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

REPLY 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)*

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

William F. Pentney
Deputy Attorney General of Canada/Sous-procureur général du Canada
Department of Justice Canada/Ministère de la Justice Canada
234 rue Wellington Street, Tour Est /East Tower, Room 1161, Pièce 1161
Ottawa, ON KIA OH8
Tel: (613) 957-4763
Fax: (613) 954-1920
robert.frater@justice.gc.ca

Counsel for the Attorney General of Canada/Procureurs du procureur général du Canada

ORIGINAL TO: THE REGISTRAR

TO:

Burke-Robertson
Barristers & Solicitors
441 MacLaren St., Suite 200
Ottawa, Ontario K2P 2H3
Per: Robert E. Houston, Q.C.
Tel: (613) 566-2058
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agents for the Attorneys General of British Columbia, Ontario, and Newfoundland & Labrador

TO:

Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Per: Henry S. Brown, Q.C. / Brian A. Crane, Q.C.
Tel: (613) 786-0139/ (613) 786-0107
Fax: (613) 563-9869/ (613) 788-3500
Email: henry.brown@gowlings.com/Brian.Crane@gowlings.com

Agents for the Attorneys General of Alberta, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, Nova Scotia, and the Minister of Justice for Northwest Territories, and Nunavut

TO:

Noël & Associés
111, rue Champlain
Gatineau, QC J8X 3R1
Per: Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for the Attorney General of Quebec and the Intervener, Serge Joyal, Senator

TO:

Daniel Jutras
University of McGill
3644 Peel
Montréal, Quebec H3A 1W9
Tel: (514) 398-6604
Fax: (514) 398-4659
Email: daniel.jutras@mcgill.ca

Amicus curiae

TO:

Supreme Advocacy LLP
397 Gladstone Avenue, Suite 1
Ottawa, Ontario K2P 0Y9
Per : Marie-France Major
Tel: (613) 695-8855 ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Amicus curiae, John Hunter, Q.C.

TO:

Heenan Blaikie LLP
300- 55 Metcalfe Street
Ottawa, Ontario K1P 6L5
Per: Mark C. Power
Jennifer Klinck
Perri Ravon
Sébastien Grammond, Ad.E.
Telephone: (613) 236-7908
FAX: (866) 296-8395
E-mail: mpower@heenan.ca

Counsel for the Intervener, Fédération des communautés francophones et acadienne du Canada

TO:

Heenan Blaikie LLP
300-55 Metcalfe Street
Ottawa, Ontario K1P 6L5
Per: Perri Ravon
Telephone: (613) 236-8071
FAX: (613) 236-9632
E-mail: pravon@heenan.ca

Agent for the Intervener, Société de l'Acadie du Nouveau-Brunswick Inc.

TO:

Stikeman Elliott LLP
1600 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2
Per: Nicholas Peter McHaffie
Telephone: (613) 566-0546
FAX: (613) 230-8877
E-mail: nmchaffie@stikeman.com

Agent for the Intervener, Anne C. Cools, Senator

A. Overview

1. The factums of the many participants in this reference reveal a diversity of views on the answers to the reference questions. The primary source of disagreement lies in the means of getting to the answers: the relevance of, and weight to be assigned to, factors such as this Court's opinion in the *Upper House Reference*,[1] the unwritten principles underlying the Constitution, the framers' intention, and the statements of politicians and government officials. This reply will examine how those factors have been used by other parties to reach conclusions that fail to give primacy to the text of the Constitution.

