Court File No.: 35203

IN THE SUPREME COURT OF CANADA

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

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

DANS LA COUR SUPRÊME DU CANADA

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

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

FACTUM OF THE ATTORNEY GENERAL OF NUNAVUT

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Attorney General of Canada takes the position that the Federal Parliament may act unilaterally to enact a variety of reforms to the Senate, up to and including its outright abolition. Canada argues that, according to the amending formula found in Part V of the *Constitution Act, 1982*, provincial consent is required only where changes would affect the powers of the Senate, the method of selecting Senators, the number of Senators to which each province is entitled, or residency requirements for Senators. Canada takes the position that, unless explicitly called for in the amending formula, provincial participation is not necessary.

2. Canada argues that it is within the power of the Federal Parliament, acting pursuant to section 44 of the *Constitution Act, 1982* to unilaterally impose retroactive term limits on Senate appointments, establish a framework for provinces and territories to enact legislation to consult their population as to their preference for Senate nominees, and remove the property requirements for Senators. Canada further argues that abolition of the Senate may be effected by using the formula set out in section 38 of Part V, which calls for the consent of seven provinces having at least 50 percent of the population of all of the provinces.

3. Neither the plain language of Part V of the *Constitution Act, 1982*, nor the jurisprudence supports Canada's arguments. Indeed, a plain reading of the text of Part V indicates that the majority of the changes proposed by Canada would require a substantial measure of provincial consent. The amending formula in Part V of the *Constitution Act, 1982* was agreed upon by the provinces in 1981 as a means of ensuring that the federal government could not, without provincial accord, make changes which diminish provincial rights.

4. If abolition of the Senate is possible, it may not be carried out without the concurrence of all provincial legislatures.

B. The Role of the Senate

5. The federation movement in Canada was at its inception an indigenous one. The result of confederation was not to create one juridical body. Rather, the provinces maintained a separate, autonomous existence, each having a direct relationship to the British Crown. The relationship was not one of subordination to the federal Crown, but was instead an alliance of equals. Each of the colonies that became provinces maintained their original legislative capacity, and each was a government of Her Majesty.[1]

6. Under the terms of the *British North America Act, 1867* each of the four original provinces retained the administration of their lands, and were equal in status and rights.[2] With the passage of the *Statute of Westminster, 1931*, total legislative competence was conferred upon the provincial and federal legislatures, including the ability to amend or repeal Imperial statutes with the exception of the *British North America Acts, 1867 to 1930.*

7. The federal entity that is Canada is the aggregate of the territories and the constituent provinces, each of which province maintain a separate, independent, and autonomous existence.[3]

8. Canada's Constitution is "similar, in Principle, to that of the United Kingdom."[4] The existence of the Senate based on equal, as opposed to proportionate representation, was, for the founding provinces of Canada, a precondition for their entrance into the federation. For those provinces with smaller populations, the Senate represented a way to ensure that their interests were represented in the federal law-making process, even when their popular political ethos varied from that of the federal majority government of the day. This

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[1] McDonald, Patrick N., *The Juridical Nature of Canadian Federalism: The Status of a Province*, March 1975, citing *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] AC 437, (Attorney General of Nunavut Record (AGN Record), Tab 1) at pp. 28 -.29.
[2] Ibid, at p.43.
[3] Ibid, at pp.-29-31, 40 - 41.
[4] *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, preamble.

protection of political minorities is one of the foundations upon which the federation was built.[5]

9. Without the pressures of political allegiance or re-election, the Senate was to be an independent body which could canvass dispassionately the measures of the House of Commons. This was initially accomplished by providing for the appointment of members of the Senate with tenure for life.[6]

C. The Amending Formula

10. The Attorney General of Canada argues that the current amending formula gives Parliament the right to make any changes to the Senate for which an alternate amending process has not been explicitly provided. He argues that the exclusive power, set out in section 44, to "make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate" is residual, and encompasses any changes to the Senate not addressed in the other sections. Canada argues that it may set retroactive term limits for Senators, change the method of selection of Senators, and repeal the property requirements for Senators, without consulting the wishes of the provinces. The Attorney General of Canada also argues that the Senate may be abolished with the consent of only the legislative assemblies of seven of the provinces, having among them fifty percent of the population of Canada.

