RESPONDENT'S MEMORANDUM
Table of Contents

VOL. PAGE

Senate Reference – Quebec Court of Appeal
Draft Factum of the Attorney General of Canada

Draft: July 10 - pm

PART I- FACTS

I - Overview

1. The Government of Quebec has referred three questions to this Court raising the constitutionality of Bill C-7, the *Senate Reform Act*,[1] which would impose a nine-year term limit on Senate appointments and which would permit consultation of electors on their preferences for Senate nominees who may be appointed by the Governor General on the recommendation of the Prime Minister.

2. Bill C-7 is valid federal legislation which respects the procedures for constitutional amendment adopted in 1982 in Part V of the *Constitution Act, 1982*.

3. Unlike the situation at the time of the 1980 *Upper House Reference*, Canada now has a constitutional text which comprehensively sets out the rules for amending the Constitution and for achieving Senate reform, rules which respond to and overtake the Supreme Court of Canada's (SCC) previous opinion on proposed Senate reform based on the interpretation of former s. 91(1) of the *British North America Act*. Part V of the *Constitution Act, 1982* is a complete code and exhaustively describes the procedures for implementing any proposed reforms that may require constitutional amendment.

4. Part V sets out what sorts of constitutional amendments require provincial consultation and consent. In relation to the Senate, they are four in number: the powers of the Senate; the method of selecting Senators; the number of Senators to which each province is entitled; and residence qualifications. Any other changes to the Senate can be made by the Parliament of Canada alone.

---

[1] *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits (the Senate Reform Act)*, 41st Parl., 1st sess. (First reading June 21, 2011)("*Senate Reform Act*" or "Bill C-7")

5. The plain language of ss. 38-44 of Part V, the history of Senate reform and amending procedure reform, and the ordinary rules of statutory interpretation all support Parliament's authority to make the reforms proposed in Bill C-7. Except for the four matters mentioned in section 42, Parliament has the exclusive authority to make laws amending the Constitution in relation to the executive government of Canada, the Senate, and House of Commons. Term limits for Senators, and the consultative process on electors' preferences for Senate appointments (persons who would still need to be summoned by the Governor General on the recommendation of the Prime Minister), are not among the four matters set out in section 42 of the *1982 Act*. Parliament may effect these changes.

6. In answer to question 1, Bill C-7 would not make any constitutional change in relation to the office or powers of the Governor General – the Governor General would continue to appoint Senators pursuant to s. 24 of the *Constitution Act, 1867* and always on the recommendation of the Prime Minister in accordance with established constitutional convention.

7. In answer to question 2, Bill C-7 does not make any change in relation to the existing method of selecting Senators – Bill C-7 permits the Prime Minister to inform himself or herself as to the preferences of electors for Senate appointment, when formulating his or her recommendation to the Governor General; the Governor General would still appoint Senators pursuant to s. 24 of the *Constitution Act, 1867*, on the advice of the Prime Minister. This is consistent with the present constitutional requirements.

8. In answer to question 3, the methodology employed by the Supreme Court of Canada in 1980 for identifying matters beyond the scope of the Parliament of Canada's legislative authority and requiring resort to the United Kingdom Parliament for amendments to the Constitution of Canada, and by convention some degree of provincial consent, has been overtaken by the amending procedures set out in Part V of the *Constitution Act, 1982*. There is no warrant for reading "fundamental features or essential characteristics" of the Senate as

unwritten exceptions to the text of s. 44 in addition to the exceptions already provided for in s. 42.

II - The Constitution and the Senate

A. The *Constitution Act, 1867* and the Composition of the Senate

9. The *Constitution Act, 1867*[2] creates the Senate, provides for its members and informs its role. The preamble records the desire of the original provinces to be "federally united into One Dominion under the Crown…with a Constitution similar in Principle to that of the United Kingdom". Section 17 establishes the Parliament of Canada, consisting of the Queen, an "Upper House styled the Senate", and the House of Commons.

10. Sections 21 and 22 set out the total number of Senators (105) and that the Senate shall be deemed to be made up of four divisions equally represented by 24 Senators. Ontario and Quebec comprise the first and second divisions and each have 24 Senators, with Quebec's Senators representing each of the 24 electoral divisions set out in schedule A to Chapter one of the pre-Confederation Consolidated Statutes of Canada. The Maritime Provinces form the third division, with its seats divided between Nova Scotia (10), New Brunswick (10) and Prince Edward Island (4). The Western provinces comprise the fourth division, with British Columbia, Alberta, Saskatchewan and Manitoba each having six senators. When Newfoundland and Labrador joined Confederation, it was provided with six Senators. The Yukon Territory, the Northwest Territories and Nunavut each have one Senator. Furthermore, section 26 allows for the addition of up to eight Senators divided equally among the four divisions.

11. Section 23 describes the qualifications of a Senator: that he or she be 30 years of age, a natural-born or naturalized Canadian, owner of land of a value of more than $4,000, resident of the Province for which he or she is appointed, and in the case of Quebec own his or her land or reside in the Electoral Division (24) for which he or she is appointed.

---

[2] *Constitution Act, 1867*, 30 & 31 Vict., c. 3; R.S.C. 1985 App. II, No. 5 [*Constitution Act, 1867*]

12. Section 24 of the *Constitution Act, 1867* provides that the Governor General shall, from time to time and in the Queen's name, summon qualified persons to the Senate. However, by operation of a long-established constitutional convention as memorialized in a 1935 Minute of Council, it is the sitting Prime Minister who recommends appointments to the Governor General, who then accepts the recommendations. [3]

13. Section 29, as amended by Parliament in 1965, provides that a Senator must retire at age 75.

14. Finally, section 91 deals with the legislative authority and powers of Parliament. It provides that the Queen is empowered to make laws for the peace, order and good government of Canada, by and with the advice and consent of the Senate and House of Commons.

B. The *Constitution Act, 1982*

15. Part V of the *Constitution Act, 1982*[4] comprehensively sets out the procedures for amending the Constitution. There are five procedures: the "7/50" or "general" procedure (s. 38); the "unanimous consent" procedure (s. 41); the "some but not all provinces affected"[5] procedure (s. 43); the federal legislative procedure (s. 44); and the provincial legislative procedure (s. 45).

16. Section 38 sets out the general procedure. An amendment under this provision may be made where it is authorized by resolutions of the Senate and the House of Commons, as well as resolutions of the legislative assemblies of at least two-thirds of the provinces that have at least fifty percent of the population of all the provinces. This is usually described as the "7/50" amending procedure.[6]

---

[3] Hawkins, Robert E. *Constitutional Workarounds,* The Canadian Bar Review, [vol. 89, 2010] p. 10 citing Order-in-Council titled, " Memorandum regarding certain of the functions of the Prime Minister" Minute of Meeting of the Committee of the Privy Council, PC 3374, October 25, 1935, AGC Authorities, Tab ZZZ

[4] *Constitution Act, 1982*, c. 11(U.K.) Schedule B

[5] To use Professor Hogg's phrase: P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Toronto: Carswell, 2007 (loose-leaf), Vol. 1, p. 4-12 ("Hogg"), AGC Authorities, Tab ZZZ

[6] S. 38(2)(3) permits a province to opt out of an amendment that derogates from the province's rights, privileges or legislative powers.

17. An amendment to the Constitution in relation to certain matters set out in section 42 of the *Constitution Act, 1982*, can be made only by use of the s. 38 process. For this Reference, the relevant sub-sections of s. 42 are:

> (*b*) the powers of the Senate and the method of selecting Senators; and
>
> (*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators.

18. Section 41 of the *Constitution Act, 1982* sets out matters in relation to which a constitutional amendment must be authorized by resolutions of the Senate, the House of Commons, and the legislative assemblies of each of the ten provinces. The matters subject to the "unanimous consent" procedure are:

> (*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.

19. Section 43 of the *1982 Act* sets out a procedure ("some but not all provinces affected") which governs amendments not relevant to all provinces, that is an amendment to a provision of the Constitution that applies to one or more, but not all of the provinces such as the amendment in relation to s. 93 of the *Constitutional Act, 1867* and denominational schools (s. 93A)[7].

20. Amendment of provincial constitutions is dealt with in s. 45.

21. Finally, section 44 provides that subject to amendments in relation to matters specifically set out in sections 41 and 42 of the *Constitution Act, 1982*, Parliament may exclusively make laws amending the Constitution in relation to the executive government of Canada or the Senate and the House of Commons.

---

[7] *Constitution Amendment, 1997 (Quebec) - Potter v. Quebec (Attorney General),* [2001] R.J.Q. 2823 (C.A.), AGC Authorities, Tab ZZZ

22. By virtue of section 47 of the *Constitution Act, 1982*, an amendment may be made under sections 38, 41, 42 or 43 without a resolution of the Senate authorizing the proclamation of the amendment if, within 180 days after the adoption by the House of Commons of a resolution authorizing an amendment, the Senate has not adopted such a resolution, and if the House of Commons then again adopts the resolution. In other words, the Senate has no permanent veto over constitutional amendments made under the general amending procedure, the unanimous consent procedure or the "some but not all provinces" procedure.

23. The Constitution has been amended through these procedures eleven (11) times since 1982. Amendments have most often taken place through section 43 of the *Constitution Act, 1982*; however, both section 38 and section 44 have also been used to amend the Constitution; the latter most recently in 2011.[8]

III - Recent Legislative Initiatives for Senate Reform

A. Bill C-7 is Currently before Parliament

24. Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits* (the "*Senate Reform Act*"), was given first reading on June 21, 2011.

25. The preamble to the proposed *Senate Reform Act* expresses the need for representative institutions to evolve in accordance with the principles of modern democracy. The preamble also highlights the need for the tenure of Senators to be consistent with modern democratic principles and the desire of Parliament to maintain the Senate as a chamber of independent, sober second thought.

---

[8] The most recent amendment under s. 44 is an *Act to Amend the Constitution Act, 1867, the Electoral Boundaries Readjustment Act and the Canada Elections Act* (*Fair Representation Act)*, S.C. 2011, c. 6. For a summary of all amendments, see Newman, Warren J., *Living with the Amending Procedures: Prospects for future Constitutional Reform in Canada*, Supreme Court Law Review (2007), 37 S.C.L.R. (2d) p. 385, p. 387, (footnote 19); p. 395 (footnotes 54 and 55); AGC Authorities Tab ZZZ..

26. Section 3 of the *Senate Reform Act* provides that if a province or territory enacts legislation that is in substantial accordance with the schedule to the Act, which in turn sets out the framework for selection of Senate nominees, the Prime Minister, in recommending Senate appointments to the Governor General, must consider names from the most current list of nominees selected for that province or territory.

27. The *Senate Reform Act* does not establish a framework for the direct election of Senators, nor is the Prime Minister required to recommend or the Governor General to appoint a nominee from the list of nominees selected for a province or territory. The process is consultative and non-binding.[9]

28. Section 4 of the *Senate Reform Act* provides that a person who was summoned to the Senate after October 14, 2008, but before the coming into force of that section, remains a Senator for nine years after the coming into force of that section. A person whose term is interrupted may be summoned again for a period of nine years, less the portion of the term served after the coming into force of that section.[10]

29. Section 5 of the *Senate Reform Act* would replace s. 29 of the *Constitution Act, 1867* and would limit Senators summoned after the coming into force of the legislation[11] to one term of nine years. Regardless of when summoned, a person who reaches the age of 75 years must cease to be a Senator at that time.[12]

---

[9] Bill S-8, An Act respecting the selection of senators, 40th Parl. 3d Sess. (First reading, April 27, 2010) ("*Senatorial Selection Act*" or "Bill S-8"), was the first of the recent federal bills to propose a framework for the selection of Senators through provincial legislation.AGC Record, vol. 1, Tab 7, p. 111.

[10] Bill C-7, The *Senate Reform Act*, s.4 (1) and (2), AGC Record, vol. 1, tab 2, p.11. This is substantially similar to Bill C-10, AGC Record, vol. 1, tab 5, p. 99, which died on the order paper when Parliament was dissolved on March 26, 2011, except the term limit in that bill was eight years. See also Bill S-7, the proposed *Constitution Act, 2009 (Senate term limits)*, AGC Record, vol. 1, tab 6, p. 105, introduced on May 28, 2009, and Bill C-19, the proposed *Constitution Act, 2007 (Senate tenure)*, AGC Record, vol. 1, tab 8,p. 133, introduced on November 13, 2007.

[11] This part of the law would be called the *Constitution Act, 2011 (Senate term limits)* and be deemed to be part of the Constitution.

[12] Bill C-7, s.5, AGC Record, vol. I, Tab 2, p.11

B. Other Recent Bills dealing with Senate Reform

30. Bill S-4, the proposed *Constitution Act, 2006* (terms limits) and Bill C-20, the *Senate Appointment Consultations Act* (on the Senate nominee consultative process) are not before the current Parliament. However, Bill S-4 was the subject of reports by both the *Special Senate Committee on Senate Reform* and the *Senate Standing Committee on Legal and Constitutional Affairs*. The reports of both committees are discussed further below. Similarly, the House of Commons, through the House order of reference of February 13, 2008, struck a Legislative Committee on Bill C-20.[13] Although the Committee heard from witnesses, a final report was not issued as the legislation died on the order paper when that Parliament ended.

IV - Record before the Court in this Reference

31. The parties have filed a considerable amount of evidence, primarily consisting of public documents that provide historical context. In addition, there are a number of original expert reports from political scientists and lawyers with respect to the role and functions of the Senate. Some of this evidence provides further historical and political context relating to the Senate and the evolution of the Constitution. However, some expert reports, such as those of Professors Heard and Desserud filed by Quebec, are merely legal argument offered by political scientists. Lawyer Henry Brown's report filed by Senator Joyal is blatantly a legal opinion.

32. The Attorney General of Canada has filed an extensive historical record detailing various aspects of Senate history, Senate reform initiatives, and constitutional reform. The Attorney General of Canada has also filed reply evidence to the expert opinions filed by Quebec and the Fédération des communautés

[13] Legislative Committee on Bill C-20, hearings, Wednesday March 5, 2008. AGC Record, vol. 8, tab 47, p. 2902. Bill C- 20 died on the order paper when Parliament was dissolved on September 7, 2008. It set out a national consultation process for potential Senate appointees run through the federal election process, as did its predecessor, Bill C-43, AGC Record, vol. 1, tab9, p. 139, which had been introduced on December 13, 2006. The successor to those bills, Bill S-8, AGC Record, vol. 1, tab 7, p. 111, provided for a provincially regulated election process.

francophones et acadienne du Canada ("FCFA") in the form of reports by two political scientists: Professor Christopher Manfredi, and Dr. John Stilborn

A. Christopher Manfredi[14]

33. Professor Manfredi discusses a number of issues concerning the Senate's representative role. He examines the history of the Senate as a body concerned with regional representation, and how Bill C-7 will have no effect on the distribution of seats to the provinces or regions. He also notes that the representation of other politically-underrepresented groups was not part of the Senate's original function, and that Bill C-7 has no impact on such representation. He has performed a statistical analysis which suggests that the appointive process of selection for the Senate has not been materially better at achieving representation of politically-unrepresented groups than has the elective principle in relation to the House of Commons. He also discusses Bill C-7 in light of Senate independence, concluding that the reforms would not adversely affect the independence, continuity and long-term perspective the Senate contributes to the legislative process.

B. John Stilborn[15]

34. Dr. Stilborn reviews the work of the Senate from its inception to the present date and looks at a number of reports on Senate reform over the years in order to provide some historical context for the current legislation before Parliament. Primarily, his report covers a range of reform initiatives such as term limits, method of selection, electoral systems, the distribution of seats and the powers of the Senate. Specifically, he compares how each report deals with some or all of those matters. This inventory of past proposals provides a useful context in which to evaluate the legal arguments at the centre of this reference.

