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

FACTUM
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(Pursuant to Rule 46 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

I. Overview

1. This Reference is about the constitutionally required process to make significant changes to, or to abolish, the Senate of Canada. It is not about whether an elected Senate or shortened term limits are desirable, or about whether the Senate should be abolished. Rather, it is about whether such changes could be effected unilaterally by Parliament without any requirement for provincial involvement, or whether they would engage either the "7/50" amending procedure or the unanimous consent requirement set out in of Part V of the *Constitution Act, 1982*.

2. The Senate of Canada is a constitutionally entrenched national institution which was born out of the essential compact that gave rise to Confederation. Senate reform is fundamentally constitutional in nature and can only be accomplished in accordance with the constitutional amending procedures.

3. The proposals contained in Reference Questions 1, 2 and 3 to introduce Senate elections and to change the term length of Senators would fundamentally change the Senate as we know it and would constitute amendments in relation to "the powers of the Senate and the method of selecting Senators". Such changes could only be effected pursuant to the "7/50" amending procedure provided for by s. 42(1) and 38(1) of the *Constitution Act, 1982*.

4. Abolition of the Senate would be a profound change to Canada's constitutional structure. It would remove one of the foundational pillars upon which the Canadian union was built. The Senate's role, as conceived, is integral not only to the federal legislative process, but also to the constitutional amending processes. The provisions of Part V, interpreted by reference to the structure of the Constitution as a whole, including the foundational unwritten constitutional principles, compel the conclusion that abolition could only be effected pursuant to the unanimous consent procedure in s. 41.

II. Facts

5. By Order in Council P.C. 2013-070, dated February 1, 2013, the Governor in Council referred several questions to this Court for its hearing and consideration pursuant to s. 53 of the *Supreme Court Act*. Those questions are found in Appendix A.

PART II – ISSUES

6. The questions referred to this Court by the Governor General in Council pursuant to Order in Council P.C. 2013-70 are found in Appendix A. The questions address four topics: term limits for Senators; the introduction of elections into the process for selecting Senators; repealing the property qualifications for Senators; and abolition of the Senate.

7. The Attorney General of Newfoundland and Labrador takes no position on the issue of property qualifications (Question 4). With respect to the other questions, the answers of the Attorney General of Newfoundland and Labrador can be summarized as follows:

Senate Elections (Reference Questions 2 and 3):

8. Questions 2 and 3 should be answered "No". The proposals referenced in these questions fall outside the exclusive legislative authority of Parliament under either s. 91 of the *Constitution Act, 1867* or s. 44 of the *Constitution Act, 1982*. These proposals would fundamentally alter the method of selecting Senators, a matter reserved for the "7/50" constitutional amending procedure pursuant to s. 42(1)(b) and 38(1).

Term Limits (Reference Question 1):

9. Question 1 (all parts) should be answered "No". The proposals to set term limits should not be considered in isolation from the proposed Senate elections, as the two are linked. The term limit proposals would work together with the election proposals to alter the method of selecting Senators. Moreover, aspects of the term limit proposals have the potential to affect the powers of the Senate. Thus these proposals would engage the "7/50" amending procedure in s. 38(1).

Abolition (Reference Questions 5 and 6):

10. Question 5 (all parts) should be answered "No". Question 6 should be answered "Yes". The correct procedure for abolition is the unanimous consent procedure of s. 41. The "7/50" procedure in s. 38 is not sufficient. None of the methods proposed pursuant to s. 38 would be constitutionally permissible.

PART III - ARGUMENT

I. Introduction

11. This reference is about the constitutionally required procedures for potential changes to the Senate. Contrary to the assertion of the Attorney General of Canada, however, it is not about procedures applicable to "relatively modest" proposals. Rather, it is about how fundamental changes could be made to the Senate, which was designed as one of Canada's national institutions and was one of the essential components of the compact that led to Confederation. It is about whether the Provinces, partners in that essential Confederation compact, would have any say in changes of such significance to the nation as a whole. And it is about the nature and scope of the amending procedures themselves, which were designed to reflect and protect the federal constitutional partnership that is Canada.

12. The choices that are made about a national institution such as the Senate are fundamental choices about how Canadian society represents itself through sovereign government. They will have long-lasting effects on the way Canadian society is governed and on the operation of the Federation. Any such changes should be the product of careful, thorough consideration and fulsome consultation between both constitutional orders of government, culminating in the achievement of the constitutionally required level of consensus.

13. The thresholds for changing the Constitution are high, but this is by design. The Constitution sets the basic rules that frame our democracy, and should not be easy to change. The fact that constitutional change can be a lengthy, complex, and arduous process is not a justification to allow such changes to be effected in a manner that avoids these rigorous standards.

II. Interpretative Approach

14. In the *Manitoba Language Rights Reference*, this Court held:

> The Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution.[1]

15. This direction applies with equal force to the exercise of interpreting and applying the amending provisions in Part V of the *Constitution Act, 1982*.

16. The amending procedures lie at the heart of the Constitution. They demand an equally robust and comprehensive interpretative approach as applies to other elements of the Constitution. Narrow formalistic interpretation has no place. The provisions of Part V should be interpreted by reference to the structure of the Constitution as a whole, including the unwritten constitutional principles which form an essential part of our constitutional structure.[2] Textual analysis should be integrated with contextual and purposive interpretation.

17. The text of Part V should be interpreted in light of the context leading to its enactment. This Court has consistently emphasized the importance of a contextual approach to the analysis of significant constitutional issues.[3]

III. The Continued Relevance of the *Upper House Reference*

18. In 1978, the Governor in Council referred a series of questions to this Court for its opinion as to whether Parliament could enact legislation under the authority of s. 91(1) of the *Constitution Act, 1867* to abolish or effect certain reforms to the Senate. In its December 21,

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[1] *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 751, AGNL Authorities, Tab 3
[2] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*") at para. 50-51, AGNL Authorities, Tab 6
[3] See, for example, *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at p. 344, AGC Authorities, Tab 15; *Secession Reference* at para. 34, AGNL Authorities, Tab 6

1979 opinion in *Re Authority of Parliament in Relation to the Upper House* (the "*Upper House Reference*"),[4] the Court devoted considerable attention to the historical background that lead to the creation of the Senate. The Court concluded, based on this historical review and an analysis of the key constitutional provisions concerning the Senate, that a primary purpose of the creation of the Senate was to afford protection for the various sectional and regional interests in Canada in relation to the enactment of federal legislation and that this role of the Senate was "vital".[5]

19. The Court concluded that under s. 91(1) it was not open to Parliament to abolish the Senate or "to make alternations 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."[6]

20. The *Upper House Reference* was decided in 1979. The Constitution was patriated in 1982, at which time the amending provisions in Part V of the *Constitution Act, 1982* were adopted and s. 91(1) was repealed. However, this sequence of events in no way calls into question this Court's characterization of the Senate's genesis or intended role in Canada's constitutional structure and federal system of government.

