

IN THE SUPREME COURT OF CANADA

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

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

FACTUM

ATTORNEY GENERAL OF ALBERTA

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

ATTORNEY GENERAL OF ALBERTA

Constitutional Law Branch
9833 - 109 Street, 4th Floor
Edmonton, AB, T5J 3S8
Telephone: (780) 427-0072
Facsimile: (780) 425-0307
Email: margaret.unsworth@gov.ab.ca

Margaret Unsworth, Q.C.

Randy Steele

Donald Padget

Counsel for the Attorney General of Alberta

GOWLING LAFLEUR HENDERSON LLP

Barristers and Solicitors
160 Elgin Street, 26th Floor
Ottawa, ON K1P 1C3
Telephone: (613) 786-0139
Facsimile: (613) 563-9869
Email: henry.brown@gowlings.com

Henry S. Brown, Q.C.

Ottawa Agents for the Counsel for
Attorney General of Alberta

DEPARTMENT OF JUSTICE CANADA
 234 Wellington Street, Room 1161
 Ottawa, ON K1A 0H8
 Telephone: (613) 957-4763
 Facsimile: (613) 954-1920
 Email: robert.frater@justice.gc.ca

Robert J. Frater
Christopher M. Rupar
Warren J. Newman
 Counsel for the Attorney General of Canada

HUNTER LITIGATION CHAMBERS LAW
CORPORATION
 1040 Georgia Street West, Suite 2100
 Vancouver, BC V6E 4H1
 Telephone: (604) 891-2401
 Facsimile: (604) 647-4554
 Email: jhunter@litigationchambers.com

John J. L. Hunter, Q.C.
Amicus Curiae

PROFESSOR DANIEL JUTRAS
 University of McGill
 3644 Peel Street
 Montreal, QC H3A 1W9
 Telephone: (514) 398-6604
 Facsimile: (514) 398-4659
 Email: daniel.jutras@mcgill.ca

Amicus Curiae

SUPREME ADVOCACY LLP
 Barristers and Solicitors
 397 Gladstone Avenue, Suite1
 Ottawa, ON K2P 0Y9
 Telephone: (613) 695-8855
 Facsimile: (613) 695-8580
 Email: mfmajor@supremeadvocacy.ca

Marie-France Major
 Counsel for the *Amicus Curiae*
 John J.L. Hunter, Q.C.

SUPREME ADVOCACY LLP
 Barristers and Solicitors
 397 Gladstone Avenue, Suite1
 Ottawa, ON K2P 0Y9
 Telephone: (613) 695-8855
 Facsimile: (613) 695-8580
 Email: mfmajor@supremeadvocacy.ca

Marie-France Major
 Counsel for the *Amicus Curiae*
 Professor Daniel Jutras

**ATTORNEY GENERAL OF PRINCE EDWARD
ISLAND**

STEWART MCKELVEY

Barristers and Solicitors

65 Grafton Street

PO Box 2140, Central Station

Charlottetown, PE C1A 8B9

Telephone: 902-629-4549

Facsimile: 902-566-5283

Email: scampbell@stewartmckelvey.com

D. Spencer Campbell, Q.C.

Rosemary Scott, Q.C.

Jonathan M. Coady

Counsel for the Attorney General of Prince
Edward Island

GOWLING LAFLEUR HENDERSON LLP

Barristers and Solicitors

160 Elgin Street, 26th Floor

Ottawa, ON K1P 1C3

Telephone: (613) 786-0139

Facsimile: (613) 563-9869

Email: henry.brown@gowlings.com

Henry S. Brown, Q.C.

Ottawa Agents for the Counsel for the
Attorney General of Prince Edward Island

ATTORNEY GENERAL OF MANITOBA

Constitutional Law Branch

405 Broadway, Suite 1205

Winnipeg, MB R3C 3L6

Telephone: (204) 945-0717

Facsimile: (204) 945-0053

Email: heather.leonoff@gov.mb.ca

Ms. Heather S. Leonoff, Q.C.

Counsel for the Attorney General of Manitoba

GOWLING LAFLEUR HENDERSON LLP

Barristers and Solicitors

160 Elgin Street, 26th Floor

Ottawa, ON K1P 1C3

Telephone: (613) 786-0139

Facsimile: (613) 563-9869

Email: henry.brown@gowlings.com

Henry S. Brown, Q.C.

Ottawa Agents for the Counsel for the
Attorney General of Manitoba

ATTORNEY GENERAL OF SASKATCHEWAN

Constitutional Law Branch

1874 Scarth Street, Suite 820

Regina, SK S4P 4B3

Telephone: (306) 787-8385

Facsimile: (306) 787-9111

Email: graeme.mitchell@gov.sk.ca

Mr. Graeme G. Mitchell Q.C.

Counsel for the Attorney General of
Saskatchewan

GOWLING LAFLEUR HENDERSON LLP

Barristers and Solicitors

160 Elgin Street, 26th Floor

Ottawa, ON K1P 1C3

Telephone: (613) 786-0139

Facsimile: (613) 563-9869

Email: henry.brown@gowlings.com

Henry S. Brown, Q.C.

