁵ Mr. Brown felt there was little doubt that the Bill would change the fundamental features or essential characteristics of the Senate and would impact on the Senate function as provider of sober second thought in legislation and thereby its independence. In Mr. Brown’s view, section 44 no more permits parliament to enact laws affecting the fundamental characteristics of the Senate than did subsection 91(1). He concludes section 44 must be given a narrow reading and does not permit the Parliament of Canada to proceed unilaterally to change the tenure of senators as proposed in the Bill. In effect, he disagrees with the conclusions of Peter Hogg and others who appeared before the Special Committee on Senate Reform who hold the view that the Bill can be dealt with by parliament alone.

8.10. On June 12, 2007, the Legal Affairs Committee reported the Bill back to the Senate with amendments and a recommendation. The committee proposed: (i) that the term of senators be fifteen years (as opposed to eight years as proposed in the Bill) and that the term shall not be extended or renewed; and (ii) that the place of a senator will become vacant when the senator attains the age of 75 years. The committee also made a

³³ Letter from Dr. Marie Bountrogianni, Minister of Intergovernmental Affairs and Minister Responsible for Democratic Renewal, Government of Ontario, dated May 30, 2007.

³⁴ Submission from Benoit Pelletier, Minister Responsible for Canadian Intergovernmental Affairs, Government of Quebec, dated May 31, 2007.

³⁵ Standing Senate Committee on Legal and Constitutional Affairs, Issue 24:81.

recommendation that after the bill is amended, it “not be proceeded with at third reading until such time as the Supreme Court of Canada has ruled with respect to its constitutionality”. The Senate adopted the report on June 19, 2007. The Government has not indicated how it will proceed in light of the report. Given that uncertainty it seems likely the matter will die on the order paper at the first of the next prorogation or dissolution of parliament.

3. Inconsistent opinions on whether parliament has the authority to deal with changing the term of Senate appointments as in the Bill.

8.11. The Paper makes it clear that the idea of trying to abdicate constitutional power to provinces in the first phase of Senate modernization runs counter to the best interests of the Senate. This is so because offering to accept that view limits the Senate’s power over the process to a six-month suspensive veto. As well, to have the provinces brought in prematurely will make the task of modernizing the Senate too difficult as there are too many competing interests and too many linkages with other issues that have little or nothing to do with reforming the Senate.

8.12. I believe that notwithstanding the testimony received by the Legal Affairs Committee in its hearings on the Bill and summarized above that the constitutional experts Peter Hogg,³⁶ Patrick J. Monahan,³⁷ Stephan Allen Scott³⁸, Richard Simeon³⁹ and Gerard-A. Beaudoin⁴⁰ hold the better view, namely that the specificity of the changes in the 1982 Constitution Act overtake the Supreme Court’s 1980 ruling in *The Upper House Reference*. It is noteworthy that Peter Hogg confirmed his view following a review of the contrary opinions heard by the Legal Affairs Committee and has forwarded a letter dated June 5, 2007 to that effect to the committee.

8.13. With regard to the recommendation made by the Legal Affairs Committee that the Senate should not proceed with the Bill until the Supreme Court has ruled with respect to its constitutionality, it should be remembered that parliamentarians are often faced with doubts as to whether a measure that is before them meets strict constitutional tests. In the normal course, they resolve this difficulty by taking the constitution into account during their deliberations as a guide to assist in deciding whether or not they vote for or against a measure. The roles of parliament and the courts are separate and distinct. As a basic principle, the primary role of parliament is to deal with the good of the community as a whole and the role of the courts is to deal with the constitutional correctness of parliament’s actions. There are no precedents to my knowledge of the

³⁶ Proceedings of Special Committee on Senate Reform, Issue 4.

³⁷ Proceedings of Special Committee on Senate Reform, Issue 5.

³⁸ Proceedings of Special Committee on Senate Reform, Issue 5.

³⁹ Proceedings of Special Committee on Senate Reform, Issue 4.

⁴⁰ Proceedings of Special Committee on Senate Reform, Issue 5.

Senate refusing to complete its deliberations on a Senate public bill because it was waiting for an opinion of the Supreme Court. Clearly, the Senate has an obligation to use its best judgment as to whether the Bill falls within parliament's constitutional competence but not to interrupt its deliberations pending a Supreme Court of Canada opinion.