B. The Use of Interpretive Aids

a) The Opinion of this Court in the *Upper House Reference*

2. The arguments of virtually all of the other participants are heavily anchored in the opinion of this Court in the *Upper House Reference,*[2] particularly in respect of the issues surrounding term limits and the consultative process set out in Bill C-7.[3] The primary use of the *Upper House Reference* by the various participants is to seek to portray it as a freestanding limit on federal legislative authority to amend the Constitution or enact laws in relation to the Senate.[4] There is repeated reliance on the Court's statement 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.[5]

---

[1] *Re: Authority of Parliament in Relation to the Upper House* [1980] 1 S.C.R. 54, **AGC Supplementary Authorities**, Tab 8

[2] See Alberta's Factum para 39; British Columbia's Factum paras 8-9, 18-19, 22-32, 106, 110, 112; Manitoba's Factum paras 7, 10, 12, 13; New Brunswick's Factum paras 3, 30, 57, 58; Newfoundland and Labrador's Factum paras 18-25, 60, 77-79; Nova Scotia's Factum paras 25-27, 30, 32, 33, 35, 39, 51; Ontario's Factum paras 31-32, 36, 37, 48, 49, 64, 68, 69; Prince Edward Island's Factum paras 29-35, 66, 69, 91-92, 95, 102, 106; Quebec's Factum paras 40, 45, 86, 97, 112, 176, 198, 210; Saskatchewan's Factum paras 10 (though only as an interpretive aid) 31, 33, 37, 71, 77-79, 85; La Fédération des Communautés Francophones et Acadienne du Canada's Factum para 68; Senator Cools' Factum paras 35-36, 38, 55; Senator Joyal's Factum paras 9, 10, 23, 33-39, 43, 83, 130-132, 144

[3] See for example British Columbia paras 94-95, 105-106; Manitoba para 13; New Brunswick paras 27-35; Newfoundland and Labrador paras 60, 61, 77-80; Nova Scotia paras 25-33, 51; Ontario paras 37, 49; Prince Edward Island paras 64-66, 92; Quebec paras 97, 174-176; Saskatchewan paras 33-39

[4] Quebec para 41

[5] *Upper House Reference* p. 78, **AGC Supplementary Authorities**, Tab 8

This passage is used to justify arguments that any changes to the Senate can only be accomplished through the s. 38 or 41 amending procedures,[6] notwithstanding the absence of textual support for such a position within the relevant sections.

3. The patriation of the Constitution with an amending formula changed the interpretive landscape. As the Court emphasized in the *Quebec Veto Reference*, the new constitution and amending formula "entirely replaces the old one in its legal as well as its conventional aspects."[7] While it is true that s. 44 of the *Constitution Act, 1982* ("the *1982 Act*") replaces s. 91(1) of the *1867 Act*, s. 44 must be interpreted as part of a comprehensive set of amending procedures; no part of the revised procedures can be waved off as mere "housekeeping,"[8] since the words demonstrate that each section is integral to a comprehensive scheme.

4. The *Upper House Reference* forms part of the historical context in which the 1982 amending procedures were drafted,[9] helping explain why s. 42 identifies the aspects of Senate reform requiring provincial consent. As several provinces rightly point out,[10] Part V was essentially a provincial proposal; the premiers had to be aware that the *Upper House Reference* set out a very general prescription for provincial participation in the amending process. Section 42 gave effect to it by enumerating matters so "essential" that they required provincial consent to alter. The framers crafted s. 44 to *exclude* matters mentioned in s. 42 from Parliament's otherwise exclusive authority to make amendments in relation to the Senate. However, the case provides no authority to *add to* the matters requiring provincial consent in s. 42 (or s. 41), as suggested by some participants.

b) <u>The Unwritten Principles of the Constitution</u>

---

[6] Ontario paras 31-32, 36
[7] *Reference re: Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 at 806, **AGC Supplementary Authorities**, Tab 10
[8] Ontario para 36
[9] Saskatchewan calls it an interpretive aid, Saskatchewan para 10
[10] British Columbia paras 36-37; Ontario para 28

5. Unwritten constitutional principles are repeatedly invoked by the other participants, particularly the federalism principle.[11] Extensive mention is made of this Court's opinion in the *Secession Reference*, where this Court relied on unwritten principles. And not surprisingly: the *Secession Reference* concerned subject matter that is not explicitly referred to in the text of the Constitution. Here, however, both the *1867* and *1982 Acts* are teeming with references to "the Senate" or "Senators."

