Court File No.: 35203

IN THE SUPREME COURT OF CANADA

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

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

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

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PART I – STATEMENT OF FACTS

A. Overview

1. At its core, this Reference has less to do with the Senate and more to do with the integrity of the amending procedures found in the Constitution. In other words, when can Parliament proceed alone to change the Constitution and when is participation by the Provinces required? If the interpretation put forward by the Attorney General of Canada is accepted, then the Provinces will have a significantly diminished role when it comes to making fundamental changes to the Constitution. Prince Edward Island, by virtue of its size, is particularly vulnerable.

2. Our response is two-fold. First, it is necessary to interpret the amending procedures in the Constitution in a way that allows Parliament and the Provinces to each participate in a meaningful way when making fundamental changes to our core federal institutions. This is the only conclusion that is consistent with federalism. Changes, like the ones being proposed here, cannot be made unilaterally. Second, it is necessary for any interpretation to preserve and protect the essence of the bargains struck in 1867 and 1982. There are burdens in a federation such as ours but, at the end of the day, a deal is a deal.

3. The integrity of the constitutional amendment process must be protected. Prince Edward Island expresses no opinion as to whether the Senate reforms being proposed are desirable. It also takes the view that any obstacles or delays that the Government of Canada may face in implementing its Senate reform agenda, or introducing its conception of "modern democracy," are not relevant to the questions before this Court.

B. Facts

4. On September 1, 1864, the "Canadians" arrived in Prince Edward Island to discuss federal union with the Maritime Provinces.[1] Negotiations began almost immediately. The Senate "was considered by many to be the main federal institution of the whole system, and much was believed to depend on its structure."[2] However, no specific agreement was reached on the selection or tenure of Senators. Those issues were left for another day.

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[1] P.B. Waite, *The Charlottetown Conference* (Ottawa: Canadian Historical Association, 1970), p. 13, AGPEI Record, Tab 2, p. 5 [Waite, *Charlottetown*].

[2] Waite, *Charlottetown*, p. 15, AGPEI Record, Tab 2, p. 7.

5. Negotiations continued at Quebec, and the Senate consumed much of the discussion. The composition of the upper chamber was of particular concern to the Maritime delegates. Hon. A.A. Macdonald, one of the representatives from Prince Edward Island, recorded that "[t]he only safeguard the small Provinces would possess was in the Council."[3] The Senate was, in his words, "to be the guardian of their rights and privileges."[4]

6. The election of Senators, and the limits on their tenure, were both canvassed at Quebec. It was proposed that members of the Senate be chosen by votes in the provincial legislatures and that terms be limited to four years.[5] That motion was rejected, and it was agreed that Senators in the new federal union would be appointed for life by the Crown.[6]

7. Prince Edward Island, for its part, rejected the resolutions passed at Quebec and embarked on a period of "splendid isolation."[7] However, after a long courtship, Canada was "annexed" to Prince Edward Island on July 1, 1873.[8] With the land question answered and the burden of a railway debt lifted, the Island embraced its part of the federal bargain: the provisions of the *Constitution Act, 1867* would be "applicable to Prince Edward Island, in the same way and to the same extent as they apply to the other Provinces of the Dominion, and as if the Colony of Prince Edward Island had been one of the Provinces originally united by the said Act."[9]

8. When the plan was being developed to patriate the *Constitution Act, 1867*, Prince Edward Island was once again at the table. Discussions took place in Ottawa. On April 16, 1981, eight Provinces, including Prince Edward Island, presented the formula for amending the Constitution of Canada. That formula recognized the "constitutional equality of provinces as equal partners in Confederation" and formed the basis of the new Canadian constitutional bargain.[10]

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[3] A.G. Doughty, ed., "Notes on the Quebec Conference, 1864" (1920) 1(1) Canadian Historical Review 26, p. 34, AGPEI Record, Tab 3, p. 22 [Doughty, Quebec].

[4] Doughty, Quebec, p. 35, AGPEI Record, Tab 3, p. 23.

[5] Doughty, Quebec, pp. 36-37, AGPEI Record, Tab 3, pp. 24-25.

[6] Doughty, Quebec, p. 38, AGPEI Record, Tab 3, p. 26.

[7] D.C. Harvey, "Confederation in Prince Edward Island" (1933) 14(2) Canadian Historical Review 143, p. 148, AGPEI Record, Tab 5, p. 68 [Harvey, Confederation].

[8] Harvey, Confederation, p. 160, AGPEI Record, Tab 5, p. 80.

[9] Prince Edward Island Terms of Union, R.S.C. 1985, Appendix II, No. 12, p. 6, AGPEI Record, Tab 6, p. 87.

[10] Conference of Provincial Premiers on the Constitution, *Amending Formula for the Constitution of Canada: Text and Explanatory Notes*, Ottawa (16 April 1981), AGPEI Record, Tab 8, p. 99.

PART II – ISSUES

9. Prince Edward Island submits that the questions[11] before the Court should be answered as follows:

Question I: No.

(a) The proposed term limits relate to the duties and rights of individual Senators – not to the Senate as a legislative body – and, for that reason, Parliament cannot proceed unilaterally.

