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

FACTUM OF THE ATTORNEY GENERAL FOR SASKATCHEWAN

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

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PART I

OVERVIEW AND FACTS

A. Overview

1. On its face this *Reference* to this Honourable Court raises technical questions relating to possible reforms to the Senate of Canada, coincidentally a matter of pressing public attention in recent months. Yet, the nature of these referred questions transcends important matters of Senate reform. They present a series of issues that offer this Court its first opportunity to consider in a comprehensive way how Part V of the *Constitution Act, 1982*[1] should operate.

2. The Government of Saskatchewan's position respecting the Senate of Canada is well-known having been publicly announced by Premier Brad Wall in July 2013.[2] It is his position–and the position of his Government–that as an institution the Senate is beyond repair and the only reasonable option is to abolish it outright. Nevertheless, the Attorney General for Saskatchewan ("Saskatchewan") will address all of the questions referred to this Court for an advisory opinion to offer his views as to how the various constitutional amending formulae located in Part V should be applied in the 21st Century Canadian federation.

3. Saskatchewan will argue that in our mature federal system significant and transformative changes to the Senate of Canada require some degree of acquiescence from the provinces. Accordingly, of the various options for reform presented to this Court, Saskatchewan submits that only a very few may be achieved unilaterally by the Parliament of Canada either under section 91 of the *Constitution Act, 1867* or section 44 of the *Constitution Act, 1982*. However, unanimity is not required for any of the proposals identified in the constitutional questions.

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[1] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[2] "Senate abolition on Wall's agenda", Regina *Leader-Post* , July 24, 2013 < http://www.leaderpost.com/news/Senate+abolition+Wall+agenda/8699858/story.html> See Appendix "A", *infra*.

B. Facts

4. Saskatchewan intervenes in this appeal as of right pursuant to sub-section 53(5) of the *Supreme Court Act*[3] and the Order of the Chief Justice of Canada dated February 22, 2013. Saskatchewan filed with the Registrar of this Court a formal Notice of Intention to Intervene dated March 7, 2013.[4]

5. Saskatchewan accepts the Statement of Facts set out at paragraphs 1 to 24 of the Factum of the Attorney General of Canada ("Canada").[5] In the course of the argument which follows Saskatchewan may identify when necessary additional factual assertions made by Canada or other participants in this *Reference*.

PART II

POINTS IN ISSUE

A. The Constitutional Questions

6. The constitutional questions are set out in P.C. 2013-70 dated February 1, 2013.[6] These questions read as follows:

> 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, 2008 as set out in subclause 4(1) of Bill C-7, the *Senate Reform Act*; and

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[3] *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 53(5).
[4] Notice of Intention to Intervene, dated March 7, 2013.
[5] Factum of the Attorney General of Canada, dated July 29, 2013 ("Canada's Factum") at 3-4, paras. 8 and 9, and at 18, para. 41.
[6] P.C. 2013-70 dated February 1, 2013; Reference Record of the Attorney General of Canada, Volume 1, Tab 1, at 1-6.

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

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*?

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*?

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?

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*?

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

B. Saskatchewan's Position Respecting the Reference Questions

7. Saskatchewan respectfully submits that the questions stated in P.C. 2013-70 should be answered as follows:

- **Question 1(a)** – No
- **Question 1(b)** – Yes
- **Question 1(c)** – No
- **Question 1(d)** – No
- **Question 1(e)** – No
- **Question 1(f)** – No
- **Question 1(g)** – No

- **Question 2** – Yes, pursuant to section 91 of the *Constitution Act, 1867.*

- **Question 3** – Yes, pursuant to section 91 of the *Constitution Act, 1867.*

- **Question 4** – Yes.

- **Question 5(a)** – Yes
- **Question 5(b)** – Yes
- **Question 5(c)** – Yes

- **Question 6** – No need to answer.

PART III
ARGUMENT

8. Prior to its submissions respecting the questions referred to this Court for its consideration in this *Reference*, Saskatchewan presents brief arguments respecting the appropriate interpretive approach to Part V of the *Constitution Act, 1982.* These submissions will be elaborated upon when addressing the various Constitutional Questions below. As well, the relevance of provisions and the interpretive approach to the *Canadian Charter of Rights and Freedoms*[7] (the "*Charter*") to our understanding of how Part V should operate

[7] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 2(*d*).

will be considered. Thereafter, Saskatchewan will address the questions in the order they appear in P.C. 2013-70.

A. Part V of the *Constitution Act, 1982* – General Interpretive Approach

(1) Part V is A Complete Code for Constitutional Amendments

9. Saskatchewan submits that Part V of the *Constitution Act, 1982* must be recognized as a complete code for amending the Constitution of Canada. It provides various methods for achieving future amendments to the Constitution. These methods exhaust the legal mechanisms available for purposes of constitutional amendment.

10. Prior to Patriation and the enactment of the *Constitution Act, 1982*, three decisions of this Court addressed the power to amend the Constitution.[8] However, Saskatchewan submits that Part V superceded the holdings in both the *Patriation Reference* and the *Quebec Veto Reference*. Only the *Upper House Reference* remains relevant for amendment purposes, and as will be demonstrated below only as an aid to interpreting the different provisions found in Part V relating to the Senate.

11. As well, Part V amended other provisions of the Constitution either expressly or implicitly, changes to the Constitution which Saskatchewan submits underscore the argument that Part V operates as a complete code for purposes amending the Constitution. Saskatchewan attaches a summary of some of these amendments as Appendix B *infra*.

12. For purposes of this *Reference* the explicit repeal of section 91(1) of the *Constitution Act, 1867* is particularly noteworthy. The Parliament of Great Britain enacted this provision in 1949.[9] It clothed the Parliament of Canada will the power to amend the Constitution of Canada "from time to time" subject to various exceptions enumerated in the section itself.

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[8] In chronological order these judgments are: *Reference re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 (the "*Upper House Reference*"); *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (the "*Patriation Reference*"), and *Reference re Opposition to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 (the "*Quebec Veto Reference*").

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

This Court relied upon section 91(1) to answer certain of the questions referred to it in the *Upper House Reference*.[10]

13. As a component of the 1982 Patriation package, section 91(1) was repealed together with the equivalent provincial provision, section 92(1) of the *Constitution Act, 1867* which authorized provinces to amend their constitutions "from time to time" except for the office of the Lieutenant Governor. The federal amending power is continued in section 44 of the *Constitution Act, 1982*, while the provincial amending power is continued in section 45. In addition, the various restrictions on the federal amending power were carried forward, and are now found in different parts of the *Constitution Act, 1982* and the *Charter*. Accordingly, as demonstrated in Appendix C *infra* the entire substance of section 91(1) continues to be found in the Constitution with the result that the analysis of this provision undertaken in the *Senate Reference* remains relevant today.

14. Saskatchewan submits that the Framers' intention was to house all powers to amend the Constitution of Canada within Part V. This conclusion is manifested in section 52(3) of the *Constitution Act, 1982*. Accordingly, Part V sets out a comprehensive and exhaustive code respecting all methods for future amendments to the Constitution of Canada.

(2) Relationship of the Various Amending Formulae in Part V

15. Part V of the *Constitution Act, 1982* contains four general provisions relating to amending various parts of the Constitution of Canada. These provisions move from a general, broadly based constitutional amendment procedure to provisions confined to unilateral amendments of provincial constitutions.

16. Section 38 is the most broadly based amending procedure. As its marginal note explains, this section sets out the "General procedure for amending Constitution of Canada".[11] An amendment under section 38 requires resolutions from the two Houses of

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[10]See for example, *Upper House Reference*, *supra* n. 8, at para. 46ff.

[11]Saskatchewan acknowledges that marginal notes traditionally are not used as an aid to interpretation of ordinary statutes. However, Saskatchewan submits that the marginal notes of the *Constitution Act, 1982* can be used for this purpose, given the special status of constitutional provisions and the particular care that went into

Parliament in addition to resolutions from legislative assemblies of at least two-thirds of the provinces having at least fifty per-cent (50%) of the Canadian population.

17. Section 41, on the other hand, enumerates five particular subject-matters that require unanimity for purposes of amendments. These are: (a) the Queen, the Governor General and the Lieutenant-Governors; (b) the right of a province to be presented in the House of Commons by at least as many MPs as the number of Senators it had as of April 17, 1982; (c) the use of the English and French languages (subject to section 43); (d) the composition of the Supreme Court of Canada, and (e) an amendment to Part V, itself.

18. For purposes of this *Reference*, the third amending formula which is relevant is the unilateral power of the Parliament of Canada to amend certain aspects of the House of Commons and the Senate. As submitted above, section 44 should be interpreted in a manner similar to the former section 91(1) of the *Constitution Act, 1867.*

19. Although it is not an amending power, section 42 of the *Constitution Act, 1982* directs that certain types of constitutional amendments are to be made in accordance with the general amending formulas set out in section 38. In particular sections 42 (a), (b) and (c) appear to have been crafted in accordance with this Court's analysis in the *Upper House Reference* to ensure that these subject matters are not permitted to fall within the unilateral federal amending power located in section 44. Nor do they require unanimous support under section 41.