6. The Court recognized in the *Secession Reference* that the existence of unwritten principles was not "an invitation to dispense with the written text" and that there were "compelling reasons to insist upon the primacy of our written constitution."[12] The utility of the unwritten principles is understandable in the extraordinary context of secession, but there is no reason to use them as the interpretive tool of first resort,[13] or to add more items to the lists of matters subject to provincial consent in ss. 41 and 42.[14] The unwritten principles should not be used to "trivialize or supplant the Constitution's written text."[15]

7. However, the most serious flaw in other participants' reliance on unwritten principles is the implicit premise that the principles can only be marshalled in support of extending the traditional stalemate on Senate reform. The federalism enshrined in the Constitution is a flexible one, which permits both levels of government considerable freedom to pursue their assigned responsibilities. Political actors designed the constitutional framework, and set the rules for changing the framework. Courts should not read in requirements -- such as a rule of unanimous provincial consent to Senate abolition -- which the framers did not set out. Moreover, the federalism principle should not frustrate initiatives such as consultative

---

[11] British Columbia paras 54-71; Manitoba paras 4, 28, 39; New Brunswick paras 48, 68; Newfoundland and Labrador paras 106-123; Northwest Territories Factum paras 86-93; Nova Scotia paras 4, 23, 32, 50; Ontario para 36; Prince Edward Island paras 12-19, 93-94, 99

[12] *Reference re: Secession of Quebec,* [1998] 2 S.C.R. at para 53, **AGC Supplementary Authorities**, Tab 11

[13] British Columbia paras 54-71; Newfoundland and Labrador paras 106-119; Northwest Territories paras 85-93 Nova Scotia paras 32-33, 49-50; Prince Edward Island paras 10-19; Quebec paras 66-69; Saskatchewan paras 23-24; Amicus paras 25-29; La Fédération des Communautés Francophones et Acadienne du Canada paras 10-13

[14] British Columbia paras 81-94; Manitoba para 25; New Brunswick para 48; Newfoundland and Labrador paras 60-61, 75, 120-123; Nova Scotia paras 32-33, 53-54; Prince Edward Island paras 93-95; Quebec paras 66-69 ; 95-115; Amicus paras 58-62, 82-89

[15] *British Columbia v. Imperial Tobacco Canada Limited* 2005 SCC 49 at para.67, **AGC Supplementary Authorities**, Tab 3

elections, which seek to promote democratic values like citizen participation, and transparent and accountable decision-making.[16] Democracy is also a fundamental principle, and the unwritten principles do not trump each other.[17]

c) The 1867 Vision of the Senate

8. The role of the Senate envisaged in 1867 is far different than the role it has actually played or currently plays. The other participants refer in great detail to the framers' intention that the Senate be an independent body of "sober second thought" and regional protection.[18] However, that original understanding cannot be stretched to require provincial consent for term limits, or to prevent recourse to consultative elections, or to demand unanimity for abolition. The Constitution being expounded in the 21st century is much different than it was in 1867. It has been progressively interpreted and amended in significant ways, not the least of which is the addition of Part V in the *1982 Act*.

9. The evidence before the Court demonstrates that the framers' aspirations for a non-partisan and reflective body representing regional interests have not been fulfilled, hence the lengthy history of calls for serious reform or even abolition. Nor can any participant credibly maintain that the Senate functions as a protector of linguistic or aboriginal minorities.[19] The reports of Professors Manfredi and McCormick outline the present role of the Senate. Manfredi points out that the representation of minorities cannot be viewed as a "foundational or fundamental feature" of the 1867 plan, and there appear to be no instances where the Senate has effectively protected or promoted the interests of minorities or the politically underrepresented.[20]

