

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

HON. SERGE JOYAL, P.C.

and

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PART I – OVERVIEW AND FACTS

1. On May 30, 2006, the government introduced in the Senate Bill S-4, *An Act to amend the Constitution Act, 1867 (Senate tenure)*. The purpose of the bill was to reduce the tenure of senators. On June 12, 2007, the Standing Committee on Legal and Constitutional Affairs presented a report to the Senate in which it recommended that the bill “not be proceeded with at third reading until such time as the Supreme Court of Canada has ruled with respect to its constitutionality.” This recommendation came after several provinces had raised objections to the unilateral approach taken by the federal government. The government chose to ignore this recommendation.
2. Following further attempts by the federal government to reform the Senate unilaterally, the Government of Quebec referred three questions to the Quebec Court of Appeal on April 4, 2012. In response, the federal government has now put before the Supreme Court of Canada six questions designed to determine the scope of Parliament’s unilateral power to reform the Senate and the constitutional amendment procedure required to abolish the Senate.

PART II – ISSUES

3. Question 1: Can Parliament change the tenure of senators to a fixed term of eight, nine or ten years? Answer: no. To a renewable term? Answer: no. Retroactively for senators appointed after October 14, 2008? Answer: no. Retrospectively before October 14, 2008? Answer: no.
4. Question 2: Can Parliament establish a scheme to hold national elections to select Senate nominees whom the Prime Minister would have to consider in making recommendations to the Governor General as set out in Bill C-20? Answer: no.
5. Question 3: Can Parliament establish a scheme to authorise provinces and territories to hold elections to select Senate nominees whom the Prime Minister would have to consider and choose among from when advising the Governor General on appointments to the Senate as set out in Bill C-7? Answer: no.

6. Question 4: Can Parliament abolish the property qualifications that senators must meet under subsections 23(3)(4) of the *Constitution Act, 1867*? Answer: it would be advisable to seek concurrence of the provinces; the answer is no for the Province of Quebec.
7. Question 5: Can the general amendment procedure (7/50) be used to abolish the Senate through one or another of the following means: a) abolishing it by a certain date; b) striking out all references to the Senate in the Constitution; or c) abolishing its powers and eliminating provincial representation? Answer: no to all of these options.
8. Question 6: Could the Senate be abolished with the unanimity of all ten of the provinces and Parliament? Answer: yes, but only after accommodating the interests of the Aboriginal Peoples of Canada.

PART III – STATEMENT OF ARGUMENT

9. The Supreme Court of Canada has understood and defined the constitutional nature of the Senate and its particular role in the legislative process of Parliament in two major rulings (*Upper House Reference* [1980] and *Quebec Secession Reference* [1998])¹ and in one judgment (*Figueroa v. Canada (Attorney General)*, [2003]).² Two of them (*Quebec Secession Reference* and *Figueroa v. Canada*) were rendered after patriation of the Constitution in 1982, and both reaffirm the particular nature of the Senate and its underlying principles.
10. All three contributed to defining the “fundamental features, or essential characteristics, given to the Senate”³ as originally conceived by the founders of Confederation in 1867, and they also helped to understand its federal nature, which is that the Senate is invested with the responsibility of articulating the views of the regions and the interests of minorities in the review of legislation.

¹ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

² *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37.

³ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 56, 78.

11. The aforementioned decisions of this Honourable Court have identified and explained the principles necessary to provide answers to the six questions set out in Order in Council P.C. 2013-70, file no. 35203.

1. Question 1

12. Can Parliament change the tenure of senators to a fixed term of nine years? If not, what other length of term would be constitutionally valid?
13. The first Question relates to the power of Parliament acting alone using s. 44 of the *Constitution Act, 1982*. To answer this question, three fundamental elements have to be established and clarified:
- 1) The legal origins of s. 44 of the *Constitution Act, 1982*;
 - 2) The intention expressed by the framers of the Constitution during their study of s. 44, available from the testimony and documents of that time; and
 - 3) The inherent limits to the power of Parliament contained in s. 44 as defined in an earlier decision of the Supreme Court.

Once these issues have been clarified, one can more specifically address the question of tenure and whether Parliament acting alone can establish a fixed term of nine years.

14. Finally, it will be useful to analyse the legal implications of a fixed term – and how this affects the relationship between the character of the office held by Senators and “the method of selecting Senators” (paragraph 42(1)(b) of the *Constitution Act, 1982*) –, and its relationship to the Senate in reviewing legislation.

1.1 The Legal Origins of S. 44 of the *Constitution Act, 1982*

15. S. 44 of the *Constitution Act, 1982* replaced subsection 91(1) of the *Constitution Act, 1867* (which had been adopted as an amendment by Westminster in 1949⁴) to allow the federal Parliament itself to make certain amendments in matters pertaining to the “Constitution of Canada”. Subsection 91(1) read as follows:

⁴ A consolidation of the Constitution 1867 to 1982, as of April 1, 1999.

The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

16. On the basis of subsection 91(1), the federal government tabled Bill C-60⁵ in 1978 in the House of Commons. This bill aimed to change the Senate from an appointed chamber with lengthy tenure to a house of the provinces with its members elected by provincial legislative assemblies as well as by the House of Commons.
17. The federal government claimed that subsection 91(1) gave it the power to amend the *Constitution Act, 1867* in relation to the Senate in every respect.
18. The federal government referred the determination of the scope of subsection 91(1) to the Supreme Court in 1978, following strong opposition from some provinces. They alleged that the Senate formed part of the historic compromise that had led to the creation of the federal Union in 1867 and that Bill C-60 fundamentally altered its structure and its inherent federal nature.
19. The Supreme Court concluded that subsection 91(1) did not grant Parliament the power to unilaterally change the “fundamental features, or essential characteristics” attributed to the Senate.⁶ It also recognised the necessary independence of the Senate as well as its role of representing the distinctive regional perspectives and minority interests in the federal legislative process. These conclusions confirmed that the provinces have a historical, established interest in the Senate and in any fundamental changes to it as a federal institution.
20. The framers of the Constitution in 1981 replaced subsection 91(1) with s. 44 keeping in mind the Supreme Court’s conclusions that the scope of federal power in subsection 91(1) was

⁵ Bill C-60, *The Constitutional Amendment Act*, 1978.

⁶ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 56.

limited to the internal constitution of Parliament (the Court used the expression “housekeeping matters”). This explains why s. 44 is more limiting than subsection 91(1)⁷. S. 44 reads: “Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons”. However, ss. 41 and 42 are not the only classes of subjects excluded from the power of Parliament under s. 44. For instance the democratic nature of the House of Commons is protected in the constitution. This essential feature imposes limits on Parliament in relation to changes that could undermine it.

1.2 The Intent of the Framers of the 1982 Constitution

21. On February 2, 1981, at a meeting of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, the Minister of Justice, who was also the sponsor of the constitutional resolution, was asked a specific question seeking to determine whether s. 44 would enlarge the unilateral power of Parliament in relation to the Senate. In his straightforward response, Minister Jean Chrétien restated the substance of the 1979 Supreme Court ruling, mentioning “the quorum of the Senate”⁸ as an example of a subject covered by s. 44.⁹
22. The intent of the framers of the 1982 Constitution was clear and unambiguous: s. 44 was not meant to enlarge the power that had been granted to Parliament in subsection 91(1).
23. This intent is further confirmed by the explanatory note appearing in the margin beside the text of s. 44 in the constitutional resolution. It reads: “intended to replace section 91(1)”¹⁰: it is thus clear that the limited scope of subsection 91(1) has retained its relevance.
24. In addition, the explanatory documents provided by the constitutional advisors of the Department of Justice, which were meant to assist the members of the committee during the

⁷ The five subjects originally excluded in subsection 91(1) were restated in other sections of the *Constitution Act, 1982*.

⁸ S. 35 of the *Constitution Act, 1867*.

⁹ *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 1st Sess., 32nd Parl., Ottawa, February 4, 1981, p. 53:50.

¹⁰ *Public documents of the Premiers' Conference*, Ottawa, April 16, 1981, p. 8.

clause-by-clause consideration of the constitutional resolution in relation to s. 44, left no doubt as to the purpose and scope of the new s. 44.