20. Saskatchewan submits as a textual matter section 38 should be presumed to be method by which a proposed constitutional amendment is to be achieved, unless the proposed amendment clearly falls within one of the exceptions enumerated in section 41. As the marginal note indicates, section 38 is the "general procedure" for amending the Constitution

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every aspect of the negotiation and drafting of the *Constitution Act, 1982*. On a similar issue, this Court held in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at paras. 22 -23, that the headings in the *Constitution Act, 1982* could be used as an interpretative aid, given the care that had been taken with the drafting, the importance of the Act, and the fact that the headings had been included in the text of the Act proposed by the House of Commons and the Senate, rather than simply inserted by the British parliamentary draftsmen. Those same considerations apply to the marginal notes, which similarly were included in the text of the Act proposed by the House of Commons and the Senate. See: "Text of the Resolution Respecting the Constitution of Canada Adopted by the House of Commons on December 2, 1981 and by the Senate on December 8, 1981," Catalogue No. CP45-22/1981; reproduced by A.F. Bayefsky, *Canada's Constitution Act, 1982 and Amendments: A Documentary History*, Vol. II, at. 924, 932-3.

of Canada and leads off Part V. It is generally phrased and contains no qualifications or internal restrictions.

21. Contrastingly, section 41 with its very specific list of topics requiring unanimous consent, should be interpreted as derogating from section 38. Unanimous consent under section 41 should be required only when the proposed amendment clearly comes within the scope of one of the exceptions set out in that section.

22. Saskatchewan submits that for purposes of amending the Constitution, unanimity is very difficult to achieve as recent history has shown. It is reasonable, therefore, to suggest that there is a constitutional preference for something short of unanimity. The appropriateness of this preference is further exemplified by the unusual population imbalances among Canada's provinces. Ontario and Quebec together have over half of Canada's population. Alberta and British Columbia together have almost one quarter; the remaining six provinces have 13% of the population with Prince Edward Island having only 0.4%.[12]

23. Saskatchewan acknowledges that this Court in *Reference re Secession of Quebec*[13] characterized the 'federalism principle' as "the lodestar by which the courts have been guided" since Confederation. Yet, the 'democracy principle' was also identified in the *Quebec Secession Reference* as a foundational constitutional value.[14] This Court described it as follows:

> The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day.[15]

24. Giving a broad interpretation to the unanimity requirement for purposes of a constitutional amendment, Saskatchewan submits, unduly privileges the federalism principle over the democratic principle. Accordingly, any proposed amendment to the Constitution of

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[12] See: Statistics Canada, "Population by year, by province and territory (Proportion); <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02d-eng.htm>.
[13] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Quebec Secession Reference*") at para. 58.
[14] *Ibid.*
[15] *Ibid.*, at para. 62 (emphasis added).

Canada should be presumed to fall under section 38, unless it is clearly within one of the exceptions in section 41.

(3) *Charter* Interpretation and Part V of the *Constitution Act, 1982*

25. Part V became part of the Constitution of Canada at the same time as the *Charter*. Since its advent, this Court has laid down certain interpretative precepts for courts to apply when adjudicating a *Charter* claim. Saskatchewan submits that these precepts as well as certain provisions of the *Charter* can assist in this *Reference*.

26. It is now well-established that the rights and freedoms guaranteed by the *Charter* should be accorded a generous and purposive interpretation. The genesis for this interpretative approach is found in *Hunter v. Southam Inc.* where Dickson J. (as he then was) cautioned against construing the *Charter* "like a last will and testament lest it become one"[16]. Subsequently, in *R. v. Big M Drug Mart Ltd.*[17], Dickson C.J. elaborated on his admonition. He stated *Charter* interpretation should be "generous" rather than "legalistic", "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection". However, such an interpretation must not "overshoot the actual purpose of the right or freedom in question". The *Charter*, Dickson C.J. concluded "was not enacted in a vacuum, and must therefore…be placed in its proper linguistic, philosophic and historical context."[18]

27. Rather, a generous and purposive interpretation of the *Charter* requires balance and nuance. The purpose sought to be achieved by the right in question, however, remains the primary consideration. In *R. v. Grant*, for example, this Court emphasized this point as follows:

> While the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose. . .While a narrow approach risks impoverishing a *Charter*

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[16] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 155.
[17] *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295
[18] *Ibid.*, at para. 117 (citations omitted)

> right, an overly generous approach risks expanding its protection beyond its intended purposes.[19]

28. Saskatchewan submits that this interpretive approach is also relevant when assessing how the amending formulae in Part V of the *Constitution Act, 1982* should operate. As will be explained below, a purposive interpretation of the relationship between section 38 and section 41, for example, will construe the language of these amending formulae in a way which accommodates both the federalism principle and the democratic principle.

29. Furthermore, particular *Charter* guarantees can inform the analysis of certain of the questions stated on this *Reference*. For example, section 4 of the *Charter* establishes the maximum duration of a particular Parliament which is constitutionally acceptable. As will be elaborated on in the next Part, this five year rule is an important guidepost for analyzing the various proposals enumerated in Question 1.

B. Question 1 – Term Limits

30. Question 1 presents various possible constitutional amendments establishing senatorial term limits. Saskatchewan submits that only one of these amendments, namely establishing "a fixed term of ten or more years" for senatorial tenure may be achieved in accordance with section 44 of the *Constitution Act, 1982*. Accordingly, Saskatchewan respectfully submits that only Question 1(b) should be answered "yes". The remaining parts of Question 1 must be answered "no".

31. In the *Upper House Reference*, this Court considered the scope of the federal amending power under what was then section 91(1) and gave it a narrow interpretation concerning the internal structure of the federal government, issues that were of relevance to the federal government alone: the "juristic federal unit." This Court also held that the amending power in section 91(1) did not include those types of amendments which would have required provincial consent, characterizing them as "housekeeping" amendments.[20]

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[19] *R. v. Grant*, [2009] 2 S.C.R. 353, at para. 17 per McLachlin C.J. and Charron J. (citation omitted).

[20] *Upper House Reference*, *supra* n. 8, at 64 and 65.

32. Saskatchewan submits that section 44 incorporates this interpretation. First, making section 44 subject to both sections 41 and 42 shows that this amending power is subordinate to the unanimity formula and the general amending formula, and cannot be used to amend issues enumerated in those sections. Second, the amending power is specifically restricted to matters in relation to the executive government of Canada, or the Senate and House of Commons. The combined effect of these qualifiers is that section 44 has the same scope as section 91(1), namely it is restricted to matters relating solely to the internal organization of the federal "juristic unit". Third, all of the restrictions on the federal amending power in section 91(1) have been confirmed by the patriation package, although these restrictions are now found in various provisions of the Constitution, instead of being contained in section 44.[21]

33. Accordingly, the decision of this Court in the *Upper House Reference* respecting section 91(1) must be applied to section 44. In the *Upper House Reference*, this Court found:

> [W]hile s. 91(1) would permit some changes to be made by Parliament in respect of the Senate as now constituted, it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. [...] In our opinion, its fundamental character cannot be altered by unilateral action by the Parliament of Canada and s. 91(1) does not give that power. [emphasis added][22]

34. Applying this understanding to section 44, Parliament's unilateral ability to amend the constitution as it relates to the Senate is limited to changes that do not change the 'fundamental character' of the body, which, by necessity, are not included in section 42 and are carved out of the general formula in section 38. The answers to the various questions posed under Question 1 should reflect this interpretive approach.

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[21] See: Appendix C, *infra*.
[22] *Upper House Reference*, *supra* n. 8, at 77 and 78.

(1) Question 1(b)

35. As found by this Court in the *Upper House Reference*, Parliament possesses the general ability to reduce senatorial terms, although "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'."[23] It was the missing length of the proposed term limit that caused this Court in that *Reference* to decline to answer that question.[24] Thus, there is no determination at this time of a term limit which would fall within section 44 and a limit which would require an amendment under section 38.

36. At present, senators are required to be at least 30 years of age[25] and must retire at their 75th birthday[26], for a maximum tenure of 45 years. Canada's Factum discusses the mean and median years for senatorial service and compares it with the mean and median length of Parliaments.[27]

37. Saskatchewan submits that Question 1(b) should be answered "yes" as a term of at least 10 years will not infringe on the ability of senators to provide "sober second thought in legislation', which this Court found to be the "fundamental character" of senatorial terms in the *Upper House Reference*. Sober second thought implies that Senators have a long-term influence to check the House of Commons, and the means to establish a body of knowledge and experience that will be helpful to the legislative process. Length of tenure is directly correlated with the development of those attributes, which is why a shorter term limitation would alter that fundamental character of the institution.

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[23] *Ibid*, at 76. The notion of "sober second thought" is of great antiquity and had a literal meaning for the German tribes of the first century. Tacitus records that the Germans would first consider a decision in the evening, when the beer flowed freely and inhibitions were accordingly lowered. The tribe would reach a tentative decision, but would re-consider the decision the next morning, when the after-effects of the night's indulgences would contribute to a more realistic decision. (Tacitus, *The Germania*, ch. 22; translated by H. Mattingly and S. A. Handford (Harmondsworth, England: Penguin Books, 1970) at 120.)
[24] *Upper House Reference*, *supra* n. 8 , at 77.
[25] *Constitution Act, 1867*, s.23(1).
[26] *Ibid*, s.29(2)
[27] Canada's Factum at 47-48, paras 125 and 126.

38. As the median length of senatorial terms since the age limit was instituted is below ten years, a 10-or-more-year term does not change the *status quo* from an institutional point of view. While the median length of terms may decline with this amendment (as it is unlikely that all Senators would serve a full term), perhaps fewer senators would ultimately retire early because a fixed term length would provide a firm end date. In either case, a 10-or-more-year term does not infringe on a senator's ability to provide sober second thought through knowledge and experience.