---

[16] *Quebec Secession Reference,* para. 67, **AGC Supplementary Authorities**, Tab 11
[17] *Quebec Secession Reference,* para. 49, **AGC Supplementary Authorities**, Tab 11
[18] Alberta para 1; British Columbia paras 7-12, 57; Manitoba para 12; New Brunswick paras 2-4, 8-19, 56-57; Newfoundland and Labrador paras 93-105; Nova Scotia paras 5-19; Nunavut Factum paras 8, 39-43; Ontario paras 7-18 (primarily dealing with the issue of an elected versus appointed Senate); Prince Edward Island paras 4-7; Quebec paras 40-43; Société de l'Acadie du Nouveau-Brunswick Factum paras 5, 12-16, 29
[19] British Columbia paras 67-68; Northwest Territories paras 91-93; Quebec para 43; Société de l'Acadie du Nouveau-Brunswick paras 27-39, 42; La Fédération des Communautés Francophones et Acadienne du Canada paras 8, 10-13; Joyal paras 137, 158-161
[20] Manfredi opinion, AGC Record, Vol XVI, Tab 105 paras 17 and 22

10. Professor McCormick states that the Senate was intended to serve four purposes: first, and primarily, as a chamber of sober second thought; second, as a chamber of privilege; third, as a chamber of representation for certain minority groups; and fourth, as a mechanism for regional representation.[21] He notes that defenders of the *status quo* rely heavily on the first of those purposes,[22] as several participants do here.[23] However, McCormick concludes that the notion of independent second thought fails because the "historical reality" of the Senate has been one of patronage, and the Senate is only as independent as "party loyalty permits."[24] He acknowledges the very worthy contributions of individual Senators, but concludes that independent second thought has not been achieved as an institution.[25] His opinion has not been credibly challenged.

11. Many participants also rely on the *1867 Act's* preamble to argue that adopting certain reforms would mean we would no longer have a constitution "similar in principle to that of the United Kingdom."[26] But Canada now has a fully mature and independent constitution; we are capable of making changes without adherence to the U.K. upper house model which, for that matter, has continued to evolve.[27]

d) The Use of Statements by Politicians, Government Officials and Experts

12. Many participants rely on statements of Ministers,[28] or Premiers,[29] explanatory side notes and comments of government officials,[30] or expert witnesses[31] to reveal Parliament's legislative

---

[21] McCormick opinion AGC Record Vol. XVII, Tab 107 para 8; See also the evidence of Richard Simeon before the Special Senate Committee where he stated that the Senate had failed in its role of regional representation. Special Senate Committee hearing p. 4:58, September 20, 2006, **AGC Supplementary Authorities**, Tab 14

[22] McCormick opinion AGC Record Vol. XVII, Tab 107 para 9

[23] British Columbia paras 10, 29; Manitoba para 5; Newfoundland and Labrador para 95; Nova Scotia para 19; Prince Edward Island para 66; Saskatchewan para 37

[24] McCormick opinion AGC Record Vol. XVII, Tab 107 para 10

[25] McCormick opinion AGC Record Vol. XVII, Tab 107 para 12

[26] *Upper House Reference*, pp. 76-77, **AGC Supplementary Authorities**, Tab 8; British Columbia para 28; Northwest Territories para 84; Nova Scotia para 52: Cools paras 22, 28-37, 65-68; Newfoundland para 102

[27] See Prince Edward Island para 55 where it still relies on House of Lords processes to support its position on term limits; Cools paras 22, 35-37

[28] Nunavut para 14; British Columbia para 41; Manitoba para 10; Ontario paras 34, 43, 54; Quebec para 108, paras 138 (referring to Senator Bert Brown) 140-141; Cools para 120; Joyal paras 21, 93-94, 100, 102; Prince Edward Island para 33(f)

[29] Nunavut paras 29 and 32; Newfoundland and Labrador paras 23, 33-38

intentions or the objects of Part V. However, this Court has recently confirmed that statements recorded in *Hansard* and other external interpretive aids should be used "...only when ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute."[32] As well, "[w]hile *Hansard* may offer relevant evidence in some cases, comments of MPs or even Ministers may or may not reflect the parliamentary intention to be deduced from the words used in the legislation."[33] If the external interpretive material is ambiguous, it should be discarded.[34] The interpretive value of headings is limited,[35] and this Court has noted that "[i]t is difficult to foresee a situation where the heading will be of controlling importance."[36]