11. The various proposed iterations of the amending formula over the years leading up to the amending formula agreed to by Provinces in the First Ministers' Agreement on the Constitution of November 5th, 1981 that is now the amending procedure set out in the *Constitution Act, 1982*, indicate that the understanding of the provinces regarding the effect of the amending formula was different from that now proposed by the Attorney General of Canada. Each of the proposals had in common a system whereby proposed amendments that would have significant impact on the provinces typically required unanimity. Those that did not require unanimity were subject to the consent of a rough majority of the provincial legislatures, representing half or more of the Canadian populace.

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[5] *In re the Regulation and Control of Aeronautics in Canada*, 1932 A.C. 54 at p.70, cited in *Reference re Legislative Authority of Parliament in Relation to the Upper House* [1980] 1.S.C.R. 54.

[6] *Re: Authority of Parliament in Relation to the Upper House* ("the Senate Reference") [1980] 1.S.C.R. 54 at p. 76.

12. Efforts to assuage the legitimate concerns of less populous provinces evidenced in the Victoria Charter of 1971 called for the consent of a majority of the provinces, which majority had to include at least two of the Atlantic Provinces, and at least two of the Western provinces, having a combined population of at least fifty percent of the population of all of the Western provinces.[7]

13. In June 1978, the federal government tabled Bill C-60, *An Act amending the Constitution.* Prime Minister Trudeau made it clear that he intended to replace the Senate with another body and to patriate the Constitution by no later than 1981. In August 1978 following the Annual Premiers' Conference, the Chairman of the Annual Premiers' Conference, Premier Allan Blakeney of Saskatchewan, expressed the Premiers' concerns with Canada's plan for unilateral constitutional reform in an August 22, 1978 letter sent to Prime Minister Trudeau on behalf of the Premiers. Premier Blakeney, stated that:

    i. "The Premiers firmly believe that significant constitutional change should have the concurrence of all governments.

    ii. The Premiers oppose any unilateral change by the federal government to the Senate or the role of the monarchy. They express doubt that the federal government has the legal authority to act alone, and emphasized that it would be wrong to do so in any case."[8]

14. Later that same month on August 31, 1978 while appearing before the Special Joint Parliamentary Committee on the Constitution in Ottawa, Federal Minister of Justice Otto E. Lang defended the federal parliament's authority to unilaterally enact Bill C-60. The then Minister of Justice took the position that when interpreting the federal government's right to legislate with respect to "The amendment from time to time of the Constitution of Canada", the words "Constitution of Canada" could only be interpreted broadly; unless a matter was

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[7] *Report of the Continuing Committee of Ministers on the Constitution to First Ministers: The Amending Formula, "Patriation" and the Delegation of Legislative Authority* (AGN Record, Tab 6), pp. 149-151. In December, 1978 the Continuing Committee of Ministers on the Constitution proposed a formula that was remarkably similar to the one that eventually became Part V of the *Constitution Act, 1982*, with some key exceptions. Notably, the general amending formula was predicated on a much higher level of provincial consent as it required the consent of seven provinces with at least eighty-five percent of the Canadian population: AGN Record, Tab 2, pp.92-95. Note that Federal Document: 840-153/10 on Patriation, and Amending Formula in AGN Record at Tab 2 is mistakenly dated as January 11-12, 1978 and should read "January 11-12, 1979".

[8] *Letter from Premier Blakeney, as Chairman of the Annual Premiers Conference, addressed to Prime Minister Trudeau*, August 22, 1978 (AGN Record, Tab 3) at p. 103.

one that was explicitly exempted from this power, the Federal Parliament could act unilaterally.[9]

15. Minister Lang went on to analyze the five exceptions to Canada's amending authority. He discounted four of the five exceptions as irrelevant to the subject matter of the proposed Bill. He then considered the second of the exceptions, amendments regarding the "rights or privileges by this or any other Constitutional Act granted or secured to the Legislatures of the provinces". Attorney General Lang, argued that the words "Constitution of Canada" must be construed in their broadest sense when determining the scope of the federal amending power, while arguing conversely that the "rights and privileges granted or secured to the Legislature or Government of a province" must be construed in their narrowest sense, as excluding rights or privileges that arose from practice or convention.[10]

16. The federal Justice Minister opined that while changes to the Senate might affect the rights of the residents of a province, they did not affect the rights or privileges of the legislature or government of a province. Mr. Lang's reasoning was that, because Senators do not represent provincial legislatures or governments, those entities did not play any role in appointing Senators, and it followed that changes to the Senate could not be said to affect the rights or privileges of provincial legislatures or governments.[11]