---

[14] Christopher P. Manfredi, An Expert Opinion on the possible effects of Bill C-7 (May 2013), AGC Record, Vol. 12 , Tab 123, p. 3978 ("Manfredi Opinion")

[15] John A. Stilborn, Expert Report (May 2013), AGC Record, Vol. 12, Tab 124, p. 4138 ("Stilborn Report")

V - Senate Review of Proposed Legislative Reforms

35. The Attorney General of Quebec's record in this Reference is highly selective on what has been written and said about Senate term limits and the consultative process on electors' preferences for Senate appointments. A more complete and balanced perspective is found in the Attorney General of Canada**'**s record of reports on Senate reform proposals, notably the reviews by different committees of the Senate.[16]

A. Report of the Special Senate Committee on Bill S-4 (October, 2006)

36. On June 21, 2006, the Senate struck a Special Committee on Senate Reform primarily to review the subject matter of Bill S-4, *An Act to amend the Constitution Act, 1867 (Senate tenure)* which would have limited new Senators to a term of eight years. Hearings were held in September of 2006 and 26 witnesses, including the Prime Minister, appeared before the Committee.[17]

37. The report addressed three issues: first, how an amendment to the Constitution would be made to alter the senatorial terms; second, what impact term limits would have on the Senate and the Canada's democratic process; and third, what might be the potential effect of consultative processes (notwithstanding the fact that Bill S-4 did not raise that issue).[18] The Committee's Report, which will be discussed further below concluded that term limits would be "an improvement to Canada's Senate" and that s. 44 of the *Constitution Act, 1982* was the correct procedure to accomplish this reform.[19]

---

[16] Special Senate Committee on Senate Reform, *Report on the subject-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)* (October 2006), p. 1 and Appendix "A". ("Special Senate Committee Report").AGC Record, Vol. 6-11

[17] Special Senate Committee Report, .AGC Record, vol. 3. Tab 25, p.1000, 1041- 1043

[18] Special Senate Committee Report, pp. 2-3 AGC Record, vol. 3. Tab 25, p.1007-1008

[19] Special Senate Committee Report, p. 29, AGC Record, vol. 3. Tab 25, p.1034-1035

B. Report of the Senate Standing Committee on Legal and Constitutional Affairs on Bill S-4 (June 2007)

38. The Senate Standing Committee on Legal and Constitutional Affairs also reviewed Bill S-4. This Committee expressed doubt that s. 44 could be used to pass term limits and recommended referral of the bill to the Supreme Court of Canada for its opinion.[20]

39. Some provincial governments by that time (New Brunswick, Newfoundland and Labrador, and Quebec, although Quebec was initially supportive before the Special Senate Committee) were opposed to Bill S-4,[21] some (Alberta and Saskatchewan) found it acceptable,[22] and others (British Columbia and Ontario) favoured abolition of the Senate or stated that Senate reform was not a priority of the provincial government.[23] The other provinces did not express an opinion.

C. House of Commons Review of Bill C-20

40. A Legislative Committee of the House of Commons was struck to hold hearings and review Bill C-20, the *Senate Appointments Consultations Act* that followed Bill C-43, the latter having died on the order paper. Some hearings were held but a report was not issued as the Bill died on the order paper at the end of the relevant Parliamentary session.[24]

VI - Senate Reform in Historical Context

41. The current proposals in Bill C-7 for term limits, and consultative processes reflect decades of study on Senate reform. That history informs not only the

---

[20] Report of the Senate Standing Committee on Legal and Constitutional Affairs("Standing Senate Committee Report") , June 12, 2007, p. 31-33, AGC Record, vol. 4, Tab 27, p. 1219-1221.
[21] Standing Senate Committee Report , pp. 25-30: AGC Record, vol. 4. Tab 27, p.1213-1218
[22] Standing Senate Committee Report, p. 30: AGC Record, vol. 4. Tab 27, p.1218
[23] Standing Senate Committee Report, p. 26 and 30: AGC Record, vol. 4. Tab 27, p.1214, 1220. Before the Special Senate Committee on Senate Reform, Minister Bountrogianni of Ontario clearly stated the view of Ontario was to favour abolition of the Senate. AGC Record, vol. 10. Tab 80, p.3503**.**
[24] Commons Legislative Committee on Bill C-20, March – June 2008, AGC Record, vol. 8-9. Tabs 47-55, p.2902-3169

current reform proposals, but is relevant to understanding the provisions in Part V of the *Constitution Act, 1982* dealing with Senate reform.

A. Legislative and Other Proposals

42. Since 1867, the only reform worthy of note to the Senate occurred in 1965. In enacting the *Constitution Act, 1965*, S.C. 1965 c.4, Parliament acting alone amended s. 29 of the *Constitution Act, 1867* (then known as the *British North America Act, 1867*) to require members of the Senate to retire at age 75. That legislative action has never been challenged and was upheld by the Supreme Court of Canada in the Upper House Reference.[25]

43. A more ambitious reform effort was embodied in Bill C-60, the proposed *Constitutional Amendment Act*, introduced on June 20, 1978, but never passed. This legislation, which reflected discussions about modernizing and patriating the Constitution, sought to replace the Senate with a "House of the Federation."[26] Half of the members of this House were to be selected by the House of Commons and the other half were to be selected by the provincial legislatures. Members from the territories were to be selected by the Governor in Council.[27] Members of the House of the Federation would have held office until the next general election of the selecting body.[28] Members would have been selected from a nomination list that would reflect the political preferences of the voters in the last federal or provincial general election and would be based on the total number of votes cast for each political party.[29]

44. Bill C-60 reflected evolution in the broader political culture of that time by requiring double majority voting in the Senate "to provide special protection for

---

[25] *Re: Authority of Parliament in Relation to the Upper House* [1980] 1 S.C.R. 54 at p. 65, AGC Authorities, Tab 19 ("*Upper House Reference*").
[26] Bill C-60, An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to other matters30th Parl., 3d Sess. (First reading, June 20, 1978), s. 56, AGC Record, vol. 1. Tab 13, p. 244
[27] Bill C- 60 s. 63(1), AGC Record, vol. 1. Tab 13, p. 246
[28] Bill C- 60 s. 63(5), AGC Record, vol. 1. Tab 13, p. 247
[29] Bill C- 60 s. 64(2), AGC Record, vol. 1. Tab 13, p. 249

the two major linguistic communities within a proposal primarily focused on improving regional representation."[30]

45. On June 7, 1985, a resolution for an amendment to the Constitution in relation to the powers of the Senate was introduced in the House of Commons. The resolution was made pursuant to the general amending procedure under s. 38 of the *Constitution Act, 1982*. It was aimed at restraining the powers of the Senate, and would have provided that money bills and ordinary legislation not passed by the Senate could nonetheless be presented for Royal Assent.[31] It did not receive the required support from the provincial legislative assemblies.

46. The *1987 Constitutional Accord*, signed by the Prime Minister and the ten provincial Premiers on June 3, 1987, (the Meech Lake Accord) sought to add a new s. 25 to the *Constitution Act, 1867*. The amendment proposed that when a vacancy occurred in the Senate in relation to a province, that province's government would submit names to the Queen's Privy Council for Canada of persons to fill the vacancy. The new Senator had to be chosen from the list of names submitted by the province, and had to be acceptable to the Queen's Privy Council.[32] The First Ministers agreed that this process would apply on an interim basis until the Accord was ratified; however it failed to obtain the unanimous support of the provinces. Prior to abandoning this process, the then Prime Minister Mulroney had recommended and the Governor General had appointed four (4) Senators whose names were submitted by the Government of Quebec.[33]

47. The 1992 *Charlottetown Constitutional Accord*, a unanimous agreement of First Ministers as well as territorial and Aboriginal representatives, provided that the Constitution should be amended to provide for an elected Senate. The final text of the Consensus Report on the Constitution noted that elections would be either directly by the population of the provinces or territories or indirectly through their

---

[30] Bill C-60, s. 69, AGC Record, vol. 2. Tab 13, p. 252-256; Stilborn Report, , AGC Record, vol. 12, Tab 124, para 25, p. 4150-4151..
[31] Resolution, *Constitution Amendment, 1985 (Powers of the Senate)*, AGC Record, vol. 1. Tab 15, p.297.
[32] *1987 Constitutional Accord*, June 3, 1987, art. 2, AGC Record, vol. 4. Tab 28, p 1268.. See also the "Guide to the Meech Lake Constitutional Accord" AGC Record, vol. 4. Tab 28, p 1258.
[33] Roch Bolduc, Jean-Marie Poitras, Gérald A. Beaudoin and Solange Chaput-Rolland.

respective legislative assemblies. Federal legislation was to govern the elections, but it was to be "sufficiently flexible" to allow for gender equality in the Senate. The election was to take place as soon as possible and, if feasible, before the next general election for the House of Commons.[34] The Charlottetown Accord also contemplated a Senate of six representatives from each province, one from each territory, as well as seats for Aboriginal peoples.[35] Ultimately, the Accord failed to achieve sufficient support in a national referendum, and it was not considered by legislative assemblies.

B. Recommendations from Reports on Senate Reform

48. Senate reform has also been the subject of numerous proposals and reports. This section briefly summarizes the key elements of the major proposals, including the position of various legislative and other bodies on the primary issues of term limits, and method of selection of Senators, and powers of the Senate.[36]

49. As early as 1874 there was a proposal in the House of Commons to allow the provinces to choose Senators. A number of proposals ensued in the following years, culminating in a 1909 Senate debate on term limits and abolition.[37] During the 1960s and 1970s, reformers emphasized the rehabilitation of the appointed Senate by recommending the amendment of the appointment process to give the provinces a role. The most notable development in this era was the introduction of Bill C-60 in 1978, which, as mentioned earlier, would have abolished the Senate and replaced it with a "House of the Federation." It provided for members to be chosen by provincial legislative assemblies and the House of Commons on the basis of proportional representation.[38] A second set of proposals in this era, based on the West German Bundesrat model, sought to give exclusive power of

[34] *Consensus Report on the Constitution: Final Text* (1992), s. 7, AGC Record, Vol. 4, Tab 29, p. 1309 ("*Charlottetown Accord*").
[35] *Charlottetown Accord, 1992*, s. 4, AGC Record, vol. 4 Tab 29, p. 1309.
[36] A fuller account is found in the Manfredi Opinion, AGC Record, vol. 12. Tab 123, p 4022 and the Stilborn Report, AGC Record, vol. 12. Tab 124, p.4138.
[37] Stilborn Report, para 44ff, AGC Record, vol. 12. Tab 124, p.4157ff.
[38] Stilborn Report, paras 47- 50, AGC Record, vol. 12. Tab 124, p.4157-4159; Bill C-60, AGC Record, vol.1, Tab 13,p. 223-292.

appointment to the Senate to the provinces in an attempt to make the Senate a proxy for provincial governments.[39]

50. The post-1980 period has been characterized by proposals seeking greater legitimacy for the Senate through direct elections. A series of proposals, starting with that of the (non-governmental) Canada West Foundation in 1981, through the Charlottetown proposal of 1992, have sought to make the Senate an elected body.[40]

51. With respect to major aspects of Senate reform—term limits, method of selection, and powers—the main proposals of the last 50 years may be summarized as follows:

i) Term Limits

-The 1972 Joint Committee of the Senate and the House of Commons chaired by Senator Gildas L. Molgat and Mark MacGuigan (M.P.) made no recommendations on term limits, but did suggest Senators should retire at age 70.[41]

-The 1980 Senate Standing Committee on constitutional and Legal Affairs (Lamontagne Report) suggested fixed terms of ten years with the possibility of a renewal for an additional five years based on a secret ballot of a committee of the Senate.[42]

-The 1981 report entitled *Regional Representation: The Canadian Partnership*, prepared by the Canada West Foundation, recommended terms that were to last the life span of two Parliaments.[43]

-The 1984 Special Joint Committee of the Senate and the House of Commons on Senate Reform (Molgat-Cosgrove Report) suggested that there should be a non-renewable term of nine years.[44]

-The 1985 Alberta Select Special Committee on Upper House Reform report recommended that a Senator's term would be the life of two Parliaments.[45]

---

[39] Stilborn Report, para 51, AGC Record, vol. 12. Tab 124, p.4159.
[40] Stilborn Report, paras 52-54, AGC Record, vol. 12. Tab 124, p.4159-4160.
[41] AGC Record, vol.1 Tab 16, p. 301
[42] AGC Record, vol.1. Tab 17, p.347
[43] AGC Record, vol.5. Tab 34, p. 1630
[44] AGC Record, vol.2. Tab 19, p.454
[45] AGC Record, vol.5. Tab 35, p. 1684

-The 1985 *Royal Commission on the Economic Union and Development Prospects for Canada (MacDonald Commission)* recommended that Senate terms be the same as the House of Commons.[46]

-The 1991 federal government "White Paper" entitled "Responsive Institutions for a Modern Canada" proposed that elections for the Senate would coincide with those of the House of Commons and terms would be the same as the House of Commons.[47]

-The 1992 report of the Special Joint Committee of the Senate and the House of Commons (Beaudoin-Dobbie) proposed that terms be limited to six years.[48]

ii) Method of Selection

-The 1972 Molgat-MacGuigan report suggested that half of the Senators should be appointed by the federal government and the other half by the provinces or territories ("mixed appointment model").[49]

-The 1979 Report on the Task Force on Canadian Unity (Pepin-Robarts Report) suggested that the Senate be replaced by a chamber of the provinces made up of delegations appointed by the provinces with members distributed roughly in accordance with the population of the provinces ("provincial appointment model").[50]

-The 1980 Lamontagne Report suggested that appointments be made by the Governor General on the advice of the Prime Minister, with every second appointment made from a list submitted by the provincial or territorial government. ("mixed appointment model").[51]

-The 1981 Canada West Foundation report recommended a single transferable vote from province-wide constituencies. The elections of half of the Senators were to take place simultaneously with the House of Commons elections ("elected Senate model").[52]

-The 1984 Molgat-Cosgrove Report recommended direct election of the Senate based on a "first past the post" process with elections held every three years on dates separate from those of House of Commons elections. ("elected Senate model").[53]

---

[46] AGC Record, vol.5. Tab 33, p. 1590
[47] AGC Record, vol.2 Tab 22, p. 613
[48] AGC Record, vol.3. Tab 24, p. 670
[49] AGC Record, vol.1 Tab 16, p. 301
[50] AGC Record, vol. 5. Tab 31, p.1451
[51] AGC Record, vol. 1. Tab 17, p.347
[52] AGC Record, vol. 5. Tab 34, p.1630
[53] AGC Record, vol. 2. Tab 19, p.454

-The 1985 *Alberta Select Special Committee* report recommended that the Senate be elected on a first-past-the-post basis based on province- wide constituencies with six Senators elected during each provincial election ("elected Senate model").[54]

-The 1985 *Royal Commission on the Economic Union and Development Prospects for Canada (MacDonald Commission)* recommended an elected Senate. Senators were to be elected by proportional representation in six member constituencies based on voter support for each party ("elected Senate model").[55]

-*Shaping Canada's Future Together-Proposals*, a 1991 federal government-produced paper, proposed a "directly elected" Senate and that the provinces should replace regions as the basis for Senate representation. ("elected Senate model").[56]

-The 1992 report of the Special Joint Committee of the Senate and House of Commons (Beaudoin-Dobbie) recommended that direct elections be held by proportional representation on fixed dates separate from elections of the House of Commons ("elected Senate model").[57]

iii) Powers

52. Whether under the pre-1980 reformed appointed Senate or under the post-1980 elected Senate, the proposals would replace the extensive powers of the Senate to initiate or reject bills (normally unused) by more limited powers. The two major options were suspensive vetoes which would suspend the adoption of the bills passed by the House of Commons for an identified period of time, for example 60 days or 6 months (Bill C-60), and absolute vetoes for defined subject matters which could be overridden by the House of Commons. Section 47 of the *Constitution Act, 1982* is a variation on this latter theme and provides that where the Senate has failed to authorize a constitutional amendment within 180 days of it being authorized by the House of Commons, the amendment can become law by the House of Commons passing the amendment resolution again without need for Senate authorization.[58]

---

[54] AGC Record, vol. 5. Tab 35, p.1684
[55] AGC Record, vol. 5. Tab 33, p 1590.
[56] . AGC Record, vol. 2. Tab 21, p.583
[57] AGC Record, vol. 3. Tab 24, p 670.
[58] Stilborn Report, para 116-147 AGC Record, vol. 12. Tab 124, p.4177-4187.

C. Early History

i) The Senate at Confederation

53. The various reports and proposals over the years reflect the fact that Senate reform has never been far from the surface of Canadian history and politics. This historical context informs the present legislation before Parliament.

54. The Senate's structure was the product of debate and part of the bargain of Confederation. Essentially, the compromise was that the House of Commons would be based on representation by population, while the Senate would be based on an equal number of members from each region. George Brown's much quoted speech sets out the compromise:

> Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition would we have advanced a step; and for my part, I am quite willing that they should have it. In maintaining the existing sectional boundaries, and handing over the control of local matters to local bodies, we recognize, to a certain extent, diversity of interests, and it was quite natural that the protection for those interests, by equality in the Upper Chamber, should be demanded by the less numerous Provinces.[59]

Two weeks after Brown's speech, Solicitor General East Hector Louis Langevin made similar comments emphasizing the Upper House's role as a protector of regional interests.[60]

55. Another purpose of the Senate was clear to the founders of Confederation: it was to be a legislative chamber separate from the House of Commons that would review legislation in a dispassionate manner.[61]

56. Macdonald accepted that the "constitution of the upper house should be in accordance with the British system as nearly as circumstances would allow"[62], a

---

[59] *Canada, Legislative Assembly, February 6, 1865*, cited in Canada's Founding Debates, Ajzenstat, Romney, Gentles and Gairdner (editors), Stoddart Publishing Co, Ltd. Toronto, 1999, p. 88.Authorities, Tab ZZ. ("*Canada's Founding Debates*").
[60] *Canada, Legislative Assembly, February 20, 1865*, p.368.AGC Authorities, Tab __
[61] *Canada, Legislative Assembly, February 6, 1865*, p. 80.Authorities, Tab ZZ

phrase reflecting the general tone of the preamble to the *Constitution Act 1867*. However, Macdonald envisioned a Senate that was not like the House of Lords. The members of the Senate were to be "… like those of the lower [House], men of the people and from the people"[64].