13. Many of the statements relied upon are ambiguous or unclear and the ones used highly selective; numerous other Ministerial statements could be considered that underscore the value of reforms in pursuing democratic principles. Certain statements stand in direct contrast to the clear and unambiguous words used in Part V. A decades-long history of debate, discussion and proposal informs the amending procedures. Given that history, it seems odd to rely on brief comments made in Parliament, unofficial side notes and briefing books to determine the "true" intention of the Constitution. In cases such as the *B.C. Motor Vehicle Reference*, this Court has been reluctant to over-value such material.[37] Thus, the

---

[30] Nunavut para 27 referring to explanatory notes to derive the scope of s. 44 of the *Constitution Act, 1982,* para 32; Manitoba para 10; Ontario para 28 referring to the scope of s. 38 of the *Constitution Act, 1982*; British Columbia paras 38-40; Saskatchewan para 16 (though in footnote 11 it explains that this reliance is exceptional); La Fédération des Communautés Francophones et Acadienne du Canada paras 27-31; Société de l'Acadie du Nouveau-Brunswick para 22 (statements of government officials); Joyal para 23 (referencing explanatory notes); Prince Edward Island paras 33(f), 97

[31] Ontario para 35; Quebec paras 92, 102, 146, 147-148, 157-159; Société de l'Acadie du Nouveau-Brunswick paras 19-21; Newfoundland and Labrador para 49

[32] *Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 at para. 95, **AGC Supplementary Authorities**, Tab 7

[33] *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, at para 12, **AGC Supplementary Authorities**, Tab 2

[34] *Placer Dome Canada Ltd. v. Ontario (Minister of Finance),* 2006 SCC 20 at para 39, **AGC Supplementary Authorities**, Tab 6

[35] Saskatchewan footnote 11

[36] *Law Society of Upper Canada v. Skapinker* , [1984] 1 S.C.R. 357 at para 23, **AGC Supplementary Authorities**, Tab 5

[37] *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 504-509, **AGC Supplementary Authorities**, Tab 9. See also *Regina v. Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd.*, [2001] 2 A.C. 349 (H.L.) at page 396, **AGC Supplementary Authorities**, Tab 12. Cited with approval in *Felipa v. Canada (Citizenship and Immigration),* 2011 FCA 272 at para 3, **AGC Supplementary Authorities**, Tab 4, and in *Attorney*

primary focus should be on the words used in Part V and the various draft bills referred to in the questions, and not on the multiplicity of subjective and sometimes conflicting comments.

14. Several participants rely extensively on the opinions of experts, most notably those who appeared before the recent Senate Committees, to bolster the credibility of their arguments.[38] But for every Heard, Desserud, Smith or Magnet opining on the unconstitutionality of the proposed reforms, there was a Beaudoin,[39] a Hogg,[40] a Monahan[41], a Scott,[42] a Tremblay,[43] and a Simeon[44] to attest to their constitutionality. Suffice it to say, some very august lawyers and scholars disagree.

C. Specific Issues

a) Contextual Approach to the Amending Procedures

15. How the foregoing appeals to authority play out in the various parties' answers to the reference questions can be concisely summarized: s. 44 should be narrowly construed, and ss. 41 and 42 liberally interpreted, to ensure provincial consent to any matter so "essential" or "fundamental" that it ought to be placed in either of the two finite lists. Most parties, even those that argue that Part V is a "complete code," treat ss. 41 and 42 as merely giving examples of matters on which provincial consent is required.[45] These interpretations stand textual interpretation on its head: s. 44, which is drafted in general terms but with specific exceptions, would lose its plenary character; ss. 41 and 42, which are drafted in prescriptive terms, would simply become a non-exhaustive list of examples.

