Court File No.: 35203

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF Section 53 of the *Supreme Court Act,* R.S.C. 1985, c. S-26;

AND IN THE MATTER OF a Reference by the Governor in Council concerning reform of the Senate, as set out in Order in Council P.C. 2013-70, dated February 1, 2013

DANS LA COUR SUPRÊME DU CANADA

DANS L'AFFAIRE DE l'article 53 de la *Loi sur la Cour suprême,* L.R .C. 1985, ch. S-26 ;

ET DANS L'AFFAIRE D'UN renvoi par le Gouverneur en conseil concernant la réforme du Sénat tel que formulé dans le décret C.P. 2013-70 en date du 1er février 2013

FACTUM
ATTORNEY GENERAL OF CANADA

(Pursuant to Rule 46 of the *Rules of the Supreme Court of Canada*/ Règle 46 des *Règles de la Cour supreme du Canada)*

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PART I- FACTS

I. Overview

1. Senate reform has been discussed almost from the moment in 1867 when the ink dried on the *British North America Act*. This reference poses six questions[1] concerning the amending procedures in Part V of the *Constitution Act, 1982*. Four questions concern Parliament's ability to enact reforms such as limiting the term of office of Senators, and providing for public consultative processes relating to Senate appointments, reforms aimed at enhancing the legitimacy of this institution. The final two questions ask the Court to address the procedures for abolishing the Senate.

2. The Constitution comprehensively sets out the rules for achieving Senate reform. Part V exhaustively describes the procedures for implementing any proposed constitutional reforms, and sets out what sort of amendments require provincial 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 Parliament alone. Thus, it is constitutionally permissible for Parliament to impose term limits, provide for public consultative processes on Senate appointments, and remove the archaic requirement that a Senator be "seised ...of Lands or Tenements ...of the Value of Four thousand Dollars."

3. The plain language of ss. 38-44 of Part V, the history of Senate and amending procedure reform, and ordinary rules of statutory interpretation all support Parliament's authority to make the reforms proposed in Bill C-7[2] without obtaining the consent of the provinces. Except for the four matters mentioned in s. 42, Parliament has the exclusive authority to make laws amending the Constitution in relation to the Senate. Term limits,

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[1] The questions are found in Appendix "A".

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

consultative processes on appointments and removal of property qualifications are not among the four matters set out in s. 42 of the *1982 Act*. Parliament may make these changes.

4. The Senate can be abolished through the general amending procedure in s. 38 requiring resolutions of the House of Commons and the Senate and of the legislative assemblies of two-thirds of the provinces with an aggregate of fifty percent of the population of all the provinces. Because Part V of the *Constitution Act, 1982* is a complete code for amending procedures, an amendment which achieves abolition must be possible pursuant to that Part. The plain language of the text of Part V dictates that the general amending procedure in s. 38, not s. 41, is the appropriate procedure.

II. The Constitution and the Senate

A. The *Constitution Act, 1867*

5. The provisions of the *Constitution Act, 1867*[3] relevant to the Senate may be summarized as follows. First, 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". Second, s. 17 establishes the Parliament of Canada, consisting of the Queen, an "Upper House styled the Senate", and the House of Commons.

6. Third, ss. 21 and 22 set out the total number of Senators (105) and provide 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 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

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[3] *Constitution Act, 1867*, 30 & 31 Vict., c. 3; R.S.C. 1985 App. II, No. 5 ["*Constitution Act, 1867*" or "*1867 Act*"], AGC Authorities, Tab 33.

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, s. 26 allows for the addition of up to eight Senators divided equally among the four divisions.

7. Fourth, s. 23 describes the qualifications of a Senator. Sub-sections 23(3) and 23(4), the subject of question 4, state that a Senator shall have property of "Four thousand Dollars over and above his Debts and Liabilities".

8. Fifth, s. 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. 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. [4]

9. Sixth, s. 29, as amended by Parliament in 1965, provides that a Senator must retire at age 75. Seventh and finally, s. 91 deals with the legislative authority 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*

10. Part V of the *Constitution Act, 1982* comprehensively sets out the procedures for amending the Constitution. There are five procedures: the "general" or "7/50" procedure (s.38); the "unanimous consent" procedure (s.41); the "some but not all provinces

[4] Robert E. Hawkins. *Constitutional Workarounds,* 89 Can. Bar Review 513 at 522, 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, Record of the Attorney General of Canada, Vol. XIV, Tab 103, p. 198 ("AGC Record").

affected"[5] procedure (s. 43); the "federal legislative" procedure (s.44); and the "provincial legislative" procedure (s.45).

11. 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 often referred to as the "7/50" amending procedure.

12. An amendment to the Constitution in relation to certain matters set out in s. 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(1) are:

(b) the powers of the Senate and the method of selecting Senators; and	(b) les pouvoirs du Sénat et le mode de sélection des sénateurs;
(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators.	(c) le nombre des sénateurs par lesquels une province est habilitée à être représentée et les conditions de résidence qu'ils doivent remplir;

13. 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;	(a) la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur;
(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	(b) le droit d'une province d'avoir à la Chambre des communes un nombre de députés au moins égal à celui des sénateurs par lesquels elle est habilitée à être

[5] To use Professor Hogg's phrase: P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Toronto: Carswell, 2007 (loose-leaf), Vol. 1, s. 4.2 (a), AGC Authorities, Tab 52.

the time this Part comes into force;	représentée lors de l'entrée en vigueur de la présente partie;
(c) subject to s. 43, the use of the English or the French language;	(c) sous réserve de l'article 43, l'usage du français ou de l'anglais;
(d) the composition of the Supreme Court of Canada; and	(d) la composition de la Cour suprême du Canada;
(e) an amendment to this Part.	(e) la modification de la présente partie.

14. Section 43 of the *1982 Act* sets out a procedure ("some but not all provinces affected") which governs amendments not relevant to all provinces, such as the 1997 addition of s. 93A dealing with education in Quebec.[6] Amendment of provincial constitutions by provincial legislatures is dealt with in s. 45.

15. Finally, s. 44 provides that subject to amendments in relation to matters specifically set out in ss. 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.

16. By virtue of s. 47 of the *Constitution Act, 1982*, an amendment may be made under ss. 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 simple terms, 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.

17. The Constitution has been amended through these procedures eleven times since 1982. Amendments have most often taken place through s. 43 of the *Constitution Act,*

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[6] *Constitution Amendment, 1997 (Quebec)*, AGC Authorities, Tab 34.

1982; however, both s. 38 and s. 44 have also been used to amend the Constitution; the latter most recently in 2011.[7]

III Recent Legislative Initiatives for Senate Reform

A. Bill C-7 is Currently before Parliament

18. The reference questions are not posed in a legislative vacuum. 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. It is specifically referred to in questions 1(a), (f) (term limits) and 3 (consultation).

19. The preamble to the *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.

20. 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 of territory.

21. The *Senate Reform Act* does not establish a framework for direct election of Senators, nor is the Prime Minister required to recommend or the Governor General to

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[7] Warren J. Newman, *Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada*, 37 S.C.L.R. (2d) (2007) at 385; 387, (footnote 19); 395 (footnotes 54 and 55); AGC Authorities, Tab 67. See also *Fair Representation Act*, S.C. 2011, c. 6, s. 2, AGC Authorities, Tab 36.

appoint a nominee from the list of nominees selected for a province or territory. The process is consultative and non-binding, and no change is made to s. 24 of the *1867 Act.*[8]

22. Section 4 of the *Senate Reform Act* provides that a person who was summoned (nommé) 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.[9]

23. 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[10] 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.[11]

B. Other Recent Bills dealing with Senate Reform

24. The reference questions also refer to Bill S-4, the proposed *Constitution Act, 2006* (question 1(e) dealing with renewability of terms) and Bill C-20, the *Senate Appointment Consultations Act* (question 2 dealing with the consultative process). Neither bill is before the current Parliament. However, Bill S-4 was the subject of reports by both the Special Senate Committee on Senate Reform and the Standing Senate 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

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[8] 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. I, Tab 7.

[9] Bill C-7, s.4 (1) and (2), AGC Record, Vol. I, Tab 2. This is substantially similar to Bill C-10 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, An Act to amend the *Constitution Act, 1867* (Senate term limits). 40th Parl. 2d sess. (First reading May 28, 2009) AGC Record, Vol. I, Tab 6 introduced on May 28, 2009, and Bill C-19, An Act to amend the Constitution Act, 1867 (Senate tenure), 39th Parl., 2d sess. (First reading Nov. 13, 2007), AGC Record, Vol. I, Tab 8.

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

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

February 13, 2008, struck a Legislative Committee on Bill C-20.[12] 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

25. 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 historians and political scientists 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 the Attorney General of Quebec, are simply thinly-disguised legal argument.

26. 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 has also filed reply evidence to the expert opinions filed by Quebec and the Fédération des communautés francophones et acadienne du Canada ("FCFA") in the form of reports by three political scientists: Professor Christopher Manfredi, Dr. John Stilborn, and Professor Peter McCormick.

A. Christopher Manfredi

27. Professor Manfredi discusses a number of issues concerning the Senate's representative role.[13] 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-

[12] Legislative Committee on Bill C-20, hearings, Wednesday March 5, 2008. 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 which had been introduced on December 13, 2006. The successor to those bills, Bill S-8, provided for a provincially regulated election process.

[13] Christopher P. Manfredi, An Expert Opinion on the possible effects of Bill C-7 (June 2013), AGC Record, Vol. XVI, Tab 105 ("Manfredi Opinion").

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

28. Dr. Stilborn reviews the work of the Senate and looks in detail at a number of proposals for Senate reform over the years in order to provide some historical context for the current legislation before Parliament.[14] Primarily, his report covers a range of reform initiatives such as 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 and demonstrates the incremental approach to Senate reform taken in the past. This inventory of past proposals provides a useful context in which to evaluate the legal arguments at the centre of this reference.