Ottawa Agents for the Counsel for the
Attorney General of Saskatchewan

ATTORNEY GENERAL OF NOVA SCOTIA

5151 Terminal Road, 4th Floor
 P.O. Box 7, Central Station
 Halifax, NS B3J 2L6
 Telephone: (902) 424-4024
 Facsimile: (902) 424-1730
 Email: goresea@gov.ns.ca

Mr. Edward A. Gores, Q.C.

Counsel for the Attorney General of Nova
 Scotia

GOWLING LAFLEUR HENDERSON LLP

Barristers and Solicitors
 160 Elgin Street, 26th Floor
 Ottawa, ON K1P 1C3
 Telephone: (613) 786-0139
 Facsimile: (613) 563-9869
 Email: henry.brown@gowlings.com

Henry S. Brown, Q.C.

Ottawa Agents for the Counsel for the
 Attorney General of Nova Scotia

ATTORNEY GENERAL OF NEW BRUNSWICK

Legal Services Branch
 Centennial Building, Room 447
 P.O. Box 6000
 Fredericton, NB E3B 5H1
 Telephone: (506) 453-2222
 Facsimile: (506) 453-3275
 Email: david.eidt@gnb.ca
 denis.theriault@gnb.ca

David E. Eidt**Denis G. Thériault**

Counsel for the Attorney General of New
 Brunswick

GOWLING LAFLEUR HENDERSON LLP

Barristers and Solicitors
 160 Elgin Street, 26th Floor
 Ottawa, ON K1P 1C3
 Telephone: (613) 786-0139
 Facsimile: (613) 563-9869
 Email: henry.brown@gowlings.com

Henry S. Brown, Q.C.

Ottawa Agents for the Counsel for the
 Attorney General of New Brunswick

**ATTORNEY GENERAL OF THE NORTHWEST
 TERRITORIES**

PO Box 1320, Station Main
 Yellowknife, NT X1A 2L9
 Telephone: (867) 920-3248
 Facsimile: (867) 873-0234
 Email: brad_patzer@gov.nt.ca

Mr. Bradley E. Patzer

Counsel for the Attorney General of the
 Northwest Territories

GOWLING LAFLEUR HENDERSON LLP

Barristers and Solicitors
 160 Elgin Street, Suite 2600
 Ottawa, ON K1P 1C3
 Telephone: (613) 233-1781
 Facsimile: (613) 563-9869
 Email: brian.crane@gowlings.com

Brian A. Crane, Q.C.

Ottawa Agents for the Counsel for the
 Attorney General of the Northwest Territories

ATTORNEY GENERAL OF NUNAVUT
 Legal & Constitutional Law Division
 PO Box 1000, Station 500
 Iqaluit, NS X0A 0H0
 Telephone: (867) 975-6332
 Facsimile: (867) 975-6349
 Email: ntarnow@gov.nu.ca

Mr. Norman M. Tarnow
 Counsel for the Attorney General of Nunavut

GOWLING LAFLEUR HENDERSON LLP
 Barristers and Solicitors
 160 Elgin Street, Suite 2600
 Ottawa, ON K1P 1C3
 Telephone: (613) 233-1781
 Facsimile: (613) 563-9869
 Email: brian.crane@gowlings.com

Brian A. Crane, Q.C.
 Ottawa Agents for the Counsel for the
 Attorney General of Nunavut

BERNARD, ROY & ASSOCIÉS
 Barristers and Counsels
 1 Notre-Dame Street East, Suite 800
 Montréal, QC H2Y 1B6
 Telephone: (514) 393-2336 Ext: 51467
 Facsimile: (514) 873-7074
 Email: jybernard@justice.gouv.qc.ca

Jean-Yves Bernard
Marise Visocchi
 Counsel for the Attorney General of Québec

NOËL & ASSOCIÉS
 Barristers and Counsels
 111 Champlain Street
 Gatineau, QC J8X 3R1
 Telephone: (819) 771-7393
 Facsimile: (819) 771-5397
 Email: p.landry@noelassocies.com

Pierre Landry
 Agents for the Counsel for the Attorney General
 of Québec

ATTORNEY GENERAL OF BRITISH COLUMBIA
 1001 Douglas Street
 P.O. Box 9280 Stn Prov Govt
 Victoria, BC V8W 9J7
 Telephone: (250) 356-5597
 Facsimile: (250) 356-9154
 Email: nancy.ag.brown@gov.bc.ca

Nancy E. Brown
 Counsel for the Attorney General of British
 Columbia

BURKE-ROBERTSON
 Barristers and Solicitors
 441 Maclaren Street, Suite 200
 Ottawa, ON K2P 2H3
 Telephone: (613) 236-9665
 Facsimile: (613) 235-4430
 Email: rhouston@burkerobertson.com

Robert E. Houston, Q.C.
 Ottawa Agents for the Counsel for the
 Attorney General of British Columbia

ATTORNEY GENERAL OF ONTARIO

720 Bay Street, 7th Floor
 Toronto, ON M5G 2K1
 Telephone: (416) 326-4454
 Facsimile: (416) 326-4015
 Email: Michel.Helie@ontario.ca

Michel Y. Hélie**Joshua Hunter**

Counsel for the Attorney General of Ontario

BURKE-ROBERTSON

Barristers and Solicitors
 441 Maclaren Street, Suite 200
 Ottawa, ON K2P 2H3
 Telephone: (613) 236-9665
 Facsimile: (613) 235-4430
 Email: rhouston@burkerobertson.com

Robert E. Houston, Q.C.

