Court File No. 35203

IN THE SUPREME COURT OF CANADA

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

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

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PART I – OVERVIEW AND FACTS

A. Overview

1. The Senate is an important part of Canada's federal system and was a key element of the Confederation bargain. It was designed to play a significant role in reflecting regional interests and protecting minority interests. Significant changes to fundamental features of the Senate therefore affect provincial concerns and require substantial provincial consent under the general amending procedure for constitutional amendments set out in section 38 of the *Constitution Act, 1982*. Section 42 of the *Constitution Act, 1982* sets out specific examples of such significant changes, such as amendments in relation to ***the powers of the Senate*** and ***the method of selecting Senators***. Less significant changes can be made by Parliament unilaterally under the federal unilateral amending procedure set out in section 44 of the *Constitution Act, 1982*. However, certain matters essential to the federal character of our federation, like the continued existence of the Senate in any form, require the consent of every member of the federation.

> *Constitution Act, 1982*, ss. 38, 41-42, and 44, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

2. Unilateral federal legislation that has the effect of creating a *de facto* elected Senate, while maintaining the veneer of an appointed Senate, constitutes a fundamental change to the Confederation bargain that can only be achieved by way of the general 7/50 amending procedure. A purposive interpretation of the ***method of selecting senators*** would not permit an end run around the requirement of substantial (7/50) provincial consent by allowing Parliament to unilaterally authorize indirect elections without such consent.

3. Similarly, unilateral federal changes to term limits must respect the requirement of substantial (7/50) provincial consent where the length of the term is so short as to derogate from the Senate's ability to carry out its role as an independent house of "sober second thought." In

our submission, reducing the tenure of Senators to a term less than nine years would impair that role and affect ***the powers of the Senate***, a matter requiring use of the general 7/50 amending procedure.

4. The highest level of protection applies to the abolition of the Senate because removing the Senate's role as a chamber of sober second thought from the various amending procedures contained in Part V of the *Constitution Act, 1982* is itself an amendment in relation to Part V. Since abolition of the Senate would necessarily eliminate the role of the Senate in future constitutional amendments, any proposal to eliminate the Senate would require an amendment to Part V of the *Constitution Act, 1982*, a matter that requires the unanimous consent of the Senate, the House of Commons, and all ten provincial legislatures (although the Senate's consent can be dispensed with by the House of Commons after 180 days) under paragraph 41(e) of the *Constitution Act, 1982*.

5. Finally, Ontario submits that Parliament can unilaterally remove the property qualifications for Senatorial appointments pursuant to s. 44 of the *Constitution Act, 1982*.

6. The Reference questions relate strictly to which amendment procedure(s) are applicable to effect the proposed Senate reforms. The wisdom or desirability of any of these reforms are irrelevant to this determination. Rather, what is relevant is whether a proposed change is in pith and substance in relation to a matter which engages significant provincial interests or the federal character of the Constitution and thus requires substantial provincial consent to enact.

B. Facts

(1) The Design of the Senate Is an Integral Part of the Confederation Bargain

7. The Senate was a key element of the Confederation bargain. The seats in the Legislative Assembly of the Province of Canada were divided equally between Lower Canada and Upper Canada. By 1867, Upper Canada had a larger and quickly growing population. One of the main

incentives for Upper Canada to enter Confederation was a promise of representation by population in the new federal House of Commons. In return, the other provinces demanded an Upper Chamber in which the various regions of the new country would enjoy roughly equal representation.

8. As the Province of Canada's Attorney-General (West), John A. Macdonald, put it at the Québec Conference:

> With the Queen as our Sovereign, we should have an Upper and a Lower House. In the former the principle of equality should obtain. In the Lower House the basis of representation should be population, not by universal suffrage, but according to the principles of the British Constitution. In the Upper House there should be equality of numbers. The population of Upper Canada is 1,400,000; Lower Canada, 1,200,000; Lower Provinces 750,000. The rate of increase of population in Canada must be greater in future than in the Maritime Provinces. We considered at Charlottetown that Upper Canada should have twenty members, Lower Canada twenty, and the Maritime Provinces twenty. If not politically united they should still have the same aggregate representation.
>
> *Act of Union, 1849* (U.K.), 3&4 Vict., c. 35, ss. 3-4 and 12, Book of Authorities of the Attorney General of Ontario ("Ontario's BOA"), Tab 11
>
> "Discussions in Conference of the Delegates from the Provinces of British North America October 1864" in Joseph Pope, ed., *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell, 1895) at 57, Ontario's Record, Tab 2, p. 20
>
> See also A.A. Macdonald, "Notes on the Quebec Conference, 1864," W.I. Smith, ed. (March 1920) 1 *Cdn. Hist. Rev.* 30 at 31 and 34-36, Ontario's Record, Tab 3, pp. 31 and 34-36

9. The Québec Conference unanimously passed resolutions that there should be an Upper House called the Legislative Council, that each section (Upper Canada, Lower Canada, and the Maritimes) should have 24 members (with four additional members for Newfoundland should it decide to join), that the members of the Legislative Council be appointed by the Crown for life, and that members be British subjects at least 30 years old owning real property worth at least $4,000 and having a net worth of at least $4,000. In writing to Viscount Monck, the Governor

General, to convey the Imperial Government's support for the Confederation project, the Colonial Secretary, Edward Cardswell, noted that this proposed Legislative Council was a "body, so important to the constitution of the Legislature."

> "Minutes of the Proceedings in Conference of the Delegates from the Provinces of British North America October 1864" in Pope, *supra* at 10-15, Ontario's Record, Tab 1, pp. 6-11
>
> "Report of Resolutions adopted at a Conference of Delegates … held at the City of Quebec, October 10, 1864 …" in *Correspondence Respecting the Proposed Union of the British North American Provinces* (London: Queen's Printer, 1867) at 158-59, Ontario's Record, Tab 4, pp. 40-41
>
> Edward Cardswell, "Despatch to Viscount Monck" (3 December 1864) in *Correspondence*, *supra* at 12, Ontario's Record, Tab 5, p. 44

10. When the Québec Resolutions were laid before the Parliament of the Province of Canada for approval, heated debate arose in both houses over the design of the Legislative Council. Again, John A. Macdonald spoke of the importance of the Legislative Council in representing regional interests:

> In order to protect local interests, and to prevent sectional jealousies, it was found requisite that the three great divisions into which British North America is separated, should be represented in the Upper House on the principle of equality. … Accordingly, in the Upper House – the controlling and regulating, but not the initiating, branch, … in the House which has the ***sober second thought*** in legislation – it is provided that each of those three great sections shall be represented equally by 24 members.
>
> Province of Canada, Legislative Assembly, Hansard (6 February 1865) at 35, Ontario's Record, Tab 6, p. 48 [Emphasis added]
>
> See also Province of Canada, Legislative Council, Hansard (6 February 1865) at 21-22, Ontario's Record, Tab 10, pp. 92-93

11. George Brown, the President of the Executive Council, similarly emphasized the central importance of the Upper House to the Confederation bargain:

> Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. ***On no other condition could we have advanced a step***; and, for my part, I am quite willing that they should have it. In maintaining the existing

> sectional boundaries and handing over the control of local matters to local bodies, we recognize, to a certain extent, a diversity of interests; and it was quite natural that the protection of those interests, by equality in the Upper Chamber, should be demanded by the less numerous provinces.
>
> Province of Canada, Legislative Assembly, Hansard (8 February 1865) at 88, Ontario's Record, Tab 7, p. 60 [Emphasis added]

12. The appointed, rather than elected, nature of the Legislative Council was a deliberate choice of the Fathers of Confederation. As the Commissioner of Crown Lands, Alexander Campbell, explained, it was a decision made "after prolonged and anxious discussion, and after a full and careful consideration of the subject." John A. Macdonald made it clear that the Atlantic provinces were generally against an elected Upper House: "I do not think there was a dissenting voice in the Conference against the adoption of the nominative principle, except from Prince Edward Island. The delegates from New Brunswick, Nova Scotia, and Newfoundland, as one man, were in favor of nomination by the Crown."