C. Peter McCormick

29. Professor McCormick looks at the purposes of upper houses generally, and the purpose of our Senate specifically, as discussed in 1867 and reflected in the work it has done since that time.[15] He discusses the meaning and relevance of terms like "representation"--whose interests is the Senate intended to protect? -- and "independence"-- independent from whom and for what reason? He discusses how possible Senate reforms may affect those subjects.

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[14] John A. Stilborn, Expert Report (May 2013), AGC Record, Vol. XVII, Tab 106 ("Stilborn Report")
[15] Peter C. McCormick, An Expert Opinion on Bill C-7: An Act Respecting the Selection of Senators and Amending the Constitution 1867 in Respect of Term Limits (June 2013), AGC Record, Vol. XVII, Tab 107 ("McCormick Opinion").

V. Senate Review of Proposed Legislative Reforms

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

30. 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.[16]

31. 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).[17] 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 amending procedure.[18]

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

32. The Senate Standing Committee on Legal and Constitutional Affairs also reviewed Bill S-4. This Committee expressed some doubt as to whether s.44 could be used to enact term limits and recommended referral of the bill to this Court.[19]

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[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". AGC Record, Vol. VI, Tab 25, pp. 74 and 109 ("Special Senate Committee Report").
[17] Special Senate Committee Report, AGC Record, Vol. VI. Tab 25, pp.75-76.
[18] Special Senate Committee Report, AGC Record, Vol. VI. Tab 25, pp.101-102.
[19] Report of the Senate Standing Committee on Legal and Constitutional Affairs, June 12, 2007, p. 26, AGC Record, Vol. VII. Tab 27, p. 130("Standing Senate Committee Report").

33. Some provincial governments at that time (New Brunswick, Newfoundland and Quebec, although Quebec was initially supportive before the Special Committee) were opposed to Bill S-4,[20] some (Alberta and to some degree Saskatchewan) found it acceptable,[21] and others (British Columbia and Ontario) favoured abolition of the Senate or stated it was not a priority of the government.[22]

C. House of Commons Review of Bill C-20

34. 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.

VI. Senate Reform in Historical Context

35. The current proposals for term limits, consultative processes and removal of property qualifications reflect decades of study on Senate reform. That history informs not only the current reform proposals, but is relevant to understanding the sections in Part V of the *Constitution Act, 1982* dealing with Senate reform.

A. Legislative and Other Proposals

36. Since 1867, the only reform to the Senate worthy of note 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

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[20] Standing Senate Committee Report, AGC Record, Vol. VII, Tab 27, pp. 120-127.
[21] Standing Senate Committee Report, AGC Record, Vol. VII, Tab 27, p. 129.
[22] Standing Senate Committee Report, AGC Record, Vol. VII, Tab 27, p.129. Before the Special Senate Committee on Senate Reform, Ontario stated that it favoured abolition of the Senate to opening up the constitution Proceedings of the Special Senate Committee on Senate Reform, September 21, 2006, pp. 5:48-5:53, AGC Authorities, Tab 57.

require members of the Senate to retire at age 75. Parliament's authority to make that change has never been challenged, and was accepted by this Court.[23]

37. A more ambitious reform effort was 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."[24] 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.[25] Members of the House of the Federation would have held office until the next general election of the selecting body. [26] 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.[27]

38. 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.[28] It did not receive the required support from the provincial legislative assemblies.

39. 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

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[23] *Re: Authority of Parliament in Relation to the Upper House* [1980] 1 S.C.R. 54 at pp. 65, AGC Authorities, Tab 18 ("*Upper House Reference*").
[24] 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 matters, 30th Parl., 3d Sess. (First reading, June 20, 1978), s. 56, AGC Record, Vol. II, Tab 13, p. 24 ("Bill C-60").
[25] Bill C- 60 s. 63(1), AGC Record, Vol. II, Tab 13, p. 26.
[26] Bill C-60, s. 63(5), AGC Record, Vol. II, Tab 13, p. 27.
[27] Bill C-60, s. 64(2), AGC Record, Vol. II, Tab 13, p. 29.
[28] Resolution, Constitution Amendment, 1985 (Powers of the Senate), AGC Record, Vol. II, Tab 15, p. 77.

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.[29] The First Ministers agreed that this process would apply on an interim basis until the Accord was ratified. However, the Accord failed to obtain the unanimous support of the provinces.

40. 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 respective legislative assemblies. Federal legislation was to govern the processes, 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.[30] The Charlottetown Accord also contemplated a Senate of six representatives from each province, one from each territory, as well as seats for Aboriginal peoples.[31] 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

41. 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 positions of various legislative and other committees on the primary issues of term limits, method of selecting Senators, property qualifications and powers of the Senate.[32]

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[29] *1987 Constitutional Accord,* art. 2, AGC Record, Vol. VIII. Tab 28, p.14-15. See also the "A Guide to the Meech Lake Constitutional Accord," AGC Record, Vol. VIII, Tab 28, pp.11-12.
[30] *Consensus Report on the Constitution: Final Text* (1992), ss. 7 -8, AGC Record, Vol. VIII, Tab 29, p. 52 ("*Charlottetown Accord*").
[31] *Charlottetown Accord,* s. 9, AGC Record, Vol. VIII, Tab 29, p. 52.
[32] A more comprehensive account is found in the Stilborn Report, AGC Record, Vol. XVII, Tab 10.

42. 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.[33] During the 1960s and 1970s, reformers emphasized the rehabilitation of the appointed Senate by amending the appointment process to give the provinces a role. The most notable development in this era was the "House of the Federation" proposal in Bill C-60 in 1978, discussed above. A second set of proposals in this era sought to give exclusive power of appointment to the Senate to the provinces in an attempt to make the Senate a proxy for provincial governments.[34]

43. The post-1980 period has been characterized by proposals seeking greater legitimacy for the Senate through direct elections. A series of proposals, starting with the (non-governmental) Canada West Foundation's in 1981, through the Charlottetown proposal of 1992, have sought to make the Senate an elected body. [35]

44. With respect to the major aspects of Senate reform—term limits, method of appointment, and property qualification—the main proposals of the last 50 years may be summarized as follows:

i) Term Limits

- The 1972 Joint Committee 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.[36]

- 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.[37]

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[33] Stilborn Report, AGC Record, Vol. XVII, Tab 106, para 44.
[34] Stilborn Report, AGC Record, Vol. XVII, Tab 106, para. 51.
[35] Stilborn Report, AGC Record, Vol. XVII, Tab 106, paras. 53-54.
[36] AGC Record, Vol. II, Tab 16, p. 91.
[37] AGC Record, Vol. II, Tab 17, p. 148.

- 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.[38]

- 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.[39]

- The 1985 *Alberta Select Special Committee on Upper House Reform* report recommended that a Senator's term would be the life of two Parliaments.[40]

- The 1985 *MacDonald Commission* recommended that Senate terms be the same as the House of Commons.[41]

- The 1991 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.[42]

- The 1992 report of the Special Joint Committee of the House and Senate (Beaudoin-Dobbie) proposed that terms be limited to six years.[43]

ii) Method of Appointment

- The 1972 Molgat-MacGuigan report suggested that the Senators should be appointed by the federal government, but half should be appointed on the advice of the provinces or territories.[44]

- 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.[45]

- The 1980 Lamontagne Report suggested that appointments be made by the Governor General on the advice of the Prime Minister, with every second

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[38] AGC Record, Vol. X, Tab 34, p. 21.
[39] AGC Record, Vol. III, Tab 19, p. 95.
[40] AGC Record, Vol. X, Tab 35, p. 94.
[41] AGC Record, Vol. IX, Tab 33, p. 149-150.
[42] AGC Record, Vol. IV, Tab 22, p.84.
[43] AGC Record, Vol. VI, Tab 24, pp.19-20.
[44] AGC Record, Vol. II. Tab 16, p. 88.
[45] AGC Record, Vol. IX. Tab 31, p. 21-22.

appointment made from a list submitted by the provincial or territorial government.[46]

- 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.[47]

- 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.[48]

- 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.[49]

- 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.[50]

- *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.[51]

- 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.[52]

iii) Property Qualifications

45. The Molgat and MacGuigan Committee suggested that the property qualifications were "repugnant" in modern society and that the electoral division system in Quebec

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[46] AGC Record, Vol. II. Tab 17, p. 148.
[47] AGC Record, Vol. X, Tab 34, pp. 21-22.
[48] AGC Record, Vol. III, Tab 19, p. 87.
[49] AGC Record, Vol. X, Tab 35, p. 67.
[50] AGC Record, Vol. IX, Tab 33, p. 157.
[51] AGC Record, Vol. IV, Tab 21, pp. 44-45.
[52] AGC Record, Vol. VI, Tab 24, pp.15-19.

should be eliminated.[53] The 1980 Lamontagne Report recommended the abolition of the Quebec senatorial districts and removal of the $4,000.00 property qualification.[54] The 1984 Molgat-Cosgrove Report concluded that the Quebec senatorial districts and the $4,000.00 property qualifications be abolished.[55] The 1985 Alberta Select Special Committee report recommended that the property qualification be abolished.[56]

C. Early History

i) The Senate at Confederation

46. The various reports and studies over the years reflect the fact that the Senate has, since its inception, been the subject of vigorous debate. The issue of Senate reform has never been far from the surface of Canadian history and politics. This historical context informs the present legislation before Parliament.

47. 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.[57]

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[53] AGC Record, Vol. II, Tab 16, p. 91.
[54] AGC Record, Vol. II, Tab 17, p. 149.
[55] AGC Record, Vol. III, Tab 19, p. 96.
[56] AGC Record, Vol. X, Tab 35, p. 67.
[57] *Canada, Legislative Assembly, February 6, 1865*, cited in Ajzenstat, Romney, Gentles and Gairdner, *Canada's Founding Debates,* (Toronto: Stoddart, 1999), p. 286-287, AGC Authorities, Tab 47 ("*Canada's Founding Debates*").