Ottawa Agents for the Counsel for the
 Attorney General of Ontario

**ATTORNEY GENERAL OF NEWFOUNDLAND
 AND LABRADOR**

4th Floor, East Block
 Confederation Bldg.
 St. John's, NL A1B 4J6
 Telephone: (709) 729-2869
 Facsimile: (709) 729-2129

Barbara Barrowman

Counsel for the Attorney General of
 Newfoundland and Labrador

BURKE-ROBERTSON

Barristers and Solicitors
 441 Maclaren Street, Suite 200
 Ottawa, ON K2P 2H3
 Telephone: (613) 236-9665
 Facsimile: (613) 235-4430
 Email: rhouston@burkerobertson.com

Robert E. Houston, Q.C.

Ottawa Agents for the Counsel for the
 Attorney General of Newfoundland and
 Labrador

**THE HONOURABLE SERGE JOYAL,
 SENATOR, PC**

250 East Block
 Parliament of Canada
 Ottawa, ON K1A 0A4
 Telephone: (613) 943-0434
 Facsimile: (613) 943-0441
 Email: joyals@sen.parl.gc.ca

Intervener

HEENAN BLAIKIE LLP

Barristers and Counsels
55 Metcalfe Street, Suite 300
Ottawa, ON K1P 6L5
Telephone: (613) 236-7908
Facsimile: (866) 296-8395
Email: mpower@heenan.ca

Mark C. Power

Jennifer Klinck

Perri Ravon

Sébastien Grammond, Ad.E.

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

COX & PALMER

Barristers and Counsels
644 Main Street, Suite 500
Moncton, NB E1C 1E2
Telephone: (506) 856-9800
Facsimile: (506) 856-8150
Email: cmichaud@coxandpalmer.ca

Christian E. Michaud

Serge Rousselle

Counsel for the Intervener
Société de l'Acadie du Nouveau-Brunswick inc.

HEENAN BLAIKIE LLP

Barristers and Counsels
55 Metcalfe Street, Suite 300
Ottawa, ON K1P 6L5
Telephone: (613) 236-8071
Facsimile: (613) 236-9632
Email: pravon@heenan.ca

Perri Ravon

Ottawa Agents for the Counsel for the Intervener
Société de l'Acadie du Nouveau-Brunswick inc.

STIKEMAN ELLIOTT LLP

Barristers and Solicitors
50 O'Connor Street, Suite 1600
Ottawa, ON K1P 6L2
Telephone: (613) 566-0546
Facsimile: (613) 230-8877
Email: nmchaffie@stikeman.com

Nicholas McHaffie

Counsel for the Intervener
The Honourable Anne C. Cools, Senator, P.C.

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PART I

FACTS

Overview

1. Formation of the Senate was a fundamental condition of Confederation as protector of regional and provincial interests. The 1865 Confederation debates are replete with reference to the importance of the Upper House yet reform of the Senate has been at topic of discussion for almost as long. Since 1874, there have numerous Reports, Bills in either the Senate or the House of Commons and a Reference to the Supreme Court of Canada. Proposals have ranged from various reforms to abolition. This current Reference is the latest in that ongoing discussion.

Reference re Authority of Parliament in Relation to the Upper House (Upper House Reference), [1980] 1 S.C.R. 54 pages 66-67 [AG Canada Authorities, Tab 18]

Stilborn, John, Bill C-7 in *Historical Perspective: An Analysis in light of the work of the Senate and major Reform proposals* [AG Canada Record, Vol. XVII, Tab 106]

2. This Reference is not about the wisdom of proceeding with Senate reform but rather is about the procedure necessary to effect reform. This Reference asks for the Court's advice on issues affecting changes of tenure, selection, and property qualifications. It also asks for the amending formula appropriate to abolish the Senate.

3. The position of the Attorney General of Alberta (Alberta) is that consultative legislation can be passed unilaterally by the federal government. Alberta further takes the position that the proposed amendments respecting tenure cannot be undertaken by Parliament unilaterally and that to abolish the Senate, the general seven-fifty formula (general 7/50) must be used. Alberta takes no position on the proposed amendments for property qualifications of Senators.

Facts

4. Alberta adopts the facts at paragraphs 5 – 72 of the factum of the Attorney General of Canada and adds the following.

5. Alberta's *Senatorial Selection Act*, passed in 1989, sets out a detailed process for selection of nominees for Senate. Section 3(1) of the Act provides that the Government of Alberta shall submit the names of those selected as Senate nominees to the Queen's Privy Council for Canada.

Senatorial Selection Act, RSA 2000, c.S-5 [AG Canada Authorities, Tab 26]

6. Alberta has held four Senate nominee elections. The first two, in 1989 and 1998, were held in conjunction with province wide municipal elections. In 1989, Stan Waters received 41.7% of the vote to finish in first place. His name was put forward as nominee from Alberta to fill a Senate vacancy and, on June 11, 1990, he was appointed to the Senate. The selection process in 1998 resulted in the names of the top two finishers being put forward as nominees to fill two Senate vacancies. Ted Morton and Bert Brown, the top two finishers, were not appointed to the Senate but two others were.