> Province of Canada, Legislative Council, Hansard (6 February 1865) at 20, Ontario's Record, Tab 10, p. 91
>
> Province of Canada, Legislative Assembly, Hansard (6 February 1865) at 35, Ontario's Record, Tab 6, p. 48

13. As for the Province of Canada, its own Legislative Council was gradually becoming an elected house (appointed members were replaced by elected members as they died or retired) since 1856. Due to the difficulty of getting members of high quality to stand for election, the large constituencies, and the cost of running, many of the Fathers of Confederation had found their experience of an elected Upper House unsatisfactory. In contrast, as John A. Macdonald put it, a truly independent Chamber of limited numbers appointed for life could have a "legitimate and controlling influence in the legislation of the country":

> There would be no use of an Upper House, if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the Lower House. It would be no value whatever were it a mere chamber for

> registering the decrees of the Lower House. ***It must be an independent House, having a free action of its own***, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people.
>
> *An Act to change the Constitution of the Legislative Council by rendering the same Elective*, S.Prov. C. 1856, c. 140, ss. 1-3, 8, 17-19, and 28, Ontario's BOA, Tab 12
>
> Province of Canada, Legislative Assembly, Hansard (6 February 1865) at 36, Ontario's Record, Tab 6, p. 49 [Emphasis added]
>
> See also Province of Canada, Legislative Assembly, Hansard (8 February 1865) at 89-90, Ontario's Record, Tab 7, pp. 61-62

14. In the Legislative Council, an opposition member moved an amendment to have the Upper Canada and Lower Canada members of the proposed federal Legislative Council be elected. After the Premier, Sir Étienne-Paschal Taché, explained the importance of having an appointed Upper House to obtaining agreement about Confederation:

> The gentlemen from the Lower Provinces were opposed to the elective principle, and were strongly for the system of appointments by the Crown. At the same time some among ourselves were not very enamoured with the present system and those who were anxious to retain the elective principle, were obliged to yield. Thus, honourable gentlemen, what is now proposed comes before you, not as the act of the Government of Canada but as the mixed work of the delegates from all the provinces, in the form, as it were, of a treaty.

and the difficulties that had been faced in having an elected Upper House :

> I would especially mention the difficulty which arises from the constituencies being so large … what I am afraid of is, that men who are well qualified for the position, after having gone through one or two elections, in which they have lost one-half, or two-thirds, or the whole of their fortune, are not likely to stand another contest, and we lose the happiness of meeting them here again.

the motion was defeated 42-18. A second motion to make the Legislative Council elected was ruled out of order as a repeat of the first.

> Province of Canada, Legislative Council, Hansard (9 February 1865) at 124-25, Ontario's Record, Tab 11, pp. 111-12

Province of Canada, Legislative Council, Hansard (9 February 1865) at 240-41, Ontario's Record, Tab 12, pp. 129-30

Province of Canada, Legislative Council, Hansard (16 February 1865) at 245, Ontario's Record, Tab 13, p. 144

Province of Canada, Legislative Council, Hansard (20 February 1865) at 317-18, Ontario's Record, Tab 14, pp. 150-51

15. In the Legislative Assembly, the question was never even put to a vote. The Leader of the Opposition, Antoine Dorion, argued in favour of an elected Upper House but was rebuffed by the Solicitor-General (East), Hector Langevin:

> Yet, the honorable member right well knows that the elective principle in the current Legislative Council was merely an experiment, and that in Lower Canada we have become tired of the system, … because the very nature of the system prevents a large number of men of talent, of men qualified in every respect and worthy to sit in the Legislative Council, from presenting themselves for the suffrages of the electors, in consequence of the trouble, the fatigue, and enormous expense resulting from these electoral contests in enormous divisions.

Province of Canada, Legislative Assembly, Hansard (16 February 1865) at 253-56, Ontario's Record, Tab 8, pp. 73-76

Province of Canada, Legislative Assembly, Hansard (21 February 1865) at 373, Ontario's Record, Tab 9, p. 84

16. When delegates from the various provinces met in London to finalize the Confederation proposal, there was some debate about how to allocate the Maritime Senators, given the decision of Prince Edward Island and Newfoundland not to join Confederation; whether the total number of Senators should be fixed; and whether the property qualifications should be eliminated or increased. Ultimately, however, the provisions regarding the Upper House were passed without any substantive changes.

"Report of Discussions London Conference" in Pope, *supra* at 115-22, Ontario's Record, Tab 15, pp. 159-66

"Resolutions adopted at a Conference of Delegates … held at the Westminster Palace Hotel, London, December 4, 1866" in *Correspondence*, *supra* at 164-65, Ontario's Record, Tab 16, pp. 168-69

> "Rough Draft of Conference" in Pope, *supra* at 123-26, Ontario's Record, Tab 17, pp. 170-73

17. As the Bill to give effect to Confederation was being drafted, the Imperial authorities considered the possibility of imposing a renewable ten-year term limit on members of the Legislative Council. Ultimately, however, the drafters found a different tool for resolving conflicts with the House of Commons (the power to appoint a limited number of additional Senators) and returned to the vision of the Fathers of Confederation – an appointed Senate whose members served for life.

> *British North America Bill* [H.L.] (Draft 23 January 1867), clauses 12-17, Ontario's Record, Tab 18, pp. 176-78

> Bill 9, *British North America Bill* [H.L.], clauses 24, 26-27, and 29, Ontario's Record, Tab 19, pp. 186

18. In moving second reading of the Bill, the Colonial Secretary, the Earl of Carnarvon, reiterated the delicate balancing of considerations that led to the design of the Senate:

> Of all problems to be solved in the creation of a Colonial Constitution, none is more difficult than the composition of an Upper House. … There are in my opinion, two broad principles to be kept in view in the creation of a Colonial Chamber: first, that it should be strong enough to maintain its own opinion, and to resist the sudden gusts of popular feeling; secondly, that it should not be so strong that it should be impenetrable to public sentiment, and therefore out of harmony with the other branch of the Legislature. These are conditions difficult under the most favourable circumstances to secure; but they are complicated in this instance by a third, which has been made a fundamental principle of the measure by the several contracting parties, and the object of which is to provide for a permanent representation and protection of sectional interests.

> House of Lords, Hansard, vol. 185, cols. 559-60 (19 February 1867), Ontario's Record, Tab 20, pp. 190-91

PART II – QUESTIONS IN ISSUE

19. Ontario takes the following positions on the questions the Governor General in Council has referred to this Honourable Court for hearing and consideration:

Question 1: In relation to each of the following proposed limits to the tenure of Senators, is it within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the *Constitution Act, 1982,* to make amendments to section 29 of the *Constitution Act, 1867* providing for

(a) a fixed term of nine years for Senators, as set out in clause 5 of Bill C-7, the *Senate Reform Act;*

(b) a fixed term of ten years or more for Senators;

(c) a fixed term of eight years or less for Senators;

(d) a fixed term of the life of two or three Parliaments for Senators;

(e) a renewable term for Senators, as set out in clause 2 of Bill S-4, *Constitution Act, 2006 (Senate tenure)*;

(f) limits to the terms for Senators appointed after October 14, 2006 as set out in subclause 4(1) of Bill C-7, the *Senate Reform Act,* and

(g) retrospective limits to the terms for Senators appointed before October 14, 2008?

Ontario's Position on Question 1:

(a) Yes;

(b) Yes;

(c) No, because such a short term would affect the Senate's ability to act as an independent house of "sober second thought" and thus would be an amendment in relation to the powers of the Senate requiring use of the general amending procedure pursuant to section 42;

(d) Life of three Parliaments: Yes;

Life of two Parliaments: No, because such a short term would affect the Senate's ability to act as an independent house of "sober second thought" and thus would be an

amendment in relation to the powers of the Senate requiring use of the general amending procedure pursuant to section 42;

(e) Yes, if the initial term can itself be enacted unilaterally by Parliament under section 44; otherwise, No, use of the general amending procedure is required pursuant to section 42;

(f) Yes, if the term can itself be enacted unilaterally by Parliament under section 44; otherwise, No, use of the general amending procedure is required pursuant to section 42;

(g) Yes, if the term can itself be enacted unilaterally by Parliament under section 44; otherwise, No, use of the general amending procedure is required pursuant to section 42.