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.[58]

48. 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. Canada's first Prime Minister, Sir John A. Macdonald, saw the Senate as an independent Parliamentary body, but not equal to the House of Commons. In a speech before the legislative assembly of the united province of Canada in 1865, he said that the Senate must be:

> ... an independent house, having free action of its own, for it is only valuable as being a regulating body, calmly considering legislation initiated by the popular branch and preventing any hasty or ill conceived legislation that may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people. [59]

49. George Brown essentially agreed with this assertion, stating that:

> [t]he desire was to render the Upper House a thoroughly independent body - one that would be in the best position to canvass dispassionately the measures of this house [then the legislative assembly] and stand up for the public interest in opposition to hasty and partisan legislation.[60]

50. Macdonald accepted that the "constitution of the upper house should be in accordance with the British system as nearly as circumstances would allow,"[61] a 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

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[58] *Canada, Legislative Assembly, February 20, 1865*, p.368, AGC Authorities, Tab 32
[59] *Canada, Legislative Assembly, February 6, 1865*, cited in *Canada's Founding Debates*, p. 80. AGC Authorities, Tab 47.
[60] *Canada, Legislative Assembly, February 8, 1865*, cited in *Canada's Founding Debates*, p. 88, AGC Authorities, Tab 47.
[61] *Canada, Legislative Assembly, February 6, 1865*, cited in *Canada's Founding Debates*, p. 78, AGC Authorities, Tab 47.

Senate were to be "... like those of the lower [House], men of the people and from the people".[62]

51. The method of selecting 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.[63] 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."[64] As Professor Manfredi points out, however, such concerns have been "erased by history."[65]

52. 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.[66] 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.[67] In a later debate, Louis-Auguste Olivier[68] argued that "... as much political liberty as possible should be conceded to the masses".[69]

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[62] *Canada, Legislative Assembly, February 6, 1865*, cited in Canada's Founding Debates, p. 81, AGC Authorities, Tab 47.
[63] *Canada, Legislative Assembly, February 6, 1865*, cited in Canada's Founding Debates, pp. 78-79, AGC Authorities, Tab 47. See also Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 28.
[64] *Canada, Legislative Assembly, February 8, 1865*, cited in *Canada's Founding Debates*, p. 85. AGC Authorities, Tab 47. See also Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 28.
[65] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 30.
[66] *Canada, Legislative Assembly, February 8, 1865*, cited in *Canada's Founding Debates*, pp. 83-84, AGC Authorities, Tab 47.
[67] *Canada, Legislative Assembly, February 8, 1865*, cited in *Canada's Founding Debates*, pp. 85, 87-88, AGC Authorities, Tab 47.
[68] Member of the pre-confederation Legislative Council of Canada, *Canada's Founding Debates*, p. 474, AGC Authorities, Tab 47.
[69] *Canada, Legislative Assembly, February 13, 1865*, cited in *Canada's Founding Debates*, pp.90-91, AGC Authorities, Tab 47.

Alexander MacKenzie, who later became our second Prime Minister, was of the view that there was simply no need for an upper house. [70]

53. Others shared the opinion that an elected Senate would be appropriate. In debates in Nova Scotia, William Annand[71] suggested that "... by all means let them [Senators] go out in rotation, so that branch may be influenced by public opinion."[72] 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

54. 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

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[70] *Canada, Legislative Assembly, February 23, 1865*, cited in *Canada's Founding Debates*, p. 94, AGC Authorities, Tab 47.
[71] Premier of Nova Scotia, 1867-74, *Canada's Founding Debates*, p. 364, AGC Authorities, Tab 47.
[72] *House of Assembly, March 19, 1867*, cited in *Canada's Founding Debates*, p. 95, AGC Authorities, Tab 47.
[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, AGC Authorities, Tab 47.
[74] All members of the Newfoundland House of Assembly, *Canada's Founding Debates*, p. 473, AGC Authorities, Tab 47.
[75] *Legislative Council, February 13, 1865; House of Assembly, February 23, 1869 and March 2, 1869* cited in Canada's Founding Debates, pp. 97-99, AGC Authorities, Tab 47.
[76] Various speeches cited in *Canada's Founding Debates*, pp. 99-102, AGC Authorities, Tab 47.
[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, Tab 46.

of terms at eight years and the election of only half the Senators at any one time. The elections would be done by and from the provincial legislature. [78]

55. In 1874 and again in 1886, Ontario's David Mills (later Senator Mills and then Mills J. of this Court) 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. McIntrye 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]

56. 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.

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[78] Bruce Hicks, "Can a Middle Ground be found on Senate Numbers?" 16 *Constitutional Forum* 21(2007), at p. 21, AGC Authorities, Tab 39; *House of Commons Debates,* p. 87 (13 April 1874), AGC Authorities, Tab 40.

[79] Janet Ajzenstat, *Protecting Canadian Democracy*, p. 16, AGC Authorities, Tab 46; House of Commons, *Debates*, 14 May 1886, 1272-73, AGC Authorities, Tab 41.

[80] *Protecting Canadian Democracy*, p. 16, AGC Authorities, Tab 46; " 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. 12-16 (point 7), AGC Authorities, Tab 50.

[81] Janet Ajzenstat, *Protecting Canadian Democracy*, p. 16, AGC Authorities, Tab 46; House of Commons, debates 30 April 1906, p. 2285, AGC Authorities, Tab 42.

[82] Janet Ajzenstat, *Protecting Canadian Democracy*, p. 20 AGC Authorities, Tab 46; House of Commons, Debates, 20 January 1908, p. 1513, AGC Authorities, Tab 43; see also, 30 April 1906, p. 2276, AGC Authorities, Tab 42.

[83] Janet Ajzenstat, *Protecting Canadian Democracy*, p. 23, AGC Authorities, Tab 46; *Debates of the Senate*, 5th Parl, 4th Sess (3 May 1886) at 334, AGC Authorities, Tab 35.

[84] Stilborn Report, AGC Record, Vol. XVII, Tab 106, para 41.

[85] Robert MacKay, *The Unreformed Senate of Canada*. (London: Oxford University Press, 1926) at p. 206, AGC Authorities, Tab 59. See also, Testimony of Rt. Hon. Stephen Harper, *Proceedings before the Special Senate Committee on Senate Reform*, p. 2:8, September 7, 2006, AGC Authorities, Tab 56 ("Special Senate Committee Hearing").

VII. The History of Amending Procedure Reform

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

58. As observed by this Court 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

59. 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 circumscribed; as one author wryly noted: "... our constitution was what the U.K. Parliament said it was." [88]

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[86] *Reference re: Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 at 806, AGC Authorities, Tab 19 ("*Quebec Veto Reference*").

[87] The history of how amendments were made to the constitution before 1982, is canvassed in the decision of this Court in *Upper House Reference* pp. 60-66, AGC Authorities, Tab 18.

[88] Strayer, Barry, "*Ken Lysyk and the Patriation Reference,*" 38 U.B.C. L. Rev. 423 at 425(2005), AGC Authorities, Tab 63 ("Strayer, Patriation Reference").

60. This legal reality was acknowledged by this Court 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]

61. 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]

62. 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]

63. Some constitutional changes did occur through the use of constitutional conventions.[93] In the *Patriation Reference,* this Court dealt with the place of constitutional conventions in the constitutional fabric, stating that the "...main purpose of constitutional conventions is to ensure that the legal framework of the constitution will

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[89] *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R. 753 at 774, AGC Authorities, Tab 20, *("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 45; Strayer, Patriation Reference, p. 427, Authorities, Tab 63.

[91] Strayer, Patriation Reference, p. 427, AGC Authorities, Tab 63; See also Strayer, Barry, "*Saskatchewan and the Amendment of the Canadian Constitution*" 12 McGill L.J. 443(1967), AGC Authorities, Tab 64.

[92] The Amendment of the Constitution of Canada , The Honourable Guy Favreau, Minister of Justice, Ottawa, February 1965, AGC Record, Vol. XV, Tab 104, pp. 150-153.

[93] Hurley, Amending the Constitution, pp. 14-17, AGC Authorities, Tab 45.

be operated in accordance with the prevailing constitutional values or principles of the period." [94]

64. In 1949, the British Parliament began loosening its control over the 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 subject to the principle of proportionate representation,[96] but could not alter the provisions of the Constitution dealing with matters such as denominational schools and language rights.[97] In total, fourteen amendments were made to the *BNA Act* between 1871 and 1964. [98]

65. Notwithstanding these limited amendments, the significant problem of a lack of a general amending process in the Constitution and the need for a political solution was recognized by this Court in the *Patriation Reference*". As this Court 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. [99]

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

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

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[94] *Patriation Reference,* pp. 879-880, AGC Authorities, Tab 20.
[95] *British North America (No. 2) Act*, 1949, s. 1, AGC Authorities, Tab 31.
[96] *Constitution Act, 1867, s.52*, AGC Authorities, Tab 33.
[97] *British North America (No. 2) Act*, 1949, s. 1, AGC Authorities, Tab 31; In addition, 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. A.G. of New Brunswick*, [1975] 2 SCR 182, AGC Authorities, Tab 10.
[98] Favreau White Paper, AGC Record, Vol. XV, Tab 104, pp. 157-161.
[99] *Patriation Reference*, at 788. AGC Authorities, Tab 20.