57. The method of selecting of Senators was a matter of controversy. Macdonald favoured an appointed Senate, rather than one with elected members; however, he accepted that "the arguments for an elective council are numerous and strong" and that the elected upper house in the united province of Canada "has not been a failure". The primary reason he favoured an appointed Senate was that the size of the constituencies and the costs of mounting an election would deter "men of standing" from coming forward.[65] George Brown shared this concern, saying that " … we must all feel that the election of members for such enormous districts as form the constituencies of the upper house has become a great practical inconvenience."[66] As Professor Manfredi points out, however, such concerns have been "erased by history".[67]

58. Although George Brown had voted against the elected upper house in the united Province of Canada, he admitted that the "evils anticipated" with an elected upper house did not materialize.[68] He also argued that Senators should be appointed by the legislative assembly (the lower house). That way, the government of the day would be responsible to the people for the appointments. He also advocated term limits to ensure a means of avoiding deadlock with the lower house.[69] In a later

---

[62] *Canada, Legislative Assembly, February 6, 1865*, cited in Canada's Founding Debates, p. 78, Authorities, Tab ZZ.
[64] *Canada, Legislative Assembly, February 6, 1865*, cited in Canada's Founding Debates, p. 81, Authorities, Tab ZZ.
[65] *Canada, Legislative Assembly, February 6, 1865*, cited in Canada's Founding Debates, , p. 83 and 78, . Authorities, Tab ZZ, See also Manfredi para 28 AGC Record, vol. 5, tab 123. para 28, p. 4040.
[66] *Canada, Legislative Assembly, February 8, 1865*, cited in Canada's Founding Debates, , p. 85, . Authorities, Tab ZZ. See also Manfredi Opinion, para 28 AGC Record, vol. 5, tab 123. para 28, p. 4040.
[67] Manfredi Opinion, para 30 AGC Record, vol. 5, tab 123. para 30, p. 4041.
[68] *Canada, Legislative Assembly, February 8, 1865*, cited in Canada's Founding Debates, pp. 83-84, Authorities, Tab ZZ
[69] *Canada, Legislative Assembly, February 8, 1865*, cited in Canada's Founding Debates, pp. 85, 87-88, Authorities, Tab ZZ

debate, Louis-Auguste Olivier[70] argued that "… as much political liberty as possible should be conceded to the masses".[71] Alexander MacKenzie, who later became our second Prime Minister, was of the view that there was simply no need for an upper house.[72]

59. Others shared the opinion that an elected Senate would be appropriate. In New Brunswick, speeches were made both in favour of an elected Upper Chamber and against it.[73] In the Newfoundland debates on joining Confederation, Robert Pinsent, George Hogsett and Joseph Little[74] spoke generally against an appointed Senate, although their main concern was the relatively small number of Senators that would be allotted to Newfoundland.[75] Politicians in Prince Edward Island also had mixed views both as to joining Confederation and as to the merits of an elected or appointed upper chamber.[76]

ii) Early Debates and Discussions Concerning Senate Reform

60. As one commentator has put it, "[d]ifferences of opinion about the Senate's performance surface as soon as the ink dries on Confederation".[77] Within a decade of Confederation, the House of Commons gave unanimous consent to a motion to consider reforms to the Senate. The proposal suggested the adoption of an electoral system based on representation by population, the allotment of six Senators for each region, the fixing of terms at eight years and the election of only

---

[70] Member of the pre-confederation Legislative Council of Canada, Canada's Founding Debates, , p. 474, Authorities, Tab ZZ

[71] *Canada, Legislative Assembly, February 13, 1865*, cited in Canada's Founding Debates, pp.90-91, Authorities, Tab ZZ

[72] *Canada, Legislative Assembly, February 23, 1865*, cited in Canada's Founding Debates, , p. 94, Authorities, Tab ZZ

[73] *House of Assembly, June 5, 1865* (Arthur Gilmor); *Legislative Council, April 16, 1866*, (Peter Mitchell); *House of Assembly, June 23, 1866,* James Gray Stevens , cited in Canada's Founding Debates, , pp. 96-7, Authorities, Tab ZZ

[74] All members of the Newfoundland House of Assembly, Canada's Founding Debates, p. 473, Authorities, Tab ZZ

[75] *Legislative Council, February 13, 1865; House of Assmebly, February 23, 1869 and March 2, 1869* cited in Canada's Founding Debates, pp. 97-99 Authorities, Tab ZZ,

[76] Various speeches cited in Canada's Founding Debates, pp. 99-102, Authorities, Tab ZZ

[77] Janet Ajzenstat, "*Bicameralism and Canada's Founders: the Origins of the Canadian Senate"* in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate you Never Knew,* (Montreal & Kingston: McGill-Queen's University Press, 2003) 3 at 16-24, AGC Authorities, Tabzzz.(" Janet Ajzenstat")

half the Senators at any one time. The elections would be done by and from the provincial legislature.[78]

61. In 1874 and again in 1886, Ontario's David Mills (later Senator Mills and then Justice Mills in the Supreme Court of Canada) argued that the provinces should be allowed to select Senators and to determine the means of doing so.[79] At the interprovincial Conference of 1887, Quebec's Premier, Honoré Mercier, suggested an elected Senate.[80] In a debate on the Senate in 1906, G.H. McIntyre argued for a scheme of shared power to appoint.[81] He also wanted term limits on Senators "not to exceed the legal term of three Parliaments".[82] In the 1886 debate, Senator Richard Scott argued for an elected Senate, finding the appointed Senate as "entirely repugnant to the first principles" on which the country is governed.[83] And, as John Stilborn notes, the Senate itself in 1906 debated at great lengths its own merit and possible abolition.[84]

62. In *The Unreformed Senate of Canada*, Robert MacKay said that "[p]robably on no other public question in Canada has there been such unanimity of opinion as on that of the necessity for Senate reform".[85] The book was published in 1926.

VII - The History of Amending Procedure Reform

---

[78] Bruce Hicks, "Can a Middle Ground be found on Senate Numbers?" 16 *Constitutional Forum* 21 (2007), at p. 21; *House of Commons Debates*, p. 87 (13 April 1874). **Authorities, Tab ZZ**

[79] Janet Ajzenstat , p. 16 AGC Authorities, TabZZZ:; House of Commons, *Debates*, 14 May 1886, 1272-73. **Authorities, Tab ZZ**

[80] Janet Ajzenstat , p. 16, AGC Authorities, TabZZZZ ; " Minutes of Interprovincial Conference held at the City of Quebec from the 20th to the 28th October 1887 inclusively", in Cloutier, Dominion Provincial and Interprovincial Conferences from 1887 to 1926, pp. 7-27 **Authorities, Tab ZZ**,

[81] Janet Ajzenstat , p. 16 AGC Authorities, TabZZZ:; House of Commons, debates 30 April 1906, 2285 **Authorities, Tab ZZ**,

[82] Janet Ajzenstat, p. 20: AGC Authorities, TabZZZ; House of Commons, Debates, 20 January 1908, p. 1513, see also 30 April 1906, p. 2276, **Authorities, Tab ZZ**

[83] Janet Ajzenstat, p. 23 AGC Authorities, TabZZZ; Senate, Debates, 3 May 1886, p.1275 **Authorities, Tab ZZ**,

[84] Stilborn,Report para. 41-42 AGC Record, vol. 12. Tab 124, para. 41, p. 4156-4157.

[85] Robert MacKay, *The Unreformed Senate of Canada*. (London: Oxford University Press, 1926) at p. 206, AGC Authorities, Tab ZZZ. See also, Testimony of Rt. Hon. Stephen Harper, *Proceedings before the Special Senate Committee on Senate Reform*, p. 2:8, September 7, 2006, AGC Record, Vol.6, Tab 37, p. 1879..

63. The historical development of the amending procedures also provides important context for consideration of the reference questions. How Part V of the *Constitution Act, 1982* came into being, and how the language of the Part V reflects this history, notably in relation to the Senate, is relevant to consideration of the role of the provinces in amending the Constitution.

64. As observed by the Supreme Court of Canada in the *Quebec Veto Reference*, there is no doubt that the pre-1982 convention-driven process for amending the Constitution of Canada was completely and definitively replaced by Part V of the *Constitution Act, 1982*:

> The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada, which entirely replaces the old one in its legal as well as its conventional aspects.[86]

i) The Absence of Formal Amending Procedures

65. Apart from the difficulty of achieving consensus as to how to reform the Senate, the biggest roadblock to Senate reform was the absence in the Constitution of procedures governing its amendment. The *British North America Act* (now the *Constitution Act, 1867*) did not provide for comprehensive amending procedures, and consequently it was left to British Parliaments (and occasionally Canadian ones) to effect constitutional change. Change was achieved through the plenary legislative supremacy of the Imperial Parliament and the limited sovereignty of our own Parliament and legislatures.[87] Canadian control was constrained; as one author wryly noted: "… our constitution was what the United Kingdom Parliament said it was".[88]

---

[86] *Re: Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 at 806, AGC Authorities, Tab 22 ("*Quebec Veto Reference*").

[87] The history of how amendments were made to the constitution before 1982, is canvassed in the decision of the Supreme Court of Canada in *Re: Authority of Parliament in Relation to the Upper House* [1980] 1 S.C.R. 54 at pp. 60-66, Authorities, Tab 29 ("Upper House Reference**")**

[88] Strayer, Barry," *Ken Lysyk and the Patriation Reference,* 38 U.B.C. L. Rev. 423 at 425(2005), AGC Authorities, Tab ZZZ ("Strayer, Patriation Reference")

66. This legal reality was acknowledged by the Supreme Court of Canada in the *Patriation Reference* of 1981 wherein the majority on this issue stated that the Constitution "…suffers from an internal deficiency in the absence of legal power to alter or amend the essential distributive arrangements under which the legal authority is exercised in the country, whether at the federal or the provincial level."[89]

67. In the decades before the Constitution was patriated and the amending procedures were included in Part V of the *Constitution Act, 1982*, over a dozen meetings or conferences took place to discuss ways to achieve that goal.[90] A House of Commons Committee discussed it in 1935. A First Ministers' conference in 1935 focused on the subject, as did a similar conference in 1950. A total of eight more meetings of First Ministers took place between 1968 and 1981 to discuss how to patriate the Constitution with an amending formula. As well, numerous other meetings took place between Attorneys General and other officials on the same matter.[91]

68. Notwithstanding the lack of a general amending procedure, some twenty-two amendments to the Constitution were made before 1965, either through addresses to the Queen and legislative action by the U.K. Parliament, or by the limited power of domestic amendment accorded to the Parliament of Canada in 1949.[92]

69. Some constitutional changes did occur through the use of constitutional conventions.[93] In the *Patriation Reference*, the Supreme Court of Canada dealt with the place of constitutional conventions in the constitutional fabric, stating

---

[89] *Re Resolution to Amend the Constitution* [1981] 1S.C.R. 743 at 774, Authorities, Tab . ("Patriation Reference")

[90] James Ross Hurley, *Amending Canada's Constitution, History, Process, Problems and Prospects*. (Ottawa: Minister of Supply and Services, 1996) pp. 25-62 ("Hurley, Amending the Constitution"), AGC Authorities, Tab ZZZ; Strayer, Patriation Reference, p. 427, Authorities, Tab ZZZ

[91] Strayer, Patriation Reference, p. 427 Authorities tab ZZ,; See also Strayer, Barry, "*Saskatchewan and the Amendment of the Canadian Constitution*" (1967) 12 McGill L.J. 443. Authorities tab ZZ

[92] The Amendment of the Constitution of Canada , The Honourable Guy Favreau, Minister of Justice, Ottawa, Ontario, February 1965 (the Favreau White Paper) Chapter 2, Bayefsky, Anne F. *Canada's Constitutional Acts & Amendments. A Documentary History* McGraw-Hill Ryerson, (Toronto), 1989,Vol. 1, p. 22 at p. 27, Authorities tab ZZ, *("Bayefsky").*See also the *Patriation Reference* , at p. 888, Authorities tab ZZ

[93] Hurley, Amending the Constitution, pp. 15-17, Authorities tab ZZ

that the "…main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values of principles of the period."[94]

70. In 1949, the British Parliament began loosening its control over the Canadian Constitution, by enacting legislation to amend s. 91 of the *BNA Act*, in order to grant the federal Parliament the power to amend certain, but not all, aspects of the Constitution.[95] For example, the Canadian Parliament could henceforth change the representation of the provinces in the House of Commons within the limits of the principle of proportionate representation, but could not alter the provisions of the Constitution dealing with matters such as denominational schools and language rights.[96]

71. Notwithstanding these limited amendments, the significant problem of a lack of a general amending process in the Constitution remained and the desirability of a political solution was recognized by the Supreme Court of Canada in the *Patriation Reference*. As the Supreme Court of Canada bluntly stated:

> It would be anomalous indeed, over-shadowing the anomaly of a constitution which contains no provision for its amendment, for this Court to say retroactively that in law we have had an amending formula all along, even if we have not hitherto known it.[97]

ii) Favreau White Paper and the Fulton-Favreau Formula (1964-1965)

72. Two events involving a federal Minister of Justice, Guy Favreau, are important to the amending procedure history. In 1965 Favreau authored a White Paper which reviewed the history of amendments to the Constitution and identified a series of four basic principles:

---

[94] *Patriation Reference*, p. 880 (para 250, see also paras 252 and 253), Authorities tab ZZ
[95] *British North America Act (No.2)*, 1949 adding s. 91(1) to the *BNAAct*., AGC Authorities tab ZZ
[96] Ibid, Hurley, Amending the Constitution, p. 30, AGC Authorities tab ZZ ; Parliament could deal with language rights through such vehicles as the Official Languages Act, as long as it did not undermine s. 133 of the *Constitution Act, 1867:* see Jones v. AG New Brunswick, [1975] 2 SCR 182, AGC Authorities, Tab ZZZ. ****Double check****
[97], *Patriation Reference* at 788, Authorities tab ZZ.

- no act of the British Parliament affecting Canada would be passed unless requested and consented to by Canada, and every amendment requested by Canada would be enacted by Parliament;
- after 1895, Canada sought amendments by the British Parliament by means of a joint address of the Senate and House of Commons to the Crown;
- the British Parliament would not act on a request to amend by a province on the basis that it should deal only with the federal government as representative of all of Canada; and
- the federal Parliament would not request an amendment that affected federal provincial relationships without consultation and agreement with the provinces – "The nature and degree of provincial participation in the amending process, however, has not lent itself to easy definition." [98]

73. The Favreau principles had also been reflected in the so-called "Fulton-Favreau formula," an agreement on an amending procedure reached in October, 1964 by the federal and provincial governments. Though the agreement proved to be short-lived, it dealt with amendments to the Senate relating to three areas, the number of Senators allotted to each province, and residence qualifications and requirements under the Constitution concerning their appointment by the Governor General, subject to approval by two-thirds of the provinces representing at least 50% of the population.[99] The formula also provided for a unanimity procedure in respect of matters such as the "powers of the legislature of a province," but unanimity was not required for changes to the Senate. This accord was one of only two occasions (the "Victoria Charter" being the other) where the federal and provincial First Ministers were able to reach unanimous agreement in principle on an amending procedure as part of the patriation of the Constitution. [100]

iii) The Victoria Charter 1971

74. A Federal-Provincial First Ministers' Conference held in Victoria, British Columbia in June 1971 produced the *Canadian Constitutional Charter, 1971*,

---

[98] Favreau White Paper ,Bayefsky, Vol. 1, p. 22 – 48, at p30, AGC Authorities, Tab ZZZ..
[99] Fulton Favreau Formula, in Anne Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History*. Toronto: McGraw-Hill Ryerson, 1989. Vol.I, pp.16-18 ("Bayefsky Documentary History")
[100] *Amending the Constitution of Canada, A Discussion Paper*, Federal-Provincial Relations Office, Minister of Supply and Services Canada, 1990, p. 3 AGC Authorities tab ZZZ

commonly known as the Victoria Charter. It dealt with a number of matters, including political rights, language rights, the courts and regional disparities.[101]

75. The Victoria Charter also provided a formula for amending the Constitution. Amendments to the powers of the Senate, the number of Senators from each province and their residence qualifications would have needed the approval of the legislative assemblies of at least a majority of the provinces that included any province that had twenty-five percent of the population of Canada, at least two Atlantic provinces, and at least two Western provinces that had a combined population of at least fifty percent of the Western provinces.[102] If an amendment applied to more than one, but not all provinces, it would require a resolution of the Senate and the House of Commons and of the legislative assemblies of the affected provinces.[103] Other provisions dealt with rules to apply the amending formula, and amendments exclusive to Parliament or provincial legislatures, but there were no subjects that required provincial unanimity in order to affect change.[104]

76. The Victoria Charter said nothing specific about changes to the "method of selection", effectively leaving that type of amendment to Parliament alone.