General of Canada et al. v. Friends of the Wheat Board of Canada et al. 2012 FCA 183 para 39, **AGC Supplementary Authorities**, Tab 1

[38] Newfoundland and Labrador paras 24, 46-49; Prince Edward Island paras 18, 69; Ontario paras 35, 51; Quebec paras 146, 147, 157-159, 177, 200, 202, 206, 207; La Fédération des Communautés Francophones et Acadienne du Canada paras 1-4, 14, 16, 46, 51, 53; Société de l'Acadie du Nouveau-Brunswick paras 16-21, 23, 32, 38, 39, 53, 54

[39] Special Senate Committee hearing p. 5: 25-5:26, September 21, 2006, **AGC Supplementary Authorities**, Tab 15

[40] Special Senate Committee hearing p. 4:36- 4:37, see also 4:46 and 4:47, September 20, 2006, **AGC Supplementary Authorities**, Tab 14

[41] Special Senate Committee hearing p. 5:8, September 21, 2006, **AGC Supplementary Authorities**, Tab 15

[42] Special Senate Committee hearing pp.5:65-5:66, September 21, 2006, **AGC Supplementary Auth**orities, Tab 15

[43] Special Senate Committee hearing pp.5: 29, September 21, 2006, **AGC Supplementary Authorities**, Tab 15

[44] Special Senate Committee hearing p. 4:60, September 20, 2006, **AGC Supplementary Authorities**, Tab 14

[45] See for example Prince Edward Island para 42

16. Section 44 gives Parliament the power to amend the Constitution in relation to "the executive government of Canada or the Senate and House of Commons." The only qualification is in the opening words: "[s]ubject to sections 41 and 42." Section 41 (unanimity) says nothing about the Senate. Section 42(1)(b) and (c) stipulate that the 7/50 procedure be used for amendments in relation to: (1) "the powers of the Senate;" (2) "the method of selecting Senators;" (3) "the number of members by which a province is entitled to be represented;" and (4) "the residence qualifications of Senators."

17. Contrary to what some participants suggest, the framers identified those four matters alone as the Senate features that could not be changed unilaterally by Parliament. Except for those four matters, Parliament has plenary power to make changes to the Senate. Any changes made under s. 44 would have to be agreed to by both Houses of Parliament. The framers were explicitly conscious of the ability of the Senate to block constitutional amendments, which is why s. 47 provides a process for bypassing the Senate. That process does not include, however, amendments made under s. 44. As well, the plenary power conferred by s. 44 reflects a respect for the parliamentary process which is inconsistent with an intention to allow the courts to expand the lists of exceptions.

18. The effect of the argument of many of the parties is to add fifth and sixth items to the four that the framers put into s. 42: (5) term limits for Senators; and (6) consultation during the selection of Senators. To these would be added, no doubt, any other law that affects one of the "fundamental" features of the Senate--as it was envisaged in 1867 or deemed desirable today. This is also the effect of the unwritten principle of "federalism" as urged by the *amici*, who argue that the Court has the power to add new topics to those expressly listed in ss. 41 and 42.[46] A variant of this argument would add to s. 42 any law that has any impact (however incidental) on the powers of the Senate or the method of selecting Senators—all this in defiance of the words "in relation to" in s. 42. Obviously, the suggested additions to s. 42 are potentially numerous and certainly far less certain in their meaning than the four deliberately

[46] Amicus paras 27-30

chosen by the framers. If this is the way in which the amending procedures in Part V are to be interpreted, their apparent clarity and certainty would be utterly destroyed, and the framers' intent frustrated.

b) Term limits

19. Many participants dispute the ability of Parliament to amend the *1982 Act* pursuant to s. 44 to provide for term limits,[47] and seek to distinguish this Court's acceptance of the federal legislative authority to do just that in setting a mandatory retirement age in 1965. This matter has been fully argued in our main factum and those arguments will not be repeated.