Question 2: Is it within the legislative authority of the Parliament of Canada, acting pursuant to section 91 of the *Constitution Act, 1867,* or section 44 of the *Constitution Act, 1982,* to enact legislation that provides a means of consulting the population of each province and territory as to its preferences for potential nominees for appointment to the Senate pursuant to a national process as was set out In Bill C-20, the *Senate Appointment Consultations Act*?

Ontario's Position on Question 2:

No, such legislation would be an amendment in relation to the method of selecting Senators requiring use of the general amending procedure pursuant to section 42.

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

Ontario's Position on Question 3:

No, establishing such a framework would be an amendment in relation to the method of selecting Senators requiring use of the general amending procedure pursuant to section 42.

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

Ontario's Position on Question 4:

Yes.

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

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

(b) by amending or repealing some or all of the references to the Senate in the Constitution of Canada; or

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

Ontario's Position on Question 5:

(a) No, as use of the unanimous consent procedure is required to remove the Senate's role in the amending procedures set out in Part V of the *Constitution Act, 1982*;

(b) No, as use of the unanimous consent procedure is required to remove the Senate's role in the amending procedures set out in Part V of the *Constitution Act, 1982*;

(c) No, as use of the unanimous consent procedure is required to remove the Senate's role in the amending procedures set out in Part V of the *Constitution Act, 1982*.

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

Ontario's Position on Question 6:

Yes.

PART III – ARGUMENT

A. The Proper Interpretation of the Constitutional Amending Procedures

20. Of the five amending procedures set out in Part V of the *Constitution Act, 1982*, only three are directly relevant to this reference: (1) the unanimity procedure set out in section 41; (2) the general 7/50 amending procedure set out in section 38 and expressly required to be used for certain matters by section 42; and (3) the federal unilateral procedure set out in section 44.

Constitution Act, 1982, *supra*, ss. 38, 41-42, and 44

21. Like the *Charter* set out in Part I of the *Constitution Act, 1982*, the amending procedures set out in Part V should be interpreted in a purposive manner. Just as the *Charter* is intended to protect individual rights and freedoms, a key purpose of Part V is to protect Confederation itself by ensuring at least a substantial number of provinces agree to constitutional amendments that affect provincial interests or the federal character of the Constitution:

> The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of the guarantee; it was to be understood, in other words, ***in the light of the interests it was meant to protect***.
>
> In my view this analysis is to be undertaken, and the purpose of the right or

> freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be a generous ***rather than a legalistic one***, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore … be placed in its proper linguistic, philosophic and historical contexts.
>
> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344 [Emphasis added], Book of Authorities Attorney General of Canada ("Canada's BOA"), Vol. I, Tab 15

22. In determining which types of amendments require use of each amending procedure, this Court should also be guided by the principles of constitutional interpretation it has articulated:

- The Constitution is "a living tree capable of growth and expansion within its natural limits" – as a result, narrow technical approaches are to be eschewed;
- The past plays a critical but non-exclusive role in determining the content of the Constitution – "the tree is rooted in past and present institutions, but must be capable of growth to meet the future."
- Practical considerations must be borne in mind. Courts must be sensitive to "the practical living facts" to which a legislature must respond.
- Arid legal formalism should be rejected in favour of an interpretative stance founded on the principles underlying the whole of our constitutional structure.
- Canada is a federal country and its constitution must be interpreted in a manner that recognizes that "the powers of the different levels of government in a federation are co-ordinate, not subordinate, powers" and that "federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres."

In summary, therefore, this Court should interpret Part V of the *Constitution Act, 1982* in a purposive, rather than a technical, legalistic, manner. It should recognize the federal nature of Canada's constitution and give effect to the purposes for which the provinces were given an express role to play in most constitutional amendments. And it should interpret the various amending procedures as a coherent whole rather than as separate and unrelated provisions.

Edwards v. Canada (A.G.), [1930] A.C. 124 at 136-37 (P.C.), Ontario's BOA, Tab 1

Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158 at 179-82, Ontario's BOA, Tab 7

R. v. Demers, [2004] 2 S.C.R. 489 at paras. 78-79, Ontario's BOA, Tab 2

Reference re Assisted Human Reproduction Act, [2010] 3 S.C.R. 457 at para. 182 (LeBel and Deschamps JJ.), Ontario's BOA, Tab 5

Reference re Securities Act, [2011] 3 S.C.R. 837 at paras. 7 and 54-62, Ontario's BOA, Tab 8

23. Section 52 of the *Constitution Act, 1982* makes it clear that the Constitution is the "supreme law of Canada" which governs both the provinces and the federal government. As Canada is a federal state, "the powers of all legislatures and governments are limited not only by definition but by their relationship to each other. The very nature of the federation requires that the rights and powers of its constituent units be protected." The provinces thus have a significant interest in almost all constitutional amendments. That interest is protected by ensuring that the default procedure for amending the constitution remains the general 7/50 amending procedure.

Constitution Act, 1982, *supra*, s. 52(1)

Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer, 1965) at 45, Canada's Record, Vol. XV, Tab 104, p. 191

24. The interest of the provinces in having a say in constitutional changes would also be protected by a requirement of unanimity. However, unanimity would come at the cost of inflexibility, a cost not warranted in a federation except in respect of matters of the highest

fundamental importance. Only amendments which in pith and substance truly concern the matters of fundamental importance listed in section 41 should require resort to the almost-impossible-to-use unanimity procedure. Conversely, given the important role intended to be played by the Senate as a truly federal institution and not merely as an institution of central government, the federal unilateral amending procedure should be limited to Senate reforms that can fairly be characterized as matters of solely federal concern.

(1) The General 7/50 Amending Procedure

25. The text, context and legislative history of section 38 make it plain that the amending procedure thereunder is the generally applicable procedure unless the criteria for the application of one of the alternative amending procedures are met. The heading of section 38, "General procedure for amending Constitution of Canada," is entirely apt. Section 38 requires approval by the federal Parliament and a substantial number of provincial legislatures (seven provinces with at least 50% of the aggregate provincial population). Unilateral amendment by Parliament or a provincial legislature alone, and amendment by unanimous consent of Parliament and all ten provincial legislatures, are exceptions, not the rule.

26. Unlike the other amending procedures, the text of section 38 contains no limitation clause restricting its application to a particular class of amendments. Rather, it speaks only of "an amendment to the Constitution of Canada" *simpliciter*. It thus is to be used to make any amendment that does not fall within one of the more specific amending procedures.

27. The very structure of Part V highlights the predominance of the general 7/50 amending procedure. Section 38 is the first provision in Part V. All of the other procedures are exceptions to the general rule it sets out. To avoid any doubt that matters of significance to both levels of government require substantial provincial consent, section 42 expressly requires use of the

general 7/50 amending procedure for certain matters that could arguably have been seen as relating exclusively to one level of government or the other.

28. The legislative history of section 38 also supports the view that the general 7/50 amending formula is the ordinary procedure for amending the constitution. Section 38 is essentially the same as the provision proposed by eight provinces in April 1981 as an alternative to the referendum-based amending procedure originally put forward by then-Prime Minister Trudeau. The Explanatory Notes attached to the provincial proposal describe the intended operation of the various amending procedures. Those Notes make it clear that the general 7/50 amending procedure is to be the default rule as "it would apply to all amendments to the Constitution of Canada unless another method of amendment is specifically provided for elsewhere."

> *Amending Formula for the Constitution of Canada: Text and Explanatory Notes* (Ottawa: 16 April 1981) at 4, Nunavut's Record, Tab 9, p. 192
>
> *Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 at 795 (the "*Québec Veto Reference*")

29. Section 38 enacted as a legal constitutional rule what had formerly been a convention of the constitution: the federal Parliament would not "request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces." That convention required substantial but not unanimous provincial consent. Section 38 sets seven provinces with 50% of the aggregate provincial population as the legal definition of "substantial" provincial consent.