25. As well, the undersigned intervener, who was co-chair of the Special Joint Committee, has personal insight into this matter. He participated in briefings with the legal advisers each morning before the Committee met to discuss what might be expected during the clause-by-clause consideration of the resolution. This included the meeting when s. 44 was to be debated and subjected to possible amendment by the members of the Committee.
26. The intervener states that there was never any expectation of particular concerns in relation to s. 44, since it was deemed to be a restatement of subsection 91(1) as understood, based on the decisions of this Honourable Court. The federal government was not seeking any enlargement of the power of Parliament at the expense of the provinces.
27. As a result, there was no debate on s. 44 in the House of Commons, nor was it raised by provincial governments during the constitutional conferences that concluded the patriation initiative in 1981.
28. Once s. 44 came into force on April 17, 1982, the dominant opinion among the large majority of the constitutional scholars who interpreted the *Constitution Act, 1982* was that s. 44 was equivalent to the former subsection 91(1), since there had never been any expressed intent to change the scope of the section or to enlarge the powers of Parliament.¹¹

¹¹ "Section 44 replaced s. 91(1) of the Constitution Act, 1867. '18 Section 91(1) was repealed by the Constitution Act, 1982. Section 91(1) conferred on the federal Parliament the power to amend the "Constitution of Canada". That phrase was then undefined; it was however given a very narrow meaning by the Supreme Court of Canada, and it was subject to important exceptions which were expressed in s. 91(1) itself. *The result is that the scope of s. 44 is similar to the scope of the old s. 91(1)*. The procedure has been successfully used three times since 1982." Peter W. Hogg, *Constitutional Law of Canada*, v. 1, 5th ed., Toronto, Thomson Carswell, 2007, section 4.6, p. 4-31 and 4-32; "Section 44 is worded more succinctly than its predecessor, the former section 91(1) of the Constitution Act, 1867." Warren J. Newman, "Defining the 'Constitution of Canada' since 1982 : The Scope of the Legislative Powers of Constitutional Amendment under Sections 44 and 45 of the *Constitution Act, 1982* " (2003) 22 *Supreme Court Law Review* (2d) 423; "D'ailleurs, nous sommes de l'avis que le pouvoir constitutionnel conféré au Parlement par l'article 44 de la Loi de 1982 possède essentiellement la même portée restreinte que celle qui avait été reconnue par la Cour suprême du Canada au dit paragraphe 91(1). Benoît Pelletier, *La modification constitutionnelle au Canada*, Toronto, Carswell, 1996, p. 187; "This provision is intended to replace section 91(1) of the B.N.A. Act." James Ross Hurley, *Amending Canada's Constitution*, Minister of Supply and Services, 1996, Appendix 9, p. 227. (emphasis added)

29. This view confirms the overwhelming conclusion that s. 44 is limited to internal constitutional matters, or “housekeeping matters”, of the federal government and Parliament. S. 44 inherited the restricted scope that had been assigned to subsection 91(1) by the Supreme Court in the *Upper House Reference*.

1.3 The Inherent Limits Applying to S. 44 in Relation to a Change in the Tenure for Senators

30. The government sponsors of Bill C-7 (and of the predecessor Bills, S-4, C-19, S-7, and C-10, that contain sections aiming to change a lengthy tenure to a limited term of eight or nine years) have claimed that “it is within the power of Parliament to adopt such a change”:

Therefore, Parliament is able to enact this provision through its authority under section 44 of our Constitution. Under section 44 of the Constitution Act, 1982, Parliament has the legislative authority to amend the Constitution in relation to the Senate.¹²

31. Such a literal interpretation of the scope of s. 44 was argued during the study of Bill S-4 (Senate tenure) at the Special Committee of the Senate in 2006¹³ on the basis of the application of the rule “*expressio unius est exclusio alterius*”. According to this understanding, s. 44 grants the federal Parliament power over the Senate with no legal constraints of any kind, except for the classes of subjects covered in ss. 41 and 42. However, this interpretation carries a major legal flaw: it ignores the principles enunciated by the Supreme Court on the nature of the Senate as a chamber in which the provinces have an essential interest because it embodies the principle of federalism in the legislative process.¹⁴
32. This Honourable Court determined that subsection 91(1) did not allow 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”.¹⁵
33. Paragraphs 42(1)(b) and (c) of the *Constitution Act, 1982* largely incorporate the conclusions of the *Upper House Reference* in relation to the Senate, and the principles identified by the

¹² *House of Commons Debates*, 41st Parl., 1st Sess., No. 24, September 30, 2011, (Tim Uppal), p. 1706.

¹³ *Proceedings of the Special Senate Committee on Senate Reform*, No. 4, Ottawa, September 20, 2006, p. 4:36 (Peter Hogg); *Proceedings of the Special Senate Committee on Senate Reform*, No. 5, Ottawa, September 21, 2006, p. 5:7 (Patrick J. Monahan).

¹⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 88.

¹⁵ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 78.

Honourable Court retain their relevance in so far as the scope of s. 44 is concerned, particularly with regard to Senate tenure.

34. To conclude otherwise is equivalent to recognising either that the principles enunciated by the Supreme Court in the *Upper House Reference* are obsolete, or that they have been superseded in the patriation process to the benefit of Parliament to unilaterally amend the federal nature of the Senate.
35. Such a wide-ranging interpretation is not founded on any historical evidence relating to the adoption of s. 44. It is based on an unjustified definition of the scope of s. 44, similar to the interpretation of subsection 91(1) put forth by the federal government in 1978.
36. During the Committee's pre-study of Bill S-4 on Senate tenure, the legal advisor from the Department of Justice¹⁶ recognised that there were limits to the power of Parliament to change the tenure for Senators. Warren J. Newman took a balanced approach in his testimony at the Special Committee on Bill S-4 (Senate Tenure):

Senator Austin: [...] Now that we have a Supreme Court reference, could you tell us whether, in your opinion, this case stands as good law, having preceded the constitutional amendment? Are you prepared to make an argument that this is no longer good law because of the constitutional amendment?

Mr. Newman: [...] No constitutional lawyer worth his or her salt would attempt to interpret sections 44 and 42 without having a look at what the Supreme Court said in the *Upper House Reference*. I think it is, by and large, good law. There are some slight adjustments to which we could allude in looking at the amending formula, but I think it is a very important precedent.

And later in his testimony:

Mr. Newman: Yes, the terms are still relevant. [...] It is a relevant precedent.

When asked by a member of the Committee whether there were limits to the reduction of tenure by Parliament, Mr. Newman answered:

¹⁶ Warren J. Newman, General Counsel, Constitutional and Administrative Law Section, Department of Justice Canada.

Mr. Newman: Senator, having blithely mentioned the one-year figure, the point was that there comes a time when what is being done appears to be arbitrary, capricious or simply an attempt to undermine the formal appointment power.¹⁷

In such a situation, inherent limits certainly exist to the power of Parliament under s. 44.¹⁸

37. Three conclusions can be drawn from this analysis:

- 1) The principles enunciated in the *Upper House Reference* are still valid in determining the scope of s. 44 in relation to the Senate;
- 2) There are limits to the unilateral power of Parliament to changing the tenure of senators; and
- 3) Too broad an interpretation of s. 44 ignores the underlying principles of the constitutional nature of the Senate.

1.4 The Impact of Post-Patriation Decisions

38. The principles enunciated by the Supreme Court in relation to the Senate in the *Upper House Reference* have been restated by this Honourable Court in the *Quebec Secession Reference* (1998) and in *Figueroa v. Canada* (2003). They are both post-patriation decisions, and they confirm the validity of “the fundamental features and essential characteristics of the Senate”.
39. The Senate is a legislative chamber whose composition and character are bound to the federal nature of our government. As such, Parliament alone cannot alter its essential role or function. Moreover, the Senate was at the centre of the historical compromise that led to Confederation, as acknowledged by the Supreme Court in the *Upper House Reference*, when it quoted George Brown: “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.”¹⁹
40. In addition, the role of the Senate with respect to the protection of minority rights was reinforced through the incorporation into the Constitution of the *Charter of Rights and*

¹⁷ *Proceedings of the Special Senate Committee on Senate Reform*, No 2 – Evidence, September 7, 2006, p. 29, 38, 39.

¹⁸ The same objection, for instance, could be made if Parliament were to initiate an amendment to subsection 4(1) of the *Charter* in relation to the maximum duration of the House of Commons.

¹⁹ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 67.

Freedoms. In the *Quebec Secession Reference*, the Supreme Court admitted as much when it noted:

Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference*, *supra*, at p. 71.²⁰

41. This Court has already recognised the intangible character of the protection afforded to minorities that were integral to the compromise which gave birth to Canada in 1867 in the *Attorney General of Quebec v. Blaikie* decision, “forbidding modification by unilateral action of Parliament” or of a Legislature.²¹
42. The conclusions reached in the *Upper House Reference* have not lost their force or relevance following the patriation of the Constitution in 1982. On the contrary, they have been given effect in s. 41 and, particularly in relation to paragraphs 42(1)(b) and (c), by clearly submitting to the joint amending procedure (federal Parliament and provinces) changes in relation to “the powers of the Senate and the method of selecting Senators”, the number of seats of a province in the Senate and the “residence qualifications of Senators”.
43. It is obvious that paragraphs 42(1)(b) and (c) addressed some of the conclusions reached by the Supreme Court in the *Upper House Reference*, but they do not cover all of them. The question of tenure for Senators (s. 29, *Constitution Act, 1867*) was left partly undecided since the question asked was so general that the Court could not rule on a specific length of tenure.
44. However, this Honourable Court recognised the importance of life tenure, and raised a caution:

Sub-question (d) relates 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 of 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”*. The Act contemplated a constitution similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life. The imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate.

²⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 81.

²¹ *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 S.C.R. 1016, p. 1025-27.

However, to answer this question *we need to know what change of tenure is proposed*.²²
(emphasis added)

45. From the position taken by this Honourable Court, four main points stand out:
- 1) Lengthy tenure is an essential characteristic of the Senate, directly linked to its role of providing sober second thought in reviewing legislation;
 - 2) The Preamble of the *Constitution Act, 1867* states that Canada was meant to have “a Constitution similar in principle to that of the United Kingdom,” where the members of the Upper House hold office for life;
 - 3) A lengthy tenure provides a degree of independence needed for the performance of the legislative role expected from the Senate in expressing the regional views and minority interests in providing “sober second thought” in reviewing legislation; and
 - 4) The characteristics of the Senate were not altered when Parliament adopted a retirement age of 75 in 1965 since this lengthy tenure still guarantees ample independence.