21. Moreover, the legislative history leading up to the adoption of Part V of the *Constitution Act, 1982* and s. 44 in particular, do not support the contention that s. 44 was intended to enlarge the legislative powers of Parliament beyond those contained in s. 91(1).

22. Section 44 states:

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

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[4] [1980] 1 S.C.R. 54, AGNL Authorities, Tab 2
[5] *Ibid.* at pp. 66, 67
[6] *Ibid.* at pp.75, 78

23. The intention of s. 44 was explained to the 1981 Special Joint Committee on the Constitution by then Minister of Justice, Jean Chrétien. The Honourable Jake Epp, a member of that committee, expressed concern about the powers to amend the Senate that were provided to Parliament under (what would become) s. 44. Epp proposed an amendment to remove the words "the Senate" from the clause "in relation to the executive government of Canada or the Senate and House of Commons", asserting that "[t]his amendment would assure that the role and scope of the Senate could not be changed simply through the House or a federal initiative". However, Minister Chrétien indicated that it was necessary for Parliament to be able to address "internal" matters related to the Senate, such as quorum. This explanation and the example put forward by Minister Chrétien make it clear that s. 44 was not intended to capture the type of fundamental features of the Senate identified by this Court in the *Upper House Reference*.[7]

24. That Parliament's authority under s. 44 is subject to limitations beyond those explicitly provided for in ss. 41 and 42 is also supported by the fact that a number of critical matters are not specifically referenced in s. 41 or 42. For example, s. 91(1) explicitly provided that Parliament did not have the authority to amend the Constitution in relation to the requirement that there must be a federal election every five years. This requirement is now found in s. 4 of the *Charter*. It is not listed anywhere in the amending provisions of Part V of the *Constitution Act, 1982*. An amendment to this requirement would arguably be "in relation to...the House of Commons", yet surely, it cannot be that Parliament has the authority, pursuant to s. 44, to unilaterally enact an amendment to do away with that five year limit.[8]

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[7] *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue 53, February 4, 1981, p. 50, AGQC Record, Vol. I, Tab 6. See also: Submission of John P. McEvoy on Bill S-4 (March 22, 2007), AGC Record, Vol. XIII, Tab 77; Don Desserud, "An expert opinion of Bill C-7: An Act respecting the selection of Senators and amending the *Constitution Act, 1867* in respect of Senate Term Limits (December 2012) at pp. 53-54 , AGQC Record, Tab 37

[8] See: Andrew Heard," An expert opinion of Bill C-7:An Act respecting the selection of senators and amending the *Constitution Act, 1867* in respect of Senate term limits" (October 2012) ("Heard Opinion on Bill C-7") at p. 15, AGQC Record, Vol. V, Tab 36; Standing Senate Committee on Legal and Constitutional Affairs, Report on Bill S-4 at pp.17-18 , AGC Record, Vol. VII, Tab 27

25. Thus, there must be further limits to Parliament's unilateral amending authority under s. 44 beyond those explicitly stated in ss. 41 and 42. The Court can properly look to the overall structure of the Constitution, the context leading to the adoption of the amending provisions of the *Constitution Act, 1982*, and its own previous jurisprudence, in particular the *Upper House Reference*, in defining the limits and scope of Parliament's authority under s. 44.

IV. Response to the Reference Questions

A. Elections (Reference Questions 2 and 3)

26. Questions 2 and 3 concern the introduction of elections into the process for selecting Senators. Question 2 references Bill C-20, which provided for federally-administered, so-called "consultations" to be held in conjunction with either a federal or provincial general election. Question 3 references Bill C-7, which contemplates provincial/territorial elections.

27. Newfoundland and Labrador submits that these elections and the legislative proposals to introduce them would fundamentally alter the method of selecting Senators. Pursuant to s. 42(1)(b) amendments to the Constitution in relation to "the method of selecting Senators" can only be made pursuant to the "7/50" amending procedure in s. 38(1). Such matters fall outside the exclusive legislative authority of Parliament under either s. 91 of the *Constitution Act, 1867* or s. 44 of the *Constitution Act, 1982*.

(i) Purpose and Effects of the Draft Legislation

28. In order to answer these two reference questions, it is necessary to understand the purpose and intended effects of the legislative proposals as well as the actual practical consequences that would ensue if they were enacted. Such an analysis reveals the true nature of the draft legislation. This is the same approach this Court has adopted in determining the pith and substance of a law in the context of a division of powers analysis.[9]

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[9] *Reference re Securities Act*, [2011] 3 S.C.R 837 ("*Securities Reference*") at para. 63-64, AGNL Authorities, Tab 7

29. It is then necessary to ascertain the meaning of "the method of selecting Senators" in s. 42(1)(b) of the *Constitution Act, 1982* in order to determine whether the draft legislation, in substance, constitutes such an amendment and is therefore outside the unilateral authority of Parliament.

30. In determining the purpose(s) of a law, it is appropriate for courts to examine the statute itself as well as relevant extrinsic evidence that is not inherently unreliable. This includes the legislative history, such as Parliamentary debates and speeches, formal statements by members of the Government, and government reports and publications.[10] A careful review of these bills, including their legislative history, reveals that their purpose is to transform the Senate into an elected body.

31. A close examination of the text and how these bills would operate in practice, particularly when the influence of the foundational constitutional principle of democracy is considered, demonstrates that they would *in fact* fundamentally change the way in which Senators are selected.

(ii) Purpose of the federal proposals is to transform the Senate into an elected body

32. Since first forming the government in 2006, the Harper government has introduced a series of bills to make changes to the Senate. Throughout this time, Senatorial elections have been a key and consistent component of these proposals.

33. In his appearance before the Senate Special Committee on Senate Reform in September 2006, Prime Minister Harper made clear his government's intention to introduce legislation to create an elected Senate in the following comments:

> As yet another step in fulfilling our commitment to make the Senate more effective and more democratic, **the government hopefully this fall, will introduce a bill in the House to create a process to choose elected senators.** (p.8)

[10] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at pp. 484-5, AGNL Authorities, Tab 1

> ...
> **We desire a national process for electing senators** rather than a province-by-province process. I view the Senate properly structured as a national institution, not a federal institution, not a provincial institution. There is no doubt to change the process in a formal constitutional sense – to making senators elected – would require provincial consent. The government would be seeking to have the ability to consult the population before make Senate appointments. Obviously, this is an interim step of democratization but we think it would be an important one. (p. 13)
> ...
> There are still nine vacant seats for senators. I do not intend to appoint senators, unless necessary. But **I can tell you that the government intends to table a legislation to create an elected Senate.** (p. 14)
> ...
> As I mentioned earlier, the proposed legislation the government will bring forward is obviously by necessity permissive in nature. **It allows the government of the day not just to create elected senators**, but to evaluate how that is affecting the system and what is happening; and it will occur over a period of time. (p. 18) (emphasis added) [11]