- 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[100]

67. In relation to the fourth principle (provincial participation) this Court in the *Patriation Reference* noted that it "...unmistakably states and recognizes as a rule of the Canadian constitution the convention... that there is a requirement for provincial agreement to amendments which change provincial legislative powers.[101]

68. 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. Although the agreement proved to be short-lived, it dealt with amendments relating to the Senate in three areas: residency requirements; the number of Senators allotted to each province; and requirements of the Constitution for their summoning by the Governor General. All would have been subject to approval by two-thirds of the provinces representing at least 50% of the population.[102] 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. [103]

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[100] Favreau White Paper, AGC Record, Vol. XV, Tab 104, p. 160-162.
[101] *Patriation Reference*, pp. 899-90, AGC Authorities, Tab 20
[102] Anne Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History*. Toronto: McGraw-Hill Ryerson, 1989, Vol.I, pp.16-18, AGC Authorities, Tab 28 ("Bayefsky, Documentary History").
[103] *Amending the Constitution of Canada, A Discussion Paper*, Federal-Provincial Relations Office, Minister of Supply and Services Canada, 1990, p. 3, AGC Authorities, Tab 27.

iii) The Victoria Charter (1971)

69. A Federal-Provincial First Ministers' Conference held in Victoria, British Columbia in June 1971 produced the *Canadian Constitutional Charter, 1971*, commonly known as the "Victoria Charter". It dealt with a number of matters, including political rights, language rights, the courts and regional disparities.[104]

70. 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 requirements for appointment by the Governor General 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.[105] If an amendment applied to more than one, but not all provinces, it required a resolution of the Senate and the House of Commons and of the legislative assembly of the affected provinces.[106] 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.[107] The Victoria Charter said nothing specific about changes to the "method of selecting Senators" or residency requirements, effectively leaving that type of amendment to Parliament alone.

iv) *The Constitution Act, 1982*

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

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[104] The *Canadian Constitutional Charter, 1971*, "*Victoria Charter*" Parts I-VII, AGC Record, Vol. VIII, Tab 30, pp. 146-157.
[105] The *Canadian Constitutional Charter, 1971*, "*Victoria Charter*" Part IX, art. 49, AGC Record, Vol. VIII, Tab 30 p. 159.
[106] The *Canadian Constitutional Charter, 1971*, "*Victoria Charter*" Part IX, art. 50 AGC Record, Vol. VIII, Tab 30, p. 159.
[107] The *Canadian Constitutional Charter, 1971*, "*Victoria Charter*" Part IX, art. 52-55, AGC Record, Vol. VIII, Tab 30, pp. 160-161.

both suggested the unanimous consent of the provinces should be needed for changes involving a limited range of subjects, none involving the Senate.[108] When the constitutional reform proposal came before Parliament in 1981, the procedures in what is now Part V of the *Constitution Act, 1982*, were adopted; i.e, provincial consent is 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.[109]

72. 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 only contemplated for a few matters.

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[108] Bayefsky, Documentary History, Vol. I, pp. 527-528; Vol. II, pp.638-639, AGC Authorities, Tab 28. The specific reference for the Vancovuer conference is the Continuing Committee of Ministers on the Constitution, Vancouver, British Columbia, July 22-24, 1980.

[109] *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 49.

PART II-ISSUES

73. The Questions to be answered by this Court are set out in the Order in Council dated February 1, 2013, and are found in Appendix "A". Essentially, the questions posed to this Court, and the answers of the Attorney General of Canada, can be summarized as follows:

1) Can the Parliament of Canada, exercising its legislative authority under s. 44 of the *Constitution Act, 1982,* amend the *Constitution Act, 1867* to set term limits for Senators, including making any such terms renewable and/or the term limits retrospective?

Answer: Yes, terms of 8 to10 years, terms fixed according to the life of 2 or 3 Parliaments, renewable terms, and retrospective limits on terms are all reforms within the scope of Parliament's legislative authority.

2) Can the Parliament of Canada, or the provincial and territorial legislatures, set out a consultative procedure to determine public preferences for potential nominees for appointment to the Senate?

Answer: Yes.

3) Is it within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the *Constitution Act, 1982*, to repeal subsections 23(3) and (4) of the *Constitution Act,1867* regarding property qualifications for Senators?

Answer: Yes.

4) Can the Senate be abolished by the general amending procedure (the "7/50" procedure) set out in section 38 of the *Constitution Act, 1982*, or is it necessary to resort to the "unanimity" procedure found in s. 41? What method(s) could be used to achieve this?

Answer: Section 38 is the correct procedure. Any of the methods listed in question 5, i.e., by way of an express provision, by amending or repealing references to the Senate in the Constitution, or by abolishing the Senate's powers and representation, would be constitutionally permissible and sufficient to achieve abolition.

PART III-ARGUMENT

I. General Approach

A. The Scope of the Reference

74. The reference is not about whether Senators can, or should be, elected. Nor is it about whether the Senate ought to be abolished. It is simply about which procedures in Part V of the *Constitution Act, 1982* apply to proposed changes.

75. The first four reference questions are based on legislative proposals (primarily Bill C-7), that have a relatively modest scope; the final two questions on abolition, which are not based on current legislation, would have a more far-reaching effect The proposed changes in C-7 would not affect the four matters set out in s. 42(1) (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 s. 24 of the *Constitution Act, 1867*, which describes the power of the Governor General to "summon qualified Persons to the Senate". Four proposed changes are at issue: term limits for Senators; whether the Prime Minister's appointment recommendation may be informed by a process of popular consultation; property qualifications; and the procedure for abolishing the Senate.

B. The Relevant Interpretive Principles

76. 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."[110] The "linguistic context" underscores the

[110] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344, AGC Authorities, Tab 15.

primacy of the text; the philosophic and historical context shows the text was informed by past Senate and amending procedure reform initiatives.

77. 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*

78. The reference questions essentially ask for this Court's advice as to which amending procedure applies to which sort of proposed change. The "linguistic approach" requires close examination of the text of Part V of the *Constitution Act, 1982*, which comprehensively describes the amending procedures. It introduced a very specific, rules-based approach to amendment of the Constitution.

79. The general scheme of Part V 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 amending 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 on this reference.

ii) Historical Context

80. This Court has frequently looked at a diverse array of material in seeking to give meaning to provisions of the *Charter*[111] and other constitutional provisions.[112] Such an

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[111] See, for example, *R. v. Prosper*, [1994] 3 S.C.R. 236 at 266-267, AGC Authorities, Tab 16; *U.S.A. v. Cotroni*, [1989] 1 S.C.R. 1469 at 1479-1480, AGC Authorities, Tab 25 ("*Cotroni*").

exercise may equally 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, those histories reinforce the conclusion that Part V is very specific and exhaustive in its identification of which aspects of Senate reform require consultation with, and the consent of, the provinces. Nothing about either of those accounts suggests that there has ever been a desire to ensure that provinces have a say in approving term limits, whether a particular consultative process should be employed, or whether property qualifications should be abolished.

81. 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. 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.[113]

82. The *Constitution Act, 1982* was enacted shortly after this Court 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 Court 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."[114] It is logical to conclude that s. 42 was drafted in contemplation of that judgment, and intended to provide a specific rule so that courts are not left to define what features of the Senate

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[112] See, for example: *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, AGC Authorities, Tab 20; *Re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 743, AGC Authorities, Tab 19; P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Toronto: Carswell, 2007 (loose-leaf), Vol. II, paras. 60.1(c)-(d), AGC Authorities, Tab 52.

[113] Record of the Fédération des Communautés Francophones et Acadienne du Canada, Vol. II, Tab Q, p. 407.

[114] *Upper House Reference*, p. 78, AGC Authorities, Tab 18.

might rise to the level of being so "fundamental" as to require a particular amending procedure. Relying on this history to draw such an inference would accord with what this Court 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.[115]

iii) Progressive Interpretation

83. 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.

84. More importantly, such an exercise would be inconsistent with the "progressive interpretation" this Court regularly employs in seeking "to ensure that our Constitution does not become rigid and unresponsive to Canadian society."[116] Slavish adherence to original intent has been rejected by this Court (as did the Privy Council before it[117]) 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.[118] In the context of this reference, a progressive interpretation approach ensures that modern democratic values are respected for example, with respect to the requirements in s. 23 of the *Constitution Act, 1867* that Senators possess property.

85. Thus, for example, although the preamble to the *Constitution Act, 1867* refers to a "Constitution similar in Principle to that of the United Kingdom," there is no compelling

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[115] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 59, AGC Authorities, Tab 2.
[116] *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at para. 144, AGC Authorities, Tab 7.
[117] The Hon. I. Binnie, "*Constitutional Interpretation and Original Intent*", 23 S.C.L.R. 345 at 356-360, AGC Authorities, Tab 66.
[118] [2004] 3 S.C.R. 698, at para. 30, AGC Authorities, Tab 22.

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 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 reformed their upper house to reflect modern democratic ideals.[119]

iv) Pith and Substance

86. 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 first four reference questions, in that reforms concerning term limits, consultative processes and property qualifications 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 an appropriate means for distinguishing amongst the array of potentially applicable amending procedures.

87. The doctrine has been applied by two courts of appeal in considering which amending procedures governed certain proposed constitutional changes. In *Hogan v.*

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[119] See, for example: the *Parliament Act 1911* (enabling the Commons to pass money bills and certain public bills without the concurrence of the Lords), AGC Authorities, Tab 53; the *House of Lords Act* (1999)(reducing the number of hereditary peers by more than 600 and freezing the number that remained at 90, pending further reform), AGC Authorities, Tab 44. Other reforms are described at: *First Report of the Joint Committee on the House of Lords Reform*, 2002-03, p. 14, AGC Authorities, Tab 37; the website for the Parliament of the United Kingdom (House of Lords Reform); http://www.parliament.uk/business/lords/lords-history/lords-reform/

Newfoundland (Attorney General)[120] and *Potter v. Quebec (Attorney General)*,[121] 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.[122] The challengers alleged that the procedure in s. 38 of the *Constitution Act, 1982*, the "7/50" formula, applied.[123]

88. Both appellate courts rejected these arguments. In *Hogan*, the Court 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. [124] Similarly, the Quebec Court of Appeal 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).[125]

89. The Quebec Court of Appeal 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" was Quebec since Ontario's s. 93 privileges remained.[126]

90. A pith and substance approach is critical in considering whether adopting consultative processes for appointments is a change to the "method of selecting" Senators

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[120] *Hogan v. Newfoundland (Attorney General)*(2000), 183 D.L.R (4th) 225(N.L.C.A.), AGC Authorities, Tab 9.
[121] *Potter v. Quebec (Attorney General),* [2001] R.J.Q. 2823 (C.A.), AGC Authorities, Tab 13.
[122] Term 17 of the Terms of Union of Newfoundland with Canada, AGC Authorities, Tab 66; and s. 93 of the *Constitution Act, 1867*).
[123] For a general description of these cases see: Warren J. Newman, *Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada*, 37 S.C.L.R. (2nd) 383 at 403-406. AGC Authorities, Tab 67.
[124] *Hogan*, paras. 95, 97, AGC Authorities, Tab 9.
[125] *Potter,* paras. 22-24, AGC Authorities, Tab 13.
[126] *Potter*, paras. 35-51, AGC Authorities, Tab 13.

mentioned in s. 42. It is not: the "method of selecting" Senators is that set out in s.24 of the *Constitution Act, 1867*, which confers that authority on the Governor General, and it will remain so under any proposed reform.

v) The Ordinary Rules of Statutory Interpretation

91. 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."[127]

92. Furthermore, words should not be added to legislation unless the addition "gives voice" to the legislator's implicit intention.[128] 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 was based on the assumption that it would pave the way for direct elections of Senators.[129] This Court must construe and interpret the legislation that Parliament is considering, without speculating on future events.