77. Thus, both the Favreau White Paper and the Victoria Charter recognized the importance of a provincial role in making certain types of constitutional change. Part V recognized that principle, and it is the scope of that role as prescribed in Part V of the *Constitution Act, 1982* that is at issue in this reference.

iv) *The Constitution Act, 1982*

78. Subsequent to the Victoria Conference, other First Ministers' conferences in Toronto in 1978 and Vancouver in 1979 involved discussions of amending

---

[101] The *Canadian Constitutional Charter, 1971,"Victoria Charter*" Parts I-VII, AGC Record, vol. 4, tab 30, p. 1397.
[102] The *Canadian Constitutional Charter, 1971,"Victoria Charter*" Part IX, art. 49, AGC Record, vol. 4, tab 30 pp. 1416
[103] The *Canadian Constitutional Charter, 1971,"Victoria Charter*" Part IX, art. 50, AGC Record, vol. 4, tab 30, p. 1416.
[104] The *Canadian Constitutional Charter, 1971,"Victoria Charter*" Part IX, art. 52-55,AGC Record, vol. 4, tab 30, pp. 1417-1418.

formulas; both suggested the unanimous consent of the provinces should be needed for changes involving a limited range of subjects, none involving the Senate.[105] When the constitutional reform proposal came before the Houses of Parliament in 1981, in the procedures in what is now Part V of the *Constitution Act, 1982*, discussed in paras. 10-16 above, provincial consent was explicitly required with respect to four types of Senate amendment: the powers of the Senate; the method of selecting Senators; the number of Senators to which each province is entitled; and residence qualifications. It was only by way of an amendment proposed by the government during those proceedings that the "method of selecting Senators" came to be added to what is now s. 42. In testimony before the Special Committee, the Deputy Minister of Justice described its omission from previous drafts as "an oversight," and something that should require provincial approval, but he did not explain what was meant by the term.[106]

79. The *Constitution Act, 1982* was thus the culmination of a very long and difficult process. Agreement on amending procedures was never easy. However, it is notable that a unanimity procedure was never contemplated for more than a very few matters, and the Senate was never among them. Provincial involvement of any kind in changes to the Senate was never contemplated for more than a few matters.

[105] Bayefsky, Documentary History, Vol. I, pp. 527-528; Vol. II, pp.638-639, AGC Authorities, Tab ZZZ
[106] *Minutes of Proceedings and Evidence of the Special Committee of the Senate and House of Commons on the Constitution of Canada*, Issue #53, Feb. 4, 1981, p.68, AGC Authorities, Tab ZZZ.

PART II-ISSUES

80. The Questions to be answered by this Court are set out in the Order in Council bearing number 346-2012. The questions posed to this Court, and the answers of the Attorney General of Canada, can be summarized as follows:

1) Does Bill C-7 constitute an amendment to the Constitution of Canada in relation to the office of the Governor General which can only be made with the authorization of the Senate, the House of Commons, and legislative assembly of each province pursuant to s. 41(a) of the *Constitution Act, 1982*?

No. Bill C-7 does not alter the "method of selecting Senators" – the Governor General would continue to appoint pursuant to s. 24 of the *Constitution Act, 1867*, a provision which would remain unchanged.

2) Does Bill C-7 constitute an amendment to the Constitution of Canada in relation to the method of selecting Senators under s. 42(1)(b) of the *Constitution Act, 1982*, which can only be made by following the process set out in s. 38 of the *Constitution Act, 1982*?

No. Bill C-7 does not alter the "method of selecting Senators" – the Governor General would continue to appoint Senators pursuant to s. 24 of the *Constitution Act, 1867*, a provision which would remain unchanged.

3) Does Bill C-7 constitute an amendment to the Constitution of Canada in relation to the fundamental features and role of the Senate, which can only be made pursuant to s. 38 of the *Constitution Act, 1982*?

No. Part V of *Constitution Act, 1982* provides a complete code to amending the Constitution and Bill C-7 respects Part V. Section 38 would only apply if one of the features of the Senate that are contemplated by s. 42 were to be amended. This is not the case in respect of Bill C-7.

PART III-ARGUMENT

I - General Approach

A. The Scope of the Reference

81. The reference questions are based on legislative proposals set out in Bill C-7 that have a relatively modest scope. The proposed changes in C-7 would not affect the four matters set out in s. 42 (b) and (c): the powers of the Senate; the number of Senators from each province; the residency requirements of Senators; and the method of selecting Senators. In particular, no change would be made to section 24 of the *Constitution Act, 1867*, which describes the power of the Governor General to "summon qualified Persons to the Senate". Two proposed changes are at issue here: term limits for Senators; and whether the Prime Minister's appointment recommendation may be informed by a process of consultation with electors.

82. The reference is not about whether Senators can, or should be, elected. It is simply about which, if any, procedures in Part V of the *Constitution Act, 1982* apply to proposed reforms.

B. The Relevant Interpretive Principles

83. This reference offers the Court an opportunity to consider the scope and meaning of key amending procedures in Part V of the *Constitution Act, 1982*. Certain well-known principles of interpretation are applicable. Like Part I of the *Constitution Act, 1982* (the Charter), Part V "was not enacted in a vacuum … and [should be placed] in its proper linguistic, philosophic and historical contexts."[107] The linguistic context underscores the primacy of the text; the philosophical and historical context commends the significance of past Senate and amending procedure reform initiatives.

[107] R. v. Big M Drug Mart [1985] 1 S.C.R. 295 at at 344, AGC Authorities, Tab 16.

84. The pith and substance doctrine is also of assistance in identifying the "matters" at issue and the ordinary rules of statutory interpretation assist in examining the intent of the proposed legislation referred to in the questions.

i) The Primacy of the Text of the *1982 Act*

85. The "linguistic approach" requires close examination of the text of Part V of the *Constitution Act, 1982,* which comprehensively describes the amending procedures. Part V introduced a very specific, rules-based approach to amendment of the Constitution.

86. The general scheme as it pertains to Senate reform may be simply expressed: changes to the powers of the Senate, the method of selecting Senators, the number of Senators to which a province is entitled and the residency qualifications of Senators require resort to the "7/50" formula; that is, the general amendment procedure in s. 38 requiring the approval of the legislative assemblies of at least two-thirds of the provinces representing 50 per cent of the population of the provinces. All other matters concerning the amendment of the Constitution in relation to the Senate are left exclusively to Parliament by virtue of s. 44 of the *Constitution Act, 1982*. The text of Part V gives very clear guidance in answering the questions in this reference.

ii) Historical Context

87. The courts have frequently looked at a diverse array of material in seeking to give meaning to provisions of the *Charter*[108] and other constitutional provisions.[109] Such an exercise may also be relevant in construing the provisions of Part V. The history of Senate reform initiatives, and the search for an amending procedure acceptable to both the provinces and the federal government, supports the plain language reading of the text referred to above. As will be argued further below,

---

[108] See, for example, *R. v. Prosper*, [1994] 3 S.C.R. 236 at 266-267, AGC Authorities, Tab 17; *USA v. Cotroni*, [1989] 1 S.C.R. 1469 at 1479-1480, AGC Authorities, Tab 17

[109] See, for example: Patriation Reference, Authorities tab ZZZ; Quebec Veto Reference, Authorities tab ZZZ; P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Toronto:Carswell, 2007 (loose-leaf), Vol. II, paras. 60.1(c)-(d), Authorities tab ZZZ ("Hogg")

those histories reinforce the conclusion that Part V is very specific in its identification of which aspects of Senate reform require the consent of, the provinces. Nothing about either of those historical accounts suggests that there has ever been a desire to ensure that provinces have a say in approving term limits, or that a particular consultative process should be employed by the Prime Minister in formulating his recommendation to the Governor General on Senate appointees.

88. While there is a wealth of public material describing the background to the Charter, clear public statements of Parliament's intention with respect to Part V are scarce.[110] One historical document that does speak to the intent of the drafters is reflected in a briefing note to an unidentified Minister in 1981. The note adverts to the opinion of this Court in the *Upper House Reference*, and then suggests that the only changes to the Senate requiring resort to the "general formula" and approval of the provinces were set out in Part V—all other changes could be made by Parliament.[111]

89. The *Constitution Act, 1982* was enacted shortly after the Supreme Court of Canada issued its opinion in the *Upper House Reference*, in which questions were posed concerning the authority of Parliament to change certain features of the Senate. In defining that authority, the Supreme Court of Canada stated that "it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process."[112] The "fundamental features" and "essential characteristics" that Parliament could not change were not, however, exhaustively defined. It is logical to conclude that s. 42 was intended to provide a specific rule so that courts are not left to define what features of the Senate might rise to the level of being so "fundamental" as to

---

[110] See however a description of the events by one of the participants: Mary Dawson, « From the Backroom to the Frontline : Making Constitutional History or Encounters with the Constitution, Meech Lake, and Charlottetown », (2012) 57 : 4 McGill LJ 955, pp. 958-971.
[111] Record of the Fédération des Communautés Francophones et Acadienne du Canada, Tab Q, p. 397
[112] *Upper House Reference*, p. 78 ,AGC Authorities, Tab 19.

require a particular amending procedure. Relying on this history to draw such an inference would accord with what the Supreme Court of Canada has described as :

> the well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law ... [and] presumed to have known all of the circumstances surrounding the adoption of new legislation.[113]

iii) "Progressive Interpretation" of the Constitution

90. Reliance on constitutional history does not mean attempting to discern and give undue effect to the intent of the Fathers of Confederation. First of all, it would be an exercise fraught with peril, as demonstrated by the pre-Confederation debates noted above, and in the reports of Professor Manfredi and Mr. Stilborn. The role, make-up and even the existence of the Senate was, at the time of Confederation and consistently since then, a matter of divergent, often strongly held, views.

91. More importantly, such an exercise would be inconsistent with the "progressive interpretation" the Supreme Court of Canada regularly employs in seeking "to ensure that our Constitution does not become rigid and unresponsive to Canadian society."[114] Slavish adherence to original intent has been rejected by the Supreme Court of Canada[115] in, for example, the *Same Sex Marriage Reference*, where the Court held that the understanding of "marriage" that prevailed in 1867 should not be determinative of our present day understanding.[116] In the context of this reference, a progressive interpretation approach ensures that modern democratic values are respected.

92. Thus, for example, though the preamble to the *Constitution Act, 1867* refers to a "Constitution similar in Principle to that of the United Kingdom," there is no compelling reason to read that clause as demanding an inquiry into what the 1867 framers thought that term meant in respect of the Senate, and then treating any

---

[113] *ATCO Gas & Pipelines Ltd. v. Alberta* (*Energy & Utilities Board*), [2006] 1 S.C.R. 140 at para. 59, AGC Authorities, Tab 2
[114] *Canada(Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at para. 144, AGC Authorities, Tab 7
[115] The Hon. I. Binnie, "*Constitutional Interpretation and Original Intent*", 23 S.C.L.R. 345 at 356-360, AGC Authorities, Tab 57.
[116] *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, at para. 30

deviation from the 1867 vision as requiring a more exacting amending procedure. In 1867, Sir John A. Macdonald foresaw an Upper Chamber of prosperous gentlemen of substance in the Upper House; he did not want an Upper House of landed nobility as found in Great Britain. But neither vision accords with contemporary expectations of who should sit in the Senate. The British themselves have repeatedly attempted to reform their Upper House to more properly reflect modern democratic ideals and better reflect the diversity of British society.[117]

iv) Pith and Substance

93. The "pith and substance" doctrine should also inform this Court's answers to the questions, in that it demands that courts take a rigorous approach to determining the "matter" with which the legislation is concerned. It is an essential first step in giving meaning to the legislative provisions referred to in the reference questions. The pith and substance doctrine is applicable to each of the reference questions, in that reforms concerning term limits, and consultative processes do not, in pith and substance, concern matters set out in ss. 41 and 42. A pith and substance approach to determining whether a proposed constitutional amendment is in relation to a matter contemplated by a given amending procedure, even if it may produce an incidental effect on a matter contemplated by another amending procedure, is also an appropriate means for distinguishing amongst the array of potentially applicable amending procedures.

94. The doctrine has been applied by two courts of appeal, including this one, in considering which amending procedures governed certain proposed constitutional changes. In *Hogan v. Newfoundland (Attorney General)*[118] and *Potter v. Quebec*

---

[117] See, for example:the *Parliament Act 1911* (enabling the Commons to pass money bills and certain public bills without the concurrence of the Lords). the *House of Lords Act* (1999)(reducing the number of hereditary peers by more than 600 and freezing the number that remained at 92, pending further reform) AGC Authorities, Tab 47,. Other reforms are described at: First Report of the Joint Committee on the House of Lords Reform, 2002-03 ,p. 14; AGC Authorities, Tab 32; the website for the Parliament of the United Kingdom (House of Lords Reform); http://www.parliament.uk/business/lords/lords-history/lords-reform/

[118] *Hogan v. Newfoundland (Attorney General)*183 D.L.R. (4th) 225, N.L.C.A.), AGC Authorities, Tab 9..

(Attorney General),[119] the Newfoundland and Labrador Court of Appeal and the Quebec Court of Appeal respectively were asked to deal with the interpretation and application of s. 43 of the *Constitution Act, 1982*, in the context of challenges to legislation which abrogated constitutionally protected denominational school rights in the two provinces.[120] The challengers alleged that the procedure in s. 38 of the *Constitution Act, 1982*, the "7/50" formula, applied.[121]

95. Both appellate courts rejected these arguments. In *Hogan*, the Newfoundland and Labrador Court of Appeal held that the amendment was in pith and substance one that applied to one or more, but not all of the provinces, and the effect of the s. 43 amendment on the application of the *Charter* rights of freedom of religion was an incidental or ancillary effect.[122] Similarly, this Court relied on the doctrine in rejecting an argument that the addition of s. 93A to the *Constitution Act, 1867* implicitly modified s. 29 of the *Charter* (denominational schools protection).[123]

96. This Court also rejected the view that the consent of other provinces, mainly Ontario, was required because s. 93 of the *Constitution Act, 1867* protected not only Protestants in Quebec but also Roman Catholics in Ontario. The Court read the French version of s. 43 of the *Constitution Act, 1982* not only to "concern" a province but to "apply to" a province. Consequently, the only province "concerned" by the amendment was Quebec since Ontario's s. 93 privileges remained.[124]

97. A pith and substance approach is critical in considering whether adopting consultative processes for appointments is a change to the "method of selecting Senators" mentioned in s. 42. It is not. The "method of selecting Senators" is set

---

[119] *Potter v. Quebec (Attorney General)*, [2001] R.J.Q. 2823 (C.A.), AGC Authorities, Tab 14.
[120] Term 17 of the Terms of Union of Newfoundland with Canada , AGC Authorities, Tab 56,.and s. 93 of the *Constitution Act, 1867*.
[121] For a general description of these cases see: Newman, Warren, *Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada*, Supreme Court of Canada Law Review (2007), 37 S.C.L.R. (2nd) pp. 403-406, AGC Authorities, Tab 58..
[122] *Hogan* paras 95, 97, AGC Authorities, Tab 9.
[123] *Potter*, paras. 22-24, AGC Authorities, Tab 14.
[124] *Potter* paras 35-51, AGC Authorities, Tab 14.

out in s. 24 of the *Constitution Act, 1867*, which grants the authority to the Governor General, and which will remain so under any proposed reform.

v) The Ordinary Rules of Statutory Interpretation

98. Although the proposed legislation at issue in this reference is not yet law, the modern approach to statutory interpretation still applies. The words of a statutory provision are to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament."[125]

99. Further, words should not be added to legislation unless the addition "gives voice" to the legislator's implicit intention.[126] This point is significant because, contrary to the clear wording of the proposed legislation and the intention and purpose of the legislation, much of the argument against the constitutional validity of Bill C-7 in Senate committee hearings, in Quebec's expert opinions and in the arguments of the Attorney General of Quebec and in those of the intervenors is based on the assumption that it will pave the way for direct elections of Senators.[127] This Court must construe and interpret the legislation that Parliament is considering, without speculating on future events or legislation.

---

[125] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 at para. 33, AGC Authorities, Tab 18; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 at para. 20 AGC Authorities, Tab 8.