34. On April 20, 2007, in moving second reading of Bill C-43, the predecessor to Bill C-20, the Minister of State (Democratic Renewal), Peter Van Loan, said in the House of Commons:

> Bill C-43 will do more than enable Canadians to have their say about the representatives who will be making decisions on their behalf here in Ottawa. It also guarantees that those representatives will be accountable for the decisions they make.
> Consulting the Canadian public on Senate appointments will help to boost the Senate's legitimacy in the eyes of Canadians by transforming it into a more modern, more democratic, and more accountable institution that reflects the core values of Canadians.
> ...Ultimately, of course, we know that fundamental reform of the Senate will require complex, lengthy and multilateral constitutional change. There does not exist, sadly, at present, the national consensus or will required to engage in the inevitably long and potentially contentious rounds of negotiations that would be involved.
> ...In conclusion, Bill C-43, the Senate Appointments Consultations Act, will strengthen and revitalize the very values that define us as Canadians, values such as democracy and accountability in government.
> Indeed, it extends to Canadian the most fundamental right of all, the right to vote, by advancing the principle that Canadians should have a say in who speaks for them in the Senate.

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[11] *Proceedings of the Special Senate Committee on Senate Reform*, September 7, 2006, Issue No. 2 at pp.8-18 , AGNL Authorities, Tab 12

> The government believes that Canadians should have that right. Bill C-43 not only allows Canadians to indicate who they would like to represent them; it ensures that the people they select are required to account for their actions.[12]

35. On October 16, 2007, when Bert Brown was sworn in as a Senator, the Prime Minister's Office issued a press release referring to him as Canada's "second elected Senator" and stating that "[t]he swearing-in of Senator Brown today reflects our government's conviction that Canadians must have a direct say in who will represent them in the Red Chamber."[13]

36. Bill C-43 died on the order paper at prorogation, but its proposal was re-introduced with some modifications as Bill C-20 on November 13, 2007. Appearing before the House of Commons Committee hearings into Bill C-20, Minister Van Loan summarized the problems which the bill was intended to address:

> As Members of Parliament, I am sure we can all agree that it is utterly absurd for the members of the unelected, unaccountable Senate to have power nearly equal to the elected, accountable House of Parliament that we are all members of, the House of Commons. This is not healthy for the Senate, it's not healthy for democracy in the 21st century. That's why we introduced two bills to create a modern and accountable Senate that is consistent with modern and contemporary democratic values, principles and traditions.
> ...
> Our hope, obviously, is that we can salvage the Senate by introducing a democratic element that has been absent until now by asking Canadians who they want to represent them.[14]

37. Bill C-7, the *Senate Reform Act*, was introduced on June 11, 2011. On second reading, Democratic Reform Minister Tim Uppal again identified the problem which the bill was intended to remedy as "the democratic deficit".[15] During second reading debates, Parliamentary Secretary Kellie Leitch stressed the commitment of the Prime Minister to appoint the winners of provincial Senate elections:

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[12] House of Commons, *Debates*, April 20, 2007, pp. 8478-9, AGNL Authorities, Tab 10
[13] Press Release, Prime Minister's Office, October 16, 2007, AGQC Record, Vol. IV, Tab 27
[14] House of Commons, Legislative Committee on Bill C-20, Evidence, March 5, 2008, at pp. 1, 5-6, AGNL Authorities, Tab 11
[15] House of Commons, *Debates*, September 30, 2011 at p. 1706, AGQC Record, Vol. IV, Tab 28

> The Prime Minister has always been clear that his preference is to appoint senators chosen by the voters, and he is committed to respecting the results of any democratic consultation with voters.[16]

38. This legislative history, including repeated formal statements by the Prime Minister and other members of the Government, demonstrate a clear, express and consistent intention to transform the Senate into an elected body and to do it by means of the legislative proposals currently under review.

(iii) The federal proposals would fundamentally change the method of selecting Senators

39. The current process for selecting Senators is made up of two essential steps. By virtue of a longstanding constitutional convention, the Prime Minister exercises unfettered discretion to recommend to the Governor General the appointment of qualified persons to become Senators. The Governor General then accepts these recommendations and summons these qualified persons to the Senate pursuant to s. 24 of the *Constitution Act, 1867*.

40. Bill C-20,[17] referenced in Question 2, provides for the holding of what it terms "consultation of the electors of one or more provinces in relation to the appointment of senators to represent those provinces". Notwithstanding this terminology, the processes provided for by Bill C-20 are fundamentally in the nature of elections.

41. They would be initiated by order of the Governor in Council and held in conjunction with a federal or provincial general election, and would have all of the procedural attributes of an election. Individuals wishing to put themselves forward as Senate nominees would have to file nomination papers in accordance with legislated requirements. Nominees could be endorsed by political parties. The Bill includes provisions addressing: rights of nominees; official agents and auditors; procedural aspects of voting; the counting of votes (by a preferential system) and the method of determining the list of selected nominees; advertising

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[16] House of Commons, *Debates*, September 30, 2011, p. 1725, AGPEI Record, Tab 12, p. 224
[17] Bill C-20, *Senate Appointment Consultations Act*, AGC Record, Vol. I, Tab 4

rules; contribution rules; and enforcement of the legislation. Significant components of the *Canada Elections Act* are made applicable under the bill.

42. Question 3 concerns provincial/territorial elections as set out in Bill C-7.[18] Section 3 of that bill states that if a province or territory enacts legislation substantially in accordance with the framework set out in the schedule, the Prime Minister "must consider names from the most current list of Senate nominees selected for that province or territory."

43. The schedule provides a framework for provincial/territorial elections to determine the list of Senate nominees for that province/territory. This framework is virtually identical to the legislative framework for elections for the House of Commons or a provincial legislature. From the perspective of a provincial or territorial elector, the process would appear exactly the same. The only difference is that the election winners would be placed on the list of Senate nominees rather than directly assuming their seat. Section 1 of the schedule provides that Senators to be appointed for a province or territory "should be chosen" from that list.

44. Thus, Bill C-7 not only authorizes elections in respect of Senate vacancies, but imposes clear obligations on the Prime Minister and Governor General with respect to the winners of these elections. The wording of the bill states that the winners of these elections "must be considered" and "should be" appointed.

45. The effect of this bill would be to substitute the unfettered discretion of the Prime Minister to recommend appointments to the Senate to the Governor General with a legislative direction that the winners of these elections should be appointed.