(b) The proposed limits also relate to the powers of the Senate and the method for selecting Senators. Those changes can only be made in accordance with the 7/50 rule.

Question II: No.

(a) The proposed selection process relates to the method of selecting Senators and, for that reason, compliance with the 7/50 rule is required.

(b) The proposed process also affects fundamental features of the Senate, namely its independence and its role as a dispassionate chamber of secondary review, and, according to the decision of this Court in the *Upper House Reference*,[12] such a change cannot be made unilaterally by Parliament.

Question III: No.

In addition to the defects noted in Question II, the proposed selection process violates the existing constitutional convention whereby the Prime Minister recommends appointments for the Senate to the Governor General, who then accepts the recommendations. This departure from convention is unconstitutional and participation by the Provinces is required in order to alter the precedent for selecting Senators.

Question IV: Yes.

(a) Parliament may be capable of repealing the property qualifications for Senators unilaterally and without participation from the Provinces. Those qualifications potentially violate section 2 of the *Canadian Charter of Rights and Freedoms*.

(b) The proposed amendments also appear to be of the housekeeping variety envisioned by the Court in the *Upper House Reference*. The changes do not

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[11] AGPEI Factum, Appendix A.

[12] *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, AGPEI Authorities, Tab 1 [*Upper House Reference*].

appear to relate to any of the fundamental features or essential characteristics of the Senate and therefore could fall within the exclusive authority of Parliament.

Question V: No.

Abolishment of the Senate would require changes to the text of the amending procedures in the Constitution and would, at a minimum, require unanimous consent.

Question VI: No.

Abolishing the Senate falls outside the limitations inherent in the word "amend." In other words, changes affecting the "basic structure" of a constitution represent a revision – not an amendment. The Constitution is silent as to its revision, and the amending procedures are not applicable. Negotiation with the Provinces would be required to effect such a fundamental change.

PART III – ARGUMENT

A. Applicable Interpretive and Constitutional Principles

10. Constitutional language must be read "generously," placed in "its proper linguistic, philosophical and historical context," and read with regard to its internal structure.[13] That task includes looking at the ordinary meaning of the words used, the overall context, and the purpose the words were (and are) intended to serve.[14] Thus, consideration of the philosophical and historical underpinnings of the Constitution is a required part of the analysis.

11. In argument, the Attorney General of Canada places little emphasis on these considerations. Instead, it is asserted that the Court should adopt a "progressive interpretation" of the amending formulas and one that is consistent with the notion of "modern democracy." Several submissions are made by Prince Edward Island in response:

(a) The "progressive interpretation" principle is one of interpretation only and does not allow the Court to ignore or minimize the actual text of the Constitution, which is the paramount consideration.

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[13] *R. v. Blais*, [2003] 2 S.C.R. 236, para. 17, AGPEI Authorities, Tab 2 [*Blais*].

[14] *Blais*, para. 18, AGPEI Authorities, Tab 2.

(b) Views differ about what essential elements are necessary for a "modern democracy." That notion also cannot be considered in a vacuum. The *Constitution Act, 1867* established a "Made in Canada" Westminster-style constitutional monarchy. Our bicameral system has been described as a product of the consensus, rather than the majoritarian, model of government.[15] It forms part of a "system of 'checks and balances' and ensures a broader consensus is reached on policy than that of the partisan majority of the lower house alone."[16] Some might argue such a system has undemocratic and outmoded features (for example, the Queen as our formal head of state), but those elements remain and were, in the case of the Queen, given enhanced constitutional protection under the 1982 amending formulas. It is also worth noting that one could easily counter that making unilateral changes to core federal institutions, without consulting or obtaining consent from provincial partners, is also profoundly undemocratic.

(c) This Court has rightly placed more emphasis on the intentions of the makers of the Constitution in "bargain" cases;[17] that is, cases where the provisions in question were the product of historic compromise. This case falls within that category. The bargain at issue is not just the one reached in 1867, but also the one made in 1982 to supplement, but not fundamentally alter, the original compromise. The *Constitution Act, 1982* maintained and, indeed, enhanced the protection afforded to the Provinces under the amending procedure.

12. Although it is agreed that the written text of the Constitution has primacy, the preamble incorporates certain unwritten – but foundational – principles and any interpretation of the Constitution must include an appreciation of them. They assist in interpreting the Constitution and, specifically, in identifying the roles of its core institutions. Those institutions are, of course, at the very heart of our constitutional arrangement.

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[15] Meg Russell, "What are Second Chambers For?" (2001) 54 Parliamentary Affairs 442, p. 443, AGPEI Authorities, Tab 3 [Russell, Second Chamber].

[16] Russell, Second Chamber, p. 450, AGPEI Authorities, Tab 3.

[17] See e.g. *Societe des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, p. 578, AGPEI Authorities, Tab 4.

13. Three unwritten principles are relevant here: federalism, democracy, and constitutionalism. The Attorney General of Canada contends that the Court should not resort to these unwritten principles unless there are ambiguities or gaps in the actual text. It is said that none exist in this case.[18] The Attorney General of Canada does, however, rely on its own principle of "modern democracy," but fails to explain the meaning of that concept to the Court or to the Provinces. It is also important to note that this Court has already held that unwritten principles are "key" to construing the express provisions of the Constitution and to filling gaps in those provisions.[19] These principles can therefore assist the Court in its interpretation. There is no requirement for an ambiguity or gap.