39. A 10-or-more-year term will also ensure senatorial independence from the appointment process and political climate in which the Governor General made the appointment. While senators are expected to be political creatures, sober second thought also implies that the Senate is a body that provides a longer-term view of issues, removed from the daily partisan battles of the House of Commons. Accordingly, a term should not be short enough for senators to be unable to exercise their expertise in several Parliaments. Therefore, in addition be being about the length of three median-length Parliament,[28] a 10-year minimum also represents a guarantee (subject to the age 75 restriction) that a senator will sit for at least two full Parliaments, as set out in section 4(1) of the *Charter*.

(2) Questions 1(a) and (c)

40. Questions 1(a) and (c) should be answered "no". While 10 years is adequate as a minimum senatorial term, nine years and eight-or-less years are not, as they do not guarantee senatorial tenure for at least two Parliaments of maximum length under the *Charter*, as discussed above.

41. Admittedly, distinctions between 10 years, nine years and eight-or-fewer years are subtle. Yet, Saskatchewan submits that this Court should adopt the principle of tying the ability to make any unilateral change in senatorial terms to a multiple of the maximum lengths of Parliaments set out in section 4(1) of the *Charter* which would require a minimum of ten years. This ensures that the required elements necessary to ensure the fundamental

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[28] *Ibid* at p 47, para 125.

character of a chamber of sober second thought is protected, while tying minimum senatorial term lengths to the maximum parliamentary term.

(3) Question 1(d)

42. Question 1(d) should be answered "no" as well because it ties senatorial terms to the actual length of Parliaments, not years. Saskatchewan acknowledges that there may be little difference between a term of two long Parliaments or three average Parliaments and a ten year term. However, it is apparent that there would be a significant decrease in the length of senatorial terms in periods of minority governments, which would impair the ability of the Senate to function as a chamber of sober second thought.

43. The significance of minority governments is highlighted by the chart prepared by Saskatchewan and attached as Appendix D to this factum. It shows that a two Parliament term could be as low as 2.68 years (Appendix D, line 25), while a three Parliament term could be as low as 4.60 years (Appendix D, line 23). Saskatchewan submits that such a short term would not allow senators the necessary independence and expertise sufficient to fulfill the "sober second thought" mandate of the Senate.

(4) Question 1(e)

44. Question 1(e) should be answered "no". Clause 2 of Bill S-4, the *Constitution Act, 2006 (Senate tenure)* creates an eight-year term, but does not create a new restriction on a Senator appointed under this new term length from being reappointed at a later date.[29] For the reasons discussed above in relation to Question 1(c), an eight-year term does not meet the minimum requirements of 'sober second thought' and, as such, represents a change to a 'fundamental character' of the Senate. Adding to this, the possibility of reappointment only compounds this fundamental flaw. It suggests that senators may actively seek reappointment as their fixed term comes to an end which compromises the independent quality of the Senate for constitutional purposes.

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[29]Bill S-4, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Session, 39th Parliament, 2006, clause 2.

45. Canada dismisses such concerns as policy issues that "do not affect the constitutional issue".[30] However, Saskatchewan submits that rather than being a mere policy issue, the importance of senatorial independence goes to the very heart of what "sober second thought" means. This concept necessarily includes the expectation of speaking truth to power, and analyzing and approving legislation outside of the cut-and-thrust of the House of Commons and partisan politics. The possibility of re-appointment is incompatible with senatorial independence.[31]

(5) Questions 1(f) and (g) - Retroactive Term Limits

46. Questions 1(f) and (g) should be answered "no" as this would effectively result in "unappointing" senators before their current mandatory retirement date.

47. Question 1(f) refers to subclause 4(1) of Bill C-7, the *Senate Reform Act*, which, *inter alia*, limits senators appointed after October 14, 2008, to a term of a maximum of nine years.[32] To the extent that this subclause deals with a nine-year term, this element should be rejected for the reasons set out in relation to Question 1(a).

48. Concerning the issue of retroactive term limits on sitting senators, there should be no distinction made between senators appointed after October 14, 2008[33], or any other date. The fact that senators appointed after this date promised to uphold term limits does not raise a justiciable issue.[34] Nor can it expand or contract the interpretation of Parliament's powers under section 44.

49. Moreover, the targeting of specific senators in Question 1(f) raises concerns about senatorial independence by singling out one group for special, retroactive term limits.

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[30] Appellant's Factum at p 48, para 127.
[31] Saskatchewan notes that there is no current constitutional prohibition on a senator being reappointed following resignation. Indeed, current Senator Fabian Manning from Newfoundland and Labrador has twice been appointed to the Senate on the advice of Prime Minister Stephen Harper.
[32] Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, 1st Session, 41st Parliament, 2013, clause 4(1).
[33] Coincidentally, the date of the election of Prime Minister Stephen Harper's second minority government,
[34] *Canadian Taxpayers Federation v Ontario (Minister of Finance)* (2004), 73 O.R. (3d) 621 (Ont. S.C.J.), at paras 70 and 71.

Surely, allowing Parliament to create unilaterally special retroactive rules encourages the possibility of new rules created for a senator's appointment based on their performance.

50. Concerning the general issue in Questions 1(f) and (g) of whether Parliament can unilaterally amend the terms of sitting senators, this too should be rejected. Although it is clear that Parliament can change the terms of yet-to-be-appointed senators by, for example, adding the age limit in section 29(2) of the *Constitution Act, 1867*,[35] no constitutional amendments have ever been applied to senators retroactively.

51. Canada argues that this change is "a critical one" applying to the "mischief" of "longstanding concerns that undermine the Senate's legitimacy as a democratic institution", which justifies the application of retrospective limits.[36] This urgent characterization suggests that the changes being proposed in Questions 1(f) and (g) deal with 'fundamental character' of the Senate, which suggests that these matters fall outside section 44.

52. Saskatchewan submits Canada cannot argue on the one hand that the changes are of a housekeeping nature so as not to change the "fundamental character" of the Senate, yet so important as to justify creating retroactive term limits on sitting senators, in spite of Canada's claim that senators since 1965 do not tend to stay much beyond 11 years[37] and the grandfathering of a seemingly more limiting change from lifetime appointments to age 75.[38]

53. Finally, given the role of Senators in reviewing, debating and passing legislation, a high standard should be applied to justify any changes to the nature of their appointment, in order to secure their independence as legislators. While there are perhaps certain retroactive changes that Parliament alone can make (reasonable updates or additions to the list of disqualifications,[39] for example), the creation of a new term limit should represent a material change to the appointment of a sitting Senator and should require a more stringent process

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[35] *Constitution Act, 1867*, s.29(2).
[36] Canada's Factum at 47 and 48, paras 128 and 129.
[37] *Ibid.*, at para 125.
[38] *Constitution Act, 1867*, s.29 as amended by the *Constitution Act, 1965*, S.C. 1965, c.4.
[39] *Constitution Act, 1867*, s.31.

than Parliament acting under section 44 in keeping with the precedent set in 1965's amendment to the lifetime tenure.

(6) Conclusion on Question 1

54. Accordingly, for these reasons, Saskatchewan respectfully submits that Question 1(b) should be answered "yes". The remaining sub-questions should be answered "no".

C. Questions 2 and 3 – Consultative Elections

(1) Introduction

55. Question 2 and Question 3 should be answered "yes" with the qualifier that the existence of a federal power to enact these provisions does not affect the constitutional authority of the provinces to enact similar legislation.

56. These two questions refer to two different methods of "consultative election." First, a national electoral system that consults the population of each province and territory regarding its "preferences" for potential nominees for Senate appointment as set out in Bill C-20. Alternately, a "framework" system which compels the Prime Minister to consider the results of independently-enacted provincial electoral models "substantially in accordance" with the federal model act as set out in Bill C-7.

57. Saskatchewan submits that jurisdiction for both Bills C-20 and C-7 can be found in the federal power to enact "Laws for the Peace, Order, and good Government of Canada" ("POGG") under section 91 of the *Constitution Act, 1867*. Part V of the *Constitution Act, 1982* authorizes provincial legislatures and Parliament to enact legislation or resolutions to initiate (or participate in) constitutional amendment. Saskatchewan submits that neither Bill C-7 nor C-20 would amend the Constitution. The authority for those Bills, therefore, must be found in the *Constitution Act, 1867*.

58. Parliament has jurisdiction to pass laws pertaining to elections of persons to the House of Commons[40] and holding ordinary referenda across Canada.[41] As noted by this Court in *Haig v. Canada*,[42] referenda are not addressed by the Constitution of Canada:

> [...] In fact, there is nothing in the Canadian Constitution which relates to referenda, let alone anything that mandates or prevents this type of consultation by either the federal or provincial governments. The propositions of the appellants to the contrary simply cannot be sustained. The decision to hold a federal referendum in nine provinces and two territories was a constitutionally permissible one. It was a political choice, a choice open under the legislation, and a choice consistent with the principles of federalism.[43]

59. The consultative models proposed in Questions 2 and 3 appear to mimic referendums: they are surveys of Canadians within a particular jurisdiction on a very specific issue which, though politically influential, do not lead to legally binding results.

60. With regard to each scheme's constitutionality and congruency with POGG, there is no material difference between the national consultation model in Question 2 and the delegated consultation model in Question 3. The delegated consultation model does nothing more than acknowledge, at the federal level, the individual efforts of provinces like Saskatchewan which have enacted their own consultative models. A similar result was noted by Iacobucci J. in *Haig* (dissenting, though not on this point). Respecting the Charlottetown Accord Referendum, British Columbia and Alberta were technically subject to both federal *and* provincial referenda; the provinces chose, however, to adopt the results of the federal referenda instead of administering their own.[44] There were, essentially, two referenda proceeding on the same ballot in those provinces.