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[127] *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33, AGC Authorities, Tab 17; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76 at para. 20, AGC Authorities, Tab 8.

[128] *Murphy v. Welsh; Stoddart v. Watson,* [1993] 2 S.C.R. 1069 at p. 1078, AGC Authorities, Tab 12. See also Pierre-André Coté, *The Interpretation of Legislation in Canada*, 3rd edition, (Scarborough: Carswell, 2000) at pp. 275-278, AGC Authorities, Tab 55. Similarly, in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 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.

[129] Report of Standing Committee on Legal and Constitutional Affairs, pp. 118-119 (Prof Joseph Magnet), pp. 119-120 (Prof Errol Mendes), p. 122 (Prof Alain Cairns), AGC Record, Vol. VII, Tab 27.

vi) No Need to Rely on Unwritten Constitutional Principles

a) The Unwritten Principles Should not Modify a Clear Text

93. The exhaustiveness of Part V, and the primacy of the text, means that there is no need here to rely 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 or impose requirements not found in the written text.[130]

94. In the *Quebec Secession Reference*, this Court concluded that constitutional amendment ultimately lies with the "people of Canada" through the 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…".[131]

95. 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. There are no ambiguities in the text that would require resorting to unwritten principles.

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[130] See, for example, *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, at para. 65, AGC Authorities, Tab 4.

[131] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 85, ("*Quebec Secession Reference*") AGC Authorities, Tab 21.

96. In the *Quebec Secession Reference*, the Court 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, this 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".[132] The unwritten principles are not "an invitation to dispense with the written text of the Constitution."[133]

b) Reforms will not Impede the Protection of Minorities

97. It is anticipated that one or more parties will seek to rely on the unwritten principle of "protection of minorities" in advancing an argument that the Senate has a role in that regard that prevents Parliament from reforming the appointment process. Such an argument is flawed for several reasons. 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 significant role in the work of the Senate. Second, the text of Part V of the *Constitution Act, 1982* provides no support for the argument, and Part I of the *1982 Act* (the *Charter*) gives a much more significant role in that regard to the courts. Third, the articulation of the unwritten principle by this Court in the *Quebec Secession Reference* provides no support for the argument. Fourth, legislative proposals such as those in 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.

98. In the *Quebec Secession Reference*, this Court explained how the *Constitution Act, 1867* can be understood as a document designed in part for the protection of linguistic and religious minorities;[134] this Court did not, however, recognize any special role for the Senate in that regard. The text of the *1867 Act* supports a representational role

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[132] *Quebec Secession Reference* para. 32, AGC Authorities, Tab 21.
[133] *Quebec Secession Reference*, para. 53, AGC Authorities, Tab 21.
[134] *Quebec Secession Reference*, paras. 32-38, 41, 79, AGC Authorities, Tab 21.

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.[135]

99. 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*.[136]

100. Professor Manfredi's views are confirmed by other scholars. In her essay "*Harmonizing Regional Representation with Parliamentary Government: The Original Plan*", Janet Ajzenstat referred to a speech by John A. Macdonald before the Canadian Legislative Assembly on February 6, 1865, where he spoke of having the "...rights of the minority respected" or of countries with "constitutional liberty" where the "...rights of minorities are regarded". Ajzenstat then commented that "[b]y 'the minority' and 'minorities', Macdonald means the political groups and parties that disagree with the government of the day".[137]

101. 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

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[135] McCormick Opinion, AGC Record, Vol. XVII, Tab 107, para. 8.
[136] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105 para. 17.
[137] Janet Ajzenstat, "Harmonizing Regional Representation with Parliamentary Government: The Original Plan," in Jennifer Smith, ed., The *Democratic Dilemma: Reforming the Canadian Senate*. Montreal & Kingston:McGill-Queen's University Press, 2009, p. 29, AGC Authorities, Tab 48; Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 17.

underrepresented groups against actions of the government." [138] The Senate was not structured in a manner enabling it to effectively protect, for example, the interests of francophones outside Quebec, for the simple reason that except for ensuring access to federal government services in either French or English, the key legislative areas related to culture and linguistic preservation (especially education) are within provincial jurisdiction.

102. 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]

103. With respect to the *Constitution Act, 1982*, this Court's opinion in the *Quebec Secession Reference* again points out that the text supports special protection for one group, aboriginal people, through ss. 25 and 35,[141] but those provisions too, assign no role to the Senate. More importantly, the introduction of ss.16 to 23 of the *Charter* (and in particular the protection of language education rights under s. 23) provided a more powerful, effective and frequently used instrument for the protection and promotion of minority rights. [142] In addition, Canada has an *Official Languages Act*[143] and a Commissioner of Official Languages.[144] The enforceability of these legal and constitutional rights is overseen by the courts.[145] These post-1867 legal frameworks

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[138] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105 para. 22.
[139] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, Tables 1, 2 and 3, paras. 20-22.
[140] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 21; McCormick Opinion, AGC Record, Vol. XVII, Tab 107, paras. 15-17.
[141] *Quebec Secession Reference*, para. 82, AGC Authorities, Tab 21.
[142] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, paras. 25-26.
[143] *Official Languages Act,* R.S.C. 1985, c. 31(4th Supp), ("*Official Languages* Act"), AGC Authorities, Tab 51.
[144] *Official Languages Act*, s. 49, AGC Authorities, Tab 51.
[145] *R. v. Beaulac*, [1999] 1 S.C.R. 768, AGC Authorities, Tab 14; *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R 201, AGC Authorites, Tab 23.

much more clearly assign a role in protection of minority interests to institutions other than the Senate.

104. 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.

105. 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 (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 that contemplates changing the distribution of Senate seats among the divisions or provinces that would adversely affect representational interests of any kind.

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

107. 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. Legislation proposed in New Brunswick would have done just that. Bill 64, *An Act Respecting the Selection of Senator Nominees*, would have divided New Brunswick into five electoral

districts. It seems such divisions were sensitive to linguistic concerns.[146] This emphasizes the fact that Bill C-7 will enhance the ability of provinces to design processes that may facilitate representation of minority interests.

108. 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 in the reference questions. And even if this unwritten principle merits consideration, it would have to be weighed against the other unwritten principles of: federalism (for example, that regional representation in the Senate would be preserved); democracy (for example, by encouraging popular participation in the appointment process); and constitutionalism, (for example, by respecting the legal procedures of Part V of the *Constitution Act, 1982* and by enhancing the framework for making political decisions). All of these principles weigh in favour of the proposed legislation.

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

109. 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.[147] This type of opinion should not be given any weight. It is the function of the judge, not the experts, to decide questions of domestic law.

110. 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 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.[148]

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[146] Bill 64, *An Act Respecting the Selection of Senator Nominees*, 2nd Session, 57th Legislature, New Brunswick. 60-61 Elizabeth II, 2011-2012, s. 5(1), AGC Authorities, Tab 30. The Bill died after first reading.
[147] Record of the Attorney General of Quebec, Vol. V, Tabs 36 and 37.
[148] AGC Record, Vol. XI- XIV.

II. Response to the Reference Questions

A. Reference Questions 1 (a-d and f): Parliament May Impose Term Limits

111. In 1965, Parliament enacted a mandatory retirement age of 75 for Senators. Setting term limits of 8-10 years or based on the life of two or three Parliaments, since it is not among the matters enumerated in s. 42, is also something Parliament can do under s. 44.

112. Section 42 requires provincial consent with respect to only four types of Senate reform: the powers of the Senate; the method of selecting Senators: the number of Senators from each province; and residency. None of these affects Parliament's authority under s. 44 to impose term limits.

i) The Senate has Acknowledged the Desirability of Term Limits

113. 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 of this factum.[149] 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.[150] Term limits were studied extensively by two Senate Committees in the hearings they held on Bill S-4, and both concluded they were desirable.

114. The Report of the Special Senate Committee on Senate Reform noted that the issue of Senate reform generally, and term limits specifically, has been studied "for several decades."[151] The acceptance by Senate committees of the democratic value of term limits on Senate appointments is simply the continuation of similar conclusions of various government or parliamentary reports, think tanks and policy papers over the

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[149] See discussion in Part I regarding the pre-confederation debates on the Senate.
[150] See studies and reports noted in para. 44 in Part I.
[151] Special Senate Committee, AGC Record, Vol. VI, Tab 25, pp. 76.

years.[152] These include: the 1980 Report by the Standing Committee on Legal and Constitutional Affairs ("Goldenberg Report"); joint reports by the Senate and the House of Commons (Molgat-MacGuigan 1980, Molgat-Cosgrove 1984, the latter of which accepted that a nine year term limit could be implemented pursuant to s. 44 of the *1982 Act*);[153] Beaudoin-Edwards (1992); government white papers (1991 federal White Paper); or third party foundations (Canada West Foundation, 1981).