17. On September 13, 1978 Prime Minister Trudeau responded to Premier Blakeney's August 22nd letter reiterating the argument that subsection 91(1) of the *Constitution Act, 1867* as it then was, allowed the Parliament of Canada to amend the Constitution in areas of federal concern, subject only to the five clearly stated exceptions found in subsection 91(1). Prime Minister Trudeau argued that, in expressing their doubts about the competence of the federal parliament to effect the proposed changes unilaterally, the First Ministers had failed to distinguish between those constitutional amendments that are within the power of Parliament

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[9] Federal Document, *Federal-Provincial Conference of First Ministers, Statement by O.E. Lang, Federal Minister of Justice to Special Joint Committee on the Constitution*, August 31, 1978 re, the Constitutional Amendment Bill, (Bill C-60) (AGN Record, Tab 4), at pp.107-109.
[10] Ibid, (AGN Record, Tab 4), at p. 110.
[11] Ibid, at p. 111.

under subsection 91(1), and those that are not. This, he argued, was a direct and sweeping intrusion by the provinces into federal jurisdiction.[12]

18. As the Special Joint Committee on the Constitution called for a reference, and in order to resolve the uncertainty, in November 1978 the federal government referred the matter of the alteration or abolition of the Senate by Parliament to the Supreme Court of Canada.

19. In February 1979, the Continuing Committee of Ministers on the Constitution met in Vancouver, and subsequently submitted a report to the Federal Provincial Conference of First Ministers. The Committee presented several proposed amending formulae, a shortlist of amendments that would require unanimity, with other matters requiring the consent of a majority of the provinces, having between fifty and eighty-five percent of the population[13].

20. On December 21st 1979, the Supreme Court of Canada released its opinion in *Re: Authority of Parliament in Relation to the Upper House* ("the Senate Reference"). This Court held that when reading the words "Constitution of Canada" in subsection 91(1), the word "Canada" as used in subsection 91(1) referred only to "the juristic federal unit". Therefore, the power to amend applied only to the constitution of the federal government, as distinct from the provincial governments, and was limited to matters of interest only to the federal government.[14]

21. This Court determined in that Senate Reference that the continued existence of the Senate was implied by one of the exceptions provided in subsection 91(1), which stipulated that the federal parliament could not change the condition that there be a meeting of Parliament once a year, as under section 17 of the *Constitution Act 1867*, "Parliament" is defined as consisting of the Queen, the House of Commons, and the Senate.

22. In May 1980, the citizens of Quebec voted against secession from Canada.

23. In July 1980 the Continuing Committee of Ministers on the Constitution met in Vancouver. The Committee issued a report which suggested a number of potential amending formulae,

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[12] *Text of Letter of Prime Minister Trudeau, September 13, 1978, in Reply to Letter from Premier Blakeney of August 22, 1978* (AGN Record, Tab 5), at p 130.
[13] *Report of the Continuing Committee of Ministers on the Constitution to First Ministers: The Amending Formula, "Patriation" and the Delegation of Legislative Authority* (AGN Record, Tab 6), at pp. 137 – 139; 142 – 148.
[14] *Re: Authority of Parliament in Relation to the Upper House* ("the Senate Reference") [1980] 1.S.C.R. 54, at p. 71.

and a draft proposal ("the Vancouver Consensus") which was a precursor to the amending formula which is the subject of this reference.[15] In September 1980, the best efforts draft of the Continuing Committee of Ministers on the Constitution was presented to the federal-provincial conference of First Ministers.[16]

24. In October 1980, the Prime Minister decided to proceed unilaterally. The federal government tabled a Resolution to be adopted by the Parliament of Canada proposing an amending procedure that most closely resembled the complex Victoria Charter formula that required the consent of at least two Atlantic Provinces, and at least two Western provinces, representing at least 50 per cent of the population of those provinces, respectively. The Resolution also proposed amendment of the Constitution by the inclusion of a controversial Charter of Rights and Freedoms, limiting provincial legislative authority.[17]

25. The provinces expressed grave doubts about the legality of the federal government's proposal to proceed unilaterally. Three References were referred to provincial courts. In December of 1980 the Province of British Columbia prepared and filed a submission with the Foreign Affairs Committee of the British House of Commons.[18]