61. Saskatchewan submits that the provincial consultative statutes can co-exist with a national consultative model, even if Parliament were to deem the provincial models not in "substantial accordance" with the federal archetype and/or enact separate consultative schemes within provinces that had their own provincial nominative regimes. Since the

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[40] *The Elections Act*, S.C. 2000, c. 9.
[41] *Referendum Act*, S.C. 1992, c. 30.
[42] *Haig v. Canada*, [1993] 2 S.C.R. 995, 105 D.L.R. (4th) 577 (S.C.C.) [*Haig*].
[43] *Haig*, *ibid.*, at para. 61. See further: *Haig*, at para. 97
[44] *Haig*, *ibid.*, at para 144.

consultative elections would not be binding on the Prime Minister or Governor General in any event, it would not be incongruous for a provincial mechanism and a federal mechanism to have different results or a different consultative process. Whether or not a senator is summoned to the Upper House from *either* list remains, as always, within the purview of the Governor General.

62. Both the federal and provincial governments can consult with Canadian citizens in the form of referendum; they are an important, if somewhat rare, political tool at both levels of government. As regards the Senate, Alberta[45] and Saskatchewan[46] have enacted consultative elections for Senatorial "nominations." As both the majority and dissents in *Haig* recognized, referenda are inherently consultative: ultimate lawmaking authority rests with Parliament or the Legislature, and not in the ballot box.[47] Questions 2 and 3 contemplate referenda that are purely consultative. They do not either in law or fact fetter the discretion of the executive to summon senators.[48]

(2) Bills C-7 and C-20 Do Not Amend the Constitution

63. Saskatchewan submits that neither Bill C-20 nor Bill C-7 modifies the text of the *Constitution Act, 1867*. Section 23 which pertains to qualifications of a senator remains unchanged; likewise are the conditions for disqualification in section 31. Most notably, the text of sections 26 and 32, which set out the rules for selection and replacement of Senators, respectively, would not be modified by either Bill C-20 or Bill C-7.

64. It is not unconstitutional for a concerned Canadian citizen to write to the Prime Minister to express his or her opinion on possible Senators. It is not unconstitutional for the Prime Minister to take such expressions of support (or, perhaps, disapproval) under advisement when recommending a Canadian to the Upper House. A scheme which, at bottom, aggregates the opinions of voting Canadians and puts those opinions before the

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[45] *The Senatorial Election Act*, R.S.A. 2000, c. S-5.
[46] *The Senate Nominee Election Act*, S.S. 2009 c. S-46.003.
[47] *Haig*, *supra* n. 42, at para. 65 (decision of L'Heureux-Dubé J., for herself and four others); *Haig*, at paras. 154, 156 (Iaccobuci J., for himself).
[48] See especially: *Re Initiative and Referendum Act (Manitoba)*, [1919] A.C. 935.

Prime Minister for his or her use in making a recommendation to the Governor General is not constitutionally different than hearing from concerned citizens individually. The Prime Minister retains the discretion to recommend any person, whether on a province's consultative list or not, to the Governor General for appointment. The Governor General is, importantly, not bound by law (neither now nor after a consultative system is in place) to follow the Prime Minister's suggestions. Thus, the discretion of the Governor General remains unfettered and the rule in *Re Initiative and Referendum Act (Manitoba)* is respected.

65. Whether or not Bill C-7 and C-20 affect constitutional amendment further depends on an interpretation of the phrase "method of selecting senators" in section 42(1)(b) of the *Constitution Act, 1982* and whether a "consultative election" scheme is deemed to be a matter for section 38, the general amending procedure.

66. As noted by this Court in *Haig*, the Constitution of Canada gives no express allowance for referenda. They are a political tool, not a legal one. Unless a government somehow binds itself to a referendum's results, any referendum is inherently consultative. Even a referendum on a specific issue cannot create or destroy legislation, for to do so would be to usurp the legislative supremacy of the Parliament or the Legislature: *Initiative and Referendum Act, Re (Manitoba)*. Neither Bill C-20 nor Bill C-7 purports to bind the Prime Minister or the Governor General in law to select a certain nominee.

67. As the history of Alberta's *Senatorial Election Act* shows, neither the Prime Minister nor the Governor General is in *practice* bound to the results of a consultative election. While there may be a political cost to a government for deviating from the results of a consultative election, there is no legal remedy. This is no different from a typical referendum.

68. Either elective scheme would, of course, be subject to repeal by Parliament. The supremacy of Parliament dictates that no government may, though ordinary legislation, fetter the ability of its successors to pass or repeal similarly ordinary legislation.[49] Similarly, ordinary legislation cannot fetter the ability of subsequent executive governments to

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[49] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 42(1); *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

introduce legislation into Parliament.[50] In addition to the non-binding nature of the election *result*, therefore, the consultative election scheme *itself* would be subject to repeal or change by subsequent Parliaments.

69. The question of whether the consultative elections will lead to a new constitutional convention (*i.e.* that the result of consultative elections will somehow become politically binding on the Crown) is irrelevant: there is no rule prohibiting a consistent or measured exercise of discretion such that a convention might arise. Constitutional practice can in no way alter the constitutional text. Importantly, as noted by this Court in *Reference Re Power of Disallowance & Power of Reservation (Canada)*[51], a purported constitutional practice or custom cannot modify or overrule the plain meaning of the written Constitution of Canada.

70. In the alternative, should this Court consider the appropriateness of utilizing section 44 of the *Constitution Act, 1982* for this purpose, Saskatchewan submits that this aspect of Questions 2 and 3 is hypothetical. Neither Bill C-7 nor C-20 identifies a constitutional amendment and it is not clear what, if any, sections of the Constitution would need to change in order to affect a consultative amendment scheme.

71. Saskatchewan submits that the proposed changes in Bill C-7 nor C-20 do not fall within the type of matters amenable to change under section 44. The proposed Bills are constitutional in large part *because* they are non-binding; if the schemes were enacted as binding, constitutional amendments they would clearly affect the "fundamental features" of the Senate. Enacting an electoral scheme for the Senate was expressly noted by this Court in the *Upper House Reference* to be outside of Parliament's competence under the former s. 91(1).[52] Parliament has not, with the enactment of s. 44 of the *Constitution Act, 1982*, gained the competence to do now what it could not do at the time of the *Upper House Reference*.

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[50] *Reference Re Canada Assistance Plan* at 560.
[51] *Reference Re Power of Disallowance & Power of Reservation (Canada)*, [1938] S.C.R. 71, [1938] 2 D.L.R. 8 [*Reservation and Disallowance Reference*] (in particular, see the decision of Duff C.J).
[52] *Upper House Reference*, at p. 77.

(3) Provincial Power Not Affected

72. Saskatchewan submits further that even if Parliament has the authority to enact consultative elections under POGG, this does not affect the constitutional authority of the Provinces to enact similar legislation to allow the provincial government to consult with the votes on an appropriate nominee. The Premier and government of a province can lobby their federal counterparts as to an appropriate person to appoint to the Senate. That lobbying is purely political, and is not binding on the federal government. A provincial consultative election simply allows the provincial government to seek the approval of the voters as to a particular candidate.

D. Question 4 – Property Qualification for Senators

73. Question 4 which is restricted to the repeal of sections 23(3) and 23(4) of the *Constitution Act, 1867*, should be answered "yes".[53] Section 23(3) requires a senator to hold real property "within the Province" for which they are appointed "of the value of Four thousand Dollars". Section 23(4) stipulates that a senator must hold real and personal property of this amount free and clear.

74. The property requirement for senators was fundamental to its composition at Confederation. The Senate was supposed to represent the interests of landowners and property in addition to the interests of Canada's regions. The property requirement also ensured, to the satisfaction of Canada's founders, that the persons appointed to the Senate would be upstanding and competent persons, capable of serving Canada by appointment to the Upper House. The $4,000 minimum property requirement has never been amended.

75. Even at the time of Confederation, then, the property requirement was modest. The prevailing attitude among the delegates of the London Conference was to *increase* the

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[53]Saskatchewan notes that this repeal would also require a modification of the Declaration of Qualification, under section 128 of the *Constitution Act, 1867* as well as the Fifth Schedule to the *Constitution Act, 1867* With the abolition of the Legislative Council of Québec in 1968 (*An Act respecting the Legislative Council*, S.Q. 1968, c.9), the "Declaration of Qualification" now pertains only to members of the Senate. To the extent that Parliament is authorized to amend unilaterally the property requirements of Senators, the authority to amend the Declaration to reflect those new requirements is surely a "housekeeping" amendment within the scope of s. 44.

qualification amount for delegates at the upper house; only the delegates' adherence to the amount fixed by the Québec Resolutions kept the value at $4,000.[54] The property requirement for the Legislative Council in the Province of Canada, for instance, had been "eight thousand dollars over and above all debts, charges and dues,"[55] twice as much as the property qualification for the Senate post-Confederation.

76. The property requirement is not mentioned in Part V of the *Constitution Act, 1982*. It is certainly not one of the five enumerated heads of amendment requiring unanimity in section 41. The authority to amend the property requirement is therefore either (a) within the federal government's purview under section 44; or (b) subject of the general amending procedure, either residually or, *via* section 42, specifically.