115. As the Special Committee commented in its Report:

> In their conclusions, based upon careful study and consultation with citizens, academics, and others, all of these exercises in constitutional renewal produced unanimous support for some form of limit on the length of time an individual could sit in the Senate. It is notable that despite variations in some areas and outright disagreement in others, virtually all who have thought about this issue have been in accord. [154]

116. The 2007 Report of the Standing Senate Committee (issued after that of the Special Committee) also accepted that term limits for Senate appointments are appropriate.[155] That Committee, however, favoured a non-renewable 15 year term.[156]

117. As with the Special Senate Committee, the Standing Senate Committee heard from a variety of witnesses.[157] However, the presentation of Professor Joseph Magnet was representative of the approach 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.[158] Others made the same assumption.[159] It also appears

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[152] Special Senate Committee, AGC Record, Vol. VI, Tab 25, pp. 102.
[153] AGC Record, Vol. III, Tab 19, p. 95.
[154] Special Senate Committee, p. 5, AGC Record, Vol. VI, Tab 25, pp. 78.
[155] Report of the Standing Senate Committee, AGC Record, Vol. VII, Tab 27, p. 105.
[156] Standing Senate Committee Report, AGC Record, Vol. VII, Tab 27, pp. 105.
[157] The Standing Senate Committee had oral and or written submissions before it from witnesses including Professors Joseph Magnet, Errol Mendes, Alan Cairns, Patrick Monahan and Peter Hogg. AGC Record, Vol. VII, Tab 27, Vol. XIII, Tab 79, Vol. XIV, Tab 94.
[158] Standing Senate Committee Report, AGC Record, Vol. VII, Tab 27, p.118.
[159] Standing Senate Committee Report, AGC Record, Vol. VII, Tab 27, p.119 (Professor Errol Mendes); p.122 (Professor Alan Cairns).

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.[160]

118. The problem with this approach, advanced by Professor Heard in his report filed with this Court and the Standing Committee,[161] 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.[162] 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

119. 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. [163]

120. The Prime Minister added that separate legislation dealing with consultative elections would soon follow.[164] He accepted that a "step-by-step", or incremental, process of Senate reform was inevitable. [165]

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[160] Standing Senate Committee Report, AGC Record, Vol. VII, Tab 27, pp. 125-126 (Ontario);pp.128-129 (Quebec).
[161] AGC Record, Vol. XIV, Tab 99, pp. 144; AG Quebec Record, Vol. V, Tab 36, pp. 74, 86, 92-93.
[162] See also the summary of evidence of Professor Errol Mendes, who stated that Bill S-4 would lead to "constitutional chaos," Standing Senate Committee Report, AGC Record, Vol. VII, Tab 27, p.130.
[163] Special Senate Committee Hearing, p. 2:7, September 7, 2006, AGC Authorities, Tab 56.
[164] Special Senate Committee Hearing, p. 2:8, September 7, 2006, AGC Authorities, Tab 56.
[165] Special Senate Committee Hearing, pp.2-10, 2:11, September 7, 2006, AGC Authorities, Tab 56.

121. 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.[166]

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:

> 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.[167]

122. The mistake made by those who suggest 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.

123. 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.

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[166] Special Senate Committee Hearing, p. 2:13, September 7, 2006. AGC Authorities, Tab 56.

[167] Special Senate Committee Hearing, p. 2:13, September 7, 2006, AGC Authorities, Tab 56; 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 consultative elections, AGC Authorities, Tab 56.

iii) The Practical Effect of Term Limits

124. Part V reflects the history of the search for amending procedures. Generally speaking, the more profound the change, the more exacting is the procedure. As the Favreau White Paper noted, where the change will directly affect the provinces collectively or result in structural change, the provinces should be 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, and one that will enhance the legitimacy of the institution.

125. 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.[168] Considering that the mean length of a Parliament of 3.2 years and a median length of 3.6 years, the proposed nine year term in Bill C-7 would typically span three Parliaments and possibly reach into a fourth.[169] 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.[170]

126. The imposition of term limits proposed in the legislation at issue (from eight to ten years or the life of two to three Parliaments -- up to twelve years) 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

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[168] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, Table 5, p. 34. These numbers are similar to those calculated by Mr. Stilborn, though his are slightly higher because of a smaller and more recent pool. Compare Stilborn Report, AGC Record, Vol. XVII, Tab 106, paras. 177-179, pp. 58-59.
[169] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 54, p. 35.
[170] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 54, p. 35.

years. Indeed, the proposed terms lengths in the legislation are among the longest in the world. [171]

B. Reference Question 1(e): Parliament May Make Terms Renewable

127. The amending procedure set out in s. 44 of the *Constitution Act 1982* could be employed for dealing with renewable terms for Senators. Some object to permitting terms to be renewable on the basis it may make Senators beholden to the Prime Minister of the day for re-appointment; others believe renewability would enhance the continuity of the Senate, by leaving open the possibility that important ongoing work would not be affected by the end of a term. But such pros and cons are policy debates that do not affect the constitutional issue before this Court. The renewability of terms is not mentioned in s. 42, and there is no basis for reading Part V as requiring provincial consent for this type of reform.

C. Reference Question 1(g): Parliament May Make Term Limits Apply Retrospectively

128. Section 44 also provides the authority for Parliament to limit the terms of Senators retrospectively. It is a principle of statutory interpretation that "a statute is to be interpreted in light of the problem it was intended to address."[172] Where legislative amendments remedy a mischief, the amendments should be given retrospective effect to prevent this mischief from recurring.[173] Moreover, Parliament can take away rights retrospectively to remedy a perceived mischief.[174] Where not applying legislation retrospectively would undermine its remedial purpose, the presumption against

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[171] McCormick Opinion, AGC Record, Vol. XVII, Tab 107, paras. 28-29, p. 162.
[172] *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, 2006 SCC 24 at para. 36, AGC Authorities, Tab 6.
[173] *Campbell v. Campbell* (1995), 130 D.L.R. (4th) 622 (Man. C.A.) at para. 20, application for leave to appeal dismissed, [1996] S.C.C.A. No. 32, AGC Authorities, Tab 5.
[174] *Acme (Village) School District No. 2296 v. Steele Smith*, [1933] S.C.R. 47 at pp. 52-53, AGC Authorities, Tab 1; Ruth Sullivan, *Sullivan on the Construction of Statutes* 5th ed. (Markham: LexisNexis Canada Inc., 2008) at p. 725, AGC Authorities, Tab 60 ("*Sullivan*"); and William Feilden Craies, M.A., *A Treatise on Statute Law* 4th ed. (London: Stevens & Haynes, 1906) at p. 332, AGC Authorities, Tab 68.

interference with vested rights may be rebutted.[175] The logic that remedial legislation should be applied retrospectively in this situation lies in the recognition that "protection of vested rights will delay implementation of an enactment designed to eliminate a specific 'mischief' and thus allow the 'mischief' to continue."[176]

129. The "mischief" in question here is a critical one: the proposed reforms seek to address longstanding concerns that undermine the Senate's legitimacy as a democratic institution.[177] Without retrospective application, the goal of enhancing the Senate's legitimacy might be a generation away from being fulfilled. Consequently, legislation limiting the terms of Senators must be able to be made retrospective in application.

D. Reference Questions 2 and 3: Public Consultations

i) Enacting Consultative Processes does not Require Constitutional Amendment

130. 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. At its highest, that sort of change amounts to a constraint on the Prime Minister's conventional authority to submit the names of Senate nominees to the Governor General; it does not demand resort to the amending procedures in ss. 41 or 42.

ii) Consultation does not mean Direct Election

131. The primary argument against Bill C-20, which proposed a national process of consultations with electors on their preferences for appointments to the Senate, is the

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[175] *Sullivan* at p. 726, AGC Authorities, Tab 60; and *Bellechasse Hospital Corp. v. Pilotte*, [1975] 2 S.C.R. 454 at pp. 460-461, AGC Authorities, Tab 3.
[176] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000) at p. 172, AGC Authorities, Tab 55.
[177] McCormick Opinion, AGC Record, Vol. XVII, Tab 107, paras. 21, 46, pp. 159-160.

misconceived notion that this would result in *de facto* direct election of Senators.[178] There is no factual basis for such an argument, and it relies on an unreasonable hypothesis of how events would unfold in an attempt to create a constitutional impediment to a legislative change wholly within federal jurisdiction.

132. The experience in Alberta demonstrates that the fears raised by some who argue that this is simply a precursor to a directly-elected Senate are overstated. The Alberta process for identifying potential Senate nominees has not had the effect of turning the Senate into a directly-elected body; for example, on four occasions, the winners of those elections have not been appointed.[179] 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.[180] While undoubtedly the refusal to appoint the winners can be explained in part by political factors or unique circumstances (like the commitment to appoint pending approval of the Meech Lake Accord),[181] it does demonstrate that many factors may be relevant in the decision to accept or reject the result of a consultative process. Bill C-7 would require the Prime Minister to "consider" the results, but does not narrow the range of available candidates to be summoned to the Senate.

133. The impact of the Alberta process in terms of the characteristics of those who actually serve in the Senate has been negligible. As Professor Manfredi states, the "Alberta Senate nominee elections have not produced Senators whose professional and life experience varies significantly from Senators appointed through the normative process." [182]

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[178] Andrew Heard, *An expert opinion of Bill C-7 an Act respectiong the selection of senators and amendingthe Constitution Act, 1867 in respect of Senate term limits* (October 2012), Attorney General of Quebec Record, Vol. V, Tab 36, p. 92, where he says that the consultative electoral process is "in substance a direct election".
[179] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 44, p. 28; McCormick Opinion, AGC Record, Vol. XVII, Tab 107, paras. 40-42, pp. 166-167.
[180] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 38, p. 26.
[181] McCormick Opinion, AGC Record, Vol. XVII, Tab 107, paras. 40-42, pp. 166-167.
[182] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 46, p. 30.