McCormick, Peter, *An Expert Opinion on Bill C-7* [AGC Record, Vol. XVII, Tab 107, p.167]

Manfredi, Christopher, *An Expert Opinion on the Possible Effects of Bill C-7* [AGC Record, Vol. XVI, Tab 105, p.28]

Cardinal, Linda, *Report* [Fédération des Communautés Francophone et Acadienne du Canada Proposed Record, Tab A, pp. 69-70]

7. The next two of Alberta's Senate nominee elections were in 2004 and 2012 in conjunction with provincial elections. In 2004, Bert Brown and Betty Unger finished in first and second place respectively. Their names were put forward as Senate nominees from Alberta. They were not appointed in 2005, when three senators were appointed who were not selected from Alberta's list of nominees, but Bert Brown was subsequently appointed in 2007 and Betty Unger in January of 2012. The 2012 election of nominees resulted in the top two finishers, Doug Black and Scott Tannis, being appointed to the Senate in 2013.

McCormick, *supra*

Manfredi, *supra*

Cardinal, *supra*

8. In addition to those summoned after being placed on Alberta's lists of nominees, a total of five other Albertans who were not on the lists have also been summoned to the Senate since 1989.

PART II

POSITION ON THE REFERENCE

9. The questions to be answered by this Court are set out in Order in Council P.C.2013-70 dated February 1, 2013. The Questions posed by the Court, and the answers of the Attorney General of Alberta can be summarized as follows:

Can the Parliament of Canada, under s.44 of the *Constitution Act, 1982*, unilaterally change term limits for Senators, including making those terms renewable or retrospective? (Question 1)

Answer: No. It is the position of Alberta that provincial participation is required to effect these changes.

Can the Parliament of Canada under s.91 of the *Constitution Act, 1867* or s.44 of the *Constitution Act, 1982* pass legislation that provides a means of directly consulting the population of each province and territory similar to Bill C-20? Can the Parliament of Canada under s.91 or s.44 pass legislation establishing a framework for provinces and territories to consult their populations similar to Bill C-7? (Questions 2 and 3)

Answer: Yes.

Can the Senate be abolished by the general amending procedure (“7/50” formula) set out in s.38 of the *Constitution Act, 1982*, or is it necessary to resort to the “unanimity” formula found in s.41? (Questions 5 & 6)

Answer: The general amending formula in s.38 of the *Constitution Act, 1982* can be used.

Can the Parliament of Canada under s.44 of the *Constitution Act, 1982* repeal s.23(3) and s.23(4) of the *Constitution Act, 1867* regarding property qualifications for Senators?

Answer: Alberta takes no position on this Reference question.

PART III

ARGUMENT

10. When approaching and interpreting the provisions of Part V of the *Constitution Act, 1982*, it is important to keep in mind that the structure and functions of the Senate, the Canadian Parliament's upper house, are woven into our federal fabric. Therefore, constitutional changes affecting the Senate also affect federalism. The logic of the Constitution of Canada reflects the need to prevent alteration of the federal structure of Canada without the consent of the appropriate governmental actors, while leaving the various governmental actors free to alter the non-federal aspects of the constitutional structure. Non-federal aspects are those that do not interfere with the interconnected and deliberately balanced division of each governmental power - executive, legislative, and judicial.

11. Against this background, it is apparent that a central parliament, whether unitary or federal, can have broad legitimate concerns about representation in the upper house of that central parliament. Those concerns may not engage issues about federalism and therefore need not be sheltered in constitutional provisions that remove the subject matter from the central parliament's exclusive legislative authority. In this regard, who is recommended to sit in an upper house from a particular jurisdiction is not only a matter that is inherently federal in nature. Rather, it is a legitimate and appropriate concern of any bicameral legislature.

Nova Scotia (AG) v Nova Scotia (Legislative Council), [1928] AC 107 (PC) [Alberta Authorities, Tab 2]

12. Imposing a new duty on the Privy Council of Canada to merely consider particular individuals for recommendation for summons to the Senate is an internal matter within the exclusive governmental competencies of Canada's Executive and the Parliament of Canada. The imposition of the new duty does not affect the federal fabric of Canada. A legislative change of this nature is in pith and substance concerned with the internal functioning of the federal executive and can be made by Parliament acting alone.

13. On the other hand, altering the length of Senate terms (both prospectively and retrospectively), or providing for Senate reappointments following the expiry of a shortened term expands the power of the federal executive to control membership in the Senate. This allows the federal executive to adjust the political and partisan nature of membership in the Senate over a shorter period of time to respond to issues of immediate concern for the federal government to the detriment of one or more of Canada's regions or provinces, and thereby modifies Canada's federal structure. This exceeds the scope of s.44 of the *Constitution Act, 1982* because its purpose and effect is to modify the fabric of the constitution in a way that effectively alters the federal balance of Confederation. This kind of effect on Canada's federal structure requires provincial participation in the amending process under Part V of the *Constitution Act, 1982*.

A. Parliament's Jurisdiction to Enact Consultation Legislation

14. When the constitutional responsibility for advice in relation to Senate selection resides with an executive council, the criteria for advice and the associated recommendations is a legitimate concern of the executive council.