77. As argued above, Saskatchewan takes the position that this Court's decision in the *Upper House Reference*[56] sets out the proper approach to take to section 44 and the scope of the "federal unilateral" amending power in the *Constitution Act, 1982*. The operative question, therefore, is whether removing the property qualification would impair the "sectional characteristic of the makeup of the Senate,"[57] and whether removing the property qualification would impair the ability of the Senate to provide a "sober second thought" in the legislative process.[58]

78. The statement of this court in the *Upper House Reference* with regard to the qualifications of Senators is apposite. It was stated in that decision:

> Some of the qualifications for senators, prescribed in s. 23, such as the property qualifications, may not today have the importance which they did when the [*Constitution Act, 1867*] was enacted. On the other hand, the requirement that a Senator should be resident in the province for which he is appointed has relevance in relation to the sectional characteristic of the make-up of the Senate.[59]

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[54] Joseph Pope, ed., *Confederation: A Series of Heretofor Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Co. Ltd., 1895) at p. 120 [Quebec's Record, Volume 1, Page 29].
[55] *An Act Respecting the Legislative Council*, C.S.C. 1859, c. 1, s. 4 (emphasis added).
[56] *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 [*Upper House Reference*]
[57] *Upper House Reference* at 76
[58] *Ibid.*
[59] *Ibid.*

79. This pronouncement stands for two propositions: (1) the qualifications of Senators are neither wholly within nor wholly outside of Parliament's jurisdiction to amend; and (2) the property qualifications and the residency qualifications for Senators were seen by this Court as distinct.

80. While clearly *obiter*, this Court recognized in the *Upper House Reference* that the *diminishing* importance of the property qualifications since 1867 led towards a conclusion that Parliament's legislative competence under section 91(1) extended to the property qualification. This is a key finding: a feature of the Senate which, at Confederation, was instrumental to its role, has become vestigial. Saskatchewan submits that the *obiter* of this Court in the *Upper House Reference* should be followed, recognizing that a feature of the Senate which *was* fundamental in 1867 may no longer be.

81. Changes to the property qualification stand to be resolved the same way as changes to tenure: some, but not all, changes to the qualifications of senators lie with the Parliament of Canada. For example, if Parliament attempted to amend the property qualification such that all prospective senators had to own a fixed amount of *commercial* property, the sectional nature of the body might be drastically altered. A similar result might be seen if Parliament attempted to increase the property requirement to four *million* dollars; the representativeness of the Upper House would be radically changed.

82. Parliament's jurisdiction to alter the property qualifications for senators is therefore not untrammeled, but Saskatchewan submits that the amendments proposed in Question 4 fall within section 44. The property requirement has not been increased since it was proposed in 1864. Inflation has removed the utility of the section 23 property qualifications altogether. Furthermore, social and political changes have accompanied inflationary pressures; the relationship between real property ownership and social position or excellence in community standing has been entirely diminished, if it ever existed. The need to protect vested property interests from the populism of the House of Commons has also greatly diminished with the expansion of the middle class and the changing distribution of wealth in Canadian society. Finally, the removal of the property requirement will not affect the calibre of persons eligible for Senate appointment.

83. The relationship between property ownership and sectional interests is more difficult. Senators must, of course, be resident in the province they are appointed from: as noted by this Court in the *Upper House Reference*, the residency qualification is a fundamental component of the sectional interests at play. The relationship between property ownership and devotion to (or relationship to) sectional interests is highly tenuous. There is no reason to suspect a person ordinarily resident in a province, though not owning real property within it, would be less capable of representing that region's interests in the Senate.

84. Saskatchewan submits further that section 42(1)(c) does not preclude Parliament, acting alone, from amending the property qualifications in section 23 of the *Constitution Act, 1867*.

85. On its face, section 42(1)(c) does not mention the property qualification of senators. The failure to include the property qualifications alongside explicit reference to the residency qualifications leads to a strong inference that property is not within the scope of section 42(1)(c). The Framers of the *Constitution Act, 1982* surely were cognizant of this Court's decision in the *Upper House Reference*. This Court had clearly distinguished between the "property" and "residence" qualifications and hinted that the former was of decreasing importance. The failure to list the property qualifications in section 42(1)(c) is material.

86. The property and residence qualifications are treated separately throughout the *Constitution Acts, 1867 and 1982*. The residence qualification in section 23(5) of the *Constitution Act, 1867* is separate from the property qualifications in sections 23(3) and 23(4), for example. Also notable is section 23(6), which states that Quebec senators may have either their residence or property qualification in the Electoral District they are appointed to represent—if the residence and property qualifications could be collectively represented by the phrase "residence qualifications," there would be no need for section 23(6).[60] Another example is section 31(5) of the *Constitution Act, 1867*, which states that

[60] The repeal of the property requirement does, therefore, have an ancillary effect on Senators from Québec. Without a property requirement, some Québec senators (who do not reside in the Electoral District they have been appointed to represent but nonetheless own property in it) could be disqualified from sitting. The National

residence and property requirements are evaluated by the Senate itself, further clarifying when a senator can be disqualified for failing to meet the section 23(5) "residence" qualifications.

87. All this leads to the conclusion that section 42(1)(c) does not include the property qualifications of senators. Nor is there any other reason to conclude that the property qualification can only be amended under the general amendment procedure. Given Saskatchewan's answer to Question 1 and the scope of the federal unilateral amending power, the ability to remove the property requirement altogether lies within the ability of Parliament acting under section 44.

E. Questions 5 and 6: Abolition of the Senate

(1) Position of Saskatchewan

88. Saskatchewan respectfully submits that Questions 5 and 6 should be answered as follows:

Question 5:

> (a) **Yes.** The Senate can be abolished outright under the general amending power set out in s. 38(1), by means of a new constitutional document, separate from the *Constitution Acts, 1867 – 1982*. For example, many amendments have been made to the Constitution since 1867 by separate *Constitution Acts*, as set out in the Schedule to the *Constitution Act, 1982*.
>
> (b) **Yes.** The Senate can be abolished outright under the general amending power set out in s. 38(1), by striking out all references to the Senate of Canada throughout the Constitution.
>
> (c) **Yes.** The Senate can be abolished outright under the general amending power set out in s. 38(1), by eliminating all its powers and its representation.

Question 6:

> **No need to answer.** Unanimity under s. 41 is not required. The Senate can be abolished under the general amending power set out in s. 38(1).

Assembly of Québec, in concert with Parliament, should be capable of amending s. 23(6) of the *Constitution Act, 1867* to address that, as *per* s. 43 of the *Constitution Act, 1982*.

(2) Section 38 of the *Constitution Act, 1982*: The General Formula

89. As set out above, Saskatchewan submits that Part V of the *Constitution Act, 1982* is a complete code for the amendment of the Constitution of Canada. All possible amendments to the Constitution can be achieved in some way through Part V. The question is which provision of Part V is to be used for a particular constitutional amendment.

90. Saskatchewan also submits that the text of Part V indicates that section 38 is the general amending formula. The starting presumption is that any amendment is possible through section 38 unless it is clear from the text of Part V that a proposed amendment falls within one of the other provisions. Because section. 38 is the general amending formula, all of the other formulae in Part V should be seen as derogations from the general formula and should be construed narrowly. If there is ambiguity whether a proposed amendment falls in the general formula or one of the more specific formulae, that ambiguity should be resolved in favour of the general formula.

91. In support of this analysis, Saskatchewan relies upon the following points.

92. First, the marginal notes for both sections 38 and 42 refer to section 38 as the "general procedure." These references to section 38 as the "general procedure" are an initial indication that it is the primary provision for amending the Constitution.

93. More significantly, the text of section 38 does not contain any internal limit or qualification on the scope of its application. The other amending powers set out in Part V all contain internal limitations on when they can be used: section 41 (fundamental constitutional provisions); section 43 (constitutional provisions applying to one or more provinces, but not all); section 44 (federal amendments respecting the federal executive, the House of Commons and the Senate); and section 45 (provincial amendments to the provincial constitutions). If a matter does not come within the internal limitations of one of those sections, that section cannot be used.

94. Section 38 does not contain any internal limitations on its use. It opens with the words, "An Amendment may be made to the Constitution of Canada..." It is a provision of general application, unlike the limited amending powers set out in the other provisions. The clear implication is that section 38 can be used to make any amendment, unless the matter is dealt with elsewhere in Part V.

95. The primacy of section 38 is also indicated by section 42, which lists types of constitutional amendments which can only be made under section 38. Those types of amendments are significant, and all relate ultimately to the composition and powers of the federal government in areas of particular concern to the Provinces: (a) proportionate representation in the House of Commons; (b) powers of the Senate and selection of Senators; (c) residence qualifications of Senators and the number of Senators from each province; (d) the Supreme Court of Canada; (e) the extension of existing provinces into the territories; and (f) the creation of new provinces. Clearly, major amendments to the federal structure can be made under section 38.

96. This analysis is also supported by the general policy underlying the amending formula. In both the *Patriation Reference* and the *Quebec Veto Reference*, this Court held that the constitutional convention concerning amendments did not require unanimous consent but simply a "sufficient measure of provincial support." While the specific holdings of the *Patriation Reference* have been superseded by the enactment of Part V, this Court's approach to the issue demonstrates that for constitutional amendments, there are strong policy reasons favouring substantial provincial consent, short of unanimity. That approach is carried forward by the general amending formula set out in section 38(1).

97. It must be remembered that in the area of constitutional amendments, unanimity is very difficult to achieve. It is reasonable to say that in interpreting the amending formula, there is a constitutional preference for something short of unanimity, except for the most fundamental issues. The analysis of the constitutional convention issue in the *Patriation Reference*, as well as the rejection of Quebec's arguments in the *Quebec Veto Reference*, provides support for this interpretative principle.