[126] *Murphy v. Welsh; Stoddart v. Watson*, [1993] 2 S.C.R. 1069 at p 1078. AGC Authorities, Tab 13 See also Pierre-André Coté, *The Interpretation of Legislation in Canada*, 3rd edition, (Scarborough: Carswell, 2000) at pp. 275-278; AGC Authorities, Tab 49 and *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9 at para. 15, AGC Authorities, Tab 12. Similarly, in *Lavigne v. Canada (Office of the Commissioner of Official Languages*), [2002] 2 S.C.R. 773, 2002 SCC 53 at para. 55 when dealing with the interpretation to be given to exemptions to the disclosure of personal information under the federal *Privacy Act*, the Supreme Court adopted the approach of the Federal Court of Appeal that "[i]f the meaning [of the wording of a provision] is plain, it is not for this Court, or any other court, to alter it.", AGC Authorities, Tab 11

[127] For example: David Smith, AGQ Record,vol. 3, p. 846-848; Andrew Heard, AGQ Record, p. 880, 917-922; AGQ Factum, para. 116-123.

vi) No Need to Rely on Unwritten Constitutional Principles in this Reference

a) The Unwritten Principles Should not Modify a Clear Text

100. The exhaustiveness of Part V, and the primacy of the text, means that there is no need here to rely extensively in this instance on interpretive tools such as "unwritten" constitutional principles. There is no gap in the text of the Constitution that invites resort to unwritten principles. Subsection 52(3) of the *Constitution Act, 1982* sets out the requirement that "[a]mendments to the Constitution of Canada shall only be made in accordance with the authority contained in the Constitution of Canada". That authority is clearly expressed in the provisions of Part V of the *Constitution Act, 1982*, which contemplates procedures for amending the Constitution in relation to the Senate in defined circumstances. Unwritten constitutional principles should not be used to create rights and obligations not found in the written text.[128]

101. In the *Quebec Secession Reference*, the Supreme Court of Canada concluded that power of constitutional amendment ultimately lies with the "people of Canada" through the lawful actions of their elected representatives. The Court wrote that "[t]he Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory…".[129]

102. Part V was enacted according to a democratic process. It sets out clear and comprehensive rules for amending the Constitution. The legislation before the Court in this reference has also been introduced as part of that democratic process.

---

[128] See, for example, *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 at para. 65for comments concerning the *Charter of Rights and Freedoms*, AGC Authorities, Tab 4.
[129] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 85, ("*Quebec Secession Reference*") AGC Authorities, Tab 23.

There are no ambiguities in the text that would benefit from resorting to unwritten principles.

103. In the *Quebec Secession Reference*, the Supreme Court of Canada also held that "in certain circumstances" unwritten constitutional principles such as federalism, democracy, constitutionalism and protection of minorities may give rise to substantive legal obligations and limit certain government action. However, the Court also recognized that the written text has a "primary place" in determining constitutional rules. The need to rely on extrinsic aids arises only where there are "problems or situations may arise which are not expressly dealt with by the text of the Constitution".[130] The unwritten principles are not "an invitation to dispense with the written text of the Constitution."[131]

104. This Court has previously dealt with the role of unwritten constitutional principles in relation to Part V of the *Constitutional Act 1982*. In the *Potter* case, the Court held that unwritten constitutional principles should play no more than a limited role in Constitutional adjudication[132]:

> [7] Les appelants plaident que la modification de 1997 ne concernait pas seulement le Québec et nécessitait donc aussi l'accord de cinq autres provinces, subsidiairement d'au moins des quatre provinces fondatrices ou de celui de l'Ontario.
>
> [8] Ils appuient leur raisonnement sur le postulat que l'article 43 doit être interprété à la lumière des grands principes constitutionnels énoncés par la Cour suprême du Canada dans le *Renvoi relatif à la sécession du Québec*[2], notamment ceux du fédéralisme, du constitutionnalisme, de la démocratie et de la protection des minorités, et que l'on doit donc lui donner une interprétation qui met en œuvre ces grands principes. À ce sujet, je rappellerai simplement les mises en garde que notre Cour a faites, tout

[130] *Quebec Secession Reference* para. 32, AGC Authorities, Tab 23.
[131] *Quebec Secession Reference*, para. 53, AGC Authorities, Tab 23.
[132] *Potter v. Quebec (Attorney General),* [2001] R.J.Q. 2823 (C.A.), AGC Authorities, Tab 14.See to same effect: *Baie d'Urfe (Ville) c Procureur général (Québec)* [2001] JQ no. 4821 (CA) para. 82- 125, AGC Authorities, Tab ZZZ

> récemment, dans le dossier de la contestation de la *Loi 170* sur les fusions municipales[3], de ne pas donner à cet arrêt une portée démesurée et universelle. Ces principes sont uniquement destinés à permettre de combler les vides de la Constitution. Ces remarques s'appliquent aussi au présent dossier. J'ajouterai en outre et de toute façon que je ne peux, à ce stade-ci de l'analyse, me convaincre de la proposition que l'article 43 irait à l'encontre de ceux-ci. »

b) Reforms will not Impede the Protection of Minorities

105. The argument by the FCFAC that the Bill C-7 reforms will compromise the unwritten principle of protection of minorities[133] is flawed for several reasons, even if we assume unwritten principles should play a role in answering the reference questions. First, neither the text of the *Constitution Act, 1867*, nor the history of the Senate and its current practices, supports the notion that protection of minority interests plays a primary role in the work of the Senate. Second, the text of Part V of the *Constitution Act, 1982*, provides no support for the argument in relation to the Senate, and Part I of that Act (the *Charter*) gives a much more significant role in that regard to the courts. Third, legislative proposals such as those in Bill S-4, Bill C-20 or Bill C-7 will not impede the Senate in any role it chooses to play in protecting minorities; indeed the Senate's role could be enhanced by the changes.

106. Professor Manfredi assessed the success of minority groups to be elected to the House of Commons and to be appointed to the Senate. Election or appointment of minorities was not frequent until the 1960s with the change in social attitudes. Their present- day weighting in both the House of Commons and the Senate is not significantly different.[134] What role the unwritten constitutional principle should have in the present case is far from clear where, as previously noted, Bill C-7 does not provide for the direct election of Senators and where the Governor General

---

[133] FCFAC factum, para.43, 50-57
[134] Manfredi Opinion, para. 19-21, AGC Record, Vol. 12, Tab 123, p. 4033-4036.

continues to appoint Senators under s. 24 of the *Constitution Act 1867* on the recommendation of the Prime Minister.

107. In the *Quebec Secession Reference*, the Supreme Court of Canada explained how the *Constitution Act, 1867* can be understood, in part, as a document designed for the protection of linguistic and religious minorities;[135] the Supreme Court did not, however, recognize any special role for the Senate in that regard. The text of the *1867 Act* supports a representational role for the Senate in relation to only one minority, Quebec anglophones, in that the "Electoral Divisions" described in s. 22 were designed to ensure representation for that group.[136]

108. In any discussion of the Senate's role as protector of minority interests, it is essential that the "minority" in question be carefully defined. Professor Manfredi notes that the concept of minorities at the time of the Confederation referred to "national minorities who otherwise constituted a majority in one of more of the provinces or regions". Therefore, the concept of "minority" referred to in the expert reports filed by some of the interveners misconceives the purport and meaning of these passages in the *Quebec Secession Reference*.[137]

109. It is doubtful that proponents of the idea that the Senate plays a role as protector of minorities mean the sort of minorities contemplated in 1867. If, however, they ascribe a role to the Senate as protector of other minorities, such as women or aboriginal peoples, it is doubtful that the Senate has ever fulfilled such a role. As Professor Manfredi notes, it "is difficult to point to specific instances where the Senate has effectively protected or promoted the interests of minorities or other politically underrepresented groups against actions of the government." [138] The Senate is not institutionally designed for the protection of interests of, for example, francophones outside Quebec, notably for the reason that except for ensuring access to federal government services in either French or English, none

---

[135] *Quebec Secession Reference*, paras. 32-38, 41, 79, AGC Authorities, Tab 23]
[136] *Constitution Act, 1867 s. 22*.
[137] Manfredi Opinion, para. 17, AGC Record, Vol. 12, tab 123, p.4031-4032
[138] Manfredi Opinion, para. 22, AGC Record, Vol. XVI, tab 105 p. 4036-4037

of the key legislative areas related to culture and linguistic preservation (especially education) is within federal jurisdiction.

110. Nor can it be argued that the "representational" role is fulfilled by a greater number of appointments of individuals from minority groups. As Professor Manfredi demonstrates, the percentage of women and aboriginal peoples appointed to the Senate is not significantly different from the numbers found in the House of Commons.[139] To the extent that there is a pattern in appointments to the Senate, it lies in the fact that almost 95% of those appointed to the Senate have been from the appointing Prime Minister's own political party.[140]

111. The language rights of ss. 16 to 23 of the *Charter* (and in particular the protection of language education rights under s. 23) constitute a powerful, effective and frequently used instrument for the protection and promotion of minority rights.[141] In addition, Canada has an *Official Languages Act*[142] and a Commissioner of Official Languages.[143] The enforceability of these legal and constitutional rights is ultimately overseen by the courts.[144] These post-1867 legal frameworks much more clearly assign a role in protection of minority interests to institutions other than the Senate.

112. Claims pertaining to the significance of this alleged role must be measured against the reality that sections 41 or 42 in Part V of the *Constitution Act, 1982* say nothing about it. Were it as fundamental as its proponents claim, it would be expected that either s. 41 or s. 42 would mention it.

113. To the extent that minority representation can be characterized as a recognized role of the Senate, nothing about Bill C-7 will impede performance of that role. The total number of Senators and their distribution amongst the various provinces

---

[139] Manfredi Opinion, Tables 1, 2 and 3, paras 20-22, AGC Record, Vol. 12, tab 123, p. 4034-4037
[140] Manfredi Opinion, para 21 ; , AGC Record, Vol. 12, tab 123, p. 4036.
[141] Manfredi Opinion, paras 25-26, , AGC Record, Vol. 12, tab 123, p. 4038-4039
[142] *Official Languages Act*, R.S.C. 1985, c. 31(4th Supp), ("*Official Languages* Act"), AGC Authorities, Tab 45.
[143] *Official Languages Act*, s. 49, AGC Authorities, Tab 45.
[144] *R. v. Beaulac*, [1999] 1 S.C.R. 768, AGC Authorities, Tab 15; *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201, AGC Authorities, Tab 26.

(or regions) is not affected by this or previously-proposed legislation. The ability of Senators to speak for or to represent particular minorities, regions or causes remains undiminished by this legislation. There is nothing in Bill C-7 that deviates from the principle of equal regional representation or contemplates changing the distribution of Senate seats among the divisions or provinces that would adversely affect representational interests of any kind.

114. Bill C-7 would not in any way prevent a Prime Minister from considering minority interests in submitting names. Representation of minorities, however defined, will remain a factor a Prime Minister can consider in exercising his or her discretion.

115. Bill C-7 is also capable of encouraging the implementation of processes that would enhance minority representation. It would allow provinces to set up consultative processes. There are no impediments to a province establishing electoral districts for the consultations that would coincide with regional or minority groups within the province. That way, a province could preserve cultural or linguistic minority representation in the Senate while respecting the consultative process proposed in the legislation. Proposed legislation in New Brunswick would do just that. Bill 64, *An Act Respecting the Selection of Senator Nominees*, would divide New Brunswick into five electoral districts. It seems such divisions were sensitive to linguistic concerns.[146] This emphasizes the fact that Bill C-7 may enhance the ability of provinces to design processes that may facilitate representation of minority interests.

c) Unwritten principles are supportive of Part V amendment procedures

116. Even if we were to assume for the sake of argument that the Senate has evolved to become a protector of minority rights, however defined, that role would not be diminished by any of the proposed reforms in Bill C-7 or other bills referred to. And even if this unwritten principle merits consideration, it would have to be

[146] Bill 64, An Act Respecting the Selection of Senator Nominees, 2nd Session, 57th Legislature, New Brunswick. 60-61 Elizabeth II, 2011-2012. AGC Authorities, Tab 30.The Bill died after first reading.

weighed against the other unwritten principles. That fundamental principles – federalism, democracy, constitutionalism, the rule of law, and the protection of minorities – underpin the provisions of part V of the *Constitution Act 1982* is evident from the provisions themselves, the matters they cover and the procedures they embody.

117. As the Supreme Court of Canada stated in the *Quebec Secession Reference*:

> [76] (…) Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.
>
> [77] In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted. [147]

118. Part V of the *Constitution Act, 1982* defines precisely which matters and constitutional provisions are subject to the requirement of an "enhanced majority",

[147] *Quebec Secession Reference*, para. 76-77, AGC Authorities, Tab 23.

and thus to the application of one of the multilateral amending procedures (in ss. 38, 41 and 43) for their amendment. [For example, an amendment to a constitutional provision that relates to the use of the English or French languages within a province is subject to the procedure set out in s. 43, requiring approval of the federal Houses and the legislative assembly of the province to which the amendment applies, whereas an amendment to a constitutional provision relating to the use of English or French in federal institutions would require resort to the unanimous consent procedure in s. 41.] Part V also specifically authorizes the exercise of unilateral legislative power by Parliament and the provincial legislatures, respectively, for certain limited classes of constitutional amendment. This balanced array of procedures gives appropriate weight to each of the fundamental constitutional principles, while at the same time, preserving the capacity of democratic representatives to pursue and effect constitutional change and institutional renewal.

vii) No weight should be accorded "expert" reports on domestic law

119. Various parties have filed expert reports in this matter. Some, such as the opinions of Professors Heard and Desserud filed by the Attorney General of Quebec, are legal opinions masquerading as political science;[148] others, such as the opinion of Henry Brown Q.C. filed by Senator Joyal, are actual legal opinions on the very issues before the Court. Neither type of opinion deserves any weight. As the Supreme Court of Canada put it in *Roberge v. Bolduc* "

> "It is the function of the judge, not the experts, to decide questions of law".[149]

120. Properly focused evidence on political theory or historical facts may be of assistance to the Court. To the extent that the Court is interested in the legal

[148] Record of the Attorney General of Quebec, Vol. III, p.876 (Andrew Heard) and p.937 (Don Desserud)
[149] *Roberge v. Bolduc,* [1991] S.C.R. 374 at para 27, AGC Authorities, Tab 24.

opinions of various academics and lawyers in relation to this matter, the Senate Committees that examined the previous versions of the present legislation heard from dozens of experts, and their (conflicting) opinions are found in the record.[150]

II. Response to the Reference Questions

121. In answering the reference questions, one must keep in mind the following considerations:

- what Bill C-7 does and how each aspect of Bill C-7 engages the amending procedures of the Constitution, if at all,

- that the amending procedures of the Constitution are concerned solely with effecting changes to the law of the Constitution and not with making formal alterations to conventions which may, from a political perspective, prescribe whether, how or when a legal power or discretion may be exercised,

- section. 44 of the Constitution Act, 1982 clearly states: "**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. (emphasis added)

1) Does Bill C-7 constitute an amendment to the Constitution of Canada in relation to the office of the Governor General which can only be made with the authorization of the Senate, House of Commons, and the legislative assembly of each province pursuant to s. 41(a) of the *Constitution Act, 1982*?

122. This question arises in relation to the Bill C-7 consultative process requiring the Prime Minister to inform himself as to the preferences of electors for various nominees for Senate appointment and the alleged unconstitutional impact this process may have on the powers of the Governor General to appoint Senators under s. 24 of the *Constitution Act, 1867*.

[150] AGC Record, Vol. 6-11.

i) The Bill C-7 consultative process results do not bind the Prime Minister or the Governor General

123. The Attorney General of Quebec argues that Bill C-7 attempts to bind the Prime Minister in the recommendation that he makes to the Governor General and that such attempts are effectively directed at, or are in relation to, the Governor General's constitutional office, and notably his or her power to appoint Senators. In other words, Bill C-7 would eliminate the discretion of the Prime Minister in giving advice to the Governor General on Senate appointments and that this elimination of discretion effectively constitutes an amendment to s. 24 of the *Constitution Act, 1867*. [151]

124. This argument misconceives the effect of the consultative process on the Prime Minister. The factors that a Prime Minister can take into account in deciding whom he or she will recommend to the Governor General to be summoned to the Senate are not set out in the Constitution. A Prime Minister has the discretion to look at any factor he or she considers relevant. The legislation at issue in this reference does not remove that discretion; at most, it commits the Prime Minister to consider the results of a consultative process.

125. The use of the terms "must consider" and "should" are indications of a strong preference that Senators be summoned from lists compiled in accordance with provincial or territorial legislation. That decision-makers may be required to *take account* of certain factors before making a decision is a concept well-known in administrative and constitutional law. Thus, a decision-maker can be required to consider factors specified by "soft" law, such as guidelines and policies,[152] by factors enumerated in statute,[153] or by factors developed by judicial interpretation of constitutional rights.[154] In none of these situations is the discretionary decision-maker's authority considered unlawfully or unconstitutionally "fettered," since

---

[151] AGQ, para 170-195
[152] *Thanmothamorem v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 198, at paras. 55-62 AGC Authorities, Tab27.
[153] See, for example, *Youth Criminal Justice Act*, s. 64(1.1);*Patent Act*, s. 21.08(2), AGC Authorities Tab 64; *Species at Risk Act*, s.38, AGC Authorities Tab 57
[154] *U.S.A. v. Cotroni* [1989] 1 S.C.R. 1469 at1498-1499, AGC Authorities, Tab .28

consideration of the factors, not blind obedience, is all that is required. Indeed, structuring discretion by reference to prescribed factors is usually considered as a virtue of the scheme, since it makes decision-making more transparent, coherent and consistent. Bill C-7 does not require the Prime Minister to recommend from the list, and the Governor General is not compelled to summon from such lists. The Governor General's role under s. 24 of the *Constitution Act, 1867* remains untouched, so no amendment to that section is required.