It would be overstressing the conclusion of this Honourable Court to maintain that Parliament is now competent to change, at will, the length of tenure for a Senator, or to replace a lengthy term for a limited fixed term, simply because this Honourable Court has recognised that Parliament could reduce life tenure to a retirement age of 75, *i.e.* a maximum term of 45 years.

46. This Honourable Court was clear in its conclusion: setting a compulsory retirement age of 75 did not alter one of the essential characteristics of the Senate, namely, its independence in providing sober second thought in the review of legislation.
47. Furthermore, this Honourable Court added a clear caveat regarding Parliament’s initiative to change lifetime tenure in 1965, stating that “at some point, a reduction of the term of office might impair the functioning of the Senate”. In other words, the reduction of a senator’s mandate must be measured on a sliding scale, where too substantial a change would jeopardise the constitutional role of the Senate. At that point, it would be beyond the power of Parliament, acting alone, and it must then engage the concurrence of the provinces.

²² *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, par. 76-77.

48. The principles defined by this Honourable Court in the *Upper House Reference* remain relevant regarding a change of tenure from age 75 to a fixed term of nine years as proposed in Bill C-7.

1.5 The Enlargement of the Prime Minister's Power

49. The Prime Minister advises the Governor General to summon qualified persons to the Senate (as per ss. 11, 24 and 32 of the *Constitution Act, 1867*). An eight, nine or ten year term would significantly increase the influence of a Prime Minister over the Senate, which is totally contrary to the original intent of the founders. The founders chose life tenure to guarantee an intermittent and gradual renewal of the Senate's membership rather than an accelerated, large-scale turnover of appointed senators because that would have confirmed the control and influence of the Prime Minister over the Senate.
50. With an eight or a nine year term, a Prime Minister winning two consecutive majorities in the House of Commons would have the means to recommend nearly all Senators during his or her mandate, and would thus be able to marginalise the opposition so that the normal proceedings of the institution would be jeopardised.²³ Clearly, there is a threshold past which the institution can no longer operate as originally intended by the founders with adversarial debate and study and where there would be too little independence left in the deliberations in the Senate.
51. As the late Justice Lyman Duff explained in the *Reference re Alberta Statutes* [1938], democratic debate is about contending ideas: when there is an absence of opposing views, it is not really possible to have substantive, in-depth examination of legislation. As he further stated about Parliament: "such institutions derive their efficiency from the free public discussion of affairs."²⁴ And in the words of the late Justice Abbott in *Switzman v. Elbling* (at p. 328), "neither a provincial legislature nor Parliament itself can 'abrogate this right of

²³ For example, in considering three of the last five Prime Ministers who held office for nine years or more: Brian Mulroney obtained a Senate majority for his party six years after he came to power in 1984 (in fact, M. Mulroney set a precedent in the fall of 1990 by invoking s. 26 of the *Constitution Act, 1867* to create eight additional Senate seats to attain his Senate majority); Jean Chrétien required only three and a half years after his first election (April 1997) for his party's Senate majority; and Stephen Harper required less than five years to attain a majority in the Senate following his first election (in December 2010).

²⁴ *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] S.C.R. 100, p. 132-33.

discussion and debate”.”²⁵ A Senate with a membership composed overwhelmingly of appointees, chosen by the same Prime Minister, would substantially limit any effective debate. Such a supine Senate would serve an objective contrary to the one supposedly sought in the Preamble of Bill C-7. Instead of introducing a democratic component to the Chamber, it would reduce the Senate to an assembly of partisan supporters of the government of the day.

52. The late Justice Beetz expressed the principle quite strongly: “I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.”²⁶
53. Furthermore, the power of the Prime Minister to identify nominees for appointment to the Senate is not constrained by any convention so as to maintain a balance of government and opposition members broadly reflecting the composition of the House of Commons based on the result of the latest general election. To reduce the tenure of senators as proposed in Question 1 is sure to increase the partisan imbalance and undermine the ability of the Senate to function in an effective manner, complementing the work of the House of Commons. In Canada, unlike in the United Kingdom with the establishment of an Independent Appointments Commission through the House of Lords Act 1999, there is no expectation that the Prime Minister would recommend appointees to ensure adequate representation of the opposition to maintain the ability of the Senate to consider varying points of view.

1.6 Tenure is a Determining Factor affecting the Independence of Senators

54. Tenure is clearly essential because it affects the ability of a senator to perform his or her functions effectively. The longer the term, the greater the assurance of independence.
55. Professor David Smith has testified that the legitimacy of the Senate is premised on the independence of its deliberations, while the legitimacy of the House of Commons is based on democratic accountability to the electorate:

[T]he fundamental character of the Senate of Canada, to be inferred from the criteria for appointment established at Confederation: that is, age and property qualifications of

²⁵ Cited by Justice J. Beetz in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, par. 151.

²⁶ *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, par. 151.

nominees; life tenure, originally; a fixed number of senators; and that enunciated 90 years later by the Supreme Court of Canada in its Senate reference opinion that *that criterion is independence*. Any proposal to alter the Senate, whose effect would compromise the Senate's independence and which, at the same time, has not met some standard of provincial concurrence for amendment of the Constitution -- a set of circumstances, I believe, that echoes those leading to the reference opinion itself in 1980 -- *would undermine the essential characteristic of the upper house in my view*.²⁷ (emphasis added)

56. The two chambers of Parliament have separate and distinct complementary roles in the legislative process. The appointed Senate was conceived and structured to express “the federal principle”²⁸, “granting distinctive views of minorities or marginalised groups across the country into federal lawmaking as opposed to the views of provinces.”²⁹ Its independence is indispensable to fulfilling this constitutional role.
57. This explains why the Senate has powers virtually equal to those of the House of Commons. Without this equivalent level of power, the ability of the Senate to fulfill its legislative responsibilities to complement the role of the democratically elected House of Commons would be significantly undermined.
58. A lengthy tenure in office better ensures the independence of senators. A reduction in tenure from one which presently may run up to 45 years to one of less than a decade, would certainly alter the perspectives of Senators.³⁰
59. An appointment to the Senate usually represents the last active step in a professional/public career. By reducing the term to eight or ten years, appointees in their late forties or early fifties would likely be concerned about the next stage of their career following their position in the Senate, a concern that is currently absent. This could bring those Senators closer to the Executive, and could inversely lead to a loss of independence during their mandate. Moreover, it would certainly have an impact on the continuity, institutional memory, and

²⁷ *The Standing Senate Committee on Legal and Constitutional Affairs*, Thirteenth Report, 39th Parl., 1st Sess., No. 30, June 12, 2007.

²⁸ *Reference re a Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.

²⁹ Mark D. Walters, “The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7”, *Journal of Parliamentary and Political Law*, 7:37-61, March 2013, p. 44-45.

³⁰ C.E.S. Franks, “The Canadian Senate in Modern Times”, in Serge Joyal, ed., *Protecting Canadian Democracy*, Montreal, MQUP, 2003, p. 182-185.

long-term perspective in the performance of the Senate's legislative role, all of which are better served by an independent office-holder.³¹

60. This Honourable Court has certainly made evident its appreciation of the independence of Senators with regard to their examination of legislation. While reviewing the frequency with which it refers to interventions made by both houses of Parliament in its interpretation of legislation, Senator George Baker has been able to conclude that the Senate is on average referred to three times more often than the House of Commons in decisions of this Honourable Court.³²
61. In addition, independence would certainly be threatened with a renewable term, since renewability is fundamentally linked to accountability. In the context described above (par. 53), it would substantially increase the control of the Prime Minister over the institution. It is the Prime Minister who would in fact decide who to recommend for reappointment. Nearing the end of his or her term, a Senator might be tempted to seek favour with the Executive and to cultivate party preferment in a bid to promote the renewal of his or her mandate.
62. If this were to happen, and it likely would, this would transform the Senate into a partisan chamber subjugated to the will of the Prime Minister. Such an outcome would be contrary to the nature of the Senate as originally conceived. George Brown, one of the Fathers of Confederation with rare foresight, issued the following warning:

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 to the administration of the day for reappointment; and the consequence would be that a third of the members would be under the influence of the executive.³³

³¹ Gil Rémillard, "Senate Reform: Back to Basics", in Joyal, *Protecting Canadian Democracy*, p. 111-117.

³² Senator George Baker said the following in the Senate Chamber on October 25th, 2012: "As senators know, Senate committees are referenced weekly by our superior courts. The House of Commons committees are not, and there is a reason for that." (He goes on to outline his reasoning for this.) *Debates of the Senate*, 1st Sess., 41st Parl., Vol. 148, No. 112, October 25, 2012, p. 2693. Senator Baker explains his reasoning in an email sent on July 30, 2013: "from time to time I personally count the references to the senate and the commons in the previous six-month period or year in reported case law. I use the search engines of WestlawCarswell and Quicklaw. I then report the ratio in speeches to the senate. In Canadian case law the senate is quoted three times more than the Commons in judgments of all judicial proceedings reported in WestlawCarswell and Quicklaw."