98. This approach is also consistent with this Court's subsequent discussion of the fundamental principles of Canadian constitutional law in the *Quebec Secession Reference*.[61] Two of those fundamental principles are federalism and democracy. Section 38 of the *Constitution Act, 1982* balances those two principles for the purposes of constitutional amendments.

99. If only the democratic principle were considered in constitutional amendments, provinces with substantial portions of the national population would be able to control the amending process, regardless of the views of the population in the smaller provinces. Alternatively, if only the federalism principle were considered, unanimity might be required, to ensure each province consented to a proposed amendment. That approach, however, would likely lead to a very difficult amending formula, in which amendments which had a substantial measure of provincial and popular consent were not enacted.

100. Section 38 balances both these principles by requiring the consent of the two Houses of Parliament, plus two-thirds of the provinces, having 50% of the national population. Both democracy and federalism are taken into account in section 38, for amendments which affect the country as a whole.

101. Saskatchewan therefore submits that major constitutional amendments to the Senate's powers and structure can be made under the general amending formula set out in section 38(1).

(3) Section 42 and the Senate

102. This position is further supported by sections 42(1)(b) and (c) of the *Constitution Act, 1982*. These two sub-paragraphs provide that amendments to the powers of the Senate and the method of selecting Senators, as well as the number of members of the Senate for each province and the residency requirement, can only be made under the general amending formula set out in section 38(1).

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[61] *Supra* n. 12, at paras. 58, 62.

103. Section 42 acts as a "road-map" provision, giving direction as between sections 44, 38, and 41. Amendments to the internal structure of the federal government can be done unilaterally by Parliament under section 44. Amendments that affect the country as a whole, but do not affect the fundamentals of the Constitution, can be done under the general formal in section 38. Unanimity under section 41 is required for a limited list of matters that are fundamental to the constitutional structure.

104. The role of section 42 is to clarify that certain types of amendments do not fall into either section 44 or section 41, but are to be dealt with under section 38. Without section 42, there could be ambiguity or uncertainly which amending provision is to be used for a particular proposed amendment. Section 42 makes it clear that certain types of amendments, even those dealing with extremely important aspects of the federal structure, are to be made under the general amending formula.

105. Saskatchewan submits that sections 42(1)(b) and (c), which indicate that the general amending procedure can be used to amend the powers of the Senate, the method of selection of senators, the number of senators from each province and the residence of senators, demonstrates that section 38 is to be used to enact amendments that Parliament cannot make unilaterally. Section 44 is subject to the same restrictions on the federal unilateral amending power as determined by this Court in the *Upper House Reference* under the former section 91(1) of the *Constitution Act, 1867.* This Court held that the participation of the Senate in the legislative process under section 91 was outside the scope of the unilateral "housekeeping" amendments permitted to Parliament under the former section 91(1). Sections 42(1)(b) and (c) continue this restriction on the unilateral powers of the federal Parliament, now found in s. 44 of the *Constitution Act, 1982*, and also provide that it is the general amending formula which is applicable to all amendments to the Senate's powers. That aspect of section 42 clarifies that the Senate is subject to amendments under the general procedure, and not the unanimity requirement under section 41.

106. Section 42 further provides that an amendment under section 38(1) which relates to the structure of the federal system, rather than to the powers of the provinces, are binding on

all the provinces, even on provinces which opposed the amendment. Section 42(2) clarifies that the power of a dissident province to opt out of a constitutional amendment relating to provincial legislative powers, proprietary rights, and other provincial rights and privileges does not apply to the types of amendments listed in section 42(1). Those types of amendment, which relate to the structure of Parliament, the Supreme Court and provincial boundaries, must be uniform across the country. Section 42(2) makes it so.

107. Sections 38(2), (3) and (4) of the *Constitution Act, 1982* also show that section 38(1) can be used to amend the legislative powers of Parliament and thus the powers of the Senate. Section 38(2) provides that any resolution under section 38(1) "...that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province" must be passed by majorities of the members of the Commons, the Senate, and the Legislative Assemblies. Sections 38(3) and (4) provide that any province which opposes an amendment dealing with these issues can dissent from the amendment, even if it is enacted by the requisite majority. Since derogations from provincial powers will normally increase federal powers,[62] these provisions are a further indication that section 38 can be used to amend the legislative powers of Parliament.

108. Taken together, sections 42(1) and (2), and sections 38(2), (3) and (4), all demonstrate that section 38(1) is the method by which major amendments can be made to the Senate both as a separate body, and as part of Parliament. In particular, the reforms in section 42(1) to the powers of the Senate, the method of selecting senators, the number of senators from each province, and the residency requirement, all show that the general amending procedure can be used to make radical, extensive changes to the Senate.

(4) Scope of Amendments under Section 38

109. Saskatchewan further submits that once it is accepted that an amendment proposing extensive changes to the Senate comes within the scope of section 38, it is solely up to the

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[62] See s; 91(2A) of the *Constitution Act, 1867*, enacted by the *Constitution Act, 1940*, which added "Unemployment Insurance" to the list of federal powers, and thereby removed that subject matter from the provincial powers, as determined by the Judicial Committee of the Privy Council in *Attorney General (Canada) v. Attorney General (Ontario)*, [1937] A.C. 355, at 365.

federal Houses and the provinces to determine the scope of those changes to the Senate's powers. Those changes could be very extensive. Currently, the two Houses of Parliament have almost co-equal powers. Both houses must consent to all legislation.[63] The only formal difference between the two is that money bills must originate in the House of Commons.[64] However, once a bill is passed by the Commons and comes to the Senate, the Senate has full authority to reject all bills,[65] including money bills.[66]

110. One possible substantive change to the Senate's powers under section 38 could be to reduce the Senate's powers from nearly co-equal to the Commons, to simply having a suspensive veto over legislation, similar to that set out in section 47 of the *Constitution Act, 1982* for constitutional amendments. The limitations on the House of Lords under the *Parliament Act 1911*[67] could provide another model. Section 38 could also be used to provide for joint sessions of the Commons and the Senate to resolve a dispute, as is the process in Australia.[68] Saskatchewan submits that sections 42(1)(b) and (c) are a clear indication that extensive amendments of these types could be enacted under the general amending power set out in section 38.

111. Saskatchewan submits that sections 42(1)(b) and (c) indicate that the general amending power could be used even further, to entirely eliminate all of the Senate's legislative powers. Once it is accepted that section 38 can be used to drastically amend or reduce the powers of the Senate, it follows that it can be used to eliminate those powers entirely.

112. Saskatchewan therefore submits that an amendment could be passed under section 38(1) to alter, reduce, or eliminate entirely all of the Senate's legislative powers. An

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[63] *Constitution Act, 1867*, s. 91, opening paragraph.
[64] *Constitution act, 1867*, s. 53.
[65] See, for instance, *An Act respecting Abortion*, Bill C-43, 2nd Sess., 34th Parl., 1991, which was passed by the Commons but rejected in the Senate on a tie vote: *Senate Journals*, January 31, 1991, pp. 2238-2239.
[66] See, for instance, *The Naval Aid Act*, Bill 21, 2nd Sess., 12th Parl., 1913, which was passed by the House of Commons but rejected by the Senate: *Senate Journals*, May 29, 1913, pp. 516-517.
[67] *Parliament Act 1911* (U.K.), 1 & 2 Geo. V, c. 13.
[68] *Constitution of Australia*, s. 57.

amendment eliminating all of the Senate's powers could be part of the abolition of the Senate, all under section 38.

(5) The Senate and Constitutional Amendments under Part V

113. Saskatchewan submits that the general amending procedure set out in section 38 could be used not only to eliminate the Senate's role in ordinary legislation under sections 91-95 of the *Constitution Act, 1867*, but also could be used to eliminate the Senate's role in constitutional amendments under Part V of the *Constitution Act, 1982*. The reference in section 42(1)(b) to the "powers of the Senate" refers to all of the Senate's powers, not simply its powers with respect to ordinary legislation. Section 42(1)(b) again acts as a road-map, directing that all of the powers of the Senate are to be amended under section 38, and not through the other amending powers set out in section 44 and section 41.

114. Saskatchewan acknowledges the argument that removing the Senate's powers with respect to constitutional amendments may be thought an amendment to Part V of the *Constitution Act, 1982*, and, therefore, requires unanimous consent under s. 41(e). Saskatchewan respectfully submits that position should be rejected, for the following reasons.

115. First, there are dueling limitations between sections 42(1)(b) and section 41(e). Section 41(e) states that an amendment to Part V can "only" be made under section 41. However, section 42(1)(b) similarly states that an amendment to the "powers of the Senate" can "only" be made under section 38. These two competing "onlys" show that it is not self-evident that the unanimity requirement applies to the Senate's powers with respect to constitutional amendments. The two provisions must be interpreted harmoniously. Saskatchewan submits that a detailed review of the two provisions show that section 42(1)(b) applies, not section 41(e).

116. Second, section 41 is an exception to section 38. It provides that unanimity is required for certain types of amendments, specifically enumerated in section 41. Saskatchewan submits that this list should be construed narrowly, as a derogation from the

general amending power. Amendments need only be passed by unanimity if they clearly come within the list set out in section 41. This Court should give a purposive interpretation to that list of powers, neither expanding nor contracting it. If a matter does not come within the specific terms set out in section 41, then the general formula is applicable.