126. The Attorney General of Québec's argument, like a similar argument by the FCFAC[156], is based on his assumption that "office of the Governor General" or "the method of selecting Senators" can be read to encompass not only his or her power *to appoint S*enators under s. 24 of the *Constitution Act, 1867*, with which the Attorney General of Canada agrees, but also the political convention that the Governor General appoints on the recommendation of the Prime Minister as stated in the 1935 minute of Cabinet identifying the Prime Minister as the appropriate government official offering advice.

127. Senator Joyal's argument is a variation on this same theme wherein he argues that s. 24 is the embodiment of the royal prerogative and necessarily incorporates the Prime Minister's conventional role to recommend candidates to the Governor General.[157]

128. This argument, like the Attorney General of Quebec's, fails to distinguish legal powers from conventional rules – conventional rules necessarily prescribe the way in which legal powers are exercised but in so far as the Governor General's legal powers are not affected in law, the conventional impact does not effect legal constitutional change requiring recourse to the amending procedures of Part V.[158]

---

[156] FCFAC factum, para 26ff

[157] Senator Joyal factum, para. Para 2-45

[158] Hogg, vol. 1, pp. 1-22-1-22.2, 9-5 – 9-8 AGC Authorities, Tab ZZZ ; Professor Hogg's testimony before Legislative Committee on Bill C-20, April 16, 2008, :AGC Record, vol. 9, Tab 50, p. 3022:

●(1545)

Getting to the corner of Professor Gélinas' point, section 24 has never attempted to control the decision-making process that precedes the decision of the Governor General to make Senate appointments. So if it did turn out that prime ministers now automatically use the process, and if it came to be accepted, as Professor Gélinas suggests

129. Senator Joyal makes reference to the appointment of the first Senators as having been made from the members of the provincial Legislative Councils pursuant to art.14 of the Quebec Conference resolutions, the sole time, he argues, that the royal prerogative to appoint Senators has been constrained or conditioned. Section 25 of the *Constitution Act 1867* provided that the Queen would appoint the first Senators but never mentioned the requirements of art. 14 which undoubtedly were conventional in character.[159] This is because art. 14 was a political and not a legal requirement enforceable by the courts. Section 24 similarly sets out the legal power to appoint Senators but does not mention the conventional actor or his or her role. Conventional rules can change over time without affecting the legal power in s. 24 and therefore do not require recourse to the amending procedures under Part V[160].

---

might be a possibility, that this was really a convention, that this ripened into a new convention that appointments would always be made by using this admittedly optional process, section 24 would not speak to that. Section 24 says nothing about the conventions that precede an appointment, and conventions can change in various ways over the years. If this ended up causing a change in the convention, section 24 would simply operate in the way it has always done. That is to say, whoever by convention is supposed to make the recommendations of the Governor General, the Governor General would then go ahead and make the appointment.

Patrick Monohan, *Constitutional Law*, 4th[d] ed., Toronto, Irwin Law, 2013 p. 7, 188-19108, AGC Authorities, Tab zzz

[159] Senator Joyal factum, para. 14-15

[160] Benoit Pelletier, *La modification constitutionnelle au Canada*, Scarbourgh (Ont.), Carswell, 1996 p. 104 AGC Authorities, Tab ZZZ : (« Benoit Pelletier »)
Les conventions constitutionnelles ne sont pas assujetties aux modalités de modification prévues à la Partie V de la Loi de 1982. [...] Il va sans dire, en effet, que l'existence et la transformation des conventions constitutionnelles dépendent fondamentalement de la volonté des acteurs politiques canadiens. Bien que les conventions constitutionnelles fassent partie intégrante de la Constitution du pays au sens large, comme l'a d'ailleurs affirmé la Cour suprême du Canada, elles ne font toutefois pas partie de la Constitution formelle, ni même du droit constitutionnel (note omise). En réalité, les conventions constitutionnelles ne font même pas partie de la Constitution du Canada au sens du paragraphe 52(2) de la Loi de 1982 et, en conséquence, ne sont pas visées par la Partie V de cette loi (note omise)

Monohan, p. 208, AGC Authorities, Tab ZZZ, ("Monahan")
Some commentators have suggested that the entire system

130. The Attorney General of Quebec's reliance on *Conacher v Canada (Premier Ministre)* and the views of Professor Monahan [161]are misconceived. As Prof*essor Monahan indicate*d, s. 56.1[162] of Bill C-16 ("fixed date elections") did not eliminate the Governor General's power to dissolve Parliament under s. 50 of the *Constitution Act, 1867*; similarly, Bill C-7 imposes no constraint on the Governor General's power to summon individuals to the Senate. Neither situation requires recourse to s. 41 amending procedure Finally, the Federal Court of Appeal specifically did not rule on the argument that eliminating the Prime Minister's discretion to recommend, pursuant to convention, to the Governor General to dissolve Parliament would affect the office of the Governor General or his or her power to dissolve Parliament.[163]

---

of Cabinet government, including the appointment of the first minister and the Cabinet by the governor general, has now been entrenched in the constitution by virtue of section 41(a) [footnote to: R.I. Cheffins and P.A. Johnson, The Revised Canadian Constitution: Politics as Law, Toronto, McGraw-Hill Ryerson Limited, 1986), p. 70-74]. However, there is no reference to the institution of the Cabinet or the office of the first minister in the constitution of Canada. The powers of the first minister are almost entirely defined through constitutional conventions. These conventions will presumably continue to evolve as political practices and the beliefs of the relevant political actors change to deal with new circumstances. There does not appear to be any principled basis for interpreting section 41(a) as constraining this process of informal and flexible evolution. In short, the better view would seem to be that section 41(a) does not constitutionally entrench the entire system of Cabinet government

[161] AGQ factum, para. 187-191

[162] *Canada Elections Act*, S.C. 2000, c.9, as amended by S.C. 2007, c. 10, s.1 (Bill C-16 *An Act to amend the Elections Act*)

56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

Election dates

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009

[163] *Conacher v Canada (Prime Minister)* 2010 FCA 131 at para. 5, AGC Authorities, Tab ZZZ: "Various conventions are associated with the Governor General's status, role, powers, and discretions. Some of these conventions, which are open to debate as to their scope, concern the Prime Minister's advice to the

131. milarly, the FCFA's argument[164] that the changes contemplated by Bill C-7 are not ones Parliament can make are based on a an erroneous understanding of the nature of our political system. At the federal level, there is what has been described as a "dual executive:" the Queen, represented by the Governor General, is the formal head of state; the Prime Minister – a political actor - is the head of government. Pursuant to convention, the formal head of state acts on the advice of the head of government. Conventions evolve and may be conditioned by legislation. Bill C-7 would not alter or constrain the powers of the formal head of state, nor would it eliminate the convention that the formal head follows the advice of the political actors. This is not a question of form trumping substance, as the FCFA alleges, but rather a recognition that no change would be made affecting the provisions of the Constitution dealing with executive government. The role of political actors like the Prime Minister would be left to the conventions of responsible government, where it always has been[165].

132. The Attorney General of Quebec's argument is that Bill C-7 binds the Prime Minister, that is, the conventional actor, and that the Governor General is similarly bound as a matter of law to appoint the nominees from the Bill C-7 consultative process. The fact that the Governor General may feel politically

---

Governor General about the dissolution of Parliament and how the Governor General should respond: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., v. 1, looseleaf (Toronto: Carswell, 2007) at 9-29 to 9-33. In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role. In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional"

See in addition: Hogg,, vol. 1, pp. 9-31 – 9-34: at p. 9-32, AGC Authorities, Tab ZZZ: "Subsection (1) of s. 56.1 preserves the power of the Governor General to dissolve Parliament. As explained, that is necessary in order to permit the conventions of responsible government to function. (…)"

[164] FCFAC factum, para 95-106

[165] Hogg, vol. 1, pp. 9-1 – 9-8, 9-31 – 9-34, . AGC Authorities, Tab ZZZ

Contrast the Attorney General of Quebec's reference in para. 177 to Re Initiative and Referendum Act[1919] A.C. 935 AGC Authorities, Tab ZZZ with R v Nat Bell Liquors, [1922] 2 A.C. 128. AGC Authorities, Tab ZZZ. In both cases, statutes initiated by referendums were challenged. In the former, the statute was held to contravene the office of the Lieutenant Governor because his role was by-passed in the legislative process. In the latter, the legislature including the Lieutenant Governor, was directed by statute to enact laws approved by referendum. This process was held not to affect the office of the Lieutenant Governor because his or her role was not entirely by-passed in the process.

Hogg, vol. 1, p.14-10-14-16

bound by convention to exercise that power in a certain way is irrelevant from a legal standpoint and does not affect the "office of the Governor General" as understood in s. 41 of the *Constitution Act, 1982*.

133. The Governor General in many situations is already "morally or politically bound" by convention to exercise his powers in a certain way, or even not to exercise them at all. For example, the power of the Governor General to appoint Senators in s. 24 is affected in the political sense (but not in the legal sense) by a longstanding existing convention. He or she is morally bound through convention to follow the recommendation of the Prime Minister[166].

134. Although this might seem to be in contradiction (in a broad sense) with the powers entrusted to the Governor General by the Constitution, there is no contradiction in law because the convention is not enforceable legally. As a matter of law, the Governor General retains the legal right to refuse to follow the Prime Minister's recommendation and thereby is considered unfettered. Conventions do not affect the "office or powers of the Governor General" as understood in s. 41, as long as the Governor General retains his or her legal discretion to appoint or to refuse to appoint.

135. The nature of conventions was discussed in *Patriation Reference*[167]:

> *Being based on custom and precedent, constitutional conventions are usually unwritten rules. Some of them, however, may be reduced to writing and expressed in the proceedings and documents of imperial conferences, or in the preamble of statutes such as the Statute of Westminster, 1931, or in the proceedings and documents of federal-provincial conferences. They are often referred to and recognized in statements made by members of governments.*
>
> *The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce*

[166] Hogg, vol. l, p. 9-11 and 9-38, AGC Authorities, Tab ZZZ .

[167] *Patriation Reference*, p. 880, AGC Authorities, Tab

> *them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.*

136. The Court goes on to address the seeming contradiction between conventions and the text of the Constitution using as an example the powers held by the Governor General under the Constitution which are morally constrained by convention, but which he or she can still legally exercise (at. p. 880-81):

> *Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.*
>
> *Some examples will illustrate this point.*
>
> *As a matter of law, the Queen, or the Governor General or the Lieutenant Governor could refuse assent to every bill passed by both Houses of Parliament or by a Legislative Assembly as the case may be. But by convention they cannot of their own motion refuse to assent to any such bill on any ground, for instance because they disapprove of the policy of the bill. We have here a conflict between a legal rule which creates a complete discretion and a conventional rule which completely neutralizes it. But conventions, like laws, are sometimes violated. And if this particular convention were violated and assent were improperly withheld, the courts would be bound to enforce the law, not the convention.*

137. As observed by constitutional law author Peter Hogg "… *the conventions allow the law to adapt to changing political realities without the necessity for formal amendment*".[168]

138. Part V of the *Constitution Act, 1982* does not change this reality.

139. For our purposes, referendums are an interesting parallel with the kind of consultations proposed by Bill C-7. As referendums are merely advisory or consultative in character, they do not create a legal obligation for legislative authorities to follow them. It is at most by way of a political obligation taking the

[168] Hogg, Vol. 1, p. 1-29, AGC Authorities, Tab ZZZ

form of a convention that governments may feel bound to follow their outcome, but they do not trigger a legal obligation.[170]

140. Referendums are sometimes even used for contemplated amendments to the Constitution itself, such as the 1992 referendum regarding the Charlottetown Accord. Although the legislative actors may feel morally bound to follow the outcome of the popular vote, such outcome is not legally binding and therefore the consultation is not contrary to the process set out by the amending procedures in Part. V of the *Constitution Act, 1982*. As the Supreme Court stated in the *Quebec Secession Reference*:

> "Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion."[172]

2) Does Bill C-7 constitute an amendment to the Constitution of Canada in relation to the method of selecting Senators under s. 42(1)(b) of the *Constitution Act, 1982*, which can only be made by following the process set out in s. 38 of the *Constitution Act, 1982*?

141. Bill C-7 does not purport to alter or entrench anything in the Constitution regarding the method of selecting Senators. Everything that is set out in Bill C-7 regarding the consultative process for selecting Senators (Part I of Bill C-7) will only have statutory force. The only element which Bill C-7 purports to entrench in the Constitution is the proposed amendment respecting term limits (Part II of Bill C-7). This is clear from the very terms of Bill C-7, which simply establishes a statutory process in Part I, while in contrast it expressly amends the Constitution and establishes new constitutional provisions in Part II: *The Constitution Act, 2011 (Senate term limits)*: see Bill C-7, s. 6. It is therefore clear that the answer to

---

[170] *Alliance Québec* c. *Directeur general des élections du Québec,* [2006] J.Q. no 4350 (CAQ), para. 28, AGC Authorities, Tab zzz

[172] *Quebec Secession Reference*, para. 87, .AGC Authorities, Tab 23.

the second question in this reference should be in the negative and the analysis could simply end there.

142. The Attorney General of Quebec, as well as the intervenors, argue that Part I of Bill C-7 seeks to, and will permit the Prime Minister to, transform the Senate into an elected body, which the Supreme Court held that Parliament could not do on its own under the predecessor to s. 44 of the *Constitution Act, 1982*, former s. 91(1) of the *BNA Act*. By proceeding towards this end, Bill C-7 would effect a fundamental change in the method of selecting of Senators contrary to s. 42(1)(b) of the Act of 1982.[173]

143. The true issue raised here is another variation on the first reference question: – who appoints: the Prime Minister or the Governor General?

144. The consultative process set out by Bill C-7 is constitutional. It constitutes a valid exercise of Parliament's residuary power to make laws for the peace, order and good government ("POGG") of Canada as set out in the introductory paragraph of s. 91 of the *Constitution Act, 1867*. For example, the *Official Languages Act*[174] applies to federal institutions, including "the Senate" (s.3); in *Jones* v. *A.G. of New Brunswick,*[175] this Court held, per Laskin C.J., that there was "no doubt" it was open to Parliament to enact the *Official Languages Act*, directed as it was to institutions of the Parliament and government of Canada, on the basis of the peace, order and good government power and "the purely residual character of the legislative power thereby conferred."

145. Furthermore, the process contemplated for selecting Senate nominess in Bill C-7 does not modify s. 24 of the *Constitution Act, 1867* whereby the Governor General summons and appoints persons to the Senate, on the recommendation of

---

[173] QCA factum, para.141-169
FCFAC factum, para.23-106
Senator Joyal factum, para. 46-63
SANB factum, para. 67-75
[174] *Official Languages Act* R.S.C. 1985, c. 31 (4th Supp.)
[175] *Jones* v. *A.G. of New Brunswick*, [1975] 2 S.C.R. 182, AGC Authorities, Tab 10; Hogg, s.17-1 (residuary nature of power, p. 17-1); s. 17-2 (the gap branch, p. 17-5), AGC Authorities, Tab ZZZ

the Prime Minister pursuant to constitutional convention. This is the method as it existed prior to Bill C-7 and Bill C-7 changes nothing in that regard.

146. FCFAC argues that such a view is formalistic and that if s. 42(1)(b) is limited to the formal power of appointment by the Governor General, then it would be redundant because s. 41(a) already restricts amendments to the office of the Governor General.[176] This is not the case – just as s. 41 and 42 carve out specific matters from s. 44, properly understood, s. 42 necessarily carves out from s. 41 matters which would otherwise fall equally under both sections but viewed from different perspectives. To the extent that the office of the Governor General in s. 41(a) includes the power to appoint Senators, s. 42(1)(b) enables amendments in relation to the method of selecting Senators using the general amending procedure (7/50) and not the more onerous unanimous consent procedure.

147. The SANB also argues that the exceptions mentioned in s. 42 are indicative but not exhaustive of the exceptions to s. 44 because were it true, that would mean, for example, that the federal government could unilaterally amend the Charter and in particular sections 4 (requirement of an annual session of Parliament) and 5 (maximum duration of a Parliament)[177]. This line of argument fails to take account of the history of amending procedures proposals[178], as well as the fact that

---

[176] FCFAC factum, para.74-75, 105-106

[177] SANB factum, para. 11-26, notably 16 and 26. See also AGQ factum para. 260-267. This was also the argument of Professor Heard before the Senate Standing Committee accepted in the Committee report: AGC Record, vol. 4, tab 27, p. 17-18.