³³ George Brown, Legislative Assembly, February 8, 1865, quoted in the Annex of the *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Thirteenth Report*, 39th Parl., 1st Sess., No. 30, June 12, 2007, p. 1. <http://www.parl.gc.ca/Content/SEN/Committee/391/lega/pdf/30issue.pdf>

63. Would a length of term based on the average life of two or three Parliaments meet the threshold defined by this Honourable Court regarding the Senate? It is instructive to examine how British parliamentarians approached the question of the reduction of life tenure for the House of Lords. The Royal Commission on the Reform of the House of Lords (the Wakeham Commission), which studied the role, function and composition of a reformed House of Lords concluded in its 2000 Report that maintaining the essential characteristics of the office (independence, continuity of membership, and expertise needed for the review of legislation) required a term of 15 years:

Recommendation 72: Regional members, whatever the precise means of their selection, should serve for the equivalent of three electoral cycles and appointed members should serve for fixed terms of 15 years.

The Report outlines its reasoning for this 15 year term:

One of our central aims is to recommend the creation of a second chamber whose members can *speak and vote with a substantial degree of independence* and who are in a position *to take a long-term view*.³⁴ (emphasis added)

64. In May 2011, the UK Government tabled a White Paper entitled the *House of Lords Reform Draft Bill*. The Paper contained the following proposal related to term limits: “A single non-renewable membership term of three normal election cycles – in practice (given 5 year fixed term Parliaments) that is likely to be 15 years.”³⁵
65. The Joint Committee of the House of Lords and the House of Commons reviewing the draft bill agreed to a proposed term of 15 years, and concluded that this would maintain the institutional features of the House of Lords:

171. The Committee considered the arguments in favour of 15-year terms. [...] With a 15-year term, transition would end in 2025, allowing for more members of the current House to remain for longer thus *guaranteeing continuity and the preservation of the current ethos of the House [of Lords]*. (emphasis added)

³⁴ Rt. Hon. Lord Wakeham, Chairman, Royal Commission on the Reform of the House of Lords, *A House for the Future*, the, Presented to Parliament by Command of Her Majesty, Cm 4534, January 2000, p. 119.

³⁵ *House of Lords Reform Draft Bill*, presented to Parliament by the Deputy Prime Minister by the Command of Her Majesty, May 2011, p. 7 and 10.

173. A majority of the Committee consider on balance that a 15-year term is to be preferred.³⁶

66. The proposals and comments from Westminster provide a useful reference, conducted by a Parliament with which we share many features, as recognised in the Preamble of the *Constitution Act, 1867*, and confirmed by this Honourable Court in the *Upper House Reference*.
67. A length of term based on the life of three Parliaments for Senators (based on the maximum length of 5 year terms as provided for in s. 50 of the *Constitution Act, 1867*), i.e. a fixed term of fifteen years, could sustain an independent Senate.

1.7 Retroactivity of Appointments

68. Can Parliament change the term of Senators appointed after October 14, 2008?³⁷ The answer is no. This would be a modification of the past exercise of the Royal command by the Governor General. Such a change is beyond the unilateral powers of Parliament.
69. Such a modification would change the Writ of Summons. The term of appointment is part of the command delivered to the Senator once the Commission has been signed by the Governor General. It cannot be changed retroactively, because it would improperly fetter the power of the Governor General constitutionalised at ss. 24 and 32 (1867).
70. The text of the Commission reads:

Elizabeth the Second, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith.

TO

Our Trusty and Well-beloved, [Name of Senator] [Province/ District]

KNOW YOU, that as well for the especial trust and confidence We have manifested in you, as for the purpose of obtaining your advice and assistance in all weighty and arduous

³⁶ Joint Committee on the *Draft House of Lords Reform Bill*, First Report, Session 2010-12, Vol. 1, 23 HL Paper 284-I, HC 1313-I, April 23, 2012, p.45-6. A formal Bill titled *House of Lords Reform Bill* with a term of 15 years was introduced in June 2012, and withdrawn September 3, 2012 for want of adopting a disposition motion.

³⁷ 52 Senators have been appointed since October 14, 2008, on the recommendation of Prime Minister Stephen Harper, with the unwritten understanding that they would resign after an eight or nine year term.

affairs which may the State and Defence of Canada concern, We have thought fit to summon you to the Senate of Canada.

AND WE do command you, that all difficulties and excuses whatsoever laying aside, you be and appear for the purposes aforesaid, in the Senate of Canada at all times whensoever and wheresoever Our Parliament may be in Canada convoked and holden, and this you are in no wise to omit.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed.³⁸ (emphasis added)

71. The length of term is intrinsically linked to the Commission since it orders the appointee to be available in the Senate as often as it sits. When a Commission is delivered to a qualified person, it is for the term set out at s. 29 of the *Constitution Act, 1867* (i.e. until retirement).
72. Commissions received after October 14, 2008, have the same legal effect as those made before that date. It is beyond the unilateral powers of Parliament to retroactively change Commissions. It would allow any Prime Minister who has a majority in both houses of Parliament to retroactively dismiss senators and to replace them with his or her own appointees in order to establish control over the Senate.
73. Concluding otherwise would unravel the laws that bind Senators to their office, and would cause changes that are totally contrary to the objectives for which the Senate was originally structured and for which it was empowered to contribute to the legislative process.

2. Question 2

74. Can Parliament establish a scheme to hold national elections, the results of which would constrain the Prime Minister's discretion in recommending Senate nominees? The answer is no: it would be a change in relation to "the method of selecting Senators", contrary to paragraph 42(1)(b) of the *Constitution Act, 1982*, which specifically prevents Parliament from making such an amendment unilaterally.
75. The meaning of paragraph 42(1)(b) is explained through the *Upper House Reference*, where this Honourable Court concluded that the Senate is an appointed body, one modeled on the

³⁸ For an example of the text of the Commission (summoning of Senator Betty Unger), consult *Journals of the Senate*, 1st Sess., 41st Parl., No. 45, January 31, 2012.

British House of Lords, and that transforming the Senate from its current composition into an elected chamber would negate the original intent behind the institution's creation.

The substitution of a system of election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom", where the Upper House is not elected. In creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life.³⁹

2.1 Changing the Method of Selecting Senators

76. The opening words of subsection 42(1) are clear: "An amendment [...] in relation to the [method of selecting senators] may be made only in accordance with subsection 38(1)". They do not state "an amendment to the method". The words "in relation to" encompass any change that can be linked to or have a bearing on "the method of selecting Senators".
77. The word "method"⁴⁰ in the phrase "the method of selecting" refers in this context to the manner, the procedure, the approach, the means, and the process through which a selection of nominees can be made. As for the concept of "selection," it should not be equated to the concept of "appointment". In other words, it is not "the method of *appointing* senators" that is covered by paragraph 42(1)(b), it is the "method of *selecting*" them, which means choosing an appointee from among a certain number of persons: a process which in fact precedes the appointment and is the exclusive responsibility of the Prime Minister.
78. A national election such as the one proposed in Bill C-20, which was introduced in the House of Commons in November 2007, conducted by the Chief Electoral Officer of Canada under the authority of a federal statute and following the rules of the *Canada Elections Act* to select

³⁹ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 77.

⁴⁰ The word "method" is defined in *Black's Law Dictionary* (Garner, Bryan A., ed., 9th edition, West, c2009) as "a mode of organizing, operating, or performing something, esp. to achieve a goal <method of election> <method of performing a job>"; and in *West's Legal Thesaurus/Dictionary* (Statsky, William P., West Pub. Co., c1985) as "a mode of operation or means of attaining a result," and also with the following words: manner, technique, system, process, procedure, *scheme*, approach, arrangement.

Senate nominees, instead of leaving that selection to the unfettered discretion of the Prime Minister, is undoubtedly a change per se in relation to “the method of selecting Senators.”⁴¹

2.2 The Doctrine of Colourability and a National Election Scheme

79. The constitutional characterisation of the scheme to select Senators proposed in Bill C-20 can be determined by identifying its object and purpose: i.e., the legislative intent of its sponsors; its legal and practical effects; and finally, the government’s actual motives. The doctrine of colourability⁴² is pertinent for the legal analysis of the electoral process proposed in Bill C-20.
80. The government’s motive in introducing Bill C-20 is to achieve a practical effect, to establish an “elected Senate”, which is at variance with the object and purpose of the motive that has been publicly stated as a mere consultation of the electorate that possesses no compelling force on the advice given by the Prime Minister to the Governor General for the appointment of Senators.
81. If adopted, Bill C-20 would be an Act of Parliament. Canadian Courts have always recognised that Parliament does not legislate in vain, and that its will should be given weight and should have both legal and binding force when enshrined in a statute.⁴³
82. The sponsors of Bill C-20 contend that it is within the powers of Parliament through s. 44 to adopt this legislation. According to the government sponsor, nothing would be changed in the selection process since the Governor General would continue to appoint Senators:

The method of selection remains unchanged. The bill does not detract in any way from the constitutional powers of the Governor General to summon Canadians to the Senate.

It does not change the conventional prerogative of the Prime Minister to recommend appointments identified through this process or any other.”⁴⁴

⁴¹ S. 58 of *Bill C-20*, states: CONSULTATION REPORT: Without delay following a consultation in a province, the Chief Electoral Officer shall submit to the Prime Minister and publish in the *Canada Gazette* a report setting out: (a) the list of nominees established under section 51, including any adjustment made under section 57; (b) the number of ballots cast by electors in the consultation; (c) the number of ballots rejected under section 49; (d) the results of each of the counts under sections 53 to 56; (e) any objection made by a nominee under section 57 and its disposition; and (f) any other information that the Chief Electoral Officer considers relevant. *Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess., 39th Parl., 2007, p. 22-23.