117. Third, the requirement for unanimity, set out in section 41, relates only to a certain number of issues which are considered so fundamental to the structure of the nation that unanimity is required for an amendment: (a) the offices of the Queen, the Governor General and the Lieutenant Governors (which in turn guarantee the parliamentary system at the federal and provincial level); (b) a minimum level of representation for each province in the House of Commons (which guarantees the existence of the House of Commons; (c) the use of the English and French languages; (d) the composition of the Supreme Court (which helps ensure that each region will have some representation on the Court), and (e) an amendment to Part V itself.

118. The absence of the Senate from this list is striking. At Confederation, the Senate was envisaged as being fundamental to the new constitutional structure, playing a major role in representing regional interests. The importance of the Senate to the Fathers of Confederation is demonstrated by the nearly co-equal legislative authority of the Senate and the House of Commons, as discussed earlier.

119. By 1982, that view of the Senate's importance had changed substantially, and that changed view is reflected in section 41. Over a century of experience with the Senate had shown that the Senate did not play a major role in the political structure of Canada. The political realities of the ever-increasing shift to electoral, democratic principles had undermined the Senate's political authority, and increased the political authority of the House of Commons. As a practical political matter, federal legislative power and policy now rests with the House of Commons, not shared with the Senate.

120. As well, the increasing role of the provinces, as reflected by the decisions of the Judicial Committee and this Court, has meant that the provinces have a major say in regional representation. Coupled with their democratic legitimacy, this shift has enabled the

governments of the provinces to assume the role of defending regional and provincial interests which the Fathers of Confederation had envisaged for the Senate, but which the Senate has been unable to carry out in a meaningful way.[69]

121. Presumably as a result of these political shifts, the Senate was not seen as sufficiently important to include in section 41, unlike the guarantee of provincial representation in the House of Commons in section 41(b).

122. Fourth, in contrast to the lack of reference to the Senate in the list of matters set out in section 41, there are the express references to the Senate in section 42(1), particularly the "powers of the Senate" mentioned in section 42(1)(b). The Framers had turned their minds to the issue of the Senate. Not only was the Senate omitted from the unanimity list, it was included in the "road-map" of section 42, which directs that specific types of amendments relating to the Senate are to be made only under the authority of section 38.

123. Fifth and finally, the Senate has a much less significant role in constitutional amendments than do the House of Commons and the legislative assemblies. Section 47 provides that for constitutional amendments passed by resolutions under sections 38, 41, 42, or 43, the Senate has only a suspensive veto. If it rejects or fails to act on a proposed resolution within 180 days of passage by the House of Commons, it is open to the House of Commons to re-pass the resolution. The constitutional amendment can then be made without the consent of the Senate.

124. Saskatchewan notes that the Senate's suspensive veto does not apply to amendments under section 44, which provides that the Parliament of Canada can "make laws" to amend the internal structure of the federal government. However, the Senate's role in enacting a federal law is a "power of the Senate" and therefore also comes within section 42(1)(b). As well, it is significant that section 44 refers to the "Parliament of Canada" as compared to the Queen, the Senate, and the House of Commons. This Court held in *Upper House Reference*

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[69]Wall, Brad (PremierBradWall). "Senate was to be a voice for the regions, specifically the provinces. We have that w/o the Senate, constitutionally known as 'the provinces.'" May 24, 2013, 4:51 p.m. Tweet.

that the specific reference to the three parts of Parliament in section 91 was a major distinction from the equivalent provincial provision, section 92(1), which conferred the amending power on the Legislatures of the provinces. This Court held that the more general reference to the Legislatures gave the Legislatures the power to re-define themselves and to abolish their Legislative Councils.[70] Saskatchewan submits that the same analysis applies to the reference to the "Parliament of Canada" in section 44.

125. In conclusion, given the weak nature of the Senate's powers with respect to constitutional amendments, the specific reference to the Senate's powers in section 42(1)(b) takes on greater significance. The Senate is not specifically mentioned in the unanimity list in section 41, and even its role under Part V is much less than that of the House of Commons and the legislative assemblies. As a result, the specific reference in section 42(1)(b), that the powers of the Senate can only be amended under section 38, should take priority over the general wording of section 41(e) which relates to the Senate in a very attenuated fashion.

PART IV

COSTS

126. Saskatchewan does not seek costs, and submits that it is not liable for costs.

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[70] *Upper House Reference, supra*, n. 8, at 74.

PART V

NATURE OF ORDER SOUGHT

127. Saskatchewan respectfully submits that Questions 1(b), 2, 3, 4 and 5 as stated in P.C. 2013-70 should be answered "yes". Questions 1(a), (c), (d), (e), (f) and (g) should be answered "no". In view of Saskatchewan's answer to Question 5, there is no need to answer Question 6.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 29th day of August, 2013.

Graeme G. Mitchell, Q.C.

for Thomson Irvine

Theodore J. C. Litowski

Counsel for the Attorney General for Saskatchewan[71]

[71] We gratefully acknowledge the invaluable participation of our colleague, Glenn MacKay, Intergovernmental Officer, Executive Council, Government of Saskatchewan, in the preparation of this factum.

PART VI

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Appendix A

Senate abolition on Wall's agenda

BY JOE COUTURE, THE STARPHOENIX JULY 24, 2013

Saskatchewan Premier Brad Wall.
Photograph by: TROY FLEECE, REGINA LEADER-POST FILES

Premier Brad Wall on Tuesday rejected criticism from Opposition NDP Leader Cam Broten that his government's position on abolishing Canada's Senate is unclear.

"It's pretty obvious that a constitutional resolution is at the top of the list of options from the legislature. But there are a number of different options to pursue, and in the Saskatchewan Party - maybe not in the NDP, but in the Saskatchewan Party we want to make sure that all of our members are engaged and have a say in the debate about what the legislative agenda looks like and what the resolution specifically on the Senate might say and what it might not say," Wall said in a phone interview.

Wall said his Sask. Party government will "be moving" in the fall in the legislature on the issue, but questions about what a resolution would look like and whether it would be paired with or separate from repealing the government's existing elected senators legislation are "potentially up for debate" with the government caucus, he said. "The principle's abolition. That will be the underlying principle. It's just, what's the best way to advance that cause? We'd like to try to do it in a way that might have a bit of traction outside of our borders. It's pretty important for me to canvass my colleagues here at the Council of the Federation," the premier added.

Wall is meeting this week in Niagara-on-the-Lake, Ont. with premiers from across the province for the annual Council of the Federation retreat.

He says he wants to speak with them about advancing the position of abolition from their individual legislatures.

He noted that while some premiers favour reforming the Senate, "a case is being made" that abolition could be the best first step to reformation by rebuilding.

That could be an "interesting idea" for provinces to pursue," Wall said.

"We have to not just make the case or resolve the matter

in our province, but hopefully do it in a way that's constructive and helpful for our debate across the country," he said.

"We're going to suggest a number of different options for provinces to look at, but we're going to be speaking clearly in favour of abolition at this conference, as I have over the last number of weeks," the premier said.

Senate abolition isn't the only topic on the agenda for Wall at the meeting. He and P.E.I. Premier Robert Ghiz, co-chairs of a working group on health care, will present their second report to the gathering of premiers.

In addition to its work on joint purchasing of pharmaceuticals, the working

group has explored reducing unnecessary diagnostic testing, among other ideas, Wall says.

"You are going to see very clear action in this report, as well.

"You will see goals set. And you'll see a recommendation from Premier Ghiz and I that this process continue," he said.

Wall said he thinks he can find common ground with premiers from Ontario and Quebec who have indicated concerns over the federal government's new job-training program.

While he agrees with some of the principles behind the federal program, the government in Ottawa "has to be flexible and willing to negotiate ..." he said.

Appendix B

Pre-Existing Amending Powers Amended by the Patriation Package

The following pre-1982 provisions respecting the amendment of the Constitution of Canada have been amended by Part V as follows:

1. The amending power of the British Parliament has been abolished by the *Canada Act 1982*, s. 2.

2. The legal authority of the Government of Canada to request the British government to enact any constitutional amendment the federal government wished, as set out in the *Patriation Reference*, has been replaced by the amending formula in Part V of the *Constitution Act, 1982*, which provides that the federal government only has unilateral amending powers with respect to "the executive government of Canada or the Senate and House of Commons" (s. 44). For all other constitutional amendments, some degree of provincial consent is required, depending on the nature of the amendment.

3. The constitutional convention requiring a "measure of provincial consent" to a proposed constitutional amendment, as set out in the *Patriation Reference*, has been replaced by the amending formula in Part V, which sets out in considerable detail how much provincial consent is required, depending on the nature of the constitutional amendment.

4. The federal power to amend the "Constitution of Canada" subject to a number of exceptions, found in s. 91(1) of the *Constitution Act, 1867*, as amended by the *British North America Act (No. 2), 1949*, was repealed. The amending power set out in s. 91(1) was carried forward, with somewhat different wording, in s. 44 of the *Constitution Act, 1982*, while the various restrictions on the amending power which had been set out in s. 91(1) are now found in a number of different provisions of the *Constitution Act, 1982* and the Charter. For a complete analysis of this change, see Appendix III.

5. Section 92(1) of the *Constitution Act, 1867*, which gave each province the power to amend "the Constitution of the Province, except as regards the Office of the Lieutenant Governor," was repealed. The amending power is now found in s. 45 of the *Constitution Act, 1982*, while the restriction on amendments to the office of the Lieutenant Governor is now found in s. 41(a) of the *Constitution Act, 1982*, which requires unanimous consent for any such amendment.