8.14. I believe it to be in keeping with the legislative role of parliament to vote a matter up or down and would have preferred to see this approach taken by the committee. Particularly, because I believe that if C-43 came before the Senate, it would be voted down given the points of view of Quebec, Ontario and New Brunswick. The Senate carrying out its role of regional representation would be properly responsive to that concern. And the Bill on its own, amended, as it has been, to provide for a reasonably long fixed term that is non-renewable, is outside the narrow hypothetical construct of facts linking the Bill and C-43 to a section 42 amendment. As it stands, the issue of terms for senators is unfortunately delayed by an attempt to bring the provinces into the issue of renewing the Senate much too soon, which is unfortunate because they have no motivation to address the issue at this time. In fact, as I understand it, British Columbia, Saskatchewan, Manitoba and Ontario who represent much more than 50% of the population favour abolishing the Senate as their preferred approach to Senate reform.

4. What's next?

8.15. As a parting comment, my response to the question posed by my friend Senator Joyal and to colleagues, is that the first-phase Senate modernization proposal needs urgent attention. A well-constructed recommendation from the Rules Committee, which has a reference to do just that, would, I believe, be welcomed by the House of Commons and the Government of the day; in particular, if the proposal came with bipartisan support. And again, the progress of Lords Reform is instructive. Reform of the Lords is progressing toward the end of the equivalent of my proposed phase-one modernization and the United Kingdom is advancing toward a reform involving election as proposed for consideration in my suggested phase two. My closing comment on the question is that we should remember the concluding words of the first paragraph of the preamble to the *Constitution Act of 1867*. "...The provinces of Canada...be federally united...with a constitution similar in principle to that of the United Kingdom." A valued guide that we should continue to embrace and in so doing recognize the dynamic nature of constitutional matters and follow the good example of the Parliament at Westminster.

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Appendix I

Draft Bill S-

An Act to amend the *Constitution Act, 1867*

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

1. This Act may be cited as the *Senate Modernization Act (2007)*.

Interpretation

2. The following definition applies to this Act:

“Sitting day” means a sitting day of the House of Commons.

Qualifications of a senator

3. Section 23 of the *Constitution Act, 1867* is amended as follows.

- (a) Subsection 23(1) is replaced by the following:

“The senator shall be a qualified elector in Canada.”

- (b) Subsection 23(2) is replaced by the following:

“The senator shall be a citizen of Canada.”

- (c) Subsections 23(3) and 23(4) are repealed.

- (d) Subsection 23(5) is replaced by the following:

“The senator shall be resident in the Province for which the senator is appointed.”

- (e) Subsection 23(6) is replaced by the following:

“In the case of Quebec, the senator shall have a Real Property Qualification worth four thousand dollars over and above debts and liabilities in the Electoral Division for which the senator is appointed, or shall be resident in that Division.”

- (f) The following new subsection is added immediately after

subsection 23(6):

“The qualification of a senator shall comply with the eligibility guidelines for appointment to the Senate established by a commission to be appointed by the Prime Minister of Canada and to be called the Senate Appointments Commission.”

Summons of a senator

4. Section 24 of the Act is amended as follows:

(a) Section 24 shall be re-numbered subsection 24(1);

(b) The following shall be added immediately after subsection 24(1):

“24(2) The Prime Minister of Canada shall consult with the Leader of the Opposition in the House of Commons and the Senate Appointments Commission in relation to the recommendation of the names of senators once a Government has a secure majority of members in the Senate.”

Addition of senators in certain cases

5. Section 26 of the Act is amended as follows:

(a) Section 26 shall be re-numbered subsection 26(1);

(b) The following shall be added immediately after subsection 26(1):

Resolving Legislative Disagreements

26(2) “When the Senate insists upon an amendment it has made to a government bill after receiving from the House of Commons a message that it does not agree with that amendment, a conference of the two houses of parliament shall be held within twenty sitting days and the report by the conference committee shall be prepared within ten sittings days and placed before the two houses of parliament and voted upon within twenty sitting days, without amendment; provided that if there is no agreement on the amendment following the vote, the government may re-introduce the bill again in the same parliamentary session.

Retirement upon attaining the age of seventy-five years

6. Section 29 of the Act is repealed.

Disqualification of senators

7. Section 31 of the Act is amended as follows:

(a) Subsection 31(1) is replaced by the following:

“If the Senate agrees by a six-tenth majority that a senator failed to meet its attendance requirements.”

(b) Subsection 31(2) is repealed.

(c) Subsection 31(3) is replaced by the following:

“If the senator is adjudged Bankrupt.”

(d) Subsection 31(4) is replaced by the following:

“If the senator is convicted of an indictable offence or violates the public trust.”