⁴² Edinger, Elizabeth: “Constitutional Law - The Doctrines of Colourability and Extraterritoriality” - *Churchill Falls (Labrador) Corporation Ltd. Et al. V. Attorney General of Newfoundland et al.*, - Case comment, 63:1, *Canadian Bar Review*, (1985), p. 203-221.

⁴³ *Canada (Attorney General) v. JTI-Macdonal Corp.*, [2007] 2 S.C.R. 610, 2007 SCC 30, p. 647.

83. Are such public assertions sufficient proof that Parliament has the unilateral power to enact an electoral scheme to select Senate nominees? This Honourable Court has mentioned in many decisions that it is necessary to go beyond the claims of competence made by the sponsors of bills. In the present instance, it is appropriate to consider the substance and incidence of such an electoral scheme, and to evaluate its impact on the exercise of the discretion inherent to the prerogative of appointment. This Honourable Court has concluded in the *Upper House Reference* that “the substitution of a system of election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament.”⁴⁵
84. Bill C-20 was designed to provide statutory support for the practice of appointing elected senators. Its purpose is to give to citizens the right to determine Senate nominees (called “senators-in-waiting” in the vernacular⁴⁶). The Bill was essentially drafted to formally introduce the democratic principle in the process of selecting Senators, by means of a general election to limit the Prime Minister’s discretion when advising the Governor General to summon a qualified person to the Senate. The Preamble of Bill C-20 refers to the democratic principle: “WHEREAS it is important that Canada’s representative institutions, including the Senate, continue to evolve in accordance with the principles of modern democracy and the expectations of Canadians.”⁴⁷
85. The democratic principle was originally reserved for the composition of the House of Commons by the founders because it was believed that the representation of the population based on elections would best serve the interests of the majority, but that in the Senate the concern was the protection of the minorities. The Supreme Court outlined this reality in 1980: “To make the Senate a wholly or partially elected body would affect a fundamental feature of that body.”⁴⁸

⁴⁴ *House of Commons Debates*, 39th Parl., 2nd Sess., Vol. 142, No. 049, February 12, 2008, p. 2924 (Hon. Peter Van Loan).

⁴⁵ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 77.

⁴⁶ *Debates of the Senate*, 1st Sess., 41st Parl., Vol. 148, No. 146, March 20, 2013, p. 3497.

⁴⁷ *Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess., 39th Parl., first reading November 13, 2007.

⁴⁸ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 77

86. The introduction of the democratic element in the composition of the Senate would have a direct impact on the federal principle enshrined in the institution. Implementing the majoritarian rule as is typically followed in a general election to select Senate nominees would diminish the representation of minorities. This is totally contrary to the original intent of how the Senate was meant to be designed as a federal chamber for the purpose of protecting the interests of the regions and of minorities.
87. In *Figueroa v. Canada*, this Honourable Court was eloquent in outlining its concern for the Senate's special constitutional role of representing minority interests: "neither Lower Canada nor the Maritime provinces would accept such an arrangement, in which the power of greater population might overwhelm and eradicate their distinct communities". The Court added: "Federalism was seen not just as a pragmatic solution but as necessary to ensure fairness to the various regional communities".⁴⁹
88. The Senate has been instituted to preserve and to give weight in the legislative process to the "'individuality' of the separate political communities"⁵⁰ that defines our nation.
89. By imposing majoritarian rule on the selection of Senate nominees through a federal statute, the electoral scheme of Bill C-20 excludes the very use of the discretion that allows the Prime Minister to recommend representatives of different minorities, either linguistic, ethnic, aboriginal, religious or visible, in larger numbers in the Senate than those represented in the House of Commons.⁵¹ The discretion used by successive Prime Ministers has allowed for a more balanced representation in Parliament as a whole, and has thus compensated for the electoral results attained through the House of Commons with its first-past-the-post system.
90. Democratic federalism in Parliament is more than a simple application of the majoritarian rule in both Houses. It involves the presence of the distinct voices of regional groups and of minorities: "The [Supreme] Court portrayed the underlying principles of the Constitution,

⁴⁹ *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37, par. 165 and 164.

⁵⁰ *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37, par. 165.

⁵¹ Currently, women represent 36.2 % of the Senate membership (38 out of 105 seats) whereas in the House of Commons they represent 25.3 % (78 out of 308 seats). Similarly for aboriginal people: five Senators (4.8%) vs. six Members of Parliament (1.9%); and for visible minorities: twelve Senators (11.4%) vs. 29 Members of Parliament (9.4%). These statistics were compiled based on information available on the Parliament of Canada website. More detailed historical compilations are available in Jonathan Nagle, "Appendix", in Joyal, *Protecting Canadian Democracy*, "Section C – Societal Diversity" (Chart C-1 : Visible Minorities in the House of Commons and the Senate at the 27 November 2000 Election; and Chart C-2 : Women in Canadian Parliament), p. 326-27.

including federalism and democracy, as existing in symbiosis”. The Court went on to add: “[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other” (par. 49). This suggests that federalism helps to define Canadian democracy in that it represents a concern for preserving and enhancing the distinctive interests of regional and minority groups.⁵²

91. The Senate was granted powers almost equal to those of the House of Commons⁵³ for that very purpose: to allow for regional and minority representation to have a genuine influence in the legislative process. Introducing majoritarian rule to determine the composition of the Senate would affect the way the Senate exercises its legislative power. As Professor John McEvoy stated clearly: “A regional representative is not only to represent the views of that particular region in one single role, but in all of its roles.”⁵⁴
92. Considering the impact on the underlying principles of federalism and on the protection of minority interests enshrined in the structure of the Senate, the introduction of an electoral scheme such as the one in Bill C-20 would dilute the character of the Senate. A change of such importance is beyond the unilateral competence of Parliament under either ss. 44 or 91.
93. The Minister who sponsored the bill (Government House Leader Peter Van Loan) added that Bill C-20 “does not change the conventional prerogative of the Prime Minister to recommend appointments identified through this process or any other.”⁵⁵ The argument is centred on the allegation that those elections are only “consultative” and not binding.
94. This assertion of the government is not convincing. During debate on Bill C-7, the real intention of the government was openly admitted. Deputy House Leader Scott Reid added that there was “no question” that Prime Ministers “in the end would lose the power they have to appoint partisans or people of their choice and would be *forced* to follow the will of the people of the relevant province”.⁵⁶

⁵² *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37, par. 167.

⁵³ Minus the introduction of money Bills – s. 53 of the *Constitution Act, 1867* and the suspensive veto for constitutional amendments – s. 47 of the *Constitution Act, 1982*.

⁵⁴ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 23, March 22, 2007, p. 23:92.

⁵⁵ *House of Commons Debates*, 39th Parl., 2nd Sess., No. 049, Vol. 142, February 12, 2008, p. 2924.

⁵⁶ *House of Commons Debates*, 41st Parl., 1st Sess., No. 024, Vol. 146, September 30, 2011, p. 1719.

95. In fact, under the guise of “consultations” for the selection of Senate nominees, the intent is to have an “elected Senate”, as the Prime Minister himself and his various government spokespersons have declared on many occasions.⁵⁷ In other words, Bill C-20 tries to achieve, indirectly, what Parliament cannot do directly without the involvement of the provinces. This raises the question of the colourability of Bill C-20: its form is not sufficient to determine its constitutional validity.
96. Future Prime Ministers would be “forced” to recommend candidates who had won the election as Senate nominees because a valid statutory election, conducted according to electoral laws that govern voting and financing, will produce a “winner” that cannot be ignored without due process.
97. National elections involving thousands of agents, workers, and volunteers, and run according to specific financing rules, would cost the public treasury (and taxpayers) millions of dollars⁵⁸, and would certainly produce results that cannot be disregarded, especially when the stated intent of the proponents for such a change is to institute an “elected Senate” through the popular selection of candidates.
98. The sponsors of Bill C-20 pretend that such elections are merely “consultative”, while still contending that the Senate nominees must be appointed. The Prime Minister and his spokespersons have repeatedly declared that “the government intends to table [...] legislation to create an elected Senate.”⁵⁹
99. This Honourable Court has recognised the obligations which valid elections impose on government. In the *Quebec Secession Reference*, this Court concluded: “Democratic rights under the Constitution cannot be divorced from constitutional obligations”.⁶⁰ Democratic votes command political authorities to act. Moreover, Bill C-20 is about an election per se to

⁵⁷ For example, Minister of State (Democratic Reform) Steven Fletcher stated the following in a 2010 Press Release: “Prime Minister Harper and this government are committed to a democratic Senate, elected by the voters.” *Harper Government Drives Senate Reform Agenda*, April 27, 2010, available at <http://reformedemocratie.gc.ca/eng/content/harper-government-drives-senate-reform-agenda-0>.

⁵⁸ Spending on the last four general elections in Canada (2004-2011) ranged from \$270-291 million each.

⁵⁹ *Proceedings of the Special Senate Committee on Senate Reform*, No. 2 – Evidence, First Session, 39th Parl., September 7, 2006, p. 2:14.

⁶⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 150, 151.

choose a winning candidate, where citizens have been invited to exercise their legitimate right to vote.