134. Enhancing public participation in the appointment process will not inexorably lead to a Senate that competes with the House of Commons and produces legislative gridlock. Senators appointed for one non-renewable term would be free to discharge their "representational responsibilities as trustees rather than as delegates."[183] As they are free from constituency pressures and the need to face re-election, Senators would become independent from those whom they represent and be able to form opinions by taking into account the wishes of the electorate, but forming their own views as well.[184] In addition, they would likely not face post-Senate appointment pressures given their age on appointment (an average of 63 in the case of those from the Alberta election process) and length of service (nine years) which results in a post-Senate career at age 72.[185]

135. Although public and political enthusiasm for the reform may induce the provinces to engage in the consultative process, and for Prime Ministers to reflect the outcome of the processes in their recommendations, the opposite is equally possible. Some provinces may choose not to participate. Reliance on the consultative process by future Prime Ministers would be impossible in non-participating provinces, and could easily wane if the process is not embraced by the provinces and the public.[186]

iii) Federal or Provincial Consultative Process is Constitutional

136. Legislation concerning who the Prime Minister may consult and how does not require constitutional amendment. Parliament may enact legislation in relation to the Senate pursuant to its general or residuary power in relation to the peace, order and good government of Canada under s. 91 of the *Constitution Act, 1867*. Even if such a change could be regarded as something requiring an amendment, s. 44 of the *Constitution Act, 1982* would provide the constitutional basis for such a reform, since a federal, provincial or territorial consultative process to choose potential candidates for Senate appointment is not among the matters listed in s. 42.

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[183] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 49, p. 31.
[184] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, paras 48-49, pp. 31-32.
[185] Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 50, p. 32.
[186] Stilborn Opinion, AGC Record, Vol. XVI, Tab 106, paras. 194-195, pp. 63-64.

iv) Federal Process is Constitutional under POGG

137. The constitutional authority of Parliament to proceed with national consultations on Senate nominees, or of Parliament to commend model legislation to the provinces for provincial consultative processes, is grounded in the opening words of s. 91 of the *Constitution Act, 1867*, the "general" or "residuary" power to make laws for the peace, order and good government of Canada. For example, the *Official Languages Act*[187] applies to federal institutions, including "the Senate" (s.3); in *Jones* v. *A.G. of New Brunswick*,[188] 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."[189]

138. The consultative nature of the federal *Referendum Act*[190] and similar provincial counterparts is clear. Section 3 of the federal *Act* allows the Governor in Council to obtain "the opinion of electors on any question relating to the Constitution of Canada". Moreover, this Court held in the *Quebec Secession Reference*, that while 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."[191]

139. There is no change to the manner in which persons are summoned to the Senate pursuant to s. 24 of the *Constitution Act 1867*. The consultative nature of the process means that the Governor General retains the legal power to summon qualified persons to the Senate and the Prime Minister retains his conventionally-recognized discretion to

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[187] R.S.C. 1985, c. 31 (4th Supp.), AGC Authorities, Tab 51.
[188] [1975] 2 S.C.R. 182, AGC Authorities, Tab 10.
[189] *Jones* v. *A.G. of New Brunswick*, [1975] 2 S.C.R. 182, p. 189, AGC Authorities, Tab 10.
[190] The long title of the federal statute is *An Act to provide for referendums on the Constitution of Canada*, S.C. 1992, c. 30.
[191] *Quebec Secession Reference,* para. 87, AGC Authorities, Tab 21, p. 265.

recommend to the Governor General anyone who meets the basic qualifications, whether or not the person has been chosen in a consultative process.

140. This is not a change to the "method of selecting Senators" because the essential discretion of the Prime Minister is preserved, not removed. The consultation process injects an element of transparency and accountability to the process since the Prime Minister may pay a political price for passing over the winner of the nominee election.[192] But absent outright removal of the Prime Minister's authority to propose, or the Governor General's to summon, or a transfer of the appointment power to the provinces, this is not a change to the "method of selecting."

141. History also 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,[193] or appointment would have been an exclusively provincial responsibility.[194] 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" 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 proposing nominations.

142. 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: a)

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[192] McCormick Opinion, AGC Record, Vol. XVII, Tab 107, paras. 50-51, p. 171.
[193] For example Bill C-60, ss. 63, AGC Record, Vol. II, Tab 13, p. 26; Molgat-McGuigan, AGC Record, Vol. II, Tab 16, para.39, p 88.
[194] Task Force on Canadian Unity, AGC Record, Vol. IX, Tab 31, Recommendation 48, p. 43.

specified by "soft" law, such as guidelines and policies;[195] b) enumerated in statute;[196] or c) developed through judicial interpretation of constitutional rights.[197] In none of these situations is the decision-maker's discretionary authority considered unlawfully or unconstitutionally "fettered," since consideration of the factors, not blind obedience, is all that is required.[198] Indeed, structuring discretion by reference to prescribed factors is usually considered to be a virtue, 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.

143. 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. As set out in some detail above, the Prime Minister was fully aware of, and in agreement with, the position that a 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.

144. 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), nor can it be assumed that a province that introduces such legislation will always maintain that approach.[199]

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[195] *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C.R. 385 (C.A.), at paras. 55-62, AGC Authorities, Tab 24.
[196] See, for example, *Youth Criminal Justice Act*, s. 64(1.1) AGC Authorities, Tab 69; *Patent Act*, s. 21.08(2), AGC Authorities, Tab 54; *Species at Risk Act*, s. 38, AGC Authorities, Tab 62.
[197] *U.S.A. v. Cotroni*, [1989] 1 S.C.R. 1469 at 1498-1499, AGC Authorities, Tab 25.
[198] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 10th ed. Oxford: Oxford U. Press, p. 270, AGC Authorities, Tab 38.
[199] Manfredi Opinion, AGC Record, Vol. XVII, Tab 105, para. 33, p. 22.

145. 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.[200]

146. Speculation that Prime Ministers will be morally or politically bound to choose from the list is without foundation. Even if such a hypothesis were relevant to appointments by the current Prime Minister, a proposition not accepted, nothing in the legislation would bind a future Prime Minister from a different course of action. Future Prime Ministers who did not introduce the legislation would not necessarily feel bound to appoint only Senate nominees elected pursuant to provincial processes, even assuming every province instituted one.

147. Alternatively, should this Court view this type of change as one requiring amendment to the Constitution, this would be a change which Parliament could make according to the amending procedure in s. 44 of the *Constitution Act, 1982*. The national and provincial consultation processes envisaged by Bills C-20 and C-7, respectively, do not affect any of the matters pertaining to the Senate set out in s. 42 of the *Constitution Act, 1982*. Thus, as with changes to term limits, this reform could be accomplished pursuant to the s. 44 procedure.

E. Reference Questions 4: Parliament May Remove Property Qualifications

148. Section 44 of the *Constitution Act, 1982* is the proper amending procedure to use to remove the property qualifications for Senators now found in ss. 23(3) and (4) of the *Constitution Act, 1867*. Property qualifications are not specifically mentioned in subsections 41 or 42 of the *Constitution Act, 1982*, and any amendment to those provisions can be made in accordance with s. 44 of the *Constitution Act, 1982*.

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[200] Alberta *Senatorial Selection Act,* R.S.A. 2000, c S-5s. 3(1) and (2), AGC Authorities, Tab 26; Saskatchewan, An Act to provide for the Election of Saskatchewan Senate Nominees, 2009 Chapter S-46.003 s. 3(b), AGC Authorities, Tab 61; British Columbia Bill 17, *Senate Nominee Election Act* s. 5, AGC Authorities, Tab 29; New Brunswick Bill 64, *An Act Respecting the Selection of Senator Nominees*, s. 15, AGC Authorities, Tab 30.

149. That Parliament has the authority under s. 44 to abolish the property qualification is clear from the text of the Constitution. Section 23 of the *1867 Act* sets out five qualifications for being a Senator: 1) a minimum age of 30 (s.23(1)); 2) status as either a natural-born, or naturalized, subject of the Queen(s. 23(2)); 3) property holdings of $4,000 (ss.23(3) and (4)); 4) residency in the province of appointment (s. 23(5)); and 5) for Quebec Senators only, holding the property or being resident in the Electoral Division of appointment. Of these qualifications, only residency has been singled out in s. 42 as something requiring resort to the "7/50" amending procedure. It follows that property qualifications must be a subject Parliament can deal with under the s. 44 procedure.

150. In its opinion in the *Upper House Reference*, this Court noted that "... property qualifications may not today have the importance which they did when the Act [the *Constitution Act, 1867*] was enacted".[201] But the property qualification is not literally "unimportant"; this Court's observation should be understood as one recognizing the inconsistency of the property qualification with modern democratic ideals.

151. The issue of property qualifications underscores the necessity of applying a progressive interpretation of the Constitution. Property qualifications are not a reliable indicator of the quality or character of a person, nor do they insure independence of thought or provide special insight into the scrutiny of proposed legislation. Whatever justification the property qualification may have had in the 19th century does not justify its continued retention in a Constitution in step with modern Canadian society.

F. Reference Questions 5 and 6: Section 38 Provides the Procedure for Abolition of the Senate

152. The Constitution can be amended to abolish the Senate. Given the tortuous history of attempts to agree on an amending procedure, and the continuous ebb and flow of the debate about abolition, it is unfathomable that the Constitution patriated in 1982 is

[201] *Upper HouseReference* p. 76, AGC Authorities, Tab 18.

incapable of effecting such a change. The only question for this Court is how abolition may be achieved. A careful analysis of the text suggests that abolition can be achieved through use of the general amending formula in s. 38.