> Favreau, *supra* at 15-16, Canada's Record, Vol. XV, Tab 104, pp. 160-61
>
> *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 899-905 (the "*Patriation Reference*")
>
> *Québec Veto Reference*, *supra* at 811-12

(2) The Unanimity Procedure

30. The Explanatory Notes to the April 1981 proposal also make it clear that, although substantial provincial consent suffices for most matters affecting federal-provincial relationships, certain matters are "of such fundamental importance that amendments in relation to them should require the consent of all the provincial Legislatures and Parliament," not just a substantial number of provinces and Parliament. Section 41 of the *Constitution Act, 1982* ensures that unanimous consent is required before such fundamental changes can be made. As Professors Magnet and Côté have suggested and as the Courts of Appeal of Québec and Newfoundland and Labrador have accepted, the pith and substance of a proposed constitutional amendment should be examined to determine which amending procedure can be used to enact it. The protection given to the matters of the most fundamental importance listed in section 41 should not be diluted by permitting use of a less stringent amending formula for an amendment which in pith and substance relates to one of those matters.

Constitution Act, 1982, *supra*, s. 41

Amending Formula, *supra* at 9, Nunavut's Record, Tab 9, p. 197

Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings* (22 March 2007) at 23:50, Québec's Record, Vol. IV, Tab 22, p. 42

House of Commons, Legislative Committee on Bill C-20, *Brief Submitted by Charles-Emmanuel Côté* (30 April 2008) at 7-9, Québec's Record, Vol. IV, Tab 25, pp. 81-83

Hogan v. Newfoundland (A.G.) (2000), 183 D.L.R. (4th) 225 at paras. 95 and 97, Canada's BOA, Vol. I, Tab 9

Potter c. Québec (P.G.), [2001] R.J.Q. 2823 aux paras. 22-24, Canada's BOA, Vol. I, Tab 13

(3) The Federal Unilateral Procedure

31. The federal unilateral procedure in section 44 is the successor provision to the former subsection 91(1) of the *Constitution Act, 1867* that was added in 1949. Although read literally,

that provision allowed Parliament to amend "the Constitution of Canada," subject only to five specific limitations, this Court held that it only permitted Parliament to enact "what might be described as federal 'housekeeping' matters which, according to the practice existing before 1949, would have been referred to the British Parliament by way of a joint resolution of both Houses of Parliament, and without the consent of the provinces." The five constitutional amendments which were passed under that provision "did not in any substantial way affect federal-provincial relationships."

Constitution Act, 1982, *supra*, s. 44

Constitution Act, 1867 (U.K.), 29&30 Vict., c. 3, s. 91(1) [repealed], Canada's BOA, Vol. I, Tab 33

British North America Act (No. 2), 1949 (U.K.), 13 Geo. VI, c. 81, Canada's BOA, Vol. II, Tab 31

Reference re Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54 at 65 (the "*Upper House Reference*"), Ontario's BOA, Tab 6

32. The term "Constitution of Canada" in subsection 91(1) did not mean the entire *BNA Act* (now the *Constitution Act, 1867*), but only "the constitution of the federal government, as distinct from the provincial governments." Subsection 91(1) was therefore "limited to matters of interest only to the federal government." It could not be used to abolish the Senate or to make changes "that would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal government."

Upper House Reference, supra at 69-70, 74, and 77-78, Ontario's BOA, Tab 6

33. The enactment of section 44 was not intended to broaden the scope of Parliament's power to unilaterally amend the Constitution. The explanatory notes indicate that it was "intended to replace section 91(1) of the B.N.A. Act." Like former subsection 91(1), section 44 allows Parliament to unilaterally amend "the Constitution of Canada," but with the further limitation

that any such amendment must be "in relation to the executive government of Canada or the Senate and House of Commons." That limitation was first added to the various drafts of a constitutional amending procedure that had been circulating at federal-provincial conferences in 1964 (as part of the "Fulton-Favreau formula") "in order to remove the possibility that the more general language of the 1949 provision [the "Constitution of Canada" *simpliciter*] could be interpreted as giving Parliament authority to act unilaterally in matters of provincial concern."

Constitution Act, 1982, *supra*, s. 44

Amending Formula, *supra* at 8, Nunavut's Record, Tab 9, p. 196

Favreau, *supra* at 37-38, Canada's Record, Vol. XV, Tab 104, pp. 183-84

34. When the Special Joint Committee on the Constitution was considering the Trudeau government's original proposed constitutional amendments, the Minister of Justice, Jean Chrétien, made it clear that what was then clause 48 was intended to be a replacement for subsection 91(1) as "the drafter did not want to change those powers." When an amendment was moved to clause 48 to limit it only to amendments in relation to the executive government of Canada or the House of Commons, Minister Chrétien opposed the amendment on the basis that Parliament should be able to amend the Constitution to deal with "some internal problems" such as "a change in the quorum of the Senate" without having to consult the provinces. The amendment was accordingly withdrawn.

House of Commons, *Proposed Resolution respecting the Constitution of Canada* (6 October 1980), s. 48, Québec's Record, Vol. I, Tab 5, p. 118

Special Joint Committee on the Constitution, *Minutes of Proceedings and Evidence* (13 November 1980) at 4:112, Québec's Record, Vol. I, Tab 6, p. 122

Special Joint Committee on the Constitution, *Minutes of Proceedings and Evidence* (4 February 1981) at 53:50, Québec's Record, Vol. I, Tab 6, p. 124

35. As Professors McEvoy and Magnet and Henry Brown, Q.C. argued before the Senate's Legal and Constitutional Affairs Committee, the narrow interpretation this Court gave to former subsection 91(1) in the *Upper House Reference* should therefore continue to apply to section 44. As a result, as Professor Whyte and Henry Brown, Q.C. suggest, the express limitations on Parliament's unilateral amendment power in sections 41 and 42 are not the only limitations. The opening words of section 44 are "subject to sections 41 and 42," not "subject ***only*** to sections 41 and 42." Amendments to constitutional provisions of provincial concern can only be made with substantial provincial consent whether or not they are expressly listed in section 41 and 42.

Stoddard v. Wilson, [1993] 2 S.C.R. 1069 at 1078

Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings* (22 March 2007) at 23:81-23:84, Québec's Record, Vol. IV, Tab 21, pp. 32-35

Senate, Standing Committee on Legal and Constitutional Affairs, *Submission of John P. McEvoy* (22 March 2007) at 2-10, Canada's Record, Vol. XIII, Tab 77, pp. 159-67

Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings* (22 March 2007) at 23:51-23:52, Québec's Record, Vol. IV, Tab 22, pp. 43-44

Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings* (29 March 2007) at 24:80-24:84, Québec's Record, Vol. IV, Tab 23, pp. 46-50

Senate, Standing Committee on Legal and Constitutional Affairs, *Memorandum of Henry S. Brown, Q.C.* (21 March 2007) at 2-16, Canada's Record, Vol. XIII, Tab 71, pp. 56-70

Senate, Standing Committee on Legal and Constitutional Affairs, *Brief Submitted by M. John Whyte* (20 September 2006) at 3-7, Québec's Record, Vol. IV, Tab 19, pp. 9-13

36. Although the *Upper House Reference* does not apply directly to section 44, its reasoning remains sound post-1982. Parliament cannot unilaterally pass an amendment "in relation to the executive government of Canada or the Senate or the House of Commons" that goes beyond "mere housekeeping" and affects matters of provincial concern. This Court held in the *Patriation Reference* that "the federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the

federal authorities." Similarly, it cannot be reconciled with a state of affairs where the modification of essential aspects of a federal, not merely central, institution like the Senate can be obtained by the unilateral action of the federal authorities.

Patriation Reference, supra at 905-06

B. Question 1 – Parliament Can Enact Long Term Limits Unilaterally But Short Term Limits Require Provincial Consent

37. In the *Upper House Reference*, this Court accepted that Parliament had been able to unilaterally change Senators' life tenure to tenure until age 75 under former subsection 91(1) of the *Constitution Act, 1867* because "the imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate." However, it was careful to note that "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.'"