[178] In the 1964 Fulton-Favreau proposal, the following exceptions from Parliament's power to amend the Constitution which now are found in the Charter were set out: s. 6 (Bayefsky, Documentary History, Vol.1, p. 17, AGC Authorities, Tab ZZZ

> b) the requirements of the Constitution of Canada respecting a yearly session of Parliament (now s. 5 of the Charter)
>
> c) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons (s. 50 of the *Constitution Act, 1867* – 5 years), except that the Parliament of Canada may, in time of real or apprehended war, invasion or insurrection, continue a House of Commons beyond such maximum period, if such continuation is not opposed by the votes of more than one-third of the members of such House (now s. 4 of the Charter),

these democratic rights were entrenched in the Charter at the same time and in the same Constitution instrument as the amending procedures themselves in 1982. The effect of entrenching the Charter in the *Constitution Act 1982* and making its provisions applicable to both the federal Parliament and the provincial legislatures was clearly to remove the Charter from the purview of the legislative power to amend under sections 44 and 45 of the *Constitution Act, 1982*. Amendments to the Charter can only be made under one of the multilateral amending procedures.

i) Bill C-7 does not change the existing method of selecting Senators

148. The consultative process is not a change to the method of selecting Senators because the essential discretion of the Prime Minister to recommend and of the the Governor General to appoint is preserved, not removed as argued by the Attorney General of Quebec. It injects an element of transparency and accountability into the process since the Prime Minister may pay a political price for passing over the list of nominees established pursuant to the consultation.[179] Furthermore, as mentioned in answer to Question 1, the amending procedures are concerned with amendments to the textual provisions of the Constitution and not with constitutional conventions, i.e. that it is the Prime Minister who recommends candidates to the Governor General. Absent outright removal of the Governor General's power to summon under s. 24 of the *Constitution Act, 1982*, a mere change in the Prime Minister's discretion does not constitute a change to the

---

In the 1971 Victoria Charter, these same exceptions from Parliament's power to amend the Constitution were proposed to apply equally to the provincial legislatures' power to amend provincial constitutions: s. 55 (The *Canadian Constitutional Charter, 1971,"Victoria Charter*" Parts I-VII, AGC Record, Vol. 4, Tab 30, p. 1417)

> (2) the requirements of the Constitution of Canada respecting a yearly session of Parliament and the legislatures (s. 86 of the *Constitution Act, 1867* in relation to Quebec) (now s. 5 of the Charter)
>
> (3) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the legislative assemblies (s. 85 of the *Constitution Act, 1867* in relation to Quebec) (now s. 4 of the Charter)

[179] Manfredi Opinion, para. 45, AGC Record, Vol. 12, Tab 123, p.4050-4051.

"method of selecting Senators" as that term is understood in relation to the relevant provisions of the Constitution.

149. History gives some insight into the meaning of the phrase "method of selecting Senators." Prior to 1982, several of the prominent Senate reform initiatives focused on replacing the federal appointment monopoly with systems where the power would have been shared between the provinces and the federal government,[180] or appointment would have been an exclusively provincial responsibility.[181] Such changes would necessarily have had a significant impact upon the Governor General's authority in s. 24 to "summon qualified Persons to the Senate," and suggest the sort of change the drafters must have had in mind in using that phrase. Clearly, removing authority over appointments from the Governor General and giving it to provincial legislatures would have changed the "method of selecting Senators" in a way that involved a transfer of authority of appointments. That is quite distinct in kind from a change that at most gives provinces a say in designing a process that will assist the Prime Minister in making nominations.

150. Provincial consultation and consent would be required if it were proposed that Senators be directly elected. This was made clear by the Prime Minister in his evidence before the Special Senate Committee that studied Bill S-4[182]. The Prime Minister was fully aware of, and in agreement with, the position that a

---

[180] For example Bill C-60, s.63, AGC Record, Vol. 1, Tab 13, p.246; Molgat-McGuigan, recommendation. 39, AGC Record, Vol. 1, Tab 16, p. 308. See generally Stilborn Report, para.55-69, AGC Record, Vol. 12, Tab 124, p.4160-4164.

[181] Task Force on Canadian Unity, recommendation 47-48, AGC Record, Vol. 5, Tab 31, p.1493

[182] Special Senate Committee Hearing p. 2:9-2:13, September 7, 2006. AGC Record, Vol. 6, tab 37, p.1880-1881.
See also the preambles to predecessors of Bill C-7: Bill C-43 and Bill C-20, AGC Record, Vol. 1, Tab 9, p. 147 ,and Vol. 1, Tab 4, p. 45:

WHEREAS the Government of Canada has undertaken — pending the pursuit of a constitutional amendment under subsection 38(1) of the *Constitution Act, 1982* to provide for a means of direct election — to create a method for ascertaining the preferences of electors in a province on appointments to the Senate within the existing process of summoning senators;

constitutional amendment to establish an elected Senate would need provincial participation. But that is not what Bill C-43 or C-20 sought to achieve and it is not what Bill C-7 seeks to achieve.

151. The consultative element of Bill C-7 is only triggered when a province chooses to do so. Even then, a future government may decide to repeal the legislation. Nor can be it assumed that every province will enact such legislation (to date four provinces have taken steps in that direction), or that a province that introduces such legislation will always maintain that approach.[183]

152. To the extent that legislation has been introduced in provinces (Alberta and Saskatchewan) or only proposed (British Columbia and New Brunswick for example), the language of the legislation acknowledges that the individuals selected have not been directly elected to the Senate but may be summoned to the Senate.[184]

153. The impact of the Alberta process in terms of the characteristics of those who actually serve in the Senate has been negligible – there has been no conflict between elected and un-elected Senators since regardless of what process is used by the Prime Minister to inform his recommendation, section 24 of the *Constitution Act, 1867* provides that it is the Governor General who appoints Senators. As Professor Manfredi states, the Alberta Senate nominee process has not produced Senators whose professional and life experience varies significantly from Senators appointed strictly through the nominative process." [185]

ii) Consultation does not mean direct election

154. The Attorney General of Quebec suggests in relation to Question 3 on fundamental features that although not expressly stated as a constitutional

---

[183] Manfredi Opinion, para. 33, AGC Record, Vol. 12, Tab 123, p. 4043

[184] Alberta *Senatorial Selection Act* R.S.A. 2000, c S-5s. 3(1) and (2) ; Saskatchewan, An Act to provide for the Election of Saskatchewan Senate Nominees, 2009 Chapter S-46.003 s. 3(b); British Columbia Bill 17, *Senate Nominee Election Act* s. 5, New Brunswick Bill 64, *An Act Respecting the Selection of Senator Nominees*

[185] Manfredi Opinion, para 38-46, AGC Record, Vol. 12, Tab 123, p. 4046-4051

requirement, the requirement of "non-election" for Senators is an implicit requirement of the *Constitution Act, 1867* which is meant to ensure a level of independence of Senators from the people. The Attorney General of Quebec suggests that the consultative process could be unconstitutional as it adds an electoral element to the position.[186] Although the answer to this argument may also be given under Question 3, it may more properly be dealt with under Question 2 in relation to method of selecting Senators in that s. 44 of the *Constitution Act, 1982* provides that "(s)ubject to s. 41 and 42, Parliament may make laws amending the Constitution of Canada in relation … to the Senate …".

155. The Attorney General of Quebec's position misconceives the consultative process. Under Bill C-7, Senate appointees would not be elected to the Senate. At most, they would be elected to provincial "Senate nominee positions" in accordance with the framework set out in the schedule to Bill C-7, whereby a pool of candidates would be constituted which the Prime Minister must consider in the exercise of his discretion to recommend persons to the Governor General for appointment, but which he would not be bound to recommend. The Prime Minister may pass over them and suffer the political consequences, if any, just as is the situation whenever he recommends a person for appointment. Even more importantly, the Governor General is still not legally bound to follow the recommendation.

156. As previously argued under Question 1, the Prime Minister could have equally provided for referendums on Senator nominees without the results binding him legally to recommend the more popular candidates. Having recourse to the pre-established machinery for provincial or municipal election for the purposes of assessing the populations views on potential Senate candidates does not transform the consultation on Senate nominees into a direct election of a Senator any more than a referendum does.[187]

---

[186] AGQ factum, para. 206-207, 237-245

[187] See for example: *Referendum Act*, S.C. 1992, c-30 which incorporates parts of the *Canada Elections Act,* AGC Authorities, Tab ZZZ *; La Loi sur la consultation poulaire* L.R.Q. c.C-64.1 which incorporates parts of *la Loi éléctorale,* AGC Authorities, Tab ZZZ

157. The experience in Alberta with a consultative process demonstrates that the fears raised by some who argue that this is simply a precursor to a directly-elected Senate are greatly overstated. The Alberta consultative elections of potential Senate nominees have not had the effect of turning the Senate into a directly-elected body since neither the Prime Minister nor the Governor General is legally bound to give effect to the outcome of the consultation process. For example, on four occasions, the winners of those nominee processes have not been appointed.[188] Of the ten people whose names have been submitted to the Queen's Privy Council in accordance with s. 3(1) of the Alberta *Senatorial Selection Act*, only five have been summoned to the Senate.[189] While undoubtedly the refusal to appoint the winners of the nominee elections can be explained in part by political factors or unique circumstances (like the commitment to appoint pending approval of the Meech Lake Accord), it does demonstrate that many factors may be relevant in the decision to accept or reject the result of a consultative process. To date, some Prime Ministers have considered the results relevant, but not binding.

iii) "Non election" and independence

158. In order for an unwritten or "implicit" principle to be brought to bear on the constitutionality of legislation, there would need to be not only an anchoring provision in the written text of the Constitution, but as well some consensus on the existence of this principle within our constitutional framework.

159. The "non-election" of Senators as a means of ensuring independence from the people or from constituents is not an implicit feature of the *Constitution Act, 1867*. While nomination through appointment was retained, this choice did not attract unanimous support at the time of Confederation. Moreover, appointment was in fact retained at the time mostly for practical considerations, and not because of some philosophical apprehension regarding elections. Some elective element in the choosing of Senators was never meant to be forbidden outright by

[188] Manfredi Opinion, para 43-44, AGC Record, Vol. 12, Tab 123, p. 4049
[189] Manfredi Opinion, para 38, AGC Record, Vol. 12, Tab 123, p. 4046-4047.

the Constitution. As long as Senators are not directly elected and the Governor General retains the final and conclusive power to appoint Senators, the Constitution is not offended by holding consultative processes that establish no more than a pool of potential nominees.

160. As Professor Manfredi states in his report when the Fathers of Confederation retained appointments and not elections for Senators "*they did so largely on practical rather than philosophical grounds*".[190]

161. The Attorney General of Quebec's own expert, David Smith[191], acknowledges the difficulties of campaigning in large constituencies in 1867 prompted the Fathers of Confederation to favour nominations over elections (at p. 17(p. 848)). Professor Manfredi elaborates on this and characterizes it as the particular reason for having favoured appointments over elections at the time of Confederation. (at para. 28-30 (p. 3998-3999)). He underlines that this concern is no longer valid today: "*In a world where elections can be contested effectively in constituencies as geographically large as the Northwest Territories, the Yukon, and Nunavut, the area over which Senate elections would have to be contested can no longer be an objection to the elective principle*" (para. 30(p. 3999))

162. Although this feature may have made sense at the time of Confederation, modern means of communication and transportation have eliminated or at least tremendously reduced its impact.

163. The Persons case (*Edwards* v. *Canada*, [1930] A.C. 124) is a useful parallel. While the Framers in 1867 may not have envisioned the nomination and appointment of women as Senators, the text did not prohibit it. When this case was decided, society had already evolved and there was no longer a sufficient consensus to derive such an implicit prohibition from the constitutional text.

---

[190] Manfredi Opinion, para. 28, AGC Record, Vol. 12, Tab 123, p. 4040-4041
[191] AGQ Record, Vol. III, David E. Smith, p. 832

164. In the same manner, it was recently held that Parliament's legislative power over "marriage" could encompass same-sex marriage. Although an implicit requirement to the contrary might have been read into the written text back in 1867 due to social realities, there was no longer such a consensus in 2004 which could justify limiting Parliament's legislative authority over marriage: [192] .

165. In the case at bar, where there was never a consensus at the time against elections, and the choice of appointment was made essentially for practical reasons, it would be even more of an error to read an implied requirement in the constitutional text against consultative nominee elections.

166. Since consultative nominee processes are not expressly prohibited by the *Constitution Act, 1867*, there is no reason to read such an implicit requirement into the *Constitution Act, 1867* and to consider Bill C-7 as potentially contravening it.

167. Moreover, Professor Manfredi emphasizes that when the Framers considered "independence" at the time of Confederation "*they sought to protect its independence not through* ***mode*** *of appointment but through the* ***term*** *of appointment*." (para. 37, p.4047). He insists that "independence" was preserved at the time by providing tenure for life, so that Senators "*neither fear capricious removal from office nor must they seek approval for continuation in office*" (para. 32, p. 4042-4043). This feature is preserved in Bill C-7 by non-renewability (para. 32, p. 4043).

168. Moreover, as Manfredi points out, the current system does not, and has never fostered the independence of Senators from the people or constituents in the way presented by David Smith. The assumption that a purely appointive process produces Senators who are more independent is not supported by reality. Senators who have been appointed throughout the years have predominantly been individuals who held an elected public office or ran for such an office in the

[192] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para. 21-30

past.[193] Moreover, they almost invariably have party affiliations when appointed. Nothing in the Constitution prohibits this. These individuals are therefore susceptible of having political ties in much the same way as what the Attorney General of Quebec contends would be created under the regime proposed by Bill C-7.

169. Under the current system, the Prime Minister may commission surveys of the population by private polling firms to find out electors' preferences for appointment to the Senate. Nothing in the Constitution prohibits this, yet it would be similar to what the Bill C-7 consultative process purports to do – to provide information about the population's preferences to permit the Prime Minister to better exercise his discretion in the recommendation of persons to be appointed to the Senate by the Governor General.

170. Similarly, the Prime Minister could choose to consult various individuals, groups or institutions, in a formal or more informal manner, in order to inform his or her recommendation to the Governor General. These processes could be conducted publicly or privately. Again, nothing in the Constitution would prohibit this, as long as the Governor General retains the final power to appoint.

iv) Bill C-7 allows provinces to adapt the proposed electoral division to provincial realities.

171. SANB argues that Bill C-7's proposed framework for a consultative process on selecting Senators on a provincial basis would cause the New Brunswick government and legislature to violate the commitments and duties imposed in relation to the French linguistic community (and thereby, the Acadian community) by s. 16(2) and 16.1 of the *Canadian Charter of Rights and Freedoms* and be inconsistent with the unwritten principle of protection of minorities.[194] However, nothing about Bill C-7 would impede the fulfillment of those commitments. Bill C-7 provides a broad framework for choosing provincial nominees; it does not impose a "one size fits all" solution, but a flexible one that

[193] Manfredi, para.21, and Annex 1 to his opinion.,AGC Record, Vol. 12, Tab 123, p. 4036, 4061ff
[194] SANB factum, para. 76-97; FCFAC factum, para. 58-63

allows provinces to design schemes that correspond "in substance" to the framework. In fact, in its draft legislation, New Brunswick has proposed selection by regions designed to recognize the province's diversity. The SANB position is belied by the text of Bill C-7 and the draft New Brunswick legislation.

v) No delegation of legislative power by Parliament to the provincial legislatures

172. Contrary to Senator Joyal's allegation[195], Bill C-7 in no way constitutes an attempt to delegate legislative power to provincial legislatures; rather, C-7 simply states conditionally: "If a province or territory has enacted legislation", along the lines of the framework in the schedule, then certain consequences may flow for the Prime Minister.

173. Furthermore, the constitutional validity of the Alberta *Senatorial Selection Act* has never been challenged before the courts and its validity is not before the Court of Appeal in this reference.

[195] Senator Joyal factum, para 73-80

vi).Conclusion

174. The method of selecting Senators is provided for in s. 24 of the *Constitution Act, 1867*, which provides that the Governor General shall summon qualified persons to the Senate. Bill C-7 does not propose any changes to s. 24 of the *Constitution Act, 1867*.

175. There is no constitutional principle prohibiting the Bill C-7 consultative process and therefore this aspect of Bill C-7, as ordinary legislation, is constitutional. Indeed, the fundamental constitutional principle of democracy would encourage it.

176. Bill C-7 does not purport to entrench this consultative process within the Constitution, and it does not represent a constitutional amendment which ought to follow the general amending procedure.

177. The Bill C-7 consultative process would be enacted under the legislative authority of "peace, order and good government" (s. 91 of the *Constitution Act, 1867*). In the alternative, it could also be enacted pursuant to s. 44 of the *Constitution Act, 1982*.

3) Does Bill C-7 constitute an amendment to the Constitution of Canada in relation to the fundamental features and role of the Senate, which can only be made pursuant to s. 38 of the *Constitution Act, 1982*?

178. Bill S-4, a predecessor to Bill C-7, in 2006 proposed term limits and received Quebec's support in that regard before the Special Senate Committee on Senate Reform. When Bill C-43 subsequently proposed a consultative process to inform the Prime Minister as to the population's preference for Senate appointees, Quebec then opposed both term limits and consultative processes before the Standing Senate Committee on Legal and Constitutional Affairs on the ground that the federal government intended to create a system of elected Senators. As we have seen in regards to the consultative process on Senate nominees in response to Reference Question Two, Bill C-7 does not purport to create an elected Senate,

nor does it purport to require the Prime Minister to recommend each and every Senate nominee for appointment to the Senate and even less so to require the Governor General to appoint the nominee. Insofar as an appointed Senate is a fundamental feature of the present day Senate, it would remain so – section 24 of the *Constitution Act, 1867* remains unchanged.