46. The language "should be" creates a clear presumption in favour of appointing the election winners. The legislation does not identify <u>any</u> exceptions to the principle of appointing election winners. In the face of this statutory language, only exceptional circumstances would justify departure from that presumption. Professor Andrew Heard suggests that the only principled reason for departing from this presumption would be if there were some serious

[18] Bill C-7, *Senate Reform Act*, AGC Record, Vol. I, Tab 2

defect in the individual's ability or qualification to sit as a Senator, for example, serious mental or physical incapacity or being convicted of a serious offence.[19]

47. The provincial/territorial opt-in nature of Bill C-7 would also result in the anomalous situation that the process for selecting Senators could be changed in some provinces and territories, but not others. This would lead to variable extension of the franchise across the country and an "inequality of democracy", and would stand in stark contrast to the right of *every* citizen of Canada to vote in elections for Parliament and the legislative assemblies entrenched in s. 3 of the *Charter*.

48. A process containing a legislated direction to the Prime Minister as to whom (s)he should appoint is fundamentally different from one in which the Prime Minister has unfettered discretion. This is particularly the case when one considers the nature of the process by which the Senate nominee has been identified – an election administered in accordance with democratic rules.

49. Professor Heard has convincingly rejected the suggestion that these elections are mere consultations or solicitations of opinion similar to referenda. He writes:

> These descriptions of [Bill C-20 and C-7 as] consultations rather than elections are completely inaccurate from my perspective as a political scientist. [...] The processes envisioned in Bill C-7, and already practiced in Alberta, is clearly not a referendum consultation. In a referendum or plebiscite, voters choose between public policy alternatives. In an election, voters select representatives [authorities referenced]. The ultimate purpose of the electoral processes conducted under C-7 is to allow voters to choose their Senators. By definition this is an election.[20]

50. The legislated principle that the election winners should be appointed would be reinforced in practice by the unwritten constitutional principle of democracy which was identified by this Court in the *Secession Reference* as one of the fundamental values in our constitutional law and political culture.[21]

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[19] Heard Opinion on Bill C-7 at p. 44-45, AGQC Record, Vol. V, Tab 36
[20] Heard Opinion on Bill C-7 at p. 36, AGQC Record, Vol. V, Tab 36
[21] *Secession Reference* at para. 61, AGNL Authorities, Tab 7

51. If the electors of a province or territory choose nominees in an electoral process conducted in accordance with all of the usual rules designed to ensure that the true will of the electorate prevails, it would be antithetical to the principle of democracy not to respect the results of those elections.

52. The assertion that the Prime Minister's discretion would be unconstrained by these elections is unsustainable. The actions of a Prime Minister who did not respect the results of these elections would undermine the principle of democracy. How could it possibly "make the Senate into a more democratic institution" to grant a right to vote to the electors, and then disregard their clear message as to who they want to have representing them in the Senate? This would be a very hollow conception of democracy.

53. Over time, the proposed legislation and the democratic principle would result in the progressive entrenchment of a rule that only in the most exceptional circumstances should the Prime Minister depart from appointing the elected nominees. Such a rule would acquire the status of a constitutional convention, replacing the current convention that the Prime Minister has unfettered discretion to recommend Senate appointments to the Governor General. Thus, the actual operation of the proposed legislation would fundamentally change the process by which Senators would be selected.

(iv) "the method of selecting Senators" in s. 42(1)(b)

54. Section 42(1) lists matters in relation to which constitutional amendments can only be made in accordance with the s. 38(1) amending procedure. One of those matters is "the method of selecting Senators" (s. 42(1)(b)). This gives rise to two key questions – (1) What is the meaning of "the method of selecting Senators" in s. 42(1)(b)? and (2) Would the bills in question, in substance, constitute amendments to the Constitution?

55. The meaning of "method of selecting Senators" in s. 42(1)(b) should be ascertained in accordance with the direction in the *Manitoba Language Rights Reference* that the Court

"cannot take a narrow and literal approach to constitutional interpretation" and that "the jurisprudence of this Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution."[22]

56. The text, context and a purposive approach all point to an interpretation that this phrase was intended to capture the process by which individuals are chosen to be Senators.

57. The plain meaning of the words chosen supports this interpretation. The *Canadian Oxford Dictionary*[23] defines these terms as follows:

> "method" - a mode of procedure; a defined or systematic way of doing a thing;
> "selection" - the act of selecting;
> "select" - choose, especially as the best or most suitable.

58. Pursuant to Bill C-20 or C-7, the driving force of the process to select Senators would become elections held in a systematic manner pursuant to legislation. A plain language reading of s. 42(1)(b) therefore clearly suggests that these bills would change "the method of selecting Senators".

59. The historical context against which these bills have been proposed also supports this interpretation. Over the years, a wide range of proposals to change the process for selecting Senators have been put forward. All of these proposals have garnered the attention and views of the Provinces. The breadth of the proposals considered was the backdrop against which the broad language "method of selecting Senators" was agreed to and adopted. It is logical to conclude that this language was intended to capture the full range of potential changes to the selection process for Senators.

60. The overarching purpose of s. 42(1) is to identify certain matters that were agreed to be of sufficient importance to the provinces as to require compliance with the s. 38(1) amending

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[22] *Re:Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 751, AGNL Authorities, Tab 3
[23] *Canadian Oxford Dictionary, 2nd ed.* (Oxford University Press, 2004) at pp. 975, 1406, AGNL Authorities, Tab 9

procedure. The process by which it is determined who will represent a province in the Senate, the body designed to represent regional and provincial interests in the federal legislative process, is of fundamental importance to the provinces. As this Court stated in the *Upper House Reference*, "To make the Senate a wholly or partially elected body would affect a fundamental feature of that body".[24] A purposive interpretation therefore also supports the conclusion that Bill C-20 and C-7 would change the "method of selecting senators".

61. The Attorney General of Canada asserts that Bills C-20 and C-7 do not engage s. 42(1)(b) because they would not formally amend s. 24 of the *Constitution Act, 1867*. This argument fails to recognize that the *substantive* effect of these bills would be to unilaterally change the method of selecting Senators, and places such changes beyond the constitutional reach of the Provinces. This would be contrary to intention of the framers of Part V, and in particular, s. 42(1)(b) and 38(1). This type of change was intended to engage the "7/50" amending procedure.

62. This Court has consistently emphasized the importance of focusing on substance over form in characterizing legislation for constitutional purposes. The clearest example of this approach is the pith and substance doctrine. In seeking to identify the pith and substance or "essential character" of the law, the process of characterization is not a technical formalistic exercise confined to the strict legal operation of the statute. The court is concerned with purpose of the law as well as the effects in order to ascertain its dominant characteristic or "main thrust".[25]

63. The importance of not allowing form to obscure substance also underlies the related "colourability" doctrine. This doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is directed to a matter outside jurisdiction. As this Court stated in *Morgentaler (1993)*, "...form alone is not controlling in the determination of

[24] *Upper House Reference* at p. 77, AGNL Authorities, Tab 2
[25] *Securities Reference* at para. 63, AGNL Authorities, Tab 7

constitutional character…the court will examine the substance of the legislation to determine what the legislature is really doing."[26]

64. The substantive analysis of the proposed legislation conducted above demonstrates that Parliament would really be changing the method of selecting Senators without following the constitutionally mandated process for such changes.