Constitution Act, 1867, *supra*, s. 91(1) [repealed], Canada's BOA, Vol. II, Tab 33

Upper House Reference, *supra* at 76-77, Ontario's BOA, Tab 6

38. As one political scientist who drew parallels between Senate reform and the U.K. Royal Commission studying reform of the House of Lords stated, long terms improve rather than detract from the ability of upper houses to perform their fundamental role:

> The Commission's aspirations for the membership of the House of Lords in many instances paralleled those expressed for the Canadian Senate. For instance, the Commission took the view that long tenure would, 'encourage members to be independent minded and take a long-term view, discourage the politically ambitious from seeking a place in the second chamber, contribute to a less partisan style of debate, and allow members time to absorb the distinctive ethos of the second chamber and to learn how to contribute most effectively to its proceedings.'
>
> Senate, Standing Committee on Legal and Constitutional Affairs, *Observations*, *supra* at 5, Canada's Record, Vol. VII, Tab 27, p. 104
>
> Senate, Special Committee on Senate Reform, *Gerard W. Horgan Evidence Submission* at paras. 9 and 11, Canada's Record, Vol. XI, Tab 36, p. 7

> UK, Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534 at paras. 10.31-10.32 and 12.13-12.16, Québec's Record, Vol. II, Tab 9, pp. 107 and 122-23

39. Thus, while Parliament may provide for long term limits in the Senate without impairing the Senate's fundamental role within Confederation, the imposition of short term limits that do impair this role changes the ***powers of the Senate*** and requires substantial (7/50) provincial consent. Parliament can therefore enact long Senate term limits unilaterally under section 44 of the *Constitution Act, 1982* (the successor to former subsection 91(1) of the *Constitution Act, 1867*). Where, however, a term limit is so short that it "might impair the functioning of the Senate" and affect the "power of the Senate" to provide independent "sober second thought," the general 7/50 amending procedure must be used in accordance with paragraph 42(1)(b).

> *Constitution Act, 1982, supra*, ss. 42(1)(b) and 44

40. The shorter the term limit, the more likely it would be that the Senate would be unable to discharge its essential functions in a federal state. Ontario submits that a nine-year term is a reasonable dividing line between term limits that are long enough to preserve the Senate's independence from the executive government, provide a distinct perspective from the House of Commons, and give individual Senators sufficient experience to discharge their responsibility of providing "sober second thought" and term limits that are so short that they would change the Senate's "essential character." A nine-year term is longer than the maximum statutory life of two Parliaments and is only slightly shorter than the average twelve-year term Senators have in fact served since life tenure was abolished in 1965. As the Standing Senate Committee on Legal and Constitutional Affairs stated in the Observations it reported to the Senate regarding Bill S-4:

> George Brown, a member of John A. Macdonald and George-Étienne Cartier's coalition government for the then province of Canada, went on to describe in his speech how their aim was to fashion an Upper House which would be "a thoroughly independent body – one that would be in the best position to canvass dispassionately the measures of this house and stand up for the public interest in

> opposition to hasty or partisan legislation."
>
> It is clear from the Confederation Debates that the framers of Canada's Constitution did consider the option of a nine year renewable term for appointed senators but concluded that it would threaten the independence of the Upper Chamber from the executive ….
>
> ***Witnesses*** raised a number of concerns about the proposed 8-year term that related to these constitutional issues, including the fact that the term would allow a two-term Prime Minister to appoint every single senator in the Chamber. This would profoundly undermine the Senate's ability to fulfil its role as "a thoroughly independent body" of sober second thought. ***Virtually every expert*** who testified before us agreed that this is a significant problem.
>
> Senate, Standing Committee on Legal and Constitutional Affairs, *Observations to the Report of the Standing Senate Committee on Legal and Constitutional Affairs on Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)* at 1 and 4, Canada's Record, Vol. VII, Tab 27, pp. 100 and 103 [Emphasis added]
>
> Christopher P. Manfredi, *An Expert Opinion on the possible effects of Bill C-7* (June 2013) at paras. 51-57, Canada's Record, Vol. XVI, Tab 105, pp. 33-38
>
> Peter McCormick, *An Expert Opinion on Bill C-7* (June 2013) at paras. 23-29, Canada's Record, Vol. XVII, Tab 107, pp. 160-62

41. Currently, the maximum statutory length of a given Parliament is approximately four years (the constitutional maximum is five years). A term of eight years or less would therefore allow a Prime Minister who served two full terms (as nine out of Canada's 22 Prime Ministers have done or likely will do) to appoint every Senator. A Senate with all of its members appointed by the incumbent Prime Minister would find it difficult to properly exercise its role of providing independent scrutiny to the government and to legislation passed by the House of Commons.

> *Constitution Act, 1982, supra*, s. 4(1)
>
> *Canada Elections Act*, S.C. 2000, c. 9, ss. 56.1-56.2, Ontario's BOA, Tab 13
>
> Gordon Gibson, "Notes for a Presentation by Gordon Gibson to the Special Senate Committee on Senate Reform" (20 September 2006), Québec's Record, Vol. IV, Tab 20, p. 25

42. Similarly, if a term limit of eight years or less were coupled with the creation of an elected Senate, a Senate with members elected so frequently would likely bear close resemblance to the makeup of the House of Commons (particularly if Senate elections were conducted at the same time as federal general elections). Given the strength of the party system in Canada, a Senate whose composition did not differ significantly from that of the House of Commons would again face challenges in exercising its essential role of providing independent "sober second thought."

43. The federal government itself has recognized that an eight-year term can raise independence concerns. Its first attempt at introducing Senate term limits, Bill S-4, provided for an eight-year term, as did its successors, Bill C-19, Bill S-7, and Bill C-10. When the current iteration of the government's Senate term limit legislation, Bill C-7, was introduced, the government had increased the term to nine years. Minister Uppal, the then-Minister of State (Democratic Reform), explained the reason for the change as follows:

> Turning to term limits, our government has made a number of amendments to respond to comments made during previous examinations of this proposal.
>
> One change was to increase the term limit from an eight-year term to a nine-year term. From the beginning, the Prime Minister was clear that he was willing to be flexible on the length of the term, as long as the principle of the bill, a truly limited term, was respected.
>
> Our government decided to increase the term-limit by one year in response to concerns that in the future, ***eight-year term limits could allow a two-term prime minister to appoint the entire Senate.***
> …
>
> ***We have changed the term from eight years to nine years so that a two-term prime minister could not appoint the entire Senate***. A nine-year term is long enough for senators to learn the job and gain the necessary experience. It is also a reasonable amount of time to have new thoughts and new people who could add their perspectives as well.
>
> Bill S-4, clause 2, Canada's Record, Vol. I, Tab 3, p. 34

Bill C-19, clause 2, Canada's Record, Vol. I, Tab 8, p. 136

Bill S-7, clauses 2-3, Canada's Record, Vol. I, Tab 6, p. 108

Bill C-10, clauses 2-3, Canada' Record, Vol. I, Tab 5, p. 102

Bill C-7, clauses 4-5, Canada's Record, Vol. I, Tab 2, p.11

House of Commons, *Hansard*, 30 September 2011, Prince Edward Island's Record, Tab 12, pp. 206 and 208 [Emphasis added]

44. The U.K. Royal Commission studying House of Lords reform also "specifically rejected a term similar to that proposed by Bill S-4" on the basis that "terms based on two electoral cycles, rather than three, … would be too short for the purposes of creating the kind of second chamber which we envisage."

Senate, Standing Committee on Legal and Constitutional Affairs, *Observations*, *supra* at 5, Canada's Record, Vol. VII, Tab 27, p. 104

Senate, Special Committee on Senate Reform, *Gerard W. Horgan Evidence Submission* at paras. 9 and 11, Canada's Record, Vol. XI, Tab 36, p. 7

UK, Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534 at paras. 12.15, Québec's Record, Vol. II, Tab 9, p. 123

45. Whether Senators are eligible for reappointment or whether the imposition of term limits applies to some or all of the existing Senators would not change which constitutional amending procedure applies to a given term limit.

46. Senate term limits of nine years or more (whether renewable or not and whether retroactive or not) can therefore be enacted by Parliament alone under section 44 of the *Constitution Act, 1982*. Term limits of eight years or less would sufficiently change the power of the Senate to act as an independent house of "sober second thought" to require use of the general 7/50 amending procedure.