100. The Prime Minister has recognised the legal weight that national elections carry for the appointment of elected Senate nominees: “I can just say that my frank hope is that that process would *force* the provinces and others to, at some point in the future, seriously address other questions of Senate reform.”⁶¹ (emphasis added)
101. The gist of the electoral scheme contained in Bill C-20 is obvious: the Bill intends to use the results of democratic elections within our constitutional structure to “*force*” changes that the government does not want to initiate formally through the appropriate amending procedure,⁶² requiring the concurrence of the provinces.
102. The government spokesperson on Senate Reform confirms such intentions by publicly stating that the appointment of elected Senators was only the “first step to a reformed Senate”, and that after “elected senators are close to a majority in the Senate”, the provincial governments and Parliament would “draft a stand-alone constitutional amendment to agree on the future representation in the Senate and retain the supremacy of the House of Commons without crippling the powers of the Senate.”⁶³
103. The purpose of the national electoral scheme proposed in Bill C-20, based on the democratic principle, has to be viewed as an attempt to evade constitutional limitations. It is “coloured” legislation with an effect that is clearly at variance with its “consultative” cover.
104. Bill C-20 fetters the prerogative of appointment constitutionalised at ss. 24 and 32 of the *Constitution Act, 1867*, since the Bill imposes a statutory obligation on the Prime Minister to consider those persons declared by the Chief Electoral Officer to be Senate nominees, as per subsection 16.(2) of Bill C-20.⁶⁴

⁶¹ *Proceedings of the Special Senate Committee on Senate Reform*, No. 2 – Evidence, First Session, 39th Parl., September 7, 2006, p. 2:18.

⁶² Mark D. Walters, “The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7”, *Journal of Parliamentary and Political Law*, 7:37-61, March 2013, p. 40, 50.

⁶³ *Debates of the Senate*, 40th Parl., 3rd Sess., Vol. 147, No. 23, April 29, 2010, p. 428 (Senator Bert Brown).

⁶⁴ Subsection 16.(2) of Bill C-20, *Senate Appointment Consultations Act* states: The Chief Electoral Officer shall transmit to the Prime Minister and publish in the *Canada Gazette* a notice that no consultation will be held in the

105. Parliament cannot unilaterally enact a fetter on a constitutionalised power which is exercised under the prerogative as per s. 24 of the *Constitution Act, 1867* and which is enshrined in the office of the Governor General (paragraph 41(a) of the *Constitution Act, 1982*). There is an important legal distinction between a prerogative of the Crown that can be constrained by an Act of Parliament (such as declaring war or signing treaties) and a prerogative of the Crown that has been explicitly constitutionalised (such as the appointment of Senators under s. 24 of the *Constitution Act, 1867*). The latter cannot be changed unilaterally by an Act of Parliament: it can only be changed through a formal constitutional amendment.
106. The federal Minister of Justice recognised this limit in his testimony when Parliament was considering Bill C-16, *An Act to amend the Canada Elections Act*: “The Governor General's legal power under the Constitution and the exercise of that power on the advice of the Prime Minister are fundamentally and inseparably linked”.⁶⁵
107. The Federal Court of Appeal has also commented recently on this very issue:
- In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role.⁶⁶
108. In a decision involving the *Alberta Senatorial Selection Act*⁶⁷ on the appointment of Senate nominees who had been elected according to that provincial electoral scheme (*Samson v. Canada (Attorney General)* [1998]), the Federal Court concluded that a statute adopted by a legislative assembly cannot fetter the constitutional prerogative of the Governor General to summon a qualified person to the Senate:
- [T]he Governor General's power to appoint qualified persons to the Senate is purely discretionary. In other words, there are no procedural or other limitations restricting the exercise of the Governor General's discretionary constitutional power of appointment under sections 24 and 32.⁶⁸

province and a report of the proceedings taken under this Act in respect of the province, including the rejection of any nomination for non-compliance with this Act.

⁶⁵ House of Commons, *Standing Committee on Procedure and House Affairs*, Evidence, 39th Parl., 1st Sess., No. 18 September 26, 2006, p. 2 (Rob Nicholson).

⁶⁶ *Conacher v. Canada* (Prime Minister), 2010 FCA 131, [2011] 4 F.C.R. 22, 2010 CAF 131, par. 5.

⁶⁷ *Senatorial Senatorial Selection Act*, RSA 2000, c S-5.

⁶⁸ *Samson v. Canada (Attorney General)*, 1998 CanLII 8543 (CF), par. 5.

109. Parliament acting alone cannot bind or limit the prerogative which is constitutionally assigned to the Governor General and which is exercised on the advice of the Prime Minister, as per the Minutes of the Privy Council of 1896 and 1935,⁶⁹ according to ss. 11 and 13 of the *Constitution Act, 1867*. Such a fetter can only be achieved through a formal constitutional amendment involving the concurrence of the provinces.

3. Question 3

110. Can Senate nominees be elected by means of a provincial election held under a provincial electoral Act as provided for in Bill C-7? The answer is no.
111. Question 3 is based on the assumption that Parliament has the power to adopt an Act to elect Senate nominees through national elections, and that it can delegate this responsibility to provinces or territories which would subsequently be empowered to enact an electoral scheme as set out in Schedule I of Bill C-7.
112. As a corollary to such an assumption, any province or territory that adopted a scheme to elect Senate nominees similar or comparable to the one proposed in Bill C-7 would formally trigger a statutory obligation for the Prime Minister to consider and to “choose” those persons in filling vacancies for that province or territory:

1. Senators to be appointed for a province or territory *should be chosen* from a list of Senate nominees submitted by the government of the province or territory.⁷⁰ (emphasis added)

3.1 Delegation of Federal Responsibility to the Provinces

113. Bill C-7 thus raises several questions: first, can Parliament, under ss. 44 or 91, adopt an Act to delegate the responsibility to a province or territory to hold a general election to select senatorial nominees who will sit in another legislative house where they will be called to give “advice and consent” for the purpose of enacting federal legislation?

⁶⁹ See Meeting Minutes from the P.M.O. from 1896, available on the *Library and Archives Canada* website): <http://data2.collectionscanada.gc.ca/e/e127/e003157930.jpg> , <http://data2.collectionscanada.gc.ca/e/e127/e003157931.jpg> , and <http://data2.collectionscanada.gc.ca/e/e127/e003157932.jpg> ; as well as those from 1935, « Memorandum regarding certain of the functions of the Prime Minister », *Minute of a Meeting of the Committee of the Privy Council*, P.C. 3374, October 25, 1935.

⁷⁰ S. 1 of Bill C-7, *Senate Reform Act*, Schedule (Sections 2 and 3), Framework for the Selection of Senators, Part I: General, Basic Principles.

114. To understand the legal implications of this question, it is necessary to revisit the definition of federalism that this Honourable Court has underlined: “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 have been guided.” The Court also added that “the principle of federalism remains a central organizational theme of our Constitution.”⁷¹ It follows that each level of government has exclusive jurisdiction first and foremost on the composition of its legislative body (its internal constitution), and the exclusive control of the process of selecting its members. The constitutional responsibility of maintaining the separate and distinct jurisdictions of each level of government is a fundamental principle of federalism. Without it there could be no real autonomy in the exercise of the respective sovereignty of each level of government.
115. Selecting nominees to fill vacancies in the Senate is a responsibility attributed to the federal government. Parliament, acting alone, cannot delegate the nomination process to a province or territory, nor compel Prime Ministers to “choose” Senate nominees selected through a provincially or territorially legislated electoral scheme.
116. Submitting the exercise of the federal prerogative to determine the composition of one of the two houses of Parliament to the results of a provincial election operated under provincial authority runs contrary to the very nature of the divisions of power and the autonomy of each legislative body in the federal structure of government. It also runs contrary to the principle of jurisdictional distribution when one level of government is dependent on another to determine the composition of one of its legislative bodies. Bill C-7 is certainly not equivalent to a delegation of administrative responsibilities or of a power to enact bylaws or regulations, which could be allowed under our current law.⁷²
117. In numerous decisions, this Honourable Court has upheld the constitutional principle of autonomy in the exercise of the respective legislative authority of each level of government. It has also formally upheld the principle that no level of government can delegate some or

⁷¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 56-57.

⁷² *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392; 1952 4 D.L.R. 146; *Reference Re: Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198; [1978] 84 D.L.R. (3d) 257.

part of its legislative authority to another level. Such authorities are held to the strict exclusion of the other level of government.⁷³

118. This constitutional principle should be given imperative application when the change contemplated addresses the very composition of the Senate:

The selection of senators by a provincial legislature or by the Lieutenant Governor of a province would involve an indirect participation by the provinces in the enactment of federal legislation and is contrary to the reasoning of this Court in the *Lord Nelson Hotel* case previously cited.⁷⁴

3.2 The Exercise of a Non-existent Power

119. The second issue to be dealt with correlates to the first one: do provinces and territories have the constitutional power to enact on their own legislation such as the 1987 Alberta *Senatorial Selection Act*? Under what heading of s. 92 of the *Constitution Act, 1867* does a province have the authority to enact legislation to elect Senate nominees?
120. The selection of candidates for Senate appointment is certainly not a matter that would obviously fall under “the constitution of the Province” (s. 45 (1982)). Nor is it a matter related to “property and civil rights” (subsection 92(13) (1867)), nor a matter pertaining to “local interest” (subsection 92(16) (1867)). In the *OPSEU v. Ontario (Attorney General)* decision, this Honourable Court established the parameters of the scope of legislation that falls outside the ambit of provincial authority: “when [the subject] is [...] entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union” (emphasis added).⁷⁵
121. The selection and appointment of Senators is a matter of exclusive federal responsibility. A provincial/territorial legislative assembly does not have the power to pass legislation purporting to select Senate nominees.⁷⁶ Such an initiative is clearly *ultra vires* and is equivalent to the “exercise of a non-existent power”.⁷⁷ Furthermore it relates to “the implementation of the federal principle” and since the structure, composition and role of the

⁷³ *Attorney General of Nova Scotia v. Attorney General of Canada* [1950] R.C.S. 31; 4 D.L.R. 369 (C.S.C.)