26. On April 16, 1981, the Governments of Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Prince Edward Island, Quebec, and Saskatchewan met together at the Conference Centre in Ottawa and signed a "Constitutional Accord" regarding a "Canadian Patriation Plan". The eight Premiers agreed that any amending formula must recognize the principle of the constitutional equality of the provinces as equal partners in confederation, and that some amendments were of such fundamental importance that all eleven governments must agree to them.[19]

27. The centerpiece of the April 16, 1981 Constitutional Accord was an amending formula which is the precursor to the amending procedure now found in Part V of the *Constitution Act,*

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[15] *Continuing Committee of Ministers on the Constitution: Report of the Sub-Committee on Patriation/Amending Formula*, July 24, 1980 (AGN Record, Tab 7), pp. 168 – 171.
[16] *Report of the Continuing Committee of Ministers on the Constitution to First Ministers: Patriation and the Amending Formula*, September 8 – 12, 1980 (AGN Record, Tab 8), at pp. 178 – 180.
[17] Melvin H. Smith, Q.C., *The Renewal of the Federation, A British Columbia Perspective*, May, 1991 (AGN Record, Tab 13), at p. 255.
[18] Ibid, at p. 256.
[19] *Constitutional Accord: Canadian Patriation Plan*, April 16, 1981 (AGN Record, Tab 9), at p. 189.

1982. Section 7 of the proposed formula was identical to the current section 44. It gave Parliament the exclusive power to make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. The Explanatory Notes to the agreed on text attached to the April 1981 Accord provide insight into the scope of the power that the parties subsequently agreed to in section 44 of the *Constitution Act, 1982* :

> "This provision allows Parliament, acting alone, to amend those parts of the Constitution of Canada that relate solely to the operation of the executive government of Canada at the federal level or to the Senate or House of Commons. Some aspects of certain institutions important for the maintaining of federal-provincial balance, such as the Senate and the Supreme Court, are excluded from this provision and are covered in sections 9 and 10. This provision is intended to replace section 91(1) of the B.N.A. Act".[20]

28. The question of the legality of unilateral action to amend the Constitution was referred to the Supreme Court of Canada. On September 28, 1981, the Court issued its opinion, in which it concluded that, while legal, the proposed changes ran counter to the unwritten Constitutional conventions of the federal system. In *Re: Resolution to Amend the Constitution* (the *Patriation Reference*) the Court held that the proposed *Charter* placed limitations on the provinces legislative powers.[21] While there was no *legal* requirement for the federal government to seek consent of the provinces, constitutional convention required a substantial measure of provincial consent before the federal government could proceed with amendments which would modify provincial legislative powers.

29. Following the decision of the Supreme Court of Canada in the *Patriation Reference* a Federal Provincial Conference of First Minister on the Constitution was held in Ottawa between November 2 and 5, 1981. Premier Lougheed of Alberta, addressing the Federal-Provincial Conference of First Ministers on the Constitution, noted that eight of the Provinces had managed to reach an accord on an amending formula and stated that:

> "Mr. Chairman eight Provinces with vastly different historical backgrounds economic interests and different political persuasions were able to agree on an appropriate method to patriate and amend the Canadian Constitution. I refer of course, to the April 16th Constitutional Accord which clearly and positively demonstrates that constitutional

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[20] Ibid. at p. 196.

[21] *Re: Resolution to Amend the Constitution* (the *Patriation Reference*), [1981] 1 SCR 753, at p. 847.

progress is possible when all parties approach the issue with good will and sincerity. Not through threats but through constructive and meaningful discussions."[22]

30. .He called for an amending formula that incorporated the principle of provincial equality and reflected the need to protect existing provincial legislative powers, right, and privileges.[23]

31. At the November 1981 conference several of the Premiers voiced their support for the April 16th 1981 Constitutional Accord's amending formula. At the same time the Premiers rejected the amending formula proposed by the federal government, and criticized the unilateral approach that it had pursued.[24] Following intensive negotiations, all Premiers, with the exception of Quebec's, agreed to patriation of the Constitution with the inclusion of the controversial *Charter of Rights and Freedoms* in exchange for the Federal Government's agreement with the April 16th, 1981 Constitutional Accord's amending formula (with some minor changes).. The final agreement was signed on November 5th, 1981 by Prime Minister Trudeau, as well as the Premiers of Ontario, Nova Scotia, Newfoundland, Prince Edward Island, New Brunswick, Manitoba, Saskatchewan, British Columbia, and Alberta.[25]

32. In a speech given in late November, 1981, Premier William R. Bennett of British Columbia lauded the move away from unilateral federal action and extolled the virtues of the agreed upon amending formula as folows:

> "....British Columbia took an active role leading up to the signing of the historic Constitutional Accord on April 16th, 1981. The April 16th Accord provided for patriation of the Constitution with a new comprehensive amending formula that had been the product of four months of intensive discussion among the signing Provinces.
>
> It is that amending formula that forms the heart of the Constitutional Agreement of November 5th incorporated in the resolution now before Parliament.
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> [...]