179. In relation to the sole constitutional amendment proposed under Bill C-7, the imposition of a term limit of nine years on Senate appointees, Part V of the *Constitution Act, 1982* is a complete code of constitutional amending procedures. [196]Section 42, in relation to the Senate, does not mention Senatorial tenure or term limits. Accordingly, Parliament has the authority to amend the Constitution in relation to Senate terms under s. 44[197].

i) The Misconception

180. The question of whether there should be term limits on Senate appointments has been around as long as the Senate itself, as set out in Part I.[198] A common theme found in the many studies on the issue is that term limits are appropriate and necessary for the renewal and continued vitality of the Senate.[199] Term limits were studied extensively by two Senate Committees in the hearings they held on Bill S-4, and both concluded they were desirable.

---

[196] Hogg, vol. 1, p. 4-4, AGC Authorities, Tab ZZZ:

> "The Constitution Act, 1982, by Part V, introduces into the Canadian Constitution a set of amending procedures which enable the B.N.A. Act (now renamed the Constitution Act, 1867) and its amendments to be amended within Canada without recourse to the United Kingdom Parliament. [...] The vague and unsatisfactory rules laid down by the Patriation Reference have accordingly been supplanted and have no current relevance. The new procedures in Part V of the Constitution Act, 1982 constitute a complete code of legal (as opposed to conventional) rules which enable all parts of the "Constitution of Canada" to be amended."

[197] Benoit Pelletier, p.199, AGC Authorities, Tab ZZZ

[198] See discussion in Part I regarding the pre-confederation debates on the Senate – para. 48-49

[199] See studies and reports noted in para. 51 in Part I

181. Both the Special Senate Committee and the Standing Senate Committee heard from a variety of constitutional scholars and expert witnesses.[200] However, before the Standing Senate Committee the presentation of Professor Joseph Magnet was representative of the approach ultimately adopted by the Committee. Professor Magnet suggested that a court would view Bill S-4 as "part of an overall design" with an object of changing "step by step" regional representation of the Senate by first setting term limits and then by introducing elections.[201] Others made the same assumption.[202] It also appears that much of the concern raised in the Standing Committee was centered on the introduction of Bill C-43. Both Ontario and Quebec wrote to the Committee to raise concerns over the linking of Bill S-4 and Bill C-43.[203]

182. The problem with this approach, advanced here by Professor Heard in his report filed with this Court,[204] is that it is based on the assumption that legislation dealing with term limits is some sort of Trojan Horse, concealing a legislative plan to move to the direct election of the Senate.[205] The legislation must be interpreted as it is written; the constituent parts of the legislation must be reviewed to determine the constitutionality of the package both severally and as a whole.

ii) The Purpose of the Proposed Reforms

---

[200] The witness list for the Special Senate Committee included Professors Gérald Beaudoin, Peter Hogg, Patrick Monahan and Stephen Scott AGC Record, vol. 3, tab 25, p.1041-1043 ; the list for the Standing Senate Committee included Professors Joseph Magnet, Errol Mendes, and Alan Cairns. AGC Record, vol. 4, tab 27, p.1141 – names listed for individual days of hearing: AGC Record, vol. 7, tab 42, p. 2476-2477; tab 43, p. 2574.

[201] Standing Senate Committee Report, AGC Record, vol. 4, tab 27, p.1207

[202] Standing Senate Committee Report, AGC Record, vol. 4, tab 27, p.1208-1209 (Roger Gibbins and Professor Errol Mendes); p.1211 (Professor Alan Cairns)

[203] Standing Senate Committee Report, AGC Record, vol. 4, tab 27, p. 1209 (Ontario);p.1209-1210 (Quebec)

[204] AGQ Record, vol.III, p. 908-909

[205] See also the evidence of Professor Errol Mendes, who stated that Senators appointed under Bill S-4 would end up in limbo when the Supreme Court declared Bill C-4 unconstitutional which would lead to "constitutional chaos," Standing Senate Committee Hearing, March 29, 2007, p. 24:63 – 24:64, AGC Record, vol. 7, tab 43, p.2540-2541

183. If there were any doubt as to the intention of the government in bringing the issue of term limits to Parliament, it was dispelled by the Prime Minister during his appearance before the Special Committee of the Senate. He said:

> …I believe in the ideas behind an upper house. Canada needs an upper house that provides sober and effective second thought. Canada needs an upper house that gives voice to our diverse regions. Canada needs an upper house with democratic legitimacy. [206]

184. The Prime Minister added that separate legislation dealing with consultative elections would soon follow.[207] He also stated that the proposal for term limits "does stand or fall on its own merits".[208] He accepted that a "step-by-step", or incremental, process of Senate reform was inevitable. [209]

185. The Prime Minister agreed that a directly-elected Senate (which has not been proposed in any legislation introduced in Parliament and is not before this Court in this Reference) would require provincial consent:

> I view the Senate properly structured as an important national institution, not a federal institution, not a provincial institution. **There is no doubt that to change the process in a formal constitutional sense--to making senators elected--would require provincial consent.**[210] **(emphasis added)**

The Prime Minister then explained the purpose of the legislation that has been before Parliament since Bill C-43 was first introduced and is at issue in this Reference:

---

[206] Special Senate Committee Hearing p. 2:7, September 7, 2006. AGC Record, vol. 6, tab 37, p.1878
[207] Special Senate Committee Hearing p. 2:8 September 7, 2006. AGC Record, vol. 6, tab 37, p.1879
[208] Special Senate Committee Hearing p. 2:9, September 7, 2006. AGC Record, vol. 6, tab 37, p.1880.
[209] Special Senate Committee Hearing pp. 2:10, 2:11, September 7, 2006. AGC Record, vol. 6, tab 37, p.1881-1882
[210] Special Senate Committee hearing p. 2:13, September 7, 2006. AGC Record, vol. 6, tab 37, p.1884

> The government would be seeking to have the ability to consult the population before making Senate appointments. Obviously, this is an interim step of democratization but we think it would be an important one.[211]

186. The mistake made by those who suggest that Bill C-7 is unconstitutional is that they conflate the distinct processes of: (a) direct elections of Senators; and (b) consultative mechanisms seeking public preferences on potential Senate nominees. Direct election is not the purpose of the legislation, as the Prime Minister clearly stated.

187. In reading intention into the legislation, the critics create the impression that a truly elected rather than a lawfully appointed Senate is the object of the legislation. This is contrary to fundamental principles of statutory interpretation. Rather than reading the plain language of the text, or looking for expressions of purpose, they seek to attribute hidden meaning. Their views cannot be supported by any reasonable construction of the legislation at issue.

188. Properly interpreted, Bill C-7 establishes a statutory consultative process in Part I, while in Part II it would adopt new constitutional provisions: *The Constitution Act, 2011 (Senate term limits).* As argued in relation to the Second Reference Question, the statutory consultative process does not change section 24 of the Constitution and the appointment process by the Governor General. No constitutional amendment is proposed. The remaining question of term limits raises a constitutional issue and will be discussed hereafter in relation to the question raised in the Third Reference Question.

iii) The pre-1982 constitutional analysis has been overtaken by Part V of the *Constitution Act, 1982*

189. "Fundamental features and essential characteristics of the Senate" is terminology employed by the Supreme Court of Canada in *Re Upper House*, when describing

---

[211] Special Senate Committee Hearing p. 2:13, September 7, 2006, AGC Record, vol. 6, tab 37, p.1884. See also Special Senate Committee Hearing p. 2:20, September 7, 2006 where it is set out that the process for electing senators is a separate choice from a consultative process. AGC Record, vol. 6, tab 37, p.1884

which aspects of the *BNA Act, 1867* (now *Constitution Act 1867*) could not be amended by the federal Parliament under s. 91. At that time, (i.e. prior to the 1982 patriation and the adoption of the amending procedures now found in the *Constitution Act, 1982)*, the general amending process was the joint address to the Queen for legislation by the UK Parliament, with provision for some residual amendments in the Canadian Parliament under s. 91(1) and in the provincial legislatures under s. 92(1) of the *BNA Act, 1867*.

190. In the 1980 *Upper House Reference*[212], which turned basically on the wholesale restructuring of the Senate proposed in Bill C-60 (1978), the Supreme Court of Canada needed to develop a methodology for determining what types of amendments could be made by the federal Parliament alone under the broad language of s. 91(1) and what necessarily needed to be left to formal sanctioning by the UK Parliament.

191. S. 91(1) read:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated;
>
> 1. **The amendment from time to time of the Constitution of Canada, except** as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of

[212] *Upper House Reference*, AGC Authorities, Tab 19

> real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House. (Emphasis added)

192. While the language of s. 91(1) appeared to list exhaustively the exceptions to Parliament's amending power, the Supreme Court held that it did not allow Parliament to abolish the Senate, nor change the regional proportion of Senate seats, nor provide for a direct election of senators, nor allow the Senate to be by-passed in the enactment of federal laws. The Court also expressed doubt as to whether Parliament could change certain other aspects of the Senate, but the Court did not rule conclusively on these points as the proposed reform was not sufficiently spelled out in the reference questions.

193. Unlike s. 44 of the *Constitution Act, 1982*, s. 91(1) of the *BNA Act* did not mention the "Senate" as a possible subject of amendment. Rather, section 91(1) granted Parliament (including the Senate), a general power to amend the Constitution of Canada, which was subject to certain listed exceptions. In the *Upper House Reference*, the Court held that s. 91(1) did not allow Parliament to abolish or to make fundamental changes to one of its "own" components: the Senate.[213]

194. Whereas s. 91(1) was effectively a delegation from the UK Parliament to the federal Parliament of some of the former's powers to amend the *BNA Act*, Part V of the *Constitution Act, 1982* is entirely different: it sets out a comprehensive series of procedures for amending the Constitution in Canada, by conferring the power to authorize amendments upon federal and provincial legislative bodies in an exhaustive fashion.

195. The full power to amend Canada's Constitution must necessarily be found in Part V, which must therefore be interpreted according to its own internal logic, and not attached to any vestigial concern for preserving the original structure or design of the Westminster Parliament.

---

[213] *Upper House Reference*, p. 71-73, AGC Authorities, Tab 19.

196. Part V of the *Constitution Act, 1982* must be a complete code, as no legislative power to amend the Constitution of Canada is left with the Imperial Parliament of Westminster.

> 52(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

197. The restrictions on the federal s. 44 authority are set out in s. 41 and s. 42 – they are not framed in terms of fundamental features and essential characteristics, but rather are spelled out in terms of specific subjects or matters.[214]

198. Since s. 44 specifically mentions that alterations to the Constitution in relation to "the Senate" are within the authority of Parliament, except for the four matters specified in section 42, namely the powers of the Senate, the method of selecting Senators, the number of Senators to which each province is entitled, and residence qualifications, there is no warrant for reading other exceptions into s. 44.

199. Section 42 includes some of the "essential" or "fundamental" characteristics of the Senate which had been identified by the Supreme Court in 1980 as exceptions to the power of amendment under s. 91(1). Other features have been left out of s. 42. The length of tenure of Senators is one of these elements. This must be presumed to have been intentional. It is not for the Court to add to the exceptions in s. 42, or to invent an entirely different amending formula when Part V specifies five amending procedures deemed to be exhaustive pursuant to s. 52(3) of the *Constitution Act, 1982*.

200. Professor Monahan, whose affidavit in another matter was filed by the Attorney General of Quebec in the present reference, has written much to the same effect:

> One question that arises is whether Parliament could utilize the procedure in section 44 to alter some aspect of the Senate that is not referred to in sections 41 or 42 and yet which might be regarded as a fundamental feature or essential characteristic of the institution. For example, the government has recently proposed to abolish the mandatory retirement age for Senators, and to limit the tenure of Senators to eight years. [...]

---

[214] Hogg, vol. 1, p. 4-20 – 4 -22, AGC Authorities, Tab ZZZ

> In my view, changes of this character can be effected by Parliament acting alone under s. 44, regardless of whether they can be described as fundamental or essential to the institution of the Senate. The drafters of the 1982 Act granted Parliament the "exclusive" authority to enact amendments to the Constitution of Canada in relation to the Senate, subject only to the exceptions identified in section 42. The items specified in section 42 should be regarded as an exhaustive list of matters deemed fundamental or essential, as those terms were utilized in the *Senate* Reference. To hold that unilateral federal power in section 44 is subject to a further limitation along the lines suggested would in my view lead to a needless uncertainty and ambiguity. [...][215]

201. As the current constitutional context is entirely different from the pre-1982 context, and as the text of s. 44, unlike s. 91(1), clearly provides for amendments in relation to the Senate, there are no valid reasons for reading additional exceptions into the text of s. 44.

202. The Senate had been the subject of much debate right up to time of the patriation of the Constitution in 1982, and the opinion of the Supreme Court of Canada in the *Upper House Reference* was part of that debate. The absence of an exception, in s. 42, to the legislative authority granted in s. 44 in relation to the Senate cannot be viewed as a mere oversight.

203. The FCFAC argues that s. 42(1)(b), respecting the powers of the Senate and the method of selecting Senators, should be interpreted to include the tenure of Senators as an integral part since how the Senate's powers will be used, and what powers are appropriate, depend on the method of selection and the term.[216] The argument overlooks s. 29 of the *Constitution Act, 1867* which specifically deals with Senate tenure as a matter distinct from s. 24, which deals with appointment by the Governor General, a method of selecting Senators. Furthermore, the history of proposals and reports on Senate reform deal with tenure, powers and method of sel*ecting Senators as sep*arate considerations, although often part of a larger

---

[215] Monahan, p. 214, AGC Authorities, Tab ZZZ, ("Monahan")
[216] FCFAC factum, para 107-109.

package of reform.[217] That history provides no foundation for rolling the tenure of Senators into Senate powers or the method of selecting Senators.

iv) Bill C-7 term limit – a modest change

204. Generally speaking, under Part V the more profound the change the more exacting is the amending procedure. As the Favreau White Paper noted, where the change will directly affect the provinces collectively or result in structural change, the provinces were part of the process. Changing term limits is neither profound nor structural. The powers, scope and role of the Senate remain as before. All that will change is the potential length of a Senator's service. It is a modest, evolutionary change consistent with what has been suggested by numerous bodies that have studied the issue.

205. The modesty of what is proposed is demonstrated by what has actually occurred in the Senate. The mean number of years of Senate service since 1965, and including current Senators, has been 11.3 years, with the median being 9.8 years. If the exercise is extended back to Confederation, the numbers rise slightly to a mean of 13.9 years and a median of 12.8 years.[218] Considering that the mean average length of a Parliament is 3.2 years and a median length is 3.6 years, the proposed nine year term in Bill C-7 would typically span three Parliaments and possibly reach into a fourth.[219] A Senator serving a nine-year term would thus present important continuity relative to the turnover that would take place in the House of Commons.[220] Most reviews over the past 40 years have recommended similar periods to maintain an effective Senate.[221]

---

[217] Stilborn Report, AGC Report, vol. 12, Tab 124,para. 43-54: method of selection, para. 70-98: electoral systems and terms-,para: 116-147: powers; Reform of the Senate – A Discussion Paper, Justice Minister Mark MacGuigan (1983): AGC Authorities, Tab ZZZ – a more complete version of FCAFC, Sources, vol.2, Tab 19

[218] Manfredi Opinion, Table 5, AGC Record, Tab 123 p. 4055. These numbers are similar to those calculated by Mr. Stilborn, though his are slightly higher because of a smaller and more recent pool. Stilborn Report, para 177-179, AGC Record, Tab 124, p. 4195-4196

[219] Manfredi Opinion, para 53-54, AGC Record, Tab 123 p. 4055-4056

[220] Manfredi Opinion, para 53-54, AGC Record, Tab 123 p. 4055-4056

[221] Stilborn Report, para 180, AGC Record, Tab 124, p. 4195.

206. The imposition of a term limit of nine years proposed in the legislation at issue is well in line with the current reality of how long Senators sit in the Upper House and as such, does not represent a significant change to the Senate. It is also in line with the norm internationally. Most bicameral federal legislatures have terms much shorter than nine years. Indeed, the proposed term length in the legislation is among the longest in the world. [222]

207. Finally, since the nine-year term is non-renewable, it greatly alleviates any questions concerning the continued independence of the Senate. The fact of non-renewability may reduce constituency pressures that come with the possibility of facing re-election, leaving Senators somewhat freer to perform their duties in an independent manner, although, as mentioned by Professor Manfredi[223] and by John Stilborn,[224] they will continue to play political roles on behalf of their respective political parties in the political process.

[222] Manfredi Opinion, para 53, AGC Record, Tab 123 p. 4055; McCormick Opinion, para. 28-29
[223] Manfredi Opinion, para 21, AGC Record, Tab 123 p. 4036
[224] Stilborn Report, para 180-181, AGC Record, Tab 124, p. 4196-4197

PART IV Costs

208. The Attorney General does not seek any costs in this Reference.

PART V - ORDER SOUGHT

i) The Attorney General of Canada submits that the questions be answered in the negative.

Dated: XXXX, XX, 2013

_____ _____ _____

Counsel for the Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

Cases **Paragraph cited**

Other

PART VII– LEGISLATION

Appendix A