15. In Canada, the Prime Minister, as a member of the Privy Council of Canada, is charged by Order in Council with making recommendations concerning Senate appointments. These recommendations are the special prerogative of the Prime Minister. The Prime Minister's recommendations presumably reflect consideration of the qualifications set out in s.23 of the *Constitution Act, 1867*.

P.C.1935-3374 (October 25, 1935) [AGC Record, Vol. XIV, Tab 103]

16. Other than the constraint imposed by a consideration of the qualifications in s.23 of the *Constitution Act, 1867*, the Prime Minister has complete discretion under the prerogative to consider other factors the Prime Minister might consider relevant. Considering a candidate chosen by election for recommendation falls within the scope of that prerogative. Requiring the Prime Minister to consider such a candidate may impose a new duty on the Prime Minister, but it does not affect law in relation to the Senate or the office of the Governor General.

17. Part V of the *Constitution Act, 1982*, governs amendment to the “Constitution of Canada” as defined by s.52 of that Act. Bills C- 20 and C-7 do not purport to, and do not in purpose or effect, amend provisions of the Constitution of Canada as defined by s.52 of the *Constitution Act, 1982* and, therefore, they are not subject to the requirements of Part V of that Act.

18. Bill C-20, titled *An Act to provide for consultations with electors on their preferences for appointment to the Senate (Senate Appointment Consultations Act)*, provides for federal consultation on Senate nominees from a province when a Senate vacancy occurs. Once the consultation occurs, the Chief Electoral Officer is charged with maintaining a list of the Senate nominees selected by the population (s.51), submitting that list to the Prime Minister and publishing it in the Canada Gazette (s.58).

19. Bill C-7, titled *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits (the Senate Reform Act)*, provides, in part, a framework for the provincial or territorial selection of Senate nominees. Section 3 of the Bill states that if a province or territory has legislation substantially in accordance with the framework then, when considering names to recommend to the Governor General to be summoned as Senators, the Prime Minister must consider names from the current list of nominees selected for that province or territory.

20. The framework in Bill C-7 is a schedule to the Act and sets out the details of an election of Senate nominees. Section 1 of the framework provides that “Senators to be appointed for a province or territory should be chosen from a list of nominees submitted by the government of the province or territory.” In brief then, Bill C-7 requires the Prime Minister to consider provincially selected nominees and the names he or she proposes to the Governor General should (but not must) include those elected.

21. Simply stated, s.3 of the federal Bill C-7 provides for consideration of nominees selected under the authority of provincial legislation that is substantially in accordance with the framework set out in the Bill. Bill C-7 recognizes that the Provinces have the legislative competence to enact legislation to provide for the consultation of the

provincial population, and that Parliament can require the Prime Minister to consider the results of the election conducted under the authority of provincial legislation.

22. The question of the validity of Alberta's *Senatorial Selection Act*, RSA 2000, c. S-5 is not directly raised by the Questions referred to this Court. Nevertheless, Alberta's *Senatorial Selection Act* may be characterized as being substantially in accordance with the scheme identified in the schedule to Bill C-7 and may serve to illustrate how Bill C-7 might operate. It is in this light, that Alberta submits that the recognition of provincial authority to enact the legislation substantially in accordance with the federal framework does not expose a constitutional infirmity. Rather, it provides an example of cooperative federalism.

23. It is Alberta's view that Alberta has the legislative authority to enact the *Senatorial Selection Act*, under the legislative power granted to the Provinces in s. 92 of the *Constitution Act, 1867*, and under s. 45 of the *Constitution Act, 1982*, to the extent that any portion of the Act may be characterized as being in pith and substance in relation to the organs of the Provincial Government and the constitution of the Province.

24. In summary, Bill C-20 sets out a process for federal consultation on Senate nominees from a province when a Senate vacancy occurred. The Chief Electoral officer is tasked with letting the Prime Minister know the results of this consultation (s.58). Bill C-7 sets out a process allowing provincial or territorial consultation on Senate nominees and states that the Prime Minister must consider names from the current list of nominees selected for that province or territory when recommending names to the Governor General. In neither case is the Prime Minister constrained on recommendations nor is the Governor General constrained on appointment.

25. Nothing in Bill C-20 or Bill C-7 alters the constitutional authority of the Governor General to summon qualified people to the Senate. Under the proposed Bills, the Governor General remains free to summon qualified people to the Senate pursuant to s.24 of the *Constitution Act, 1867*. Neither the proposed Bills nor s.24 require the Governor General to take the advice regarding those to be summoned to the Senate. In addition, there is no constitutional restraint upon imposing statutory conditions on the Privy Council when it fulfills its obligation under s.11 of the *Constitution Act, 1867* "to aid and

advise in the Government of Canada”. Consequently, a constitutional amendment is not required to enact the proposed legislation to impose a new duty on the Prime Minister or to provide the mechanism that will allow the Prime Minister to perform the new duty. The proposed federal legislation, whether for federal selection or provincial selection, does not alter or amend any provision of the Constitution of Canada as defined by s.52 of the *Constitution Act, 1982* and, therefore, does not require recourse to the amending provisions in Part V of that Act.

26. There is no factual basis for an argument that the Bills lead to election of Senators or lead to a convention where the Governor General must appoint those selected. These are hypothetical concerns not borne out by the wording of the Bills. In addition, the experience in Alberta does not support such an interpretation.