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[22] *Opening Statement by the Honourable Peter Lougheed, Premier of Alberta, at the Federal-Provincial Conference of First Ministers on the Constitution*, November 1981 (AGN Record, Tab 10), at p. 212.
[23] Ibid, (AGN Record, Tab 10), at p. 213.
[24] *Federal – Provincial Conference of First Ministers on the Constitution, Summary Record of Proceedings*, Nov. 2 – 5, 1981 (AGN Record, Tab 11), at pp. 221 – 225.
[25] Ibid. at pp. 233 – 236.

> Finally, for a limited number of important matters such as those relating to the Crown, parliamentary representation, language and the composition of the Supreme Court, the consent of all governments is required."[26]

36. The current amending formula is the result of a hard fought political compromise by the Provinces whereby the Provinces accepted a *Charter of Rights and Freedoms* which significantly eroded provincial legislative and policy-making authority, in exchange for an amending formula that provides the Provinces a say in future changes to the Constitution of Canada. A prerequisite to this compromise was the understanding that the amending formula ensured provincial participation in the Constitutional amendment process.

37. The Northwest Territories formed from part of what was previously Rupert's Land were constituted by federal legislation, but share many of the core attributes of the Provinces, most importantly the right to legislate in matters of local concern.

PART II – STATEMENT OF POSITION REGARDING THE QUESTIONS IN ISSUE

38. The Attorney General of Nunavut would answer the questions posed by the Attorney General of Canada as follows:

    1. Is it within the Legislative authority of the Parliament of Canada, acting pursuant to section 44 of the *Constitution Act, 1982*, to amend section 29 of the *Constitution Act, 1867* to enact limits to the tenure of Senators?
       Answer: No.

    2. Is it within the legislative authority of the Parliament of Canada, acting pursuant to section 91 of the *Constitution Act, 1867*, or section 44 of the *Constitution Act, 1982*, to enact legislation that provides for consultation with the population of each province and territory regarding preferences for potential nominees for appointment to the Senate pursuant to the process set out in Bill C-20, the *Senate Appointment Consultations Act*?
       Answer: No.

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[26] *Speaking Notes for Speech by the Honourable William R. Bennett, Premier of British Columbia, to the Canada West Foundation/Vancouver Board of Trade Conference*, Nov. 23, 1981 (AGN Record, Tab 12), at pp. 241 – 244.

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

   Answer: No.

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

   Answer: Nunavut takes no position regarding this question.

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

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

      Answer: No.

   b) By amending or repealing some or all of the references to the Senate in the Constitution of Canada?

      Answer: No.

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

      Answer: No.

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

Answer: Yes.

PART III –ARGUMENT

A. Reference Question 1: Term Limits may not be unilaterally imposed.

39. The Constitution of Canada is, according to the preamble to the *Constitution Act, 1867*, similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life. Limits on the tenure of Senators constitute a significant change to the Constitution that may change the essential character of the Senate and may impair the independent nature of the Senate. [27] Any such amendment must have provincial consent.

40. The existence of an independent Upper House, which would represent provincial interests and restrain the federal parliament from forcing through measures which the provinces considered injurious to their interests, was a pre-condition of confederation.[28]

41. Sir John A. MacDonald saw the Senate as an independent body, "for it is valuable as a regulating body, calmly considering legislation initiated by the popular branch and preventing any hasty or ill conceived legislation that may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people."[29]

42. As noted by George Brown during Parliamentary Debates on the subject of Confederation, the decision to appoint Senators for life was based on the desire to create an independent Upper House that would be in the best position to canvass dispassionately the measures of the House of Commons and stand up for the public interest in opposition to hasty or partisan legislation.[30] Lifetime appointments ensured that Senators were not beholden to the government of the day for reappointment as their terms near expiry.