⁷⁴ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 77.

⁷⁵ *OPSEU v. Ontario (Attorney General)* [1987] 2 S.C.R. 2, par. 90.

⁷⁶ *Samson v. Canada (Attorney General)*, [1998] 4 F.C. D-22, par. 5.

⁷⁷ *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, p. 759.

Senate constitute the “fundamental term[s] or condition[s] of the union” that took place in 1867, it is clearly beyond provincial jurisdiction.

4. Question 4

122. Can the property qualifications of Senators established in subsections 23(3) and 23(4) of the *Constitution Act, 1867* be repealed by Parliament under s. 44 of the *Constitution Act, 1982*?

4.1 The Purpose of Qualifications for Senators

123. S. 23 of the *Constitution Act, 1867*, contains a set of five criteria defining the qualifications that an appointee to the Senate must satisfy to be a Senator. They are a coherent ensemble designed to guarantee the independence and autonomy of the Senate and maintain its federal character. No similar constitutional provisions apply to members of the House of Commons.⁷⁸
124. These five qualifications together support the objectives that the founders wanted the Senate to serve. The Senate is a federal institution in which the provinces have a direct interest and the abolition of the qualifications would jeopardise its fundamental character and impair its ability to exercise sober second thought in the review of legislation.
125. The minimum age requirement of 30 years (subsection 23(1)) was meaningful in 1867 since it corresponded to midlife (in 1900 for example, average life expectancy was 51 years)⁷⁹; the intention was to have appointees in the Senate with a certain level of maturity and career experience.
126. To abolish the age requirement and appoint persons in their twenties would not provide the Senate with the same perspective, experience and wisdom of mature legislators for undertaking the task of legislative review.

⁷⁸ S. 39 (1867) provides that a senator cannot be elected, sit or vote in the House of Commons. The *Canada Elections Act* states that a candidate has to be 18 years old and a Canadian citizen.

⁷⁹ Information drawn from the Office of the Superintendent of Financial Institutions Canada Report, *Canada Pension Plan Mortality Study*, Actuarial Study No. 7, July 2009, p. 11.

127. Similarly, the residence qualifications (subsection 23(5)), now entrenched by paragraph 42 (1)(c) is directly linked to the federal structure of the Senate, as this Honourable Court recognised in 1980.⁸⁰
128. Property qualifications were included in 1867 to provide for appointees who had a substantial level of wealth (in land title and personal wealth) and who had achieved some success in their career. This was in order to bring to the Senate a stronger sense of responsibility and social reliability. This requirement confirmed the personal autonomy of the appointees and guaranteed a greater independence in the Senate as a whole.
129. The wealth amounts outlined in subsections 23(3) and (4) have not been readjusted since 1867. The amounts referred to, which are marginal by present-day standards, have lost some of their intended significance. While a certain level of wealth may no longer be a requisite for appointment, its absolute absence remains a cause for disqualification and declaring a seat vacant: it should be noted that bankruptcy is a ground for disqualification (subsection 31(3)).

4.2 The Criteria Established in the *Upper House Reference*

130. To determine whether Parliament is competent under s. 44 to abolish the property qualifications, it is helpful to apply the criteria defined by this Court in the *Upper House Reference* when it answered questions relating to changes in the composition, role and functions of the Senate as constituted by the founders:
- 1) Does the proposed change alter the fundamental features or essential characteristics of the Senate?⁸¹; and
 - 2) Does it impair the independence of the Senate in providing sober second thought in the review of legislation?⁸²

These two questions remain relevant with respect to the scope of s. 44 in relation to the property qualifications of Senators.

131. Property qualifications provide a certain link between a person and a region where the property is located. When taken together with the residence qualifications in the province for

⁸⁰ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, par. 76

⁸¹ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 78.

⁸² *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, p. 77.

which a Senator is appointed, property qualifications may strengthen the link between a senator and his or her region, and confirm that the Senator will maintain ties with that particular region for the length of his or her tenure.⁸³

132. Given the original intention behind the imposition of specific qualifications for appointees to the Senate as a way to anchor them in their respective provinces, its change, even its abolition, should be pursued with the concurrence of the provinces under s. 38.

4.3 Property Qualifications and Quebec Senatorial Divisions

133. This obligation to involve the provinces is even greater with respect to Quebec. The *Constitution Act, 1867* contains a particular provision of property qualifications for the Province of Quebec, at subsection 23(6) (1867): “In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.”
134. Quebec senators represent and sit for one of 24 particular provincial districts in the Senate (subsection 22(4) (1867)).⁸⁴ At the time of Confederation, this was meant to guarantee Senate seats for both the French-speaking community and the English speaking minorities living in districts where they were dominant. Subsection 23(6) was specifically adopted to protect in the Senate the interests of both communities living within these districts. This was a clear embodiment of the federal principle, which had been specifically requested by the representatives of Lower Canada during the Quebec Conference of 1864. Quebec representative Étienne-Paschal Taché stated the following:

Lower Canada is in a different position from Upper Canada, and [...] there are two nationalities in it occupying certain portions of the country. Well, these divisions have been made so as *to secure to both nationalities their respective rights*, and these, in our opinion, are good reasons for the provision that has been made.⁸⁵ (emphasis added)

Districts were established in the province of Quebec to guarantee fair representation for both French-speaking Catholics and English-speaking Protestants:

⁸³ Janet Ajzenstadt, “Bicameralism and Canada’s Founders: The Origins of the Canadian Senate”, in Joyal, *Protecting Canadian Democracy*, p. 9-11.

⁸⁴ The territory of the Province of Quebec has been extended in the northern part of the Province by two Acts of Parliament in 1898 and 1912. However, new districts have not been added to represent those populations.

⁸⁵ Canada, Legislature, *Parliamentary Debates on the Subject of Confederation*, Quebec, Hunter, Rose & Co., 1865, p. 210.

The purpose of this article [par. 23(6)] was to provide for an adequate representation for both the French-catholic and the Anglo-protestant groups of Quebec in the Senate. It would be difficult for the government to appoint a senator that did not share the cultural characteristics of the district for which the appointment is made.⁸⁶

135. To give effect to the unique division of the Province of Quebec into 24 senatorial districts, Quebec Senators are required either to reside in their senatorial district, or to own property or hold land title worth \$4,000 within that district.

136. A provision of the Constitution in which both Quebec and the federal government share an interest is beyond the scope of s. 44. It is instead subject to amendment by s. 43 of the *Constitution Act, 1982*:

43. An amendment to the Constitution of Canada in relation to any provision *that applies to one or more, but not all, provinces*, including

- (a) any alteration to boundaries between provinces, and
- (b) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by *resolutions of the Senate and House of Commons* and of the *legislative assembly* of each province to which the amendment applies.
(emphasis added)

137. S. 43 was introduced in the *Constitution Act, 1982* to address a situation very much like the abolition of subsection 23(6). Parliament alone cannot delete a section of the Constitution that was originally intended to protect the interests of linguistic and religious minorities, as well as the right of the majority in the province of Quebec to be represented fairly in the Senate. For this very reason, a bilateral constitutional resolution would be needed to abolish subsection 23(6) of the *Constitution Act, 1867* related to property qualifications for the Senators representing districts within the province of Quebec.

138. Given the obligation to secure the concurrence of Quebec for any change with respect to property qualifications, equity and due consideration for the joint federal provincial interests in the Senate would require the federal government to seek agreement from other provinces

⁸⁶ Claude Bélanger, Marianopolis College, History Department, Readings in Quebec History website: "Québec, the Constitution and Special Status", Montreal, last revised August 23, 2000, <http://faculty.marianopolis.edu/c.belanger/QuebecHistory/readings/special.htm>.

and territories as to property qualifications on the basis of the principles that this Honourable Court stated in the *Upper House Reference*.⁸⁷

5. Question 5

139. Questions 5 and 6 seek to determine which of the two amending procedures covered in Part V of the *Constitution Act, 1982* would be sufficient to abolish the Senate: the general 7/50 procedure of s. 38, or the unanimity rule provided in s. 41.

5.1 The Fundamentals of the Constitutional Structure

140. The basic structure of the Constitution of Canada, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including an appointed Senate and elected legislative bodies at the federal and provincial levels. The Senate is a “basic structural imperative” as set out in the Preamble of the *Constitution Act, 1867*,⁸⁸ establishing our government on the Westminster model. It was an essential component of the compromise to bring the original four provinces together into a federal union.
141. The Canadian Constitution calls for a Parliament consisting of two chambers: the House of Commons, elected by the people, and the appointed Senate to embody the federal principle, as confirmed by the *Upper House Reference*. S. 17 of the *Constitution Act, 1867* states: “There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons”, and s. 91 adds that: “It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada”. Abolishing the Senate would have a direct impact on the definition of Parliament and also on the exercise of legislative power.

5.2 The Abolition of the Senate: an Unprecedented Objective

142. The founders in 1867 and the framers in 1982 did not contemplate the abolition of the Senate. The abolition of the Senate would constitute a radical change of the very structure of the

⁸⁷ *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, par. 77.