27. Alberta has held four Senate nominee elections since the *Senatorial Selection Act* was proclaimed in force in 1989. Ten names have been put to the Queen’s Privy Council of Canada and five have been summoned to the Senate. In addition, there have been five Albertans summoned to the Senate who were not selected by the population.

Manfredi, *supra*

McCormick, *supra*

28. The practical experience of the Senate selection process in Alberta demonstrates that the Governor General is not constrained to summons only those elected. The Governor General may consider an untold number of factors in selecting Senators and the fact that a person has been selected by their regional or provincial population is just one of those factors.

29. The consultation proposals enhance public participation but do not bind the Governor General to summon or the Prime Minister to recommend as both remain independent legal actors when it comes to Senate appointments. They are not obliged to follow the results of a selection process. No process can form to bind the Governor General to appoint nominees that were chosen by popular consultation in each Province. Just as the Governors General are not obliged to follow the advice of the Queen’s Privy

Council recommending such an appointment, they need not follow the result of the popular consultation. In fact, Governors General are twice removed from that consultation. Under the proposed legislation, the Privy Council or Prime Minister is not bound to recommend appointment of the nominee with the most support in a popular consultation.

Reference re Constitution Act, 1867, ss.26, 27 & 28, [1991], 4 WWR 97 (BCCA) para 66 [Alberta Authorities, Tab 4]

Le Blanc v. Canada, (1991) 80 DLR (4th) 641 (OntCA) p. 647 [Alberta Authorities, Tab 1]

30. Consultation of the population by means of the proposed election processes for the purpose of identifying Senate nominees is not a distinct or enumerated subject matter of legislative competence in the Constitution of Canada, but rather it is governed by s.91 of the *Constitution Act, 1867*, which permits Parliament to enact such legislation without any need to amend the Constitution of Canada. The Bills, in pith and substance, fall within the scope of Parliament's legislative competence under s.91 of the *Constitution Act, 1867* and are *intra vires* Parliament.

31. The pith and substance of the Bill C-20 and Bill C-7 is determined by looking at the purpose and the effect of the proposed Bills. The main purpose and the intended effect of the Bills will be the imposition on the Prime Minister of a duty to consider the preferences of the population as expressed in the results of the election, before performing the executive duty of making recommendation to the Governor General. In addition the Bills' purposes and intended effects include the establishment of a process for, and the consultation of, the population of Canada or a province to determine, which candidate the population would prefer as a Senator. In short, the proposed legislation simply establishes a new executive duty and provides the means to perform that duty.

32. The proposed selection processes are essentially referendum processes which seek the views of citizens on their preference for Senate nominees and are therefore constitutionally valid.

Although . . . the results of a referendum have no direct role or legal effect in our constitution scheme, a referendum undoubtedly may provide

a democratic method of ascertaining the views of the electorate or on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people

Reference Re Secession of Quebec (Secession Reference)[1998] 2 S.C.R. 217, para 87 [AGC Authorities, Tab 21]

33. In addition to Parliament's legislative competence under s.91 of the *Constitution Act, 1867*, Parliament has exclusive authority under s.44 of the *Constitution Act, 1982* to enact laws "amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons" excluding those matters specifically listed in s.42.

34. It is apparent that the matters excluded in s.44 from Parliament's exclusive authority are not matters that relate to imposing new duties on members of the Privy Council. It is also apparent that s.24 of the *Constitution Act, 1867* would not be altered by the proposed Bills, and the method of selecting Senators would remain in law subject to convention at the discretion of the Governor General. In any event, there is no evidence that the proposed legislation will lead to the Governor General ignoring convention.

35. The express grant of legislative power in s.44 must be interpreted as providing some substantive scope to Parliament's exclusive power to make laws amending the Constitution of Canada. To the extent that the imposition of duty on a member of the Privy Council might be construed as constituting an amendment of the Constitution of Canada, none of the express exclusions from s.44 suggest that Parliament would be unable to impose the new duty contemplated by the proposed Bills. Given the express grant of legislative power in relation to the Constitution of Canada as defined in s.52 of the *Constitution Act, 1982*, and the scope of the residuary power of Parliament under s.91 of the *Constitution Act, 1867*, there is no doubt that the proposed Bills are *intra vires* Parliament.

36. In short, the subject matter of the proposed Bills is in relation to the executive government of Canada. This subject matter is not listed in either ss.91 or 92 of the

Constitution Act, 1867 and legislative competence is not expressly granted to either Parliament or the Legislatures. However, s.91 of the *Constitution Act, 1867*, expressly includes a residuary power, which includes the unlisted legislative subject matter of the executive government of Canada, of which the Privy Council and its members are part. The proposed Bills, properly characterised, are in relation to the executive government of Canada and fall within the legislative competence of Parliament. They do not alter or amend the Constitution of Canada as defined by s.52 of the *Constitution Act, 1982*, and cannot be characterized as amendments. Moreover, even if they could be characterized as amending the Constitution of Canada, they would fall within the legislative competence of Parliament under s.44 of that Act to enact laws amending the Constitution of Canada in relation to the Executive Government of Canada.