43. Any change to the tenure of Senators which could diminish the independence of the Senate and alters the nature of the Constitution so that it deviates significantly from that of the

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[27] *Re: Authority of Parliament in Relation to the Upper House* ("the Senate Reference") [1980] 1.S.C.R. 54 at p. 76.
[28] *Province of Canada, Legislative Assembly, Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 8th Parl., 3rd Sess. (8 February 1865) at 88 – 92 (President of the Council George Brown) Record of the AG of Ontario, at p. 60.
[29] *Province of Canada, Legislative Assembly, Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 8th Parl., 3rd Sess. (6 February 1865) at 88 – 92 (John A. MacDonald) Record of the AG of Ontario, at p. 49.
[30] Supra Note 28, at p. 90.

United Kingdom must have the imprimatur of the Provinces. A shortening of the tenure of Senators will necessarily diminish the powers of Senators. Therefore, pursuant to section 42 of the *Constitution Act, 1982*, the correct procedure for limiting the terms of Senators is found in subsection 38(1).[31]

B. Reference Questions 2 and 3: Bill C-7 Changes the Method of Selection of Senators and is Subject to the Amending Formula in Subsection 38(1)

44. The *Senate Reform Act* (Bill C-7) represents a change to the manner in which Senators are selected, and can only be made in accordance with subsection 38(1) in Part V of the *Constitution Act 1982*.

45. If passed, Bill C-7 would create a statutory regime for Provincial elections in which candidates for appointment to the Senate would be designated based on popular votes

46. Bill C-7 would allow Provinces or Territories to opt in by passing legislation which is substantially in accordance with the framework found in a Schedule. The Schedule sets out a system for an electoral process whose goal would be the selection of Senate nominees. A participating Province or Territory would hold elections for Senate nominees. Candidates could be nominated as the official representative of a registered Provincial or Territorial political party or be an independent candidate.[32]

47. The provincial or territorial government would be bound to present as nominees only those candidates who had been chosen by the electorate. The Schedule entitled "Framework for the Selection of Senators", sets out the following procedure for the election of nominees:

> "1. Senators to be appointed for a province or territory <u>should</u> be chosen from a list of Senate nominees submitted by the government of the province or territory.
>
> 2. The list of Senate nominees for a province or territory <u>is to be determined</u> by an election held in the province or territory...." [33]
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> (Emphases added)

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[31] *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, ss. 38 – 42.
[32] Bill C-7, AGC Record, Vol. 1, Tab 2, at p. 12.
[33] Ibid.

48. The proposed Act stipulates that, where a province or territory sets up a system for the election of Senate nominees as set out in the Schedule, the Prime Minister "in recommending Senate nominees to the Governor General must consider" names from the list of elected nominees in a Province or Territory.

49. The legislation is vague and troubling. Section 1 of the Schedule states that Senators should be chosen from a list of nominees submitted by the government of a Province or Territory. The use of the passive tense obscures a key difficulty. Provincial governments have no ability to bind the Governor General, and it is difficult to discern the utility of provincial statutory provisions which purport to govern what the Governor General "should" do.

50. Further, the federal government argues that the Prime Minister will not be bound to select from among those nominees who have been elected. Rather, the Prime Minister must only consider the names of the elected candidates. But if the obligation is only to "consider" names, then the question arises as to who the "should" in section 1 of the Schedule to Bill C-7 applies to.

51. We note that section 1 of the Schedule uses the vague term "should", and "must consider" to describe the obligation of the federal government to appoint Senators from those who are elected and put forward as nominees. Such vagueness may be a purposeful attempt to diminish the extent to which the federal government is bound by the outcome of Territorial or Provincial senatorial elections. However, the language clearly places a statutory obligation upon the federal government to select nominees from amongst those who have been elected.

52. Despite the vagueness of the drafting, the purpose of the Schedule and Bill C-7 itself is clear; the federal government seeks to create a regime whereby Senators are chosen from among a set of provincially or territorially elected nominees. This would represent a change to the method in which Senators are selected. It would also necessarily lead to a change in the role played by the Senate in the Canadian parliamentary process.

53. If passed, Bill C-7 would result in a change to "the method of selecting Senators" . The amending procedure set out in subsection 38(1) of Part V of the *Constitution Act, 1982* clearly applies to such an amendment to the Constitution.

54. As argued above, the provincial decision to enter into the federation was contingent upon the existence of a Senate.[34] Its purpose was largely to allay sectional fears by providing strong safeguards for sectional and provincial interests.[35]

55. The choice to appoint Senators rather than elect them was deliberate, and a change from appointment to election would represent a fundamental change to the nature of the Senate, one which would almost certainly have an impact on the democratic process in Canada. Such a change must not be made without full consultation and the substantial agreement of the provinces and territories.