Federalism

14. "Federalism" is a critical consideration in this case. It is "a central organizational theme of our Constitution."[20] The amending formula also "presupposes that federalism is the most important constitutional organizing principle."[21] The objective of this principle is to ensure that "a fine balance" is maintained between local and centralized decision-making.[22] In other words, the federal government should not encroach on the constitutional powers of the provincial governments and vice versa.

15. Adoption of a bicameral mode of parliament is a "fundamental" element of constitutional design.[23] This choice can have a profound impact on a country's style of government. Representation of sub-national units, like provinces, in upper houses is also a common attribute of federal systems like ours. That form of representation is "important both in relation to the

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[18] AGC Factum, paras. 95-96.

[19] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, para. 95, AGPEI Authorities, Tab 5.

[20] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, p. 251, AGPEI Authorities, Tab 6 [*Secession Reference*].

[21] Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen's University Press, 1992), pp. 6-7, AGPEI Authorities, Tab 7.

[22] *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] 3 S.C.R. 407, para. 30, AGPEI Authorities, Tab 8.

[23] Russell, Second Chamber, p. 442, AGPEI Authorities, Tab 3.

passage of national legislation ... and in relation to constitutional amendment."[24]

16. The Provinces have vital and vested interests in not only the Senate but also the constitutional amendment process which, by its express terms, requires active participation by the Senate. As Twomey has observed:

> *Federations protect the interests of territorially-based minorities within a nation by establishing sub-national polities with a level of independent legislative and executive power. As it is the national Constitution which establishes the federal system and distributes and limits power within that system, sub-national units have a vital interest in the means by which it is amended. In particular, sub-national units have a vested interest in:*
>
> - *the preservation of their role in the process of amending the national Constitution;*
> - *the maintenance of the federal structure;*
> - *the protection of their representation in the upper House of the national Parliament;*
> - *the maintenance of the integrity of their boundaries; and*
> - *the distribution of legislative and executive powers between the different levels of government.*[25]

Democracy

17. "Democracy" is a second critical element for consideration by the Court. In the *Secession Reference*, this Court discussed the "democracy" principle and noted that it was best understood as "a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated."[26] With that in mind, it must be noted that the *Charter*, which also formed part of the *Constitution Act, 1982*, did not extend our voting guarantee to include the election of members for the Senate. It cannot, therefore, be said that the Senate, as now constituted, is somehow inconsistent with our established constitutional norms or the Canadian conception of democracy – modern or otherwise. In fact, the preamble to the *Constitution Act, 1867* expressly contemplated that the

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[24] Anne Twomey, "Involvement of Sub-national Entities in Direct and Indirect Constitutional Amendment within Federations" (accessed 10 August 2013), online: http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Twomey.pdf, p. 16, AGPEI Authorities, Tab 9 [Twomey, Sub-national Entities].

[25] Twomey, Sub-national Entities, p. 1, AGPEI Authorities, Tab 9.

[26] *Secession Reference*, p. 253, AGPEI Authorities, Tab 6.

Senate would be modeled on the British House of Lords.

18. This commitment to "democracy" has other important implications in this Reference. In particular, this Court has repeatedly emphasized that, in a constitutional democracy like ours, the legislatures have the primary responsibility for law reform and the courts are confined to making incremental changes.[27] This statement applies with even more force to constitutional reform and, more specifically, to Senate reform. This Court should not be drawn, either directly or indirectly, into allowing the amending process to be side-stepped by Parliament simply because that process has been unsuccessful in the past or may be difficult in the future. It is difficult to amend the Constitution and properly so.[28] Inconvenience is not a constitutional basis for Parliament to proceed unilaterally.

Constitutionalism

19. The doctrine of "constitutionalism" is also relevant in this case. It requires that all legislative action comply with the Constitution. Consequently, as pointed out in the *Secession Reference*, it must be shown that the lawful authority to unilaterally enact these proposals rests with Parliament – and Parliament alone – under our Constitution. The only issue before the Court is one of legal authority. The issue is not whether the Senate is an effective body or whether Senate reform is desirable.

B. The Pith and Substance Doctrine

20. The Attorney General of Canada asserts that the "pith and substance" doctrine, applicable to the division of legislative powers, should also be applied to the amending formulas. Prince Edward Island submits that this would be inappropriate. Given the text and context of Part V of the *Constitution Act, 1982*, a more rigorous approach, which would prevent incursion into ss. 38, 41 and 42, should be taken.

21. In the *Securities Reference*, Rothstein J. summarized the pith and substance approach to

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[27] *R. v. Salituro*, [1991] 3 S.C.R. 654, p. 670, AGPEI Authorities, Tab 10.