B. Tenure

37. The current long tenure for Senators is integral to the federal and overall central role of the Senate and Senators such that changing tenure requires the substantial support of Provinces. Parliament may not unilaterally impose Senate term limits, make terms renewable or apply them retrospectively. Constitutionally requiring more than Parliament's own approval of term limits merely means that this fundamental aspect of Senate reform will require discussion and negotiation with Provinces generally, just as they were involved in the initial Confederation deal.

38. Shorter terms are contrary to the original negotiated terms of Confederation that aimed to protect provincial interests in the Federal Parliament and this alone requires that a substantial majority of Provinces support such a change to the original bargain. Shortening Senate tenure is a fundamental change to Senators and the Senate that affects the nature of that office, the appointment, mode of selection and reduces the independence and therefore power of the Senate.

39. This Court noted in the 1980 *Upper House Reference* that tenure is of fundamental importance in relation to the Senate. At some point a reduction in tenure might impair the functioning of the Senate to provide sober second thought and result in a change to the essential character of the Senate:

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. However, to answer this question we need to know what change of tenure is proposed. (page 76)

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. (page 77)

Upper House Reference, supra at pp 76-77 [AGC Authorities, Tab 18]

Also see: Manfredi, *supra* [AGC Record, Vol. XVI, Tab 105, p. 24, para 37]

40. The view of Dr. Manfredi on the importance of the term of appointment is endorsed by many other authorities. According to the Honourable George Brown in 1865, a short term would place Senators entirely under the influence of the executive to obtain its favour for reappointment. Other modern experts before Senate committees have been of the view that a short term would make Senators influenced by personal considerations for their own future and give them reason to take decisions favourable to the current government in the hopes of occupying another federal position. Shorter terms would mean less consideration of regional interests and input when exercising the powers of the Senate and these regional interests and input are primary reasons for Senate independence.

Parliamentary Debates on the subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada, p.90 (1865), George Brown, [AG Quebec Record, Vol. I, Tab 2, page 73]

Gibson, Gordon, *Proceedings of the Special Senate Committee on Senate Reform* (September 20, 2006) [AG Quebec Record, Vol. IV, Tab 20, pages 16, 24-25]

McEvoy, John, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs* (March 21, 2007) [AG Quebec Record, Vol. IV, Tab 21, pages 36-37]

41. Alberta submits that such a fundamental change would not only occur with a tenure of one Parliament, which would make the Senate much more like the Commons (yet without election), but would occur when many or most Prime Ministers could be expected to appoint all Senators over the course of two or three Parliaments or approximately eight to twelve years. This would not only give a Prime Minister majority control over both houses of Parliament, but a majority of the Senate could be seeking re-appointment from the Prime Minister. This concern encompasses all the tenure options presented by the Federal Government and should enable this Court to conclude that any tenure option proposed would change the fundamental character and role of the Senate. Absent substantial Provincial support for a change in tenure, the best protection for that role of sober second thought, as noted by this Court, is to provide very long term tenure, such that no further expectation of federal favour or appointment is likely sought or expected.

42. The Senate has full power to review, approve or refuse every federal law and was established so the provinces would have some input and protection for their interests within the federal Parliament. This input and protection is diminished if the Prime Minister effectively has the power to appoint shorter term Senators and they are in fact less independent from the House of Commons and from the executive.

43. This independence achieved from the term of appointment is a foundational aspect to the Senate.

Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an “enhanced majority” to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

Secession Reference, supra, para 77

44. The constitutional principle of federalism also suggests that substantial agreement of the Provinces should be obtained for such a change.

45. Notably, the Senate is the only part of Parliament to have specified fixed tenure in the Constitution, in s.29 of the *Constitution Act 1867*. It was intended to be longer than the House of Commons (and essentially the executive) whose members have up to five year terms renewable by the electorate. With each election, we speak of a new Parliament with many new Members of Parliament while the Senators remain in place to provide independent regional and provincial representation and continuity. Greatly shortening Senate tenure is a fundamental change to the nature of the appointment and role that should require substantial agreement of the Provinces.

46. Senators were provided long tenure for reasons that can be analogized to the reasons for long tenure for judges. Senators are to provide a longer term independent view so they have no necessary incentive to favour any outside power or influence for their later careers. A short fixed term, especially with possibility for reappointment, either to the Senate or to any other federal appointment, changes these incentives and reduces independence.

47. Most recent Prime Ministers have been in office for two or more Parliaments and over eight years. Particularly if a shorter term is chosen and made retroactive, it is entirely possible that a given Prime Minister would be able to appoint all or nearly all Senators by the end of his or her tenure as Prime Minister. This would result in much easier passage of all federal laws by such an executive, including those for which regional input is key and contentious, and could result in much easier passage of all constitutional amendments, especially those requiring only Parliament to pass. This result would be the exact opposite to the intended function of the Senate as a body of sober second thought, a counterweight to the House, with the independence to represent regional interests and input as it reviews the legislative work of the government of the day.

48. The federal executive already has substantial executive control over Senate appointment and increasing that for most federal executives lasting longer than a

Parliament or two would be an undue increase in executive control that should require substantial agreement of the Provinces. The increased likelihood of control by the executive over both Houses of Parliament, made possible by appointment to a shorter Senatorial tenure, cannot be easily reconciled with either the principle of Federalism, or, to use the terms of Bill C-7, with a modern democracy.