20. It is interesting that for those participants who agree that s. 44 can be used to set term limits, they come to somewhat different conclusions. Ontario states that 9 years is the constitutional floor for term limits,[48] Saskatchewan says it is 10 years,[49] and Senator Joyal says it is 15.[50] When parliamentary committees have proposed term limits, they have suggested different numbers: a 1980 Senate committee suggested fixed terms of ten years with the possibility of a renewal for an additional five years;[51] a 1984 joint committee of the Senate and the Commons suggested a non-renewable term of nine years;[52] a 1992 report of a special joint committee of the Senate and Commons proposed that terms be limited to six years.[53]

21. Such a disparity of views, vigorously defended and supported by principled justifications for each position, can only suggest one thing: if in principle Parliament has the power to set term limits, it is entitled to a margin of appreciation in setting the actual number. There is no more magic in the number 8 than there is in the numbers 9 or 10, or a term tied to the life of two or three Parliaments, all of which compare favourably with the range of time Senators typically serve.[54]

---

[47] Quebec, Prince Edward Island, New Brunswick, Newfoundland and Labrador, Alberta, British Columbia, Nunavut
[48] Ontario para 40
[49] Saskatchewan para 37
[50] Joyal paras 66 and 67
[51] AGC Record, Vol. II, Tab 17, p. 148
[52] AGC Record, Vol. III, Tab 19, p. 95
[53] AGC Record, Vol. VI, Tab 24, pp.19-20
[54] Manfredi opinion, AGC Record, Vol XVI, Tab 105 paras 51-55

c) Consultative Processes

22. Several participants contend that adopting the sort of consultative elections contemplated by Bills C-7 and C-20 would amount to a change to the "method of selection" of Senators, by amounting to a fetter on the discretion of the Prime Minister to propose nominees.[55] However, as argued by Saskatchewan, what is at issue here is essentially a process for aggregating information the Prime Minister could collect if there were time to contact Canadians individually. Referenda are a political tool achieving the same result.[56] This certainly may give that information more weight in the deliberative process, and makes the Prime Minister's information-gathering somewhat more transparent, but changing information-gathering processes does not amount to changing the method of selection.

d) No Amendment of the Amending Formula

23. Another recurring theme in the arguments of other participants is that the Senate could not be abolished pursuant to section 38 of the *1982 Act* because abolition would be an amendment to the Part V amending procedures. It is suggested that section 41 comes into play because abolition of the Senate would remove a "key actor" from the amending procedures.[57]

24. This approach reads protection for the Senate into section 41 in a way that is unsupported by a plain reading its words. The topics listed in s. 41 (and s. 42) are introduced by the phrase "in relation to", which, as the framers would have been aware, comes from ss. 91 and 92 of the *1867 Act*, where it has been consistently interpreted as excluding incidental effects.[58] The impact of Senate abolition on the amending procedure would not be a principal purpose or effect of Senate abolition, but at most a by-product. Abolition of the Senate has been

---

[55] British Columbia para 105; Newfoundland and Labrador paras 39-53; Nova Scotia para 41; Ontario paras 59-60; Prince Edward Island paras 74-76; Quebec para 180; Saskatchewan para 64 (where it is argued that the discretion not affected); Amicus paras 113-114(where it is argued that the discretion not affected)

[56] Saskatchewan paras 64-67

[57] Manitoba para 34; New Brunswick paras 62-68; Newfoundland and Labrador paras 124-134; Prince Edward Island paras 103-108; Cools paras 45-52; Ontario para 66; Quebec paras 244-248; Nova Scotia paras 63-64; Amicus paras 134-142

[58] P.W. Hogg Constitutional Law of Canada 5th ed. Toronto: Reuters, 2007 Vol.1; pp. 15-8—15-10, **AGC Supplementary Authorities**, Tab 13

discussed since Confederation but was not listed as one of the items in section 41 of the *1982 Act* requiring unanimous federal and provincial approval. What the arguments of many of the other participants do is expand the scope of section 41(e) beyond its plain words to include abolition. As recent history has shown, unanimous consent under section 41 has never been achieved. Only a select few items were included within section 41. By not placing abolition under section 41, it is logical to infer that the framers did not view the continued existence of the Senate as being of equal importance to the listed matters. Abolition was thus achievable by the less onerous general procedure, a process that would still demand provincial participation.