(v) The federal bills are not authorized under s. 91 ("POGG")

65. Parliament's authority to enact legislation for the peace, order and good government of Canada is a residuary power to enact ordinary legislation. It does not include authority to amend the Constitution.

66. Parliament's power to enact legislation for the peace, order and good government of Canada should not be construed so as to circumvent the requirements for provincial consent prescribed by the constitutional amending provisions.

67. It is not within Parliament's power under s. 91 of the *Constitution Act, 1867* to enact legislation which is, in substance, an amendment in relation to any of the subject matters identified in the provisions of Part V as requiring the consent of one or more provinces. To conclude otherwise would subvert the amending provisions in Part V and the intent of the framers of those provisions.

68. It cannot be that Parliament can accomplish by ordinary legislation that which it is expressly precluded from doing by the Constitution. Sections 42(1) and 38(1) of the *Constitution Act, 1982* expressly preclude Parliament from unilaterally making changes to the Constitution in relation to certain matters, including significant aspects of Senate. The opening words of s. 91 of the *Constitution Act, 1867* should not be read as granting Parliament unilateral

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[26] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at p. 496, AGNL Authorities at Tab 1. See also: *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at p. 332, AGNL Authorities, Tab 5; *Ward v. Canada*, [2002] 1 S.C.R. 569 at para.17, AGNL Authorities, Tab 8

authority to effect those same changes, and put them beyond the reach of the provinces, by means of ordinary legislation. The election procedures contained in Bill C-20 and C-7 engage the constitutional amending procedures, in particular the requirements of the "7/50" amending procedure pursuant to s. 42(1)(b) and s. 38(1).

B. Term Limits (Reference Question 1)

69. The length of tenure of Senators is established in s. 29 of the *Constitution Act, 1867*. Senators were originally appointed for life. The Constitution was amended in 1965 such that Senators now hold their place until the age of seventy-five. The proposals contained in Question 1 would require amendments to s. 29 and thus would constitute amendments to the Constitution of Canada.[27]

(i) Term limit proposals are interrelated with Senate election proposals

70. The federal government has consistently presented proposals on term limits and Senate elections as part of a package of changes to the Senate. The proposals to introduce term limits for Senators were initially introduced as companion bills to the Senate election bills. Most recently, Bill C-7, which is currently before Parliament, combines both term limits and elections in a single bill.

71. Although separated into two reference questions (Questions 1.(a),(f) and 2), Parliament's constitutional authority to enact the entirety of Bill C-7 is before the Court on this Reference.

72. Where the constitutionality of particular provisions of a statute is challenged, the proper approach is to focus on the constitutionality of those provisions, read in the context of the statute as whole. Where an integrated scheme is challenged, the Court must analyze the entirety of the scheme from a constitutional perspective.[28]

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[27] *Constitution Act, 1965*, S.C. 1965, c. 4, AGC Record, Vol. II, Tab 12
[28] *Securities Reference* at para. 91, AGNL Authorities, Tab 7

73. Term limit proposals have consistently been an integral component of the federal government's proposals for Senate reform. They have been justified on the same basis as the proposals for Senate elections – to increase the democratic legitimacy and accountability of the Senate.

74. If the federal government's rationale for elections is to increase democracy and accountability in the Senate by seeking the views of the electorate as to who should represent them, that same rationale would also point to holding such elections and implementing their results at regular, defined intervals.

75. Term limits therefore go hand in hand with elections in the federal government's proposed legislation and its rationale. It is thus artificial to consider the constitutionally required procedure to make changes to the term length for Senators in isolation from the constitutional procedure required to introduce Senate elections. They are both integrally related to changing the method of selecting Senators, a matter governed by the "7/50" amending procedure pursuant to ss. 42(1)(b) and 38(1).

(ii) Changes to term length could impair the powers of the Senate

76. The Attorney General of Canada's argument is that since "term limits" are not listed in s. 42, Parliament can make constitutional amendments in relation to them pursuant to s. 44. The logic of this argument would apply with equal force regardless of the length of the term proposed.

77. In the *Upper House Reference*, this Court said in respect of changes to the tenure of Senators:

> At present, a senator, when appointed has tenure until he attains the age of seventy-five. At some point, a reduction in the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as "the sober second thought in legislation".[29]

[29] *Upper House Reference* at p. 76, AGNL Authorities, Tab 2

78. At a certain point, term lengths could be so short as to impair the ability of Senators to exercise their powers and discharge their duties in a meaningful way. Significantly shortened terms and the resultant high turnover of Senators could also impair the overall continuity of the Senate as an institution.

79. A reduction in the term of office that "impaired the functioning of the Senate in providing the sober second thought in legislation" would affect the powers of the Senate. One of the key duties and powers of the Senate is to review and vote on proposed legislation. If the term length of Senators was so short that it impaired the Senate's ability to properly discharge this fundamental duty, the powers of the Senate would be significantly compromised as was contemplated in the *Upper House Reference*.

80. Thus, at some point, reductions in the term length of Senators would constitute an amendment in relation to "the powers of the Senate", which pursuant to s. 42(1)(b) can only be effected in accordance with the s. 38(1) amending procedure.

81. The point at which term limits might have such an impact on the powers of the Senate is difficult to predict. The fact that there is a significant risk that reducing term lengths could affect the powers of the Senate supports the conclusion that a change to term length is a matter that comes within the scope of s. 42(1) as a constitutional amendment that can only be made pursuant to the "7/50" amending procedure.

(iii) Renewable Terms (Reference Question 1(e))

82. Question 1.(e), which proposes legislation providing for a renewable term for Senators as set out in Bill S-4, raises an additional constitutional concern – that renewable terms could impair the independence of the Senate, its ability to act as "a chamber of sober second thought" and its effectiveness in providing representation of provincial and regional interests. Such impairment would fundamentally affect the powers of the Senate, a matter reserved to the "7/50" amending procedure pursuant to s. 42(1)(b) and s. 38(1).

83. This concern was considered as early as the debates leading up to Confederation. The Honourable George Brown stated in the Legislative Assembly in 1865:

> Suppose you appoint them for nine years, what will be the effect? For the last three or four years of their term they would be anticipating its expiry, and anxiously looking for re-appointment; and the consequence would be that a third of the members of the Senate would be under the influence of the executive.[30]

84. The Standing Senate Committee on Legal and Constitutional Affairs on Bill S-4 heard from many experts in relation to this concern and concluded that the prospect of re-appointment, where terms were renewable at the sole discretion of the Prime Minister, "could significantly undermine the independence of Senators, and therefore the Senate as a whole."[31]

85. The Senate was conceived of as means of providing effective representation of provincial and regional interests and "a chamber of sober second thought in legislation". Impairment of this mandate would constitute a change to the powers of the Senate.