B. Reference Questions 5 and 6: Abolition of the Senate Requires Unanimous Provincial Consent

56. The elimination of the Senate would constitute a change to the amending formula itself, and would require the consent of the Legislatures of each of the Provinces of Canada in addition to the federal Parliament.

57. Section 41 of the *Constitution Act, 1982* lists those constitutional amendments which require the unanimous consent of the Senate, House of Commons, and the legislative assembly of each province. Paragraph 41(e) provides that unanimity is required in order to effect "an amendment to this Part".

58. Under the current amending procedure a resolution of the Senate is not required for any amendments made under sections 38, 41, 42 or 43. The Attorney General of Canada argues that abolition of the Senate would not, in pith and substance, represent an amendment to the amending procedure. The pith and substance doctrine is useful in determining whether an exercise of a statutory power falls within either federal or provincial legislative authority. It is of limited use here. The key question is, would elimination of the Senate change the manner in which the Constitution may be amended? I.e., would the amending formula be different? That the amending procedure set out in Part V of the *Constitution Act, 1982*, would be changed is a matter of fact.

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[34] *Re: Authority of Parliament in Relation to the Upper House* ("the Senate Reference) [1980] 1.S.C.R. 54 at p. 67.
[35] Supra Note 17 (AGN Record, Tab 13), at p. 268.

59. The Attorney General of Canada argues that, if the Senate were abolished, those provisions of the amending formula which mention the Senate would simply be spent. With the exception of section 44, every provision of the amending formula which provides a means of amending the Constitution mentions the Senate. Does Canada argue that these provisions would be spent? If so, then Part V would most certainly be amended by the elimination of several elements of the amending formula. If the Attorney General argues that only those parts of the provisions which refer to the Senate would be spent, then the question remains, how can the elimination of a step in the amending process be anything but an amendment to the procedure for amending the Constitution set out in Part V of the *Constitution Act, 1982* ?

60. The Attorney General of Canada states that the Senate plays no active role in constitutional amendments. He argues that the Senate only has a "suspensive veto" in respect of the multilateral amending procedures. With respect, this is a mischaracterization of the roll of the Senate. Section 47 allows the House of Commons to by-pass the Senate, but only where six months have passed and the Senate has not adopted the resolution. Even then, the House of Commons must pass the resolution a second time before proceeding without Senate consent. This provision, far from diminishing the role of the Senate, emphasizes its importance by setting in place a significant waiting period and further procedural barriers before an amendment can be made without Senate approval.

61. Abolition of the Senate would fundamentally alter the law-making process and Constitution of Canada. As noted above, in the preamble of the *Constitution Act, 1867* the founding provinces expressed their desire to be federally united with a Constitution similar in Principle to that of the United Kingdom. Section 17 of the *Constitution Act, 1867*, clearly highlights that the Senate is an integral part, not just of the Constitution, but of Parliament itself:

> "Constitution of Parliament of Canada
>
> **17.**There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons."[36]

62. Abolition of the Senate would represent a radical departure from Canada's parliamentary history which finds its roots in the British system of bicameralism. Abolition of the Senate

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[36] *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s. 17.

would result in the creation of a new legislative body of which the Senate would not be a member, one comprised only of the House of Commons and the Queen, as represented by the Governor General. Such a fundamental change can only be made with the consent of the legislative assembly of each of the provinces and the federal parliament.

The Territories must be consulted regarding Senate Reform

63. This Court had held that protection of minority rights was clearly an essential consideration in the design of our constitutional structure.[37] In the *Quebec Secession Reference* this Court affirmed that holding, and noted that the *Constitution Act, 1982* included explicit protection for existing aboriginal and treaty rights, as well as a non-derogation clause in section 25 in favour of aboriginal peoples. This Court held that the protection of these rights reflected an important underlying constitutional value.[38]

64. Also in the Quebec Secession Reference, this Court held that, in Canada, Constitutional arrangements are to be arranged by the people of Canada, acting through their elected representatives:

> "The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory."[39]

65. Canada's Territories play no explicit legal role in Canada's amending formula. However, as the process of devolution continues, and the Territories accrue province-like powers, Canada must take steps to include them in decision-making regarding amendments to the Constitution. To do otherwise is to risk the legitimacy of such changes by excluding those jurisdictions in Canada which have the most immediate need of vocal representation in the federal law-making process.