[28] House of Commons, Legislative Committee on Bill C-20, *Evidence*, 39th Parl. 2d. sess. (30 April 2008), p. 3, (Professor John Whyte), AGPEI Record, Tab 10, p. 149. Professor Whyte noted that "[t]he inconvenience of changing the law is designed precisely to force us to have those inconvenient conversations that we might not otherwise have, except for the fact that for one reason or another our predecessors judged it was important that we do so."

dividing legislative authority. When applying this test, the Court must (1) look at the purpose of the legislation, and its legal and practical effects, to identify the "main thrust" of the statute and (2) determine whether that main thrust "falls within a particular head of power."[29] Rothstein J. went on to stress that, while federalism aims to encourage flexibility and cooperation between the federal and provincial governments, "federalism as an underlying constitutional principle ... demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers."[30] It is therefore necessary to keep in mind that "[t]he dominant tide of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state."[31]

22. Part VI of the *Constitution Act, 1867* and Part V of the *Constitution Act, 1982* engage very different considerations. The former divides legislative authority between Parliament and the Provinces while the latter sets forth the mechanism for altering that agreement and the other compromises found in the Constitution. Any constitutional provision requires a certain amount of "rigidity" in order to protect its integrity; however, the amending component of a constitution must be even more difficult to change.[32] It has been said that amending formulas "need to be entrenched by the highest level of protection available."[33] This need is reflected in s. 41(e) of the *Constitution Act, 1982*, which requires unanimous consent for any amendment to Part V. It also goes without saying that constitutional amendments make changes to powers or rights that are fundamental in nature and, for that reason, constraints on the exercise of such authority are necessary and must be enforced by the Court as the guardian of the Constitution.

23. The constitutional amending process is important to all the Provinces; however, it has special significance for a small province like Prince Edward Island. Indeed, it has been written that an amending formula constitutes "a line of defence" against attacks on "less powerful

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[29] *Reference re Securities Act*, [2011] 3 S.C.R. 837, paras. 63-65, AGPEI Authorities, Tab 11 [*Securities Reference*].

[30] *Securities Reference*, para. 61, AGPEI Authorities, Tab 11 [emphasis added].

[31] *Securities Reference*, para. 62, AGPEI Authorities, Tab 11 [emphasis added].

[32] Nicholas Aroney, "Formation, Representation and Amendment in Federal Constitutions" (2006) 54 Am J. Comp. L. 277, pp. 325-326, AGPEI Authorities, Tab 12.

[33] Twomey, Sub-national Entities, p. 19, AGPEI Authorities, Tab 9.

states."[34] In practical terms, the interpretation of Part V of the *Constitution Act, 1982* will determine whether Prince Edward Island, and its people, have any meaningful say in future constitutional reform.

24. The amending provisions were obviously drafted with care and reflect an intention to create separation between its various provisions (in effect, they serve as a guide for "who can do what"). Most of them are also subject to highly-particularized processes that engage the Provinces and require varying levels of provincial support. To protect the integrity of the amending formulas, and lend certainty to their future application, there is a need to draw a "bright line" between each one of them. Dismissing provincial participation because there would be only incidental effects on the Provinces, or their representation at the federal level, is inconsistent with both the text and intent of Part V of the *Constitution Act, 1982*.

25. Historically, there have been two approaches to the "pith and substance" test: the "watertight compartment" or "classical paradigm" and the more flexible "modern paradigm," which may allow even significant incidental effects to be disregarded. Both approaches were discussed in the *Securities Reference*.[35] While the modern approach was adopted by the Court in its final analysis, the Court did not hold that the "watertight compartments" approach, or something similar to it, should never be used in interpreting the Constitution.

26. A compartmental or categorical approach has previously been taken by the Court. For example, Patrick Monahan points out that the *Patriation Reference*[36] is a "classic application" of a "categorical" form of analysis. Monahan also cites a few other cases in which the Court has used the "'watertight compartment" test.[37] The *Patriation Reference,* which addressed issues of similar significance to our federation, demonstrates that the Court is prepared to adopt the test that is most appropriate in the circumstances.

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[34] Brendon Troy Ishikawa, "Toward a More Perfect Union: The Role of Amending Formulae in the United States, Canadian, and German Constitutional Experiences" (1996) 2 U. C. Davis J. Int'l L. & Pol'y 267, p. 291, AGPEI Authorities, Tab 13.

[35] *Securities Reference*, paras. 54-60, AGPEI Authorities, Tab 11.

[36] *Reference Re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753, AGPEI Authorities, Tab 14 [*Patriation Reference*].

[37] Patrick J. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U. Toronto L.J. 47, pp. 66, AGPEI Authorities, Tab 15.

27. The Attorney General of Canada relies on *Hogan* in support of its argument in favour of the "pith and substance" doctrine. *Hogan*, however, does not stand for the proposition cited. In *Hogan*, the respondent argued that the "pith and substance" test could be adopted, but the Newfoundland and Labrador Court of Appeal did not see any need to develop a detailed method of analysis to aid in the interpretation of Part V.[38] In short, the suggestion that the doctrine was applied in *Hogan* is incorrect. A similar interpretation is placed upon the decision in *Potter*.[39] Again, it is not clear where the Quebec Court of Appeal actually relies on the pith and substance doctrine. What is clear is that the arguments put forward in *Potter* were rejected for reasons other than pith and substance. Other grounds were cited and relied upon by the Quebec Court of Appeal.