86. In conclusion, when the term limit proposals are properly assessed in the context of, and in conjunction with, the related election proposals, it becomes clear that they would work together to fundamentally alter the "method of selection of Senators". Moreover, aspects of the term limit proposals have the potential to affect the "powers of the Senate". Pursuant to s. 42(1)(b), amendments in relation to "the powers of the Senate and the method of selecting Senators" are subject to the "7/50" amending procedure in s. 38(1).

C. Abolition of the Senate (Reference Questions 5 and 6)

87. Question 5 asks whether the Senate could be abolished pursuant to s. 38 by any of three listed methods. Question 6 asks, in the event that abolition could not be accomplished pursuant to s.

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[30] Province of Canada, Legislative Assembly, Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 8th Parl., 3rd Sess. (February 8, 1865), p. 90, (President of the Couincil George Brown), AGON Record, Tab 7

[31] Standing Senate Committee on Legal and Constitutional Affairs, Report on Bill S-4 at p. 10, AGC Record, Vol. VII, Tab 27, p. 109

38, whether the unanimous consent procedure of s. 41 is applicable. Taken together, these two questions in essence ask, "What is the constitutionally required level of provincial consent to abolish the Senate?"

88. Newfoundland and Labrador submits that abolition of the Senate could only be constitutionally effected pursuant to unanimous consent. Abolition of the Senate would strike at the entire structure of the Constitution and therefore demands the highest level of consent. An analysis of the text of Part V of the *Constitution Act, 1982*, interpreted and applied by reference to the structure of the Constitution as a whole, including the foundational underlying constitutional principles, compels this conclusion.

89. Abolition of the Senate is not expressly contemplated in Part V of the *Constitution Act, 1982*, nor anywhere else in the written texts of the Constitution. To the contrary, the Senate has been woven through the fabric of the Constitution since the original Confederation compact. It has been a defining feature of our constitutional framework.

90. The continued existence of the Senate is presupposed in those aspects of the Senate explicitly made subject to the "7/50" amendment procedure in s. 38(1). Other provisions of Part V, most clearly s. 41(e), demonstrate the degree to which the Senate is embedded in our constitutional structure and the very amending processes themselves.

91. Abolition of the Senate is not the only matter to which the amending provisions of Part V do not speak specifically. As this Court observed in the *Secession Reference*, "...the Constitution is silent as to the ability of a province to secede from Confederation."[32]

92. An understanding of the centrality of the Senate to Canada's constitutional structure necessitates a review of the history of the formation of the Canadian union and the foundational principles around which our Constitution is organized.

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[32] *Secession Reference* at para. 84, AGNL Authorities, Tab 6

(i) Creation of the Senate was Essential to Confederation

93. Agreement on the Senate was essential to the achievement of Confederation. This Court has previously traced the events leading up to Confederation and emphasized the importance of the discussions and ultimate agreement on the Senate, including its key characteristics, to the formation of the Canadian union.[33]

94. The agreement emerging from the Charlottetown Conference of September 1864, which formed the basis for Confederation, was summarized by this Court in the *Secession Reference* as follows:

> The salient aspects of the agreement may be briefly outlined. There was to be a federal union featuring a bicameral central legislature. Representation in the Lower House was to be based on population, whereas in the Upper House it was to be based on regional equality, the regions comprising Canada East, Canada West and the Maritimes. The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.[34]

95. At the Quebec Conference the following month, considerable time was occupied in discussing provisions related to the Senate. Professor Andrew Heard has summarized the key features of the Senate that emerged from those discussions and debates:

> Canada's upper house was modeled on the UK House of Lords as an unelected body. As in the UK, the Senate was intended to provide 'sober second thought' in the legislative process, to counterbalance ill-conceived measures emanating from the elected lower house. [...] Unlike the House of Lords, Senate membership was allocated on a territorial basis, to provide equal representation of 24 Senators to the then three regions of Canada, Quebec, Ontario, and the Maritime Provinces. This regional representation was then expanded in 1915 to include a fourth equal sized division for the Western provinces. This sectional representation is thought of as a foundational element of Canada's federal system (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*,

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[33] *Upper House Reference* at pp. 66-67, AGNL Authorities, Tab 2; *Secession Reference* at para. 35-41, AGNL Authorities, Tab 6

[34] *Secession Reference* at para. 37, AGNL Authorities, Tab 6

> Montreal: McGill-Queen's Press, 2003, pp. 3-30). The importance of the Senate to the confederation bargain is underlined by the fact that over half of the confederation debates were devoted to discussing the Senate (André Bernard, La vie politique au Québec et au Canada, Sainte –Foy: Les Presses de l'Université du Québec, 1996, p. 27).[35]

96. In the *Upper House Reference,* this Court quoted the following excerpts from speeches delivered in the debates on Confederation in the parliament of the province of Canada by Sir John A. Macdonald and the Honourable George Brown as illustrative of the important purpose of the Senate in the proposed union:

> Sir John A. Macdonald:
>
> In order to protect local interests and to prevent sectional jealousies, it was found requisite that the three great divisions into which British North America is separated, should be represented in the Upper House on the principle of equality. There are three great sections, having different interests, in this proposed Confederation… To the Upper House is to be confided the protection of sectional interests: therefore is it that the three great divisions are there equally represented for the purpose of defending such interests against the combinations of majorities in the Assembly.
>
> Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, Quebec, 1865, pages 35 and 38.
>
> The Honourable George Brown:
>
> But the very essence of our compact is that the union shall be federal and not legislative. 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 could we have advanced a step; and, for my part, I am quite willing 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, a diversity of interests; and it is quite natural that the protection for those interests, by equality in the Upper Chamber, should be demanded by the less numerous provinces.
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> Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, Quebec, 1865, p. 88.[36]

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[35] Heard Opinion on Bill C-7 at p. 7, AGQC Record, Vol. V, Tab 36
[36] *Upper House Reference* at pp. 66-67, AGNL Authorities, Tab 2

97. After considering this historical context, the Court concluded in the *Upper House Reference* that a primary purpose of the creation of the Senate was to afford protection to the various regional and provincial interests in Canada in relation to the enactment of federal legislation.[37]

98. The Court characterized the Senate's role as an institution forming part of the federal system created by the *British North America Act* (now *Constitution Act, 1867*) as "vital".[38]

99. All subsequent provinces entered into Confederation in accordance with the fundamental arrangements concerning the Senate that had been established in 1867. Provision was made for representation of each new province in the Senate in accordance with the principle of regional representation. In 1949 the *Terms of Union of Newfoundland with Canada* provided that Newfoundland would be represented in the Senate by six members.[39]

100. It is thus evident that the Senate was designed to complement and support Canada's federal system of government by providing effective representation of the interests of the regions and the provinces. It was a key component of the original Confederation compact and remained a key component of the understanding upon which each subsequent province entered Confederation.