(e) Subsection 31(5) is replaced by the following:

“If the senator ceases to be qualified in respect of Residence; provided, that a senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of the senator residing at the Seat of Government of Canada while holding an Office under that Government requiring the presence of the senator there.”

Summons on Vacancy in Senate

8. Section 32 of the Act is amended as follows:

(a) Section 32 of the Act is re-numbered subsection 32(1);

(b) The following subsection shall be added immediately after subsection 32(1):

“32(2). The Prime Minister of Canada shall within 180 days after the Governor General is notified of the Vacancy propose the name of a candidate to fill any vacancy in the Senate.”

Appointment of Speaker of the Senate

9. Section 34 of the Act is amended as follows:

(a) Section 34 shall be re-numbered subsection 34(1);

(b) The following shall be added immediately after subsection 34(1):

Consultation with the Senate on Choice of Speaker

34(2) “The Prime Minister of Canada shall consult with the Senate in relation to the recommendation of the Speaker of the Senate and shall nominate to the Governor General its choice of Speaker.”

10. The Fifth Schedule of the Act is amended in the portion dealing with the Oath of Allegiance by adding the following:

Oath of Allegiance for Members of the Senate of Canada

“I, A.B., do swear that I will be faithful and bear true Allegiance to Her Majesty Queen Elizabeth II and to Canada”

Coming Into Force

11. This Act comes into force on a day to be fixed by order of the Governor in Council.

Appendix II

THE SENATE

Number of Senators **21.** The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators. ⁽¹¹⁾

Representation of Provinces in Senate **22.** In relation to the Constitution of the Senate Canada shall be deemed to consist of *Four* Divisions:

1. Ontario;
2. Quebec;
3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;

which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory and the Northwest Territories shall be entitled to be represented in the Senate by one member each.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada. ⁽¹²⁾

Qualifications of Senator **23.** The Qualifications of a Senator shall be as follows:
(1) He shall be of the full age of Thirty Years:
(2) He shall be either a natural-born Subject of

the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union:

- (3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-allevu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same:
- (4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities:
- (5) He shall be resident in the Province for which he is appointed:
- (6) In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division. ⁽¹³⁾

Summons of Senator **24.**

The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

[Repealed] **25.**

Repealed. ⁽¹⁴⁾

Addition of Senators in certain cases **26.**

If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the

Senate accordingly. ⁽¹⁵⁾

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| Reduction of Senate to normal Number | 27. | In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty-four Senators and no more. ⁽¹⁶⁾ |
| Maximum Number of Senators | 28. | The Number of Senators shall not at any Time exceed One Hundred and thirteen. ⁽¹⁷⁾ |
| Tenure of Place in Senate | 29. | (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

(2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years. ⁽¹⁸⁾ |
| Retirement upon attaining age of seventy-five years | | |
| Resignation of Place in Senate | 30. | A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant. |
| Disqualification of Senators | 31. | The Place of a Senator shall become vacant in any of the following Cases:
<ol style="list-style-type: none">(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate:(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power:(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:(4) If he is attainted of Treason or convicted of Felony or of any infamous Crime:(5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason |

only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

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| Summons on Vacancy in Senate | 32. | When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy. |
| Questions as to Qualifications and Vacancies in Senate | 33. | If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate. |
| Appointment of Speaker of Senate | 34. | The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead. ⁽¹⁹⁾ |
| Quorum of Senate | 35. | Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers. |
| Voting in Senate | 36. | Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative. |

Appendix III

PART V PROCEDURE FOR AMENDING CONSTITUTION OF CANADA⁽⁹⁹⁾

- General procedure for amending Constitution of Canada** **38.** (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
- (a) resolutions of the Senate and House of Commons; and
 - (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.
- Majority of members** (2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).
- Expression of dissent** (3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.
- Revocation of dissent** (4) A resolution of dissent made for the

purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation

- 39.** (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation

- 40.** Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

- 41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
- (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
 - (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

- (c) subject to section 43, the use of the English or the French language;
- (d) the composition of the Supreme Court of Canada; and
- (e) an amendment to this Part.

Amendment by general procedure

- 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.

Exception

- (2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces

- 43.** An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
- (a) any alteration to boundaries between provinces, and
 - (b) any amendment to any provision that relates to the use of the English or the French language within a province,

	<p>may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.</p>
Amendments by Parliament	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.
Amendments by provincial legislatures	45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.
Initiation of amendment procedures	46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.
Revocation of authorization	(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.
Amendments without Senate resolution	47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.
Computation of period	(2) Any period when Parliament is

prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Advice to issue proclamation

- 48.** The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

- 49.** A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.