28. In the *Securities Reference*, this Court found that the "main thrust" of the legislation came within a provincial head of power. If the Court chooses to apply the "pith and substance" test as outlined in that case, it is our position that the "main thrust" of the proposals in this Reference fall within ss. 38(1), 41, or 42 of the *Constitution Act, 1982* and not under s. 44.

C. The *Upper House Reference* and Part V of the *Constitution Act, 1982*

29. In the *Upper House Reference*, several similar questions were referred to this Court for its opinion. The first was whether Parliament could repeal ss. 21 through 36 of the *Constitution Act, 1867* to delete any reference to the Senate. The second question raised several issues that related to the members of the Senate (including whether Parliament could change the qualifications, tenure, and method of selecting Senators).

30. This Court expressed the view that Parliament could not unilaterally abolish the Senate. It said, in particular, that the federal power to amend the "Constitution of Canada" under s. 91(1) of the *Constitution Act, 1867* only granted the authority to make amendments in relation to the constitution of the federal government and matters of interest to it alone. The Court advised that, in the absence of a factual background, the remainder of the questions could not be answered categorically.

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[38] *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225 (N.L.C.A.), paras. 80-81, AGPEI Authorities, Tab 16 [*Hogan*].

[39] *Potter v. Quebec (Attorney General)*, [2001] R.J.Q. 2823 (C.A.), AGC Authorities, Vol. I, Tab 13 [*Potter*].

31. In the course of its reasons, the Court reviewed the historical background of the Senate, emphasized the importance of the original bargain upon which Canada was founded, and made several comments about the role that the Senate plays in our constitutional order:

(a) The Senate has a "vital role as an institution forming part of the federal system" created by the *Constitution Act, 1867*.[40]

(b) One of the primary purposes of the Senate was "to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation."[41]

(c) The Senate, which had been created as a means of protecting sectional and provincial interests, was deliberately made a "participant" in the federal legislative process.[42]

(d) The unilateral power of amendment, which had been given by s. 91(1) of the *Constitution Act, 1867*, related to "the constitution of the federal government in matters of interest only to that government."[43]

(e) The compromise that had led to the creation of the Senate as a part of the federal legislative process should not be interpreted so as to impose a new and different bargain on the parties:

> *Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the*

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[40] *Upper House Reference*, p. 66, AGPEI Authorities, Tab 1.
[41] *Upper House Reference*, p. 67, AGPEI Authorities, Tab 1.
[42] *Upper House Reference*, p. 68, AGPEI Authorities, Tab 1.
[43] *Upper House Reference*, p. 71, AGPEI Authorities, Tab 1.

federating bodies.[44]

(f) While some unilateral changes may be made by Parliament in relation to the Senate, 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."[45]

32. The *Upper House Reference* was decided on December 21, 1979 and the resolution leading to the *Constitution Act, 1982* was placed before the House of Commons on November 18, 1981. Section 91(1) was repealed and Part V of the *Constitution Act, 1982* was enacted on April 17, 1982. Given the freshness of the decision, the questions asked of the Court and the content of the reasons delivered to Parliament and the Provinces, the *Upper House Reference* surely informed the discussions about, and the agreement reached under, Part V of the *Constitution Act, 1982*.

33. Prince Edward Island takes the view that the *Upper House Reference* is as germane today as it was then for several reasons:

(a) It sets out the history of the Senate, recognizes the vital role that the Senate plays as "the Provinces' House," and emphasizes the importance of the original bargain between the members of the federation. Against that historical background, the decision rightly refuses to recognize that Parliament has the unilateral power to amend the Constitution in the absence of clear and demonstrative language supporting its ability to proceed alone. In particular, it confirms that Parliament, acting alone, cannot alter the fundamental features or essential characteristics of the Senate.

(b) The *Upper House Reference* was not confined to interpreting s. 91(1) of the *Constitution Act, 1867*. The reasons of the Court speak of the Senate generally and establish a number of fundamental principles that are distinct

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[44] *Upper House Reference*, p. 71, AGPEI Authorities, Tab 1.

[45] *Upper House Reference*, p. 78, AGPEI Authorities, Tab 1.

from s. 91(1). Those principles were distilled from the legislation as a whole,[46] including its preamble,[47] and the nature of the bargain struck between the parties.[48]

(c) Sections 41, 42, and 44 of the *Constitution Act, 1982* reflect – and do not displace – the findings made by the Court in the *Upper House Reference*. This position is supported by the very purpose of the reference process itself (and its corresponding dialogue). The opinion in the *Upper House Reference* was also released less than two years before the resolution leading to the *Constitution Act, 1982* was adopted by Parliament. It would be very strange if the Provinces, whose position was strengthened by the *Upper House Reference*, would have bargained away their participatory rights in relation to fundamental Senate reform less than two years after they were acknowledged by the Court. This is especially true given that the amendment formula was presented by the Provinces themselves.[49]

(d) The language chosen in s. 44 of the *Constitution Act, 1982* is distinctly narrower than that found under s. 91(1) of the *Constitution Act, 1867*. The latter granted Parliament the authority for "amendment from time to time of the Constitution of Canada." Section 44, on the other hand, gives Parliament the authority to make "laws amending the Constitution of Canada <u>in relation to the executive government of Canada or the Senate and House of Commons</u>."[50] None of the fundamental changes described by the Court in the *Upper House Reference* are specifically identified in s. 44 of the *Constitution*

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[46] *Upper House Reference*, pp. 67-68, AGPEI Authorities, Tab 1.