101. The centrality of the Senate to the constitutional framework of Canada was confirmed by the written provisions of the *Constitution Act, 1867* and the unwritten principles it incorporated by reference.

102. The preamble to the *Constitution Act, 1867* is of considerable significance. The first recital states:

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[37] *Ibid.* at pp. 67, 78
[38] *Ibid.* at p. 66
[39] *Terms of Union of Newfoundland with Canada,* s. 4, Schedule to the *British North America Act 1949*, now *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), *Newfoundland Act* , AGNL Authorities, Tab 14

> Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

103. Under the Constitution of the United Kingdom, legislative power was and is exercised by the Queen by and with the advice and consent of the House of Lords and the House of Commons.

104. This fundamental aspect of the constitutional structure of Canada - a bicameral federal house - was confirmed in s. 17 and 91 of the *Constitution Act, 1867*. Section 17 provides that:

> **17.** There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

105. Under s. 91, the section defining federal legislative powers, the power to enact federal legislation was given to the Queen by and with the advice and consent of the Senate and House of Commons. As this Court observed in the *Upper House Reference*, "Thus, the body which had been created as means of protecting sectional and regional interests was made a participant in the legislative process."[40]

(ii) The Structure of the Constitution, the Amending Provisions and the Unwritten Constitutional Principles

106. Part V of the *Constitution Act, 1982* does not stand as a self-contained code in isolation from the rest of the Constitution. As this Court held in the *Secession Reference*:

> Our Constitution has an internal architecture, or what the majority of this Court in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.[41]

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[40] *Upper House Reference* at p. 68, AGNL Authorities, Tab 2
[41] *Secession Reference*, at para. 50, AGNL Authorities, Tab 6

107. An analysis of the text of the amending provisions of Part V should be undertaken in conjunction with a recognition of how these provisions interact with the overall structure of the Constitution.

108. The underlying unwritten constitutional principles are an essential part of that overall structure. This Court has held that it would be "impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and as such are its lifeblood."[42]

109. These principles assist in the interpretation of the text of the Constitution and may in certain circumstances give rise to substantive legal obligations. They are "not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."[43] They have been described by the Court as the "organizing principles" of the Constitution, which the written provisions simply elaborate. They are not only a key to construing the express provisions of the Constitution, but are also the means by which the "underlying logic" of the Constitution can be given the force of law.[44]

110. In the *Secession Reference* this Court characterized the unwritten principles as "the foundational principles governing constitutional amendments".[45] It is therefore appropriate that in considering a matter as fundamental as the constitutionally required procedure for abolition of the Senate, the Court consider the implications of these principles.

111. In engaging in the requisite textual and structural constitutional analysis to determine the applicable procedure for abolition of the Senate, two foundational constitutional principles are of particular relevance. These are the principles of constitutionalism and federalism.

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[42] *Ibid.* at para. 51
[43] *Ibid.* at para. 54
[44] *Re Provincial Court Judges*, [1997] 3 S.C.R. 3 at para. 95, AGNL Authorities, Tab 4
[45] *Secession Reference* at para. 34, AGNL Authorities, Tab 6

(iii) Constitutionalism

112. Constitutionalism and the rule of law lie at the root of our system of government. The constitutionalism principle requires that all government action comply with the Constitution. Under our system of constitutional supremacy, the Constitution binds both the federal and provincial governments.

113. In the *Secession Reference*, the Court observed the relevance of the constitutionalism principle to the process of constitutional amendment:

> Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.[46]

114. The Court emphasized that the unwritten constitutional principles were the source of the requirements of the amending provisions:

> Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it.[47]

(iv) Federalism

115. In the *Secession Reference*, the Court explained the importance of the principle of federalism to the Constitution and its interpretation:

> In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts are guided.
>
> This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the *Patriation Reference, supra*, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the *Patriation Reference*, at p. 821,

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[46] *Ibid.* at para. 76
[47] *Ibid.* at para. 56-57

> considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the *Charter*, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.[48]

116. In the *Securities Reference* the Court confirmed that the principle of federalism demands respect for the constitutional division of powers and "the maintenance of a constitutional balance between federal and provincial powers".[49]

117. Perhaps nowhere is the principle of federalism more important than in the context of determining the applicable procedure for a constitutional amendment as profound and intertwined with Canada's federal nature as the potential abolition of the Senate.

118. It is evident that the principle of federalism underlay the creation of the Senate in Canada. Internationally, conceptions of federalism also underlie the existence of upper houses in the vast majority of federations worldwide. As Professor Ronald Watts wrote in 2008:

> ...of some 25 federations in the world today, only five do not have federal second chambers: these are the United Arab Emirates, Venezuela, and the three small island federations (each with less than a million in total population) of Comoros, Micronesia, and St. Kitt's and Nevis. Virtually all others, although in varied forms, have found a federal second chamber desirable for at least two functions: legislative review and the inclusion of distinctively regional views in the federal decision-making process.[50]

119. The constitutionally required process to effect the elimination of the Senate should pay equal respect to the principle of federalism to that upon which its creation was based.

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[48] *Ibid.* at para. 56-57; *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at pp. 905-909 ("*Patriation Reference*"), AGC Authorities, Tab 20

[49] *Securities Reference* at para. 61, AGNL Authorities, Tab 7

[50] Ronald Watts, Bill C-20: Faulty Procedure and Inadequate Solution (Testimony Before the Legislative Committee on Bill C-20, House of Commons, 7 May, 2008) in Jennifer Smith (ed.), *The Democratic Dilemma: Reforming the Canadian Senate* (Montreal & Kingston: McGill-Queen's University Press, 2009) p. 61, AGNL Authorities, Tab 13

(v) Section 38(1) not the appropriate procedure

120. Section 42(1) addresses particular changes to the Senate whose impact would fall well short of that of abolition. Amendments in relation to these matters are expressly made subject to the s. 38(1) amending procedure. The aspects of the Senate referenced by s. 42(1) (method of selection of Senators, powers of the Senate and regional representation) all presuppose the continued existence of the Senate. This must particularly be considered the case when the amending provisions are considered in relation to the overall structure of the Constitution and the integral place of the Senate in that structure.

121. Abolition is a change to Canada's constitutional structure of a different order of magnitude than changing the particular characteristics of the Senate. The very *existence* of the Senate is a fundamentally different "matter" from variation of its features, particularly when considered in light of its historical origins and intended role within Canada's constitutional structure.

122. As Professor Watts' comparative analysis demonstrates, while federal second chambers assume many varied forms, their *existence* is virtually universal in federations, particularly in federations of a similar size and composition as Canada.

123. Abolition is not appropriately reduced to the sum of a series of amendments pursuant to s. 38(1) to alter - in fact, to eliminate - the characteristics of the Senate. Such a formalistic exercise fails to capture the profound nature and implications of abolition for Canada's constitutional structure.