⁸⁸ *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, par. 151.

Canadian government A constitutional change of such magnitude is unprecedented, and Questions 5 and 6 try to resolve how to implement such a drastic initiative.

143. This Honourable Court has been faced with such a dilemma before, when it had to address the question related to the secession of the Province of Quebec in 1998. It acknowledged outright that “an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements.” This Honourable Court concluded that the legal process to be followed to answer such an unprecedented change should be based on the “constitutional principles [of] federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.”⁸⁹ Abolition of the Senate would require nothing less.
144. Constitutions are not drafted in a manner that makes them easy to amend because they provide rules, norms and values that are linked to the settled democratic life of a nation, while they also fix its system of government. In Canada, neither Parliament nor any legislative assembly acting alone can change the agreement that defines the principles and values of our federal democracy. As stated in the *Quebec Secession Reference*, “The Court must be guided by the values and principles essential to a free and democratic society which [embody] respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”⁹⁰ An attempt to change the constitutional structure, including the abolition of the Senate, which could alter how these core values are protected, should only be accomplished with the concurrence of all of the provinces since they share a vital interest in how the nation is governed.

5.3 The Underlying Principles of the Constitution

145. Moreover, as this Honourable Court has often emphasised, the Constitution, as a coherent structure with underlying principles, seeks to bring together the distinctive identities of the nation protected by the principle of constitutionalism and the rule of law:

⁸⁹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 84, 90.

⁹⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 64.

The principles of constitutionalism and the rule of law lie at the root of our system of government. [...] At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It [the rule of law] provides a shield for individuals from arbitrary state action.

And this Court further acknowledged the possibility that:

[T]here are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively.⁹¹

146. The principles of constitutionalism impose an inescapable obligation on the federal government to respect the procedures for implementing amendments that involve the participation of the provinces. There are no shortcuts to clearly and definitely abolish the Senate. Such a drastic change would be analogous to rethinking the whole federal structure, and to redefining the balance between competing regional interests throughout the country and guaranteeing protection for minority rights in the legislative process.
147. An attempt to entirely remove the Senate from the constitutional federal structure would be akin to reopening the founding debates of Confederation. The legal, political and social implications are enormous, considering that almost all federal states in the democratic world have a bicameral system of government⁹², a system which accommodates the distinctive diversities and interests of their various communities.
148. The federal Union of Canada was originally requested by Lower Canada (Québec), New Brunswick and Nova Scotia. As this Honourable Court has acknowledged:

The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. [...]

Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters.⁹³

⁹¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 70, 74.

⁹² All but five small federal countries have adopted bicameralism for their federal legislature. See Bruce M. Hicks, *An expert opinion on Bill C-7, an Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits* (October 2012), p. 4. The document is available in the Dossier of the Attorney General of Quebec for Supreme Court file No. 35203, Vol. V, Tab 38.

⁹³ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par 59, 60.

The population of these three provinces currently totals 28%⁹⁴ of the national population. Were the 7/50 amending procedure to be applied to abolish the Senate (with these provinces, for instance, opposed to it), there could be serious unintended consequences.

5.4 The Importance of the 1996 Act on Regional Veto

149. Parliament understood such a reality when it adopted *An Act respecting constitutional amendments* to provide for regional vetoes in 1996 committing the federal government not to proceed with a constitutional resolution unless the change proposed was first endorsed by legislative assemblies of the five regions of the country: Ontario, Quebec, British-Columbia, two of three of the Western provinces, and two of four of the Atlantic provinces, totalling 50% of the population in each of those two regions (s. 1).⁹⁵ Parliament agreed to bind the federal government in exercising its veto power in order to acknowledge the regional balance needed before an amendment to the Constitution of Canada could be brought under the 7/50 amending procedure. Question 5 as formulated by the government entirely ignores this legally binding obligation and its commitment to fairer participation in the amending process and the need for each of the regions to be a willing stakeholder of any proposed constitutional change.
150. Question 5 seeks to achieve the abolition of the federal house of Parliament with minimal provincial concurrence (7/50). Constitutions are purposefully difficult to amend because they are intended to protect their minorities. A removal of the federal principle from the legislative structure of Parliament cannot but be an objective that would deeply interest all the provinces.
151. The approach outlined in Question 5(b) is fundamentally one designed to remove the participation of the Senate in the amending process, as required in ss. 38, 41, 42, 44 and 47 in Part V of the *Constitution Act, 1982*. In other words, it would be an amendment to the amendment procedure (enshrined under the unanimity rule at paragraph 41(e)) in using the 7/50 procedure to amend the “powers of the Senate” at paragraph 42(1)(b). This would be

⁹⁴ Information compiled from data available on the Statistics Canada website, Table 2, Annual population estimates (2012), <http://www.statcan.gc.ca/daily-quotidien/120927/t120927b002-eng.htm>.

⁹⁵ Bill C-110, *An Act respecting constitutional amendments*, S.C. 1996, c. 1.

contrary to the unanimous level of support required in paragraph 41(e).⁹⁶ The intent of the framers in 1982 is clearly spelled out in paragraph 41(e): amending the amendment procedure is subject to the unanimity rule, and is excluded from the ambit of paragraph 42(1)(b).

5.5 The Role of the Senate in the Amending Procedure

152. One cannot tamper with this provision on the argument that the Senate only has a suspensive veto (s. 47 (1982)). The passage of time can be critical to providing sober second thought. Removing the Senate entirely from the amendment process would expand the authority of the House of Commons because there would be, in effect, no opportunity to check it.
153. The approach proposed in Question 5(c) to abolish the Senate is analogous to eviscerating the Senate of all its legislative powers, thus preventing it from expressing the interests of the regions or providing protection for minorities. The provinces would lose their compensatory representation, regardless of any opposition from the smaller provinces, a situation which is contrary to the very constitutional objective for which the Senate was created. Those provinces would be brought under the majoritarian rule in the House of Commons. The use of the 7/50 amending procedure to abolish the Senate would remove all their entrenched protections. Such an approach hurts equity, a guiding common law principle, because the contemplated change would remove the current protection afforded to smaller provinces.
154. The subject covered by paragraph 41(b), regarding the protection of the representation of the smaller provinces in the House of Commons, is fundamental in its own right. The framers wanted to give real effect to the federal principle, allowing the voices of the smaller regions to be heard in the federal legislative process. This was at the heart of the historical compromise that led to Confederation in 1867 and is a determining factor of our federal democracy, as this Honourable Court underlined in *Figueroa*.⁹⁷ The deletion of the federal principle in Parliament was recognised to be so detrimental to our system of government that it was intentionally brought under the protection of the unanimity rule.

⁹⁶ Benoît Pelletier, *La modification constitutionnelle au Canada*, Carswell, 1996, p. 221 and 224.

⁹⁷ *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37, par. 165.

155. Such reasoning is in fact similar to the one behind the decision of the framers in 1982 to bring changes to the composition of the Supreme Court under the unanimity rule: its purpose is to guarantee regional representation on the bench of the Court and to ensure recognition of both the common law and civil law.
156. The amendment of the powers of the Senate pursuant to s. 38 was not meant to eviscerate the legislative capacity of this Chamber. It is foreseeable that a change to the method of selecting Senators (as per paragraph 42(b)) could result in a redefinition of the exercise of the powers of the Senate, but any new definition of Senate powers would have to remain meaningful, as acknowledged and protected under paragraph 41(e). Both sections are complementary in nature: they are not intended to be played against one another. To achieve such a drastic change in the constitutional order by abolishing the Senate demands the concurrence of all the provinces.

6. Question 6

157. The abolition of the Senate can only be achieved by using the unanimity procedure under s. 41 (1982).

6.1 The Aboriginal Peoples and the Abolition Process

158. The Aboriginal Peoples possess rights under ss. 25 and 35 of the *Constitution Act, 1982*. Their interests have been promoted in the Senate since the appointment of the first Aboriginal Senator in 1958, and especially since the creation of Nunavut in 1993, as the third Canadian Territory, each of which are represented by a single Senator⁹⁸. The Senate has provided an opportunity to protect native rights through the participation of Aboriginal Senators in the legislative process. These remedial efforts would be lost if the Senate were to be abolished.
159. When this Honourable Court identified in the *Quebec Secession Reference*, the protection of minority rights as an underlying principle of the Constitution⁹⁹, it made clear that any substantive change to the Constitution could not be made without addressing its impact on the minorities affected, including the Aboriginal Peoples: “The protection of [Aboriginal]

⁹⁸ *Bill C-39, An Act to amend the Nunavut Act and the Constitution Act, 1867*, [1998] Part II, subsection 43(3).

⁹⁹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 79-82.

rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.”¹⁰⁰

160. This Honourable Court has affirmed that the Aboriginal Peoples have a right to be fairly consulted and accommodated¹⁰¹ when their status is put at risk through a legislative initiative of the federal, provincial or territorial governments.
161. Abolition of the Senate should not proceed without addressing the right of the Aboriginal Peoples to be directly involved.

PART IV – COSTS (NOT APPLICABLE)

PART V – PERMISSION TO PRESENT ORAL ARGUMENT

162. This Intervener requests permission to present oral arguments to this Honourable Court.

All of which is respectfully submitted

Dated at Ottawa this 30th of August, 2013.

The Honourable Serge Joyal, P.C.

¹⁰⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 82.

¹⁰¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, par. 168; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, par. 25.

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