[47] *Upper House Reference*, p. 66, AGPEI Authorities, Tab 1. The preamble, which was relied upon by the Court to articulate the principle that changes affecting fundamental features or essential characteristics of the Senate would require provincial participation, was not altered by the *Constitution Act, 1982*.

[48] *Upper House Reference*, p. 71, AGPEI Authorities, Tab 1. See also *Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, p. 70, AGPEI Authorities, Tab 17.

[49] Conference of Provincial Premiers on the Constitution, *Amending Formula for the Constitution of Canada: Text and Explanatory Notes*, Ottawa (16 April 1981), AGPEI Record, Tab 8.

[50] [emphasis added]. See also Warren J. Newman, "Defining the 'Constitution of Canada'" (2003) 22 S.C.L.R. (2d) 423, p. 493, AGPEI Authorities, Tab 18, [Newman, Defining the Constitution], where the author describes section 44 of the *Constitution Act, 1982* as being "worded more succinctly than its predecessor."

Act, 1982. In the circumstances, one would have expected far clearer and much more express language if the intent of the drafters was to grant such authority to Parliament, especially after the opinion of this Court in the *Upper House Reference*. In the immediate wake of that decision, the drafters could have easily authorized Parliament to amend the Constitution "in relation to the fundamental features or essential characteristics of the Senate." They chose not to do so.

(e) Section 44 of the *Constitution Act, 1982* merely clarified and confirmed that Parliament continued to hold unilateral authority over its own "housekeeping"[51] or, as the Court had defined it, "matters of interest only to the federal government."[52] This construction is also supported by the related provisions of the *Constitution Act, 1982*. Other matters that bear on the Senate, but may affect the interests of the Provinces, are found in ss. 41 and 42 of the *Constitution Act, 1982* and require provincial participation.

(f) This interpretation of s. 44 of the *Constitution Act, 1982* is supported by the evidence of then Minister of Justice, Jean Chrétien, his Deputy Minister of Justice, Roger Tassé, and his Assistant Deputy Minister of Justice, Barry Strayer, who explained to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada that the amendment power given to Parliament:

- is "not as broad as the power that appeared to be given in Section 91(1)";[53]
- is "worded much more narrowly";[54] and
- "only relates to the executive government."[55]

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[51] *Upper House Reference*, p. 65, AGPEI Authorities, Tab 1.

[52] *Upper House Reference*, p. 70, AGPEI Authorities, Tab 1.

[53] Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (13 November 1980), p. 4:112, AGPEI Record, Tab 7, p. 93 [Special Senate Committee Minutes] [emphasis added].

[54] Special Senate Committee Minutes (13 November 1980), p. 4:112, AGPEI Record, Tab 7, p. 93.

[55] Special Senate Committee Minutes (13 November 1980), p. 4:112, AGPEI Record, Tab 7, p. 93.

(g) This position is also consistent with that taken by Professor Hogg in his text, where he concludes that, after the *Upper House Reference* and the repeal of s. 91(1), "the scope of s. 44 is similar to the scope of the old s. 91(1)."[56] This view, where s. 44 of the *Constitution Act, 1982* is considered to be similar in scope to s. 91(1) of the *Constitution Act, 1867* and interpreted in light of the *Upper House Reference*, has considerable support. A number of scholars share this position.[57] According to Peter Meekison, s. 44 "carries forward the authority conferred on Parliament by the *1949 Amendment (No. 2) to the British North America Act*" and, for that reason, "section 91(1) was no longer needed and was repealed."[58] This construction is also supported by Warren Newman, who has written that "[s]ection 44 thus inherits the restricted scope assigned to section 91(1) by the Supreme Court in the *Senate Reference*."[59]

(h) To the extent that the Attorney General of Canada attempts to rely upon the *Quebec Veto Reference*[60] to argue that the convention-driven process described in the *Upper House Reference* was "completely and definitively replaced" by Part V of the *Constitution Act, 1982*, it is important to carefully review the language chosen by the Court:

> *The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects.*[61]

The Court in the *Quebec Veto Reference* was speaking only of the process to amend the Constitution. It was not speaking of the substance of the amending formula. The boundaries of Part V remain open to interpretation in this case.

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[56] Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2011), p. 4-32, AGPEI Authorities, Tab 19. Professor Hogg adopted a different view before the Special Committee on Senate Reform. See AGC Reply Record, Vol. XII, Tab 53, p. 31.

[57] See e.g. Stephen Scott, "The Canadian Constitutional Amendment Process" (1982) 45:4 Law & Contemp. Prob. 249, p. 277, AGPEI Authorities, Tab 20.