C. Questions 2 and 3 – Senate Elections Require Provincial Consent

47. In substance, both Bill C-20 and Bill C-7 change the method of selection of Senators from an appointed system to an elected system. Both Bills therefore constitute an amendment in relation to ***the method of selecting Senators*** and require use of the general 7/50 amending procedure under paragraph 42(1)(b) of the *Constitution Act, 1982*.

(1) Paragraph 42(1)(b) Should Be Interpreted Broadly to Apply to any Bill that In Pith and Substance Creates Senate Elections

48. One of the essential characteristics of the Senate is that it is an appointed, not an elected body. As discussed above, the appointed nature of the Senate was a deliberate choice by the Fathers of Confederation in light of their unsatisfactory experience with a partially-elected Legislative Council in the Province of Canada.

49. This Court, in the *Upper House Reference*, held that:

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

The Court therefore held that Parliament could not unilaterally create an elected Senate under former subsection 91(1) of the *Constitution Act, 1867*.

Upper House Reference, *supra* at 77, Ontario's BOA, Tab 6

50. The express inclusion of the "method of selection of Senators" in paragraph 42(1)(b) of the *Constitution Act, 1982* makes it even clearer that Parliament cannot unilaterally create an elected Senate. Moreover, it is not only direct amendments to the "method of selection of Senators" which are caught by paragraph 42(1)(b); rather, it is any amendment "***in relation to*** …

the method of selection of Senators." Given that section 42 is intended to ensure substantial provincial consent is obtained before constitutional changes affecting significant provincial interests are made, the words "in relation to" should be given a broad interpretation to ensure that Parliament cannot do indirectly what section 42 prohibits it from doing directly.

Constitution Act, 1982, *supra*, s. 42(1)(b)

R. v. Lavigne, [2006] 1 S.C.R. 392 at paras. 13-15, Ontario's BOA, Tab 3

R. v. Nowegijick, [1983] 1 S.C.R. 29 at 39, Ontario's BOA, Tab 4

Wawanesa Mutual Insurance v. Axa Insurance (2012), 112 O.R. (3d) 354, 2012 ONCA 592 at paras. 39-50, Ontario's BOA, Tab 9

51. If the drafters of paragraph 42(1)(b) had intended to limit it only to changes to the process of formal appointment by the Governor General, as the Attorney General of Canada suggests in his factum, they would have used language like that found in the analogous exception in the Fulton-Favreau formula: "the requirements of the Constitution of Canada for the summoning of persons to the Senate by the Governor General in the Queen's name." Instead, as Professor Côté notes, they chose the generic language of "in relation to … the method of selection of Senators." That language captures not only directly creating an elected Senate by amending the Constitution to expressly provide for Senate elections, but also indirectly creating an elected Senate by enacting legislation which leaves the Governor General's formal appointment power unchanged but in substance will create over time an elected Senate.

Favreau, *supra* at 37, Canada's Record, Vol. XV, Tab 104, p. 183

House of Commons, Legislative Committee on Bill C-20, *Evidence* (30 April 2008) at 5, Québec's Record, Vol. IV, Tab 25, p. 74

House of Commons, Legislative Committee on Bill C-20, *Brief Submitted by Charles-Emmanuel Côté* (30 April 2008) at 3-7, Québec's Record, Vol. IV, Tab 25, pp. 77-81

(2) Bill C-20 Constitutes a Change In Relation to the Method of Selection of Senators

52. Bill C-20 was clearly intended to have the effect of creating Senate elections. In testifying before the Special Senate Committee on Senate Reform, Prime Minister Harper promised that "As yet another step in fulfilling our commitment to make the Senate more effective and more democratic, the government, hopefully this fall, will introduce a bill in the House ***to create a process to choose elected senators***." As promised, later that fall, the government introduced Bill C-43, which was reintroduced as Bill C-20 in the next session.

> Senate, Special Committee on Senate Reform, *Proceedings* (7 September 2006) at 2:8, Québec's Record, Vol. IV, Tab 18, p. 4

53. Bill C-20 sets out a detailed code for the running of "Senate nominee consultations" that largely parallels the *Canada Elections Act* provisions governing House of Commons elections (and in some cases directly incorporates those provisions by reference). "Senate nominee consultations" are to be held in conjunction with federal or provincial general elections, overseen by the Chief Electoral Officer of Canada. They would use the same electoral list as federal elections, and be subject to many of the same financial and advertising rules as federal elections.

> Bill C-20, clauses 3-110, Canada's Record, Vol. I, Tab 4, pp. 47-89
>
> *Canada Elections Act*, *supra*, Ontario's BOA, Tab 13

54. As the then-Leader of the Government and Minister for Democratic Reform, Peter Van Loan, himself acknowledged, Bill C-20 (like Bill C-43 before it) was intended to make "reflecting the will of the people … the norm rather than the exception." It was designed to "give Canadians a say in who speaks for them in one of their representative institutions." In response to a question whether the Prime Minister could reject the nominees proposed by the electors, the Minister responded:

> The very essence of the bill is to go to the people of those provinces and consult them every time there is a decision made on who should be appointed to the

> Senate, so that they get to choose who represents them, not some of the other stakeholders, not a prime minister, not a cabinet, not a provincial premier but the people of that province. That is what we consider to be consultation, the most genuine consultation. That is the essence and purpose of the bill.

In light of that "essence and purpose," the pith and substance of the Bill was clearly to effectively create Senate elections whose results would not be ignored by the Prime Minister.

> House of Commons, *Hansard* (12 February 2008) at 2923 and 2925, Prince Edward Island's Record, Tab 11, pp. 170 and 172

55. Unlike the provincially-initiated elections held under the Alberta *Senatorial Selection Act* (whose winners some Prime Ministers have appointed and others have not), elections held under Bill C-20 would have been held under the auspices of federal legislation. It is one thing for the federal Prime Minister to choose whether or not to take advantage of a list of potential Senators put forward under another jurisdiction's legislation. It is something quite different to ignore the results of votes expressly authorized by the very Parliament to which that Prime Minister is responsible.

> *Senatorial Selection Act*, R.S.A. 2000, c. S-5, Canada's BOA, Vol. II, Tab 26

56. Describing the elections envisioned by Bill C-20 as "consultations" is little more than a poor attempt to allow form to override substance. Electors are called upon to cast their vote for the candidate of their choice. The elections held under the Bill would decidedly not be a merely advisory exercise analogous to a judicial appointments advisory committee for purposes of advising the Executive Branch of meritorious candidates. What is proposed under Bill C-20 is an election, full stop, notwithstanding its garb.

57. Bill C-20 therefore would in pith and substance change the method of selection of Senators. As a result, it should be considered "an amendment in relation to … the method of selection of Senators" which can only be implemented with the consent of seven provinces with 50% of the aggregate provincial population.

> House of Commons, Legislative Committee on Bill C-20, *Evidence* (30 April 2008) at 3-5, Québec's Record, Vol. IV, Tab 24, pp. 58-60
>
> House of Commons, Legislative Committee on Bill C-20, *Evidence* (7 May 2008) at 1, Québec's Record, Vol. IV, Tab 26, p. 90

(3) Bill C-7 Constitutes a Change in Relation to the Method of Selection of Senators

58. For the same reasons that Bill C-20 constitutes a change in relation to the method of selection of Senators, so too does Bill C-7. Yet Bill C-7 goes even further than Bill C-20. It provides that:

> If a province or territory has enacted legislation that is substantially in accordance with the framework set out in the schedule, the Prime Minister, in recommending Senate nominees to the Governor General, ***must consider*** names from the most current list of Senate nominees selected for that province or territory.

The Bill's Preamble states that "it is appropriate that those whose names are submitted to the Queen's Privy Council for Canada for summons to the Senate be determined by ***democratic election*** by the people of the province or territory that a senator is to represent." And the framework set out in the Bill's Schedule provides for "the list of Senate nominees for a province or territory … to be determined by an ***election*** held in the province or territory." The candidate(s) who receive the most votes are "declared ***elected***" by the chief electoral officer.