66. Nunavut represents almost a quarter of the landmass of Canada. It is unique amongst Canadian jurisdictions in that the majority of its residents are Inuit. Its government is

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[37] *Re: Authority of Parliament in Relation to the Upper House* ("the Senate Reference") [1980] 1.S.C.R. 54 at p. 71
[38] *Reference re Secession of Quebec, [1998]* 2 S.C.R. 217 ("Quebec Secession Reference"), para 82.
[39] *Reference re Secession of Quebec, [1998]* 2 S.C.R. 217 ("Quebec Secession Reference"), para 85.

consensus based, meaning that every member of the Legislature is independent, and unaffiliated with a federal or Provincial political party.

67. For many years Inuit leaders have spoken out against the exclusion of the Territories from the process of Constitutional reform. As noted by John Ningark in 1990 talks regarding the Meech Lake Accord, the Territorial Governments cannot continue to be left outside the meeting rooms of Constitutional reform.[40]

68. The Attorney General of Nunavut adopts the words of the Northwest Territories' Special Committee on Constitutional Reform in their presentation to the Senate and House of Commons Special Joint Committee in 1991 on the Process of Amending the Constitution of Canada:

> "The process of reform must be legitimized in the eyes of Canadians. In Particular, our special committee wants to make it very clear that Territorial Residents, particularly aboriginal peoples, and the elected representatives from the Northwest Territories, must be involved in any processes designed to seek constitutional reform. We are not satisfied with being consulted after agreements have been reached and ratified by other governments and legislative assemblies. We are determined to be at the table whenever constitutional issues of national importance are being discussed".[41]

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[40] Presentation by Government of the Northwest Territories to House of Commons Special Committee re: Meech Lake, 1990, Record of the AG of the Northwest Territories, at p.56.

[41] Presentation by the Government of the Northwest Territories to the Senate and House of Commons Special Joint Committee re: Amending the Constitution, 1991, Record of the AG of the Northwest Territories, at pp. 64 – 65.

PART IV – NOT APPLCABLE

PART V – ORDER SOUGHT

69. The Attorney General of Nunavut submits that the answer to Questions 1(a) – (g) is no. Each of the proposed changes represents a diminishment of the powers of Senators, and could impair the independence of the Senate. Questions 2 and 3 must be answered in the negative because the proposed statutory frameworks represent a change to the manner of selection of Senators, and requires the consent of 7 of the provinces having at least fifty percent of the population of Canada. The answer to Questions 5(a) - (c) is no, and the answer to question 6 is yes. Abolition of the Senate represents a significant change to Canada's system of parliamentary democracy which requires the consent of the legislatures of each of the Provinces of Canada.

Dated this 27th day of August, 2013.

Norman M. Tarnow Adrienne E. Silk

PART VI – TABLE OF AUTHORITIES

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Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3.

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Letter from Premier Blakeney, as Chairman of the Annual Premiers Conference, addressed to Prime Minister Trudeau, August 22, 1978 (AGN Record, Tab 3).

Federal Document, Federal-Provincial Conference of First Ministers, Statement by O.E. Lang, Federal Minister of Justice to Special Joint Committee on the Constitution August 31, 1978 re, the Constitutional Amendment Bill,(Bill C-60) (AGN Record, Tab 4).

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January 11-12, 1978 and should have read "January 11-12, 1979") (AGN Record, Tab 2).

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Melvin H. Smith, Q.C., *The Renewal of the Federation, A British Columbia Perspective*, May, 1991 (AGN Record, Tab 13).

Opening Statement by the Honourable Peter Lougheed, Premier of Alberta, at the Federal-Provincial Conference of First Ministers on the Constitution, November 1981 (AGN Record, Tab 10).

Federal – Provincial Conference of First Ministers on the Constitution, Summary Record of Proceedings, Nov. 2 – 5, 1981 (AGN Record, Tab 11).

Speaking Notes for Speech by the Honourable William R. Bennett, Premier of British Columbia, to the Canada West Foundation/Vancouver Board of Trade Conference, Nov. 23, 1981 (AGN Record, Tab 12).

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Presentation by Government of the Northwest Territories to House of Commons Special Committee re: Meech Lake, 1990, Record of the AG of the Northwest Territories, at p.56

Presentation by the Government of the Northwest Territories to the Senate and House of Commons Special Joint Committee re: Amending the Constitution, 1991, Record of the AG of the Northwest Territories, at pp. 64 – 65.