[58] Peter Meekison, "The Amending Formula" (1983) 8 Queen's L.J. 99, p. 118, AGPEI Authorities, Tab 21.

[59] Newman, Defining the Constitution, p. 494, AGPEI Authorities, Tab 18.

[60] *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, AGC Authorities, Vol. I, Tab 19 [*Quebec Veto Reference*].

[61] *Quebec Veto Reference*, AGC Authorities, Vol. I, Tab 19, p. 806 [emphasis added].

34. It must also be noted that, in Part V the *Constitution Act, 1982*, the Provinces secured significant constitutional protection for their interests in the Senate and other matters. Section 41 requires unanimous consent for various changes that were obviously considered to be of special importance. Under the express terms of s. 42, any change in the "powers of the Senate" and the "method of selecting Senators" also requires a high level of provincial support (that is, compliance with the 7/50 rule). A general amending formula, which covers all other amendments not otherwise provided for in Part V, and which also requires adherence to the 7/50 rule, was also adopted at that time.

35. The text and context of Part V do not indicate an intent on the part of the Provinces to give up the gains from the *Upper House Reference* or to limit those protections only to those items explicitly recorded in ss. 42(1)(b) and (c). The Attorney General of Canada essentially argues that it is "logical" to conclude that the intent of s. 44 of Part V of the *Constitution Act, 1982* was to give Parliament a free hand to make fundamental changes to all aspects of the Senate that are not covered by s. 42. This contention is not, however, supported by the text of ss. 44 or 42 of the *Constitution Act, 1982* or their broader context. Such a conclusion is also inconsistent with the constitutional principle of federalism.[62]

D. Operative Provisions of the *Constitution Act, 1982*

36. Part V of the *Constitution Act, 1982* is entitled "Procedure for Amending Constitution of Canada." The term "amend" is not defined, but susceptible to two meanings. It can mean that any change is permissible or it can exclude changes to the fundamental (or basic) structure of the Constitution.[63] It has been persuasively argued that the word "alteration," which appears in the Australian Constitution (and is arguably broader than the term "amend"), does not authorize changes that are inconsistent with, or subvert, the very basis of the constitutional instrument.[64]

37. The general amending procedure prescribed by s. 38(1) provides that "an amendment" to the Constitution "may" be made by complying with the 7/50 rule. Section 38(1) is the first section of Part V and the heading above it reads "General Procedure for Amending Constitution

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[62] Twomey, Sub-national Entities, p. 3, AGPEI Authorities, Tab 9.

[63] Gregory Craven, "Would the Abolition of the States be an Alteration of the Constitution Under Section 128?" [1989] 18 Fed. L. Rev. 85, pp. 95 and 103-104, AGPEI Authorities, Tab 23 [Craven, Alteration].

[64] Craven, Alteration, pp. 95 and 103-104, AGPEI Authorities, Tab 23.

of Canada." Its deliberate placement demonstrates the intended generality of its application.[65]

38. Section 42(1) sets out certain amendments that can only be made by the 7/50 rule. It requires that the procedure in s. 38(1) be followed with respect to those types of amendments. Certain Senate-related matters are listed; however, there is nothing to indicate that s. 42 is exhaustive of all matters requiring the 7/50 rule. Rather, it appears that the drafters identified items of obvious concern, but drafted s. 38 with such breadth that it would apply to any other matters that were not otherwise known or particularized in s. 42.

39. Under s. 44, the "Parliament of Canada" has the exclusive authority to make laws amending the "Constitution of Canada in relation to" certain designated branches and institutions of the federal government. The "Parliament of Canada" is identified in s. 17 of the *Constitution Act, 1867* as a single entity consisting of three integral parts: the Queen, the Senate, and the House of Commons. The section is also, by its explicit terms, subject to ss. 41 and 42. The phrase "subject to" is defined in *Black's Law Dictionary* as "subordinate" or "inferior."[66] The provision is therefore explicit in stating that it is subordinate to the formulas prescribed by both ss. 41 and 42.

40. Section 44 of the *Constitution Act, 1982* also uses the phrase "in relation to" for the purpose of identifying the subjects of its application. This particularization can be found in all of the amending formulas contained in Part V and, in this section, extends to the Senate and the House of Commons. It is therefore worth bearing in mind, for the purpose of interpretation, that what Parliament can do to the Senate it can also do to the House of Commons.[67]

41. The last amending formula in Part V is found in s. 45. It gives the provincial legislatures the corresponding authority to make "laws" amending their own constitutions.

42. The Attorney General of Canada argues that s. 38(1) does not apply because matters relating to the Senate are exhaustively dealt with in ss. 42 and 44. Section 38(1) does not,

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[65] *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, pp. 376-377, AGPEI Authorities, Tab 22.

[66] *Black's Law Dictionary*, 4th ed., (St. Paul: West Publishing, 1968), p. 1594, AGPEI Authorities, Tab 24 [*Black's*].