> Bill C-7, Preamble, clause 3, and Schedule, clauses 2 and 22, Canada's Record, Vol. I, Tab 2, pp. 9-10, 12, and 21 [Emphasis added]

59. In keeping with the constitutional convention of responsible government, the Governor General appoints to the Senate whomever the Prime Minister, holding the confidence of the House, recommends (the last Governor General to reject a Prime Ministerial recommendation of a Senate appointment was Lord Aberdeen in 1896). In the absence of Senate reform, the Prime Minister has a completely unfettered discretion to consider whomever he or she pleases as a potential nominee for appointment to the Senate.

Queen's Privy Council for Canada, *Minutes* (25 October 1935), Québec's Record, Vol. I, Tab 3, p. 75

Audrey O'Brien and Marc Bosc, eds., *House of Commons Practice and Procedure*, 2nd ed. (Cowansville, QC: Éditions Yvon Blais, 2009) at 21, n. 106, Ontario's BOA, Tab 10

60. Bill C-7 would place a legal fetter on the Prime Minister's discretion. Provided that a province holds an election under legislation substantially in accordance with the federal framework, the Prime Minister would be legally required to consider names from the list compiled at that election for nomination to the Senate. Although the Prime Minister could legally recommend appointment of someone else (however practically unlikely that would be), the fact remains that the Prime Minister would no longer be free to refuse to consider the names on the list of Senate nominees. That he would no longer have an unfettered discretion to consider whomever he or she pleases would mean that the method of selection of Senators had changed.

61. Bill C-7 therefore constitutes "an amendment in relation to … the method of selection of Senators" and could only be enacted by a constitutional amendment under the general 7/50 amending procedure.

Andrew Heard, *An Expert Opinion on Bill C-7* (October 2012) at 23-49, Québec's Record, Vol. V., Tab 36, pp. 67-93

Don Desserud, *An Expert Opinion on Bill C-7* (December 2012) at 62-63, Québec's Record, Vol. V, Tab 37, pp. 167-68

D. Question 4 – Parliament Can Unilaterally Amend Senators' Property Qualifications

62. Paragraph 42(1)(c) of the *Constitution Act, 1982* requires the use of the general 7/50 amending procedure for amendments in relation to the ***residence*** qualifications of Senators. Expressly requiring the use of the general 7/50 amending procedure for one of the qualifications set out in section 23 of the *Constitution Act, 1867* implies that Parliament can unilaterally amend the other qualifications set out in section 23, including Senators' property qualifications, under section 44 of the *Constitution Act, 1982*.

Constitution Act, 1867, *supra*, s. 23, Canada's BOA, Vol. II, Tab 33

Constitution Act, 1982, *supra*, ss. 42(1)(c) and 44

63. Further support for Parliament being able to unilaterally amend Senators' property qualifications can be found in the *Upper House Reference*, where this Court noted that, unlike residence qualifications which have "relevance in relation to the sectional characteristic of the make-up of the Senate," property qualifications "may not today have the importance which they did when the Act was enacted." Requiring use of the general 7/50 amending procedure for changes to residence qualifications but not for changes to property qualifications therefore makes sense: residence qualifications impact provincial interests and require provincial consent to be changed; property qualifications do not and thus can be changed by Parliament alone.

Upper House Reference, supra at 76, Ontario's BOA, Tab 6

E. <u>Questions 5 and 6 – Abolition of the Senate Requires Unanimous Provincial Consent</u>

64. This Court has held that the "the Senate has a vital role as an institution forming part of the federal system created by the [*Constitution Act, 1867*]. … A primary purpose of the creation of the Senate, as a part of the federal legislative process was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation." Like the other matters of the most fundamental importance for which unanimous consent is required under section 41 of the *Constitution Act, 1982*, the outright abolition of the Senate would so fundamentally reorder a key federal institution that the consent of all members of the federation is required.

Upper House Reference, supra at 66-67

65. Any proposal to abolish the Senate outright would necessarily require amendments to Part V of the *Constitution Act, 1982* to remove the Senate's role in the constitutional amending procedures set out in that Part. Paragraph 41(e) of the *Constitution Act, 1982* requires the

unanimous consent of the Senate, the House of Commons, and all ten provincial legislatures to make "amendments in relation to … an amendment to this Part." Abolishing the Senate therefore requires use of the unanimous consent amending procedure.

Constitution Act, 1982, *supra*, s. 41(e)

66. As discussed above, especially in paragraphs 7 to 11, the Senate was a key element of the federal bargain. Elimination of a core institution so central to the foundation of the country should not occur without the same unanimous agreement of all of the members of the federation. The amending procedures set out in Part V of the *Constitution Act, 1982* recognize the Senate's importance by giving it a role to play in all of the constitutional amending procedures except the provincial unilateral procedure. The Senate is expressly given a 180-day suspensive veto under the unilateral, general 7/50, and bilateral amending procedures and its consent (as a part of Parliament) is required to amendments made under the federal unilateral procedure.

Constitution Act, 1982, *supra*, ss. 38, 41-44, and 46-47

67. Contrary to paragraphs 163-64 of the Attorney General of Canada's factum, the fact that the Senate cannot ultimately prevent constitutional amendments from being enacted under the multilateral amending procedures set out in sections 38, 41, 42, or 43 does not mean "the Senate is not an essential actor in relation to" those procedures. The Senate's suspensive veto allows the Senate, in keeping with its role as a "house of sober second thought," to ensure that constitutional amendments are not passed with undue haste. By allowing the Senate to debate constitutional amendments for at least 180 days (not including periods when Parliament is prorogued or dissolved) and by requiring the House of Commons to pass a resolution of approval for a second time to proceed without the Senate's consent, section 47 ensures the Senate continues to have a powerful role so that the far-reaching consequences of proposed constitutional amendments are properly studied before they are enacted. Abolishing the Senate

would end its ability to fulfil a role that is intended to facilitate full scrutiny and maximize the opportunity for full public debate.

68. The question of how the Senate could be abolished was before this Court in the *Upper House Reference* shortly before the Constitution was patriated. Even though abolition of the Senate was not one of the matters expressly carved out of Parliament's power to amend "the Constitution of Canada" under former subsection 91(1) of the *Constitution Act, 1867,* this Court held that Parliament could not unilaterally abolish the Senate because "the continued existence of the Senate as part of the federal legislative process [was] implied in the exceptions provided in [former] s. 91(1)."

Upper House Reference, supra at 71-74, Ontario's BOA, Tab 6

69. Similarly, when the *Constitution Act, 1982* was drafted, the abolition of the Senate was not expressly included in section 41 as one of the matters requiring unanimous consent. It did not need to be. Just as "the continued existence of the Senate as part of the federal legislative process [was] implied in the exceptions provided in [former] s. 91(1)," the continued existence of the Senate is implied in the entire scheme of Part V of the *Constitution Act, 1982*. Removing the Senate's role in the constitutional amending procedures set out in that Part, as must be done if the Senate is to be abolished, is in pith and substance an amendment to Part V, a matter that requires unanimous consent.

Upper House Reference, supra at 73, Ontario's BOA, Tab 6

70. For these reasons, and consistent with the substantive and purposive approach Ontario takes to the other questions referred to this Honourable Court, Ontario submits that the Senate can only be abolished by way of a constitutional amendment passed under the unanimous consent amending procedure.

PART IV – SUBMISSIONS ON COSTS

71. As an intervener, Ontario submits that costs should not be awarded to or against it.

PART V – SUBMISSIONS ON DISPOSITION

72. Ontario submits that the reference questions should be answered as follows:

Question 1:

(a) Yes;

(b) Yes;

(c) No, because such a short term would affect the Senate's ability to act as a house of "sober second thought" and thus would be an amendment in relation to the powers of the Senate requiring use of the general amending procedure under section 42;

(d) Life of three Parliaments: Yes;

Life of two Parliaments: No, because such a short term would affect the Senate's ability to act as a house of "sober second thought" and thus would be an amendment in relation to the powers of the Senate requiring use of the general 7/50 amending procedure pursuant to section 42;

(e) Yes, if the initial term can itself be enacted unilaterally by Parliament pursuant to section 44; otherwise, No, use of the general 7/50 amending procedure is required pursuant to section 42;

(f) Yes, if the term can itself be enacted unilaterally by Parliament pursuant to section 44; otherwise, No, use of the general 7/50 amending procedure is required pursuant to section 42;

(g) Yes, if the term can itself be enacted unilaterally by Parliament pursuant to section 44; otherwise, No, use of the general 7/50 amending procedure is required under section 42.