25. The second difficulty with this approach is that it ignores the secondary role of the Senate in making multilateral constitutional amendments. The House of Commons is the only federal house that is an essential actor under ss. 41, 38 and 43, as s. 47 makes amply clear. The Part V amending procedures can function without amending Part V, even if the Senate is abolished, and thus abolition is not caught by s. 41(e) of the *1982 Act*.

e) Section 23 and the Real Property Qualifications

26. Most of the other participants agree[59] that section 44 of the *1982 Act* is the proper amending procedure to eliminate the property qualification for Senators in sections 23(3) and (4) of the *1867 Act*. However, several suggest that elimination will produce an anomaly in that Quebec Senators will still have an unexplained real property qualification pursuant to s 23(6) of the *1867Act*.[60] Some argue, therefore, that the proper amending procedure to deal with the elimination of the property requirement for Senators, at least for Quebec, is s. 43 of the *1982 Act*. Senator Joyal argues that the property qualifications can only be eliminated through s. 38 of the *1982 Act*, and that in the case of Quebec s. 43 should also be invoked.[61]

---

[59] British Columbia paras 112-115; Manitoba para 30; New Brunswick paras 49-53; Prince Edward Island paras 100-102; Nova Scotia paras 56; Ontario paras 62-63; Saskatchewan paras 73-87

[60] Nova Scotia para 58; New Brunswick para 52 ; Quebec paras 227-230; Amicus paras 127-133

[61] Joyal paras 132-138

27. There is no anomaly. Section 44 allows Parliament to effect changes to the Senate that are not otherwise mentioned in sections 41 or 42. The only qualification to be a Senator as set out in s. 23 of the *1867 Act* that is protected by s. 42 is residence (42(1)(c)). Therefore, Parliament can remove the property requirement through section 44. The "real property qualification" mentioned in s. 23(6) would be spent, as it would refer to a qualification that no longer existed in the Constitution. Further, s. 23(6) is disjunctive; it requires a property or residence in the electoral district for which the Senator is appointed. As a result, the impact on s. 23(6) would be incidental in that the requirement in s. 23(6) would be read simply as in relation to residence. Section 23(6) would operate only in regard to residence, which was originally intended to ensure representation of English-speaking Quebecers.[62] The words concerning the real property qualification would remain, but as their effect would be spent there would be no need to remove the reference to property and no need to resort to s. 43 of the *1982 Act* to deal with the wording unique to Quebec. An amendment to repeal s. 23(6) could be accomplished with Quebec's consent under s. 43. A similar situation with respect to spent wording exists in s. 133 of the *1867 Act* as a result of Quebec's abolition of its upper house.

f) Regional Veto Legislation

28. Senator Joyal suggests that question 5 concerning abolition "entirely ignores" the impact of *An Act respecting constitutional amendments* (the so-called "regional veto" legislation).[63] If this reasoning were correct, it would mean that the regional veto legislation effected a constitutional amendment in relation to the amending procedures. That is not, and cannot be, its effect, given s. 41(e) of the *1982 Act*. Parliament can legislate in respect of matters under s. 91 of the *1867 Act* that may touch upon matters mentioned in the Constitution—the *Royal Assent Act* and the fixed date elections legislation are other examples—but such legislation does not amend the Constitution when it does not alter the text of the Constitution.[64]

---

[62] McCormick opinion AGC Record Vol. XVII, Tab 107 para 8; Stillborn opinion AGC Record Vol. XVII, Tab 106 para 24
[63] Joyal para 149
[64] Amicus para 72

Dated this 3rd day of October, 2013

Robert J. Frater Christopher Rupar Warren J. Newman

Counsel for the Attorney General of Canada