Bill C-7, preamble, paras 1 and 6 [AG Canada Record, Vol. I, Tab 2, p.11]

49. The federal executive was not intended to have such direct and frequent control and influence over the Senate as the federal executive is only responsible to the House of Commons from which it obtains confidence. For such reasons, only the House can introduce money bills and only it is directly elected. The Senate was intended to have a different but coordinate role.

50. Reduced Senate tenure and true, direct Senate elections have been frequent and key parts of Senate reform proposals, often recommended together, and as such should require substantial agreement of the Provinces. True elections together with limited terms could go a long way to alleviate the concerns about the lack of independence from short term Senators when all the power of appointment is left with the Prime Minister or executive.

C. Amending Formula on Abolishment

51. Alberta agrees with the federal Government that the 7/50 general amending formula in s.38(1) of the *Constitution Act, 1982* can be used to abolish the Senate. Alberta takes no position on the details of the text of the required Constitutional amendment but it must be clear, which may imply removal of all references to the Senate in the Constitution.

52. The answer to which amending formula applies to abolish the Senate, the general amending formula in s.38 or the unanimity formula in s.41 of the *Constitution Act, 1867*, is found within the amending provisions themselves. Reference to other provisions, constitutional principles or to extraneous evidence or history is only necessary to help to

inform consideration of any gaps or ambiguities. The written constitution is to be given primacy.

Secession Reference, supra at para. 53

53. A plain reading of s.42 leads to the conclusion that the general 7/50 formula in s.38, the default procedure for constitutional amendment, is the formula that applies to abolish the Senate. There are no gaps or ambiguities.

54. Section 42 states that any change in “the powers of the Senate and the method of selecting senators” or changes to “the number of members by which a province is entitled to be represented in the Senate and the residence qualifications” require the general 7/50 amending procedure (s.42 and s.38). There are no stated limitations so the powers of the Senate and the method of selecting Senators could be removed and the numbers for each province reduced to none. Absent any prohibition relating to removing all powers from the Senate, or abolition, this must also be the amending formula that applies to abolition and removing all powers.

55. Abolition of the Senate was a known option for Senate reform at the time the amending formulas were adopted and has been the subject of significant debate. A limitation on such an application of the general 7/50 formula could have been added or Senate abolition could have been listed in the unanimity formula to achieve abolition. This was not done.

56. The unanimous consent of Provinces is only required for a very short list of constitutional amendments in s.41 of the *Constitution Act, 1982* and abolition of the Senate is neither explicitly nor implicitly one such amendment. The Senate is not listed among the offices and bodies for which amendment requires the unanimous amending formula yet it would have been a simple and clear matter to have done so. Other bodies that cannot be abolished without unanimous consent include the offices of the Queen and the Governor General.

57. Abolishing the Senate does not affect the “office of the Governor General” or “the office of the Queen.” The “office” of the Governor General is not synonymous with the

“powers” of the Governor General. The office refers to the essential and core constitutional role of the Governor General as representative of our Head of State most notably with regard to prorogation of Parliament, naming a Prime Minister and cabinet and the calling of elections.

58. Five Canadian provinces at one time had upper houses which, since 1867, have been abolished. The Courts have ruled that abolishment of the provincial upper houses does not impact the “office” of the Lieutenant Governor in the province.

Quebec (Procureur General) c. Montplaisir, [1977] RJQ 109 (Cours superieure), p.30 [Alberta Authorities, Tab 3]

R. v. Somers, [1997] 3 W.W.R. 107 (Man. Q.B.) pp. 115-116 [Alberta Authorities, Tab 5]

59. The “office” of the Governor General and the Queen does not require the “power” to summons Senators. The word “powers” was used elsewhere in the Constitution, notably with reference to the “powers of the Senate” which can be changed using the general 7/50 amending formula.

PART IV

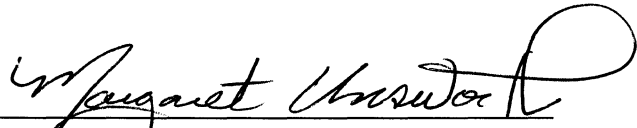
REQUEST FOR PERMISSION TO GRANT ORAL ARGUMENT

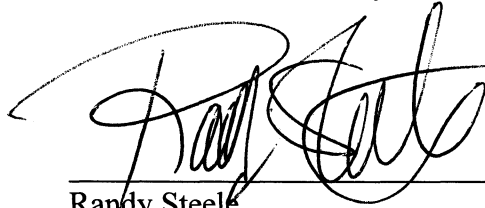
60. As a participant under s.55 of the *Supreme Court Act*, the Attorney General for Alberta requests permission for oral argument; time as granted by the Court.

PART V**ORDER SOUGHT**

61. The Attorney General of Alberta submits that reference question 2, 3, and 5 should be answered in the affirmative while reference questions 1 and 6 should be answered in the negative. The Attorney General of Alberta takes no position on reference question 4.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF
AUGUST, 2013.



Margaret Unsworth, Q.C.
Counsel for the Attorney General of Alberta

Randy Steele
Counsel for the Attorney General of Alberta

Donald Padget
Counsel for the Attorney General of Alberta

PART V**TABLE OF AUTHORITIES**

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