Question 2:

No, such legislation would be an amendment in relation to the method of selecting Senators requiring use of the general 7/50 amending procedure pursuant to section 42.

Question 3:

No, establishing such a framework would be an amendment in relation to the method of selecting Senators requiring use of the general 7/50 amending procedure pursuant to section 42.

Question 4:

Yes.

Question 5:

(a) No, as use of the unanimous consent procedure is required to remove the Senate's role in the amending procedures set out in Part V of the *Constitution Act, 1982*;

(b) No, as use of the unanimous consent procedure is required to remove the Senate's role in the amending procedures set out in Part V of the *Constitution Act, 1982*;

(c) No, as use of the unanimous consent procedure is required to remove the Senate's role in the amending procedures set out in Part V of the *Constitution Act, 1982*.

Question 6:

Yes.

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

_____
Michel Y. Hélie

_____
Josh Hunter

Counsel for the Attorney
General of Ontario

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTES AND REGULATIONS

1. *Constitution Act, 1867* (UK), 29&30 Vict., c. 3, ss. 23 and 91(1) [repealed]

2. *Constitution Act, 1982*, ss. 4, 38-48, and 52, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

3. *Act of Union, 1849* (U.K.), 3&4 Vict., c. 35, ss. 3-4 and 12

4. *An Act to change the Constitution of the Legislative Council by rendering the same Elective*, S.Prov. C. 1856, c. 140, ss. 1-3, 8, 17-19, and 28

5. *British North America Act (No. 2), 1949* (U.K.), 13 Geo. VI, c. 81

6. *Canada Elections Act*, S.C. 2000, c. 9

7. *Senatorial Selection Act*, R.S.A. 2000, c. S-5

Constitution Act, 1982, ss. 4, 38-48, and 52, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

...

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

...

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

...

Mandat maximal des assemblées

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes.

Prolongations spéciales

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative.

...

PARTIE V

PROCÉDURE DE MODIFICATION DE LA CONSTITUTION DU CANADA

Procédure normale de modification

38. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée à la fois :

a) par des résolutions du Sénat et de la Chambre des communes;

b) par des résolutions des assemblées législatives d'au moins deux tiers des provinces dont la population confondue représente, selon le recensement général le plus récent à l'époque, au moins cinquante pour cent de la population de toutes les

provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Majorité simple

(2) Une modification faite conformément au paragraphe (1) mais dérogatoire à la compétence législative, aux droits de propriété ou à tous autres droits ou privilèges d'une législature ou d'un gouvernement provincial exige une résolution adoptée à la majorité des sénateurs, des députés fédéraux et des députés de chacune des assemblées législatives du nombre requis de provinces.

Expression of dissent

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Désaccord

(3) La modification visée au paragraphe (2) est sans effet dans une province dont l'assemblée législative a, avant la prise de la proclamation, exprimé son désaccord par une résolution adoptée à la majorité des députés, sauf si cette assemblée, par résolution également adoptée à la majorité, revient sur son désaccord et autorise la modification.

Revocation of dissent

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Levée du désaccord

(4) La résolution de désaccord visée au paragraphe (3) peut être révoquée à tout moment, indépendamment de la date de la proclamation à laquelle elle se rapporte.

Restriction on proclamation

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Restriction

39. (1) La proclamation visée au paragraphe 38(1) ne peut être prise dans l'année suivant l'adoption de la résolution à l'origine de la procédure de modification que si l'assemblée législative de chaque province a préalablement adopté une résolution d'agrément ou de désaccord.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Idem

(2) La proclamation visée au paragraphe 38(1) ne peut être prise que dans les trois ans suivant l'adoption de la résolution à l'origine de la procédure de modification.

Compensation

40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Compensation

40. Le Canada fournit une juste compensation aux provinces auxquelles ne s'applique pas une modification faite conformément au paragraphe 38(1) et relative, en matière d'éducation ou dans d'autres domaines culturels, à un transfert de compétences législatives provinciales au Parlement.

Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

Consentement unanime

41. Toute modification de la Constitution du Canada portant sur les questions suivantes se fait par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province :

a) la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur;

b) le droit d'une province d'avoir à la Chambre des communes un nombre de députés au moins égal à celui des sénateurs par lesquels elle est habilitée à être représentée lors de l'entrée en vigueur de la présente partie;

c) sous réserve de l'article 43, l'usage du français ou de l'anglais;

d) la composition de la Cour suprême du Canada;

e) la modification de la présente partie.

Amendment by general procedure

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the

Procédure normale de modification

42. (1) Toute modification de la Constitution du Canada portant sur les questions suivantes se fait conformément au paragraphe 38(1) :

a) le principe de la représentation proportionnelle des provinces à la Chambre des communes prévu par la Constitution du Canada;

b) les pouvoirs du Sénat et le mode de sélection des sénateurs;

c) le nombre des sénateurs par lesquels une province est habilitée à être

Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

représentée et les conditions de résidence qu'ils doivent remplir;

d) sous réserve de l'alinéa 41*d*), la Cour suprême du Canada;

e) le rattachement aux provinces existantes de tout ou partie des territoires;

f) par dérogation à toute autre loi ou usage, la création de provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Exception

(2) Les paragraphes 38(2) à (4) ne s'appliquent pas aux questions mentionnées au paragraphe (1).

Amendment of provisions relating to some but not all provinces

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

(*a*) any alteration to boundaries between provinces, and

(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

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

Modification à l'égard de certaines provinces

43. Les dispositions de la Constitution du Canada applicables à certaines provinces seulement ne peuvent être modifiées que par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province concernée. Le présent article s'applique notamment :

a) aux changements du tracé des frontières interprovinciales;

b) aux modifications des dispositions relatives à l'usage du français ou de l'anglais dans une province.

Amendments by Parliament

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

Modification par le Parlement

44. Sous réserve des articles 41 et 42, le Parlement a compétence exclusive pour modifier les dispositions de la Constitution du Canada relatives au pouvoir exécutif fédéral, au Sénat ou à la Chambre des communes.

Amendments by provincial legislatures

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Modification par les législatures

45. Sous réserve de l'article 41, une législature a compétence exclusive pour modifier la constitution de sa province.

Initiation of amendment procedures

46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Initiative des procédures

46. (1) L'initiative des procédures de modification visées aux articles 38, 41, 42 et 43 appartient au Sénat, à la Chambre des communes ou à une assemblée législative.

Revocation of authorization

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Possibilité de révocation

(2) Une résolution d'agrément adoptée dans le cadre de la présente partie peut être révoquée à tout moment avant la date de la proclamation qu'elle autorise.

Amendments without Senate resolution

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Modification sans résolution du Sénat

47. (1) Dans les cas visés à l'article 38, 41, 42 ou 43, il peut être passé outre au défaut d'autorisation du Sénat si celui-ci n'a pas adopté de résolution dans un délai de cent quatre-vingts jours suivant l'adoption de celle de la Chambre des communes et si cette dernière, après l'expiration du délai, adopte une nouvelle résolution dans le même sens.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Computation du délai

(2) Dans la computation du délai visé au paragraphe (1), ne sont pas comptées les périodes pendant lesquelles le Parlement est prorogé ou dissous.

Advice to issue proclamation

48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

...

Demande de proclamation

48. Le Conseil privé de la Reine pour le Canada demande au gouverneur général de prendre, conformément à la présente partie, une proclamation dès l'adoption des résolutions prévues par cette partie pour une modification par proclamation.

...

PART VII

GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

PARTIE VII

DISPOSITIONS GÉNÉRALES

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Constitution du Canada

(2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

Modification

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.