(vi) Section 41(e): Abolition of the Senate would require amendment to Part V of the *Constitution Act, 1982*

124. The Senate is anchored in our constitutional history and embedded in our present-day constitutional structure. Nowhere is this more clear than in the amending provisions of Part V of the *Constitution Act, 1982* themselves.

125. Sections 38, 41, 42 and 43 (the "7/50" amending procedure, the "unanimous consent provision", and the procedure applicable to "amendments affecting some but not all provinces") all expressly require a resolution of the Senate as a part of the amending procedure they establish.

126. Pursuant to s. 46, the procedure for an amendment under any of these sections may be initiated by the Senate, the House of Commons or a legislative assembly of a province.

127. Section 47 provides that the House of Commons may adopt a second resolution after 180 days if "the Senate has not adopted a resolution". Like the other provisions of Part V, this section presupposes the existence of the Senate and emphasizes the importance of its role by providing that the House of Commons cannot proceed for a full 180 days without a resolution of the Senate.

128. Section 44 grants authority to "Parliament" to make laws effecting certain amendments to the Constitution, thus engaging the role of the Senate as a constituent part of Parliament. Section 47 does not apply to section 44 amendments. There is no provision in the Constitution for a s. 44 amendment to be made without the law being passed by the Senate.

129. The above review of the provisions of Part V demonstrates that the Senate is constitutionally entrenched as a key actor in the amending processes.

130. Section 41, the provision concerning amendments by unanimous consent, states:

> **41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
>
> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

> (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
> (c) subject to section 43, the use of the English or the French language;
> (d) the composition of the Supreme Court of Canada; and
> **(e) an amendment to this Part.**
> (emphasis added)

131. Abolition of the Senate would significantly alter the amending procedures of Part V. Abolition would by necessity remove the Senate, a key actor, from the constitutional amending processes. This would have to be reflected in the Constitution itself. Section 41(e) requires that such amendments be made in accordance with the unanimous consent procedure.

132. The Attorney General of Canada argues that s. 41(e) does not apply because abolition of the Senate "would not constitute, in pith and substance, an attempt to amend Part V of the *Constitution Act, 1982*" and that the changes to the amending procedures would be merely "incidental" to the Senate's abolition.[51]

133. This argument disregards one of the most important implications of abolition of the Senate. The legal and practical effects of abolition of the Senate on the amending procedures would be highly significant. The Senate, a key constitutional actor in the amending processes, would be completely eliminated. This cannot be dismissed as a merely incidental impact.

134. The process for amending a constitution lies at the very heart of the constitution. While the Constitution establishes the essential legal framework within which all other legal rules and institutions of government must operate, the amending procedures determine *how* those basic rules can be changed and *who* can change them. It is hard to conceive of any significant change to those amending procedures, let alone one as profound as the elimination of a key constitutional actor in those procedures, as "incidental".

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[51] AGC Factum at para. 153

135. Subsection (e) was included in section 41 with some of the most fundamental elements of our constitutional framework. It is a reflection of the importance with which the amending procedures were regarded by the federal government and the provinces in 1982, that after the protracted and arduous negotiations in pursuit of an amending formula that adequately reflected Canada's federal nature, it was agreed that any changes to that formula would require unanimous consent.

136. The Attorney General of Canada also asserts that there would be no need to amend Part V and that any references to the Senate that remained in Part V could simply be regarded as spent. This argument falls short for several reasons. First, it fails to recognize that the abolition of the Senate would, *in substance*, amend Part V even if the references to the Senate remained in the text. A formalistic argument that attempts to avoid the clear implications of abolition of the Senate on the amending provisions should not be allowed to prevail, particularly where the amending provisions would be effectively amended to such a significant extent. Second, Canada relies on the abolition of the upper house of the Quebec Legislature as a precedent, however this change took place prior to 1982 and the introduction of s. 41(e). Finally, where there is no principled reason not to do so, such significant changes to our constitutional structure should be accurately reflected in the constitutional text.

137. In conclusion, an analysis of the text of Part V, properly placed in its historical and constitutional context, compels that the constitutionally required procedure for the abolition of the Senate would be one of unanimous consent of Parliament and the provincial legislatures.

PART IV – COSTS

138. The Attorney General of Newfoundland and Labrador does not seek any costs in this Reference and requests that no costs be awarded against him.

PART V- ORDER SOUGHT

139. The Attorney General of Newfoundland and Labrador submits that questions 1(a)-(g), 2, and 3 should be answered in the negative. All of these potential changes to the Senate can only be accomplished pursuant to the "7/50" amending procedure in s. 38 of the *Constitution Act, 1982*. With respect to abolition of the Senate, the correct procedure would be the unanimous consent procedure in s. 41. Accordingly all parts of question 5 should be answered in the negative and question 6 in the affirmative.

140. The Attorney General of Newfoundland and Labrador seeks to present oral argument at the hearing of this Reference.

Dated this 23rd day of August, 2013

Barbara G. Barrowman

Philip Osborne

Counsel for the Attorney General of Newfoundland and Labrador

PART VI – TABLE OF AUTHORITIES

Cases	**Cited at paragraph**
R. v. Big M Drug Mart, [1985] 1 S.C.R. 295	17
R. v. Morgentaler, [1993] 3 S.C.R. 463	30, 63
Re Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54	18-91, 60, 77, 93 96-98, 105
Re: Manitoba Language Rights, [1985] 1 S.C.R. 721	14, 55
Re Provincial Court Judges, [1997] 3 S.C.R. 3	109
Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753	115
Re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297	63
Reference re Secession of Quebec, [1998] 2 S.C.R. 217	16-17, 50, 91, 93-94, 106-110, 113-115
Reference re Securities Act, [2011] 3 S.C.R. 837	28, 62, 72, 116
Ward v. Canada, [2002] 1 S.C.R. 569	63

Other	
Canadian Oxford Dictionary, 2nd ed. (Oxford University Press, 2004) at pp. 975, 1406	57
House of Commons, *Debates*, April 20, 2007, pp. 8478-9	34
House of Commons, Legislative Committee on Bill C-20, Evidence, March 5, 2008, at pp. 1, 5-6	36
Proceedings of the Special Senate Committee on Senate Reform, September 7, 2006, Issue No.2 , pp. 8-18	33
Ronald Watts, Bill C-20: Faulty Procedure and Inadequate Solution (Testimony Before the Legislative Committee on Bill C-20, House of Commons, 7 May, 2008) in Jennifer Smith (ed.), *The Democratic Dilemma: Reforming the Canadian Senate* (Montreal & Kingston: McGill-Queen's University Press, 2009)	118

PART VII – LEGISLATION

Appendix A
Reference Questions

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 for Bill C-7, the *Senate Reform Act*?

4. 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?

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 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?