153. The abolition of the Senate by any of the methods suggested in Question 5 would not constitute, in pith and substance, an attempt to amend Part V of the *Constitution Act, 1982*, because abolition of the Senate is not a matter in relation to the amendment of the amending procedures. The changes resulting to the operation of those procedures would be incidental to the Senate's abolition.

i) Section 38 is the Appropriate Procedure

154. Several contextual and textual factors favour the abolition of the Senate through the general amending formula found in s. 38 of the *Constitution Act, 1982.* First, the general amending formula is the default procedure for constitutional amendments. The procedures in ss. 41 to 43, however, are used in specific circumstances. The abolition of the Senate does not come within the specific matters set out in s. 41 of the *Constitution Act, 1982*. By contrast, the composition of the Supreme Court of Canada, another central institution, is specifically mentioned in that section. Section 42(1) specifically makes other amendments related to the Supreme Court of Canada subject to s. 38. If the ability to change or eliminate the composition or powers of the Senate was intended to be made subject to s. 41, exceptional wording similar to that in relation to changes to the Supreme Court would have been found in s. 41 and s. 42.

155. The Senate is specifically mentioned only in s. 42, which in turn makes specific reference to s. 38 and the general amending procedure. Section 42 mentions only the powers of the Senate, the method of selecting Senators, the number of Senators per province and their residency requirements. Since abolition of the Senate is not specifically mentioned in s. 41, and s. 44 is not applicable because abolition of the Senate would necessarily affect the powers and characteristics of the Senate mentioned in s. 42

of the *Constitution Act, 1982,* the default procedure is the general procedure found in s. 38.

156. In the *Patriation Reference,* this Court dealt with arguments that a convention had arisen that demanded the unanimous consent of the provinces to constitutional amendment.[202] The Court refused to enshrine unanimity as a legal imperative where there was no textual support for doing so. The fact that since 1982 we have had comprehensive amending procedures that say nothing about the sort of consensus required for abolition of the Senate should make this Court even more reluctant to read such a requirement in to Part V.

157. Section 42 is significant for another reason. The aspects of Senate reform requiring provincial consent are set out in s. 42. The general amending procedure could be used to realign the distribution of seats in the Senate and remove the legislative "powers" of the Senate. The removal of these key features of the Senate through the general amending procedure strongly suggests that the Senate could be abolished using that same procedure.

158. Since these key elements of the Senate may be changed through the general amending procedure, this further undermines arguments that the preservation of the Senate in its present form is necessary to protect regional and provincial interests. There is no fundamental or inherent role or function of the Senate that is not subject to constitutional amendment pursuant to s. 38.

159. In accordance with the progressive approach to constitutional interpretation, the role, powers and even existence of the Senate must be reviewed in terms of circumstances, values and context of present society. In terms of the Senate, those values would be reflected in the resolutions of the democratically elected legislative assemblies of the provinces, and the Houses of Parliament.

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[202] *Patriation Reference,* AGC Authorities, Tab 20, pp. 900-909.

160. The abolition of the Senate by means of the general amending procedure found in s. 38 of the *Constitution Act, 1982* would not constitute, in pith and substance, an amendment to the amending procedure. Any provisions that mention the Senate that might remain in the text of the Constitution would be spent. Precedent for this is found in relation to the abolition of the upper house of the Quebec Legislature. Section 71 *et seq.* of the *Constitution Act, 1867* still refers to the "Legislative Council of Quebec" even though that body was abolished by the *Act respecting the Legislative Council of Quebec*, S.Q. 1968, c. 9.

ii) Section 41 is not the Appropriate Procedure

161. The text and context of the provisions in the Constitution is important. The requirement for unanimity is limited to amendments in relation to the five matters listed in s. 41. The first four matters deal with the regal and vice-regal offices, the number of representatives in the House of Commons, the status and use of French and English and the composition of this Court. The final matter listed in s. 41 is the amendment of the Part V itself. None of these suggest explicitly that abolition of the Senate should be done according to this procedure.

162. The primary argument advanced by those who believe the unanimous consent procedure is necessary to abolish the Senate is that the abolition of the Senate itself constitutes an amendment to Part V of the *Constitution Act, 1982* and therefore requires unanimous approval pursuant to s. 41.

163. The Senate is expressly mentioned in ss. 38, 41 and 43 of Part V. However, the Senate is not an essential actor in relation to any of the multilateral amending procedures in the Constitution. With the exception of s. 44 of the *Constitution Act, 1982*, the Senate has only a suspensive veto in respect of the amendment process. The absence of the Senate would not prevent the enactment of amendments under s. 38 (the 7/50 formula), s. 41 (unanimity) or bilateral/multilateral amendments under s. 43.

164. That the concurrence of the Senate is not required for any of the major categories of amendments of the Constitution is supported by s. 47 of the *Constitution Act, 1982.* That section makes it clear that an amendment to the Constitution under ss. 38, 41, 42 or 43 may be made without a resolution of the Senate if within 180 days after the House of Commons adopts an authorizing resolution, the House again adopts the resolution.

165. Even amendments under s. 44 of the *Constitution Act 1982*, which gives "Parliament" the power to amend the Constitution, do not necessarily require Senate approval. The definition of "Parliament" in s. 17 of the *Constitution Act, 1867* could be amended (pursuant to s. 38) to remove the reference to the Senate, such that the Senate would cease to be a part of Parliament. That would not be an amendment in relation to the Part V amending procedures but rather, an amendment in relation to the composition of Parliament, and thus within the general amending procedure found in s. 38. The consequence of that amendment would be that the newly-defined Parliament (now consisting of the Queen and the House of Commons) would inherit any and all powers of legislative amendment under s. 44 of the *Constitution Act, 1982*. Thus, Part V is exhaustive both with regard to the reform of the Senate, but also with respect to its abolition.

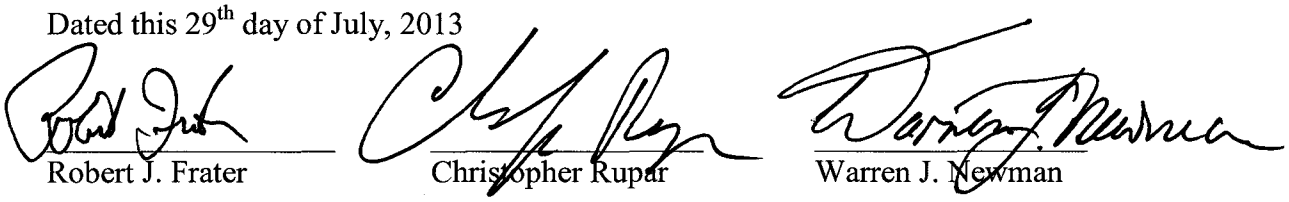
PART IV - COSTS

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

PART V - ORDER SOUGHT

167. The Attorney General of Canada submits that questions 1 (a) – (g), 2, 3, 4, and 5 should be answered in the affirmative. With respect to question 5, any of the methods listed may be used to abolish the Senate. In respect of question 6, the general amending formula in s. 38 of the *Constitution Act, 1982* is the correct procedure.

Dated this 29th day of July, 2013



Robert J. Frater | Christopher Rupar | Warren J. Newman

Counsel for the Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

Other

PART VII– LEGISLATION

1. Bill C-7, AGC Record, Vol. I, Tab 2
2. Bill S-4, AGC Record, Vol. I, Tab 3
3. Bill C-20, AGC Record, Vol. I, Tab 4

Appendix A

1. In relation to each of the following proposed limits to the tenure of Senators, is it within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the *Constitution Act, 1982*, to make amendments to section 29 of the *Constitution Act, 1867* providing for

(*a*) a fixed term of nine years for Senators, as set out in clause 5 of Bill C-7, the *Senate Reform Act*;

(*b*) a fixed term of ten years or more for Senators;

(*c*) a fixed term of eight years or less for Senators;

(*d*) a fixed term of the life of two or three Parliaments for Senators;

(*e*) a renewable term for Senators, as set out in clause 2 of Bill S-4, *Constitution Act, 2006*
(Senate tenure);
(*f*) limits to the terms for Senators appointed after October 14, 2008 as set out in subclause 4(1) of Bill C-7, the *Senate Reform Act*; and

(*g*) retrospective limits to the terms for Senators appointed before October 14, 2008?

2. Is it within the legislative authority of the Parliament of Canada, acting pursuant to section 91 of the *Constitution Act, 1867*, or section 44 of the *Constitution Act, 1982*, to enact legislation that provides a means of consulting the population of each province and territory as to its preferences for potential nominees for appointment to the Senate pursuant to a national process as was set out in Bill C-20, the *Senate Appointment Consultations Act*?

3. Is it within the legislative authority of the Parliament of Canada, acting pursuant to section 91 of the *Constitution Act, 1867*, or section 44 of the *Constitution Act, 1982*, to establish a framework setting out a basis for provincial and territorial legislatures to enact legislation to consult their population as to their preferences for potential nominees for appointment to the Senate as set out in the schedule to Bill C-7, the *Senate Reform Act*?

4. Is it within the legislative authority of the Parliament of Canada, acting pursuant to section44 of the *Constitution Act, 1982*, to repeal subsections 23(3) and (4) of the *Constitution Act,1867* regarding property qualifications for Senators?

5. Can an amendment to the Constitution of Canada to abolish the Senate be accomplished by the general amending procedure set out in section 38 of the *Constitution Act, 1982*, by one of the following methods:

(*a*) by inserting a separate provision stating that the Senate is to be abolished as of a certain date, as an amendment to the *Constitution Act, 1867* or as a separate provision that is outside of the *Constitution Acts, 1867 to 1982* but that is still part of the Constitution of Canada;

(*b*) by amending or repealing some or all of the references to the Senate in the Constitution of Canada; or

(*c*) by abolishing the powers of the Senate and eliminating the representation of provinces pursuant to paragraphs 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*?

6. If the general amending procedure set out in section 38 of the *Constitution Act, 1982* is not sufficient to abolish the Senate, does the unanimous consent procedure set out in section 41 of the *Constitution Act, 1982* apply?