6. The power of the federal Parliament to provide for the "Constitution, Organization and Maintenance of a General Court of Appeal for Canada" (*Constitution Act, 1867*, s. 101), has now been limited by two provisions of the *Constitution Act, 1982*. Section 41(d) of the *Constitution Act, 1982* now provides that any change to the "composition of the Supreme Court of Canada" can only be done by unanimous consent, while s. 42(1) of the *Constitution Act, 1982* provides that any change to the Constitution respecting the

Supreme Court, other than the composition of the Court, can only be made by the general amending formula set out in s. 38 of the *Constitution Act, 1982.*

7. The power of the federal Parliament to establish new provinces out of the federal territories (*Constitution Act, 1871*, s. 2) has been limited by s. 42(1)(f) of the *Constitution Act, 1982*, which provides that new provinces can only be established by the general amending formula, set out in s. 38 of the *Constitution Act, 1982.*

8. The power of the federal Parliament to change the boundaries of existing provinces, with their consent (*Constitution Act, 1871*, s. 3), is now limited by s. 42(1)(e) of the *Constitution Act, 1982*, which provides that the existing provinces cannot be extended into the territories except by the general amending formula, set out in s. 38 of the *Constitution Act, 1982*.

9. The amending formula for the *Natural Resources Transfer Agreements* is not expressly referred to in Part V, but it appears that Part V has implicitly amended that formula. The four Agreements each provide that they can be amended by concurrent federal and provincial statutes. See, for example, the Saskatchewan NRTA, paragraph 26. However, the *Constitution Act, 1930* gives the Agreements the "force of law," elevating them to constitutional status. They are therefore constitutional provisions which apply to "... one or more, but not all, provinces," which appears to bring them within the amending formula set out in s. 43 of the *Constitution Act, 1982*. Under that provision, amendments are made by concurrent resolutions of Parliament and the relevant provincial legislature, rather than statutes. It would appear that this provision has superceded the NRTA amending formula.

Appendix C

Section 91(1) of the Constitution Act, 1867 - Transfer of Provisions to the *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1982*

From 1949 until patriation in 1982, the federal Parliament had a limited power to amend the "Constitution of Canada". This power was set out in a new paragraph added to s. 91 of the *British North America Act, 1867.* This new paragraph 91(1) was added by the *British North America Act (No. 2), 1949*, 13 Geo. VI, c. 81 (U.K.). As a consequential amendment, the 1949 Act also renumbered the original section 91(1), "The Public Debt and Property," as section 91(1A).

Section 91(1) gave the federal power the following legislative authority:

> 1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

Section 91(1) and the 1949 Act were both repealed by the *Constitution Act, 1982*, s. 53(1) and the Schedule, Items 1 and 22. Section 91(1) was "unpacked" and all of its component parts continue to be found in the Charter and in the *Constitution Act, 1982*. In the following analysis, the bolded portions indicate where a particular provision is now found:

> 1. The amendment from time to time of the Constitution of Canada, **[now found in s. 44 of the *Constitution Act, 1982*]**
>
> > [1] except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, **[continues to be exempted from federal authority by s. 92 of the *Constitution Act, 1867* and s. 38 of the *Constitution Act, 1982*]**
> >
> > [2] or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, **[now protected by s. 38(2) of the *Constitution Act, 1982*]**
> >
> > [3] or to any class of persons with respect to schools **[continues to**

be protected by s. 93 of the *Constitution Act, 1867* and s. 43 of the *Constitution Act, 1982*]

[4] or as regards the use of the English or the French language **[continues to be protected by s. 133 of the *Constitution Act, 1867,* with respect to the federal government and Quebec, and by s. 23 of the *Manitoba Act, 1870,* with respect to Manitoba; further protection now provided by ss. 17 to 19 of the Charter, with respect to the federal government and New Brunswick, as well as by s. 41(c) and s. 43(b) of the *Constitution Act, 1982*]**

[5] or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, **[now protected by s. 5 of the Charter]**

[6] and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: **[now protected by s. 4(1) of the Charter]**

[7] provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House. **[now protected by s. 4(2) of the Charter]**

Senate Tenure Using Question 1(d) Methodology

Parliament Data					Two Parliaments		Three Parliaments	
Parliament	Opening	Progogation	Dissolution	Total	Days	Years	Days	Years
*1	11-Jun-67	14-Jun-72	8-Jul-72	1,854	[illegible]	[illegible]	3,761	10.30
*2	5-Mar-73	7-Nov-73	2-Jan-74	303	[illegible]	[illegible]	[illegible]	8.48
*3	26-Mar-74	10-May-78	16-Aug-78	1,604	2,794	7.65	4,231	11.59
*4	13-Feb-79	17-May-82	18-May-82	1,190	2,627	7.20	4,050	11.10
*5	8-Feb-83	2-Jun-86	15-Jan-87	1,437	2,860	7.84	4,713	12.91
*6	13-Mar-87	16-May-90	3-Feb-91	1,423	3,276	8.98	4,788	13.12
*7	29-Mar-91	23-Apr-96	24-Apr-96	1,853	3,365	9.22	4,696	12.87
*8	19-Aug-96	18-Jul-00	9-Oct-00	1,512	2,843	7.79	4,188	11.47
9	6-Feb-01	10-Aug-04	29-Sep-04	1,331	2,676	7.33	3,596	9.85
10	11-Jan-05	20-Jul-08	17-Sep-08	1,345	[illegible]	[illegible]	4,417	12.10
11	20-Jan-09	29-Jul-11	29-Jul-11	920	3,072	8.42	4,368	11.97
12	15-Nov-11	20-Sep-17	6-Oct-17	2,152	3,448	9.45	4,725	12.95
13	18-Mar-18	6-Apr-21	4-Oct-21	1,296	2,573	7.05	[illegible]	[illegible]
14	8-Mar-22	27-Jun-25	5-Sep-25	1,277	[illegible]	[illegible]	[illegible]	[illegible]
15	7-Jan-26	2-Jul-26	2-Jul-26	176	[illegible]	[illegible]	[illegible]	[illegible]
16	9-Dec-26	30-May-30	30-May-30	1,268	3,069	8.41	4,518	12.38
17	8-Sep-30	5-Jul-35	14-Aug-35	1,801	3,250	8.90	5,016	13.74
18	6-Feb-36	25-Jan-40	25-Jan-40	1,449	3,215	8.81	4,547	12.46
19	15-May-40	15-Mar-45	16-Mar-45	1,766	3,098	8.49	4,465	12.23
20	6-Sep-45	30-Apr-49	30-Apr-49	1,332	2,699	7.39	3,946	10.81
21	15-Sep-49	14-May-53	13-Jun-53	1,367	2,614	7.16	[illegible]	[illegible]
22	12-Nov-53	12-Apr-57	12-Apr-57	1,247	[illegible]	[illegible]	[illegible]	[illegible]
23	14-Oct-57	1-Feb-58	1-Feb-58	110	[illegible]	[illegible]	[illegible]	[illegible]
24	12-May-58	18-Apr-62	19-Apr-62	1,438	[illegible]	[illegible]	[illegible]	[illegible]
25	27-Sep-62	5-Feb-63	6-Feb-63	132	980	2.68	[illegible]	[illegible]
26	15-May-63	30-Jun-65	9-Sep-65	846	[illegible]	[illegible]	[illegible]	[illegible]
27	18-Jan-66	23-Apr-68	23-Apr-68	826	[illegible]	[illegible]	[illegible]	[illegible]
28	9-Sep-68	1-Sep-72	1-Sep-72	1,453	[illegible]	[illegible]	3,581	9.81
29	4-Jan-73	9-May-74	9-May-74	490	[illegible]	[illegible]	[illegible]	[illegible]
30	30-Sep-74	26-Mar-79	26-Mar-79	1,638	[illegible]	[illegible]	[illegible]	[illegible]
31	9-Oct-79	14-Dec-79	14-Dec-79	66	[illegible]	[illegible]	[illegible]	[illegible]
32	14-Mar-80	9-Jul-84	9-Jul-84	1,578	3,004	8.23	4,736	12.98
33	5-Nov-84	1-Oct-88	1-Oct-88	1,426	3,158	8.65	4,323	11.84
34	12-Dec-88	9-Sep-93	9-Sep-93	1,732	2,897	7.94	4,135	11.33
35	17-Jan-94	25-Mar-97	27-Mar-97	[illegible]	2,403	6.58	3,613	9.90
36	2-Jun-97	22-Oct-00	22-Oct-00	1,238	2,448	6.71	[illegible]	[illegible]
37	29-Jan-01	23-May-04	23-May-04	1,210	[illegible]	[illegible]	[illegible]	[illegible]
†38	4-Oct-04	29-Nov-05	29-Nov-05	421	[illegible]	[illegible]	[illegible]	[illegible]
†39	3-Apr-06	7-Sep-08	7-Sep-08	888	[illegible]	[illegible]		
†40	18-Nov-08	25-Mar-11	26-Mar-11	856				
†41	2-Jun-11							
			Average:	1,186	2,362	6.47	3,570	9.78

NOTES

1. Excel cannot handle dates before 1900. Dates marked with an asterisk (*) have been entered as if they took place in the 1900's (e. g. 1867 becomes 1967). This should not affect the mathemetics.

2. Length of Parliament is calculated between the beginning of the **session** and **dissolution** (not **progogation**, where those dates differ pre-1926)

3. Dates for 1st to 37th Parliaments taken from *Canadian Parliamentary Guide* (2005)

4. Data for years marked with a dagger (†) taken from: http://www.parl.gc.ca/Parlinfo/compilations/parliament/Sessions.aspx

5. Values highlighted in each column are below the average for that column.