[67] Other core institutions, such as the Supreme Court of Canada, may also be affected by the interpretation of Part V of the *Constitution Act, 1982*. See e.g. Warren J. Newman, "The Constitutional Status of the Supreme Court of Canada" (2009) 47 S.C.L.R. (2d) 429, AGPEI Authorities, Tab 25.

however, refer to s. 42 and there is nothing in its general text to indicate that it is limited only to s. 42. In addition, there is nothing in s. 42 to suggest the only Senate-related amendments subject to s. 38(1) are those listed in s. 42. Such an interpretation would also be inconsistent with existing jurisprudence on statutory interpretation. Indeed, the Court has already observed that "an affirmative provision of limited scope does not ordinarily exclude the application of a general rule otherwise established …".[68] The far better view is that the listing in s. 42 simply illustrates the types of matters that require compliance with the 7/50 rule.

43. The federal interpretation of s. 44 is also undermined by the very structure of Part V of the *Constitution Act, 1982*, which gives the amending process a hierarchical appearance. The provisions contain amending formulae that require unanimity for certain matters and then impose progressively more lenient amending requirements for other matters. An interpretation that would allow Parliament to unilaterally alter a core institution which represents all the Provinces runs counter to the construction of Part V.

44. It is also worth noting that s. 44 confers authority on Parliament to make "laws" amending the Constitution. The word "laws" must refer to those that follow the normal course of parliamentary lawmaking. Consequently, the section does not give Parliament the power to amend the Constitution by indirect or informal means. The interpretive principle of "legality" also requires that a "law" that changes a constitution must be both express and specific.[69]

E. Responses to the Reference Questions

Question I: Senatorial Term Limits

45. Prince Edward Island submits that the answer to this question is, in all respects, "no." It is not within the legislative power of Parliament, acting pursuant to s. 44 of the *Constitution Act, 1982*, to make amendments to s. 29 of the *Constitution Act, 1867* (or the necessary changes to ss. 23 and 24) by way of the proposed term limits because:

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[68] *Alimport (Empresa Cubana Importadora de Alimentos) v. Victoria Transport Ltd.*, [1977] 2 S.C.R. 858, p. 862, AGPEI Authorities, Tab 26.

[69] *Regina v. Secretary of State for the Home Department Ex Parte Simms, Secretary of State for the Home Department Ex Parte O'Brien*, [1999] UKHL 33, p. 11, per Lord Hoffman, AGPEI Authorities, Tab 27 [*Ex Parte Simms*].

(a) The proposed amendments are laws "in relation to" the constitutional duties of individual Senators and are not "in relation to" the Senate as a legislative body and, consequently, s. 44 of the *Constitution Act, 1982* does not apply.

(b) Any such amendment would be "in relation to" the "powers of the Senate" within the meaning of s. 42(1)(b) of the *Constitution Act, 1982* and could only be adopted in accordance with the 7/50 rule. Also, insufficient facts have been presented to this Court to allow it to determine that the powers of the Senate would not be affected by any such amendment.

(c) Any such amendment would be "in relation to" the "method of selecting Senators" within the meaning of s. 42(1)(b) of the *Constitution Act, 1982* and could only be enacted in accordance with the 7/50 rule.

46. In determining whether any such law falls within s. 44, it is appropriate to consider the purpose of Parliament in enacting the law and its legal and practical effects. The Reference refers to two bills: the *Senate Reform Act* or Bill C-7, and the *Constitution Act, 2006 (Senate Tenure)* or Bill S-4. Bill S-4 would amend s. 29 of the *Constitution Act, 1867* to provide that Senators shall hold a place in the Senate for a term of 8 years. Bill S-4 is actually silent on whether Senators, who have served their term, are eligible for re-appointment. The questions posed in the Reference do suggest, however, that the terms would be renewable under Bill S-4. The Bill also removes the requirement that Senators retire at age 75. Bill C-7, on the other hand, imposes a 9-year, non-renewable term on Senators who are appointed after the Bill comes into force and those who were appointed after October 14, 2008. The Bill also requires that all Senators retire at age 75. The Reference also inquires generally about the constitutionality of term limits that are not subject to any bill but fall within a hypothetical range from less than 8 years up to 12 years.

47. The purpose of the Bills in question can be drawn, at least in part, from their preambles. It is said to be important for the Senate to "evolve" in accordance with "the principles of modern democracy."[70] The proposals also form part of a larger commitment by the Government of

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[70] Bill C-7, Preamble, para. 1, AGC Record, Vol. I, Tab 2, p. 10 [emphasis added].

Canada to reform the Senate to better reflect the "democratic values" of Canadians.[71] It is said to be appropriate for prospective Senators to be "determined by democratic election by the people."[72]

48. Before the Special Senate Committee on Senate Reform, the Prime Minister addressed the specific subject of term limits and defended the proposed legislation on the ground that lengthy terms of appointment are "just not acceptable today to the broad mainstream of the Canadian community."[73] The Prime Minister explained that such limits would lessen the danger of "ossification" in the Senate and protect against "reduced effectiveness on the part of [S]enators who have remained in office too long."[74] The limits also form part of a larger commitment by the Government of Canada to make the Senate "accountable"[75] and to do so in a way that "respects the primacy of the democratic mandate of the House of Commons."[76]

49. Thus, the purpose of the Bills (and, presumably, the other term limit proposals) is to reduce the length of time that individual Senators can serve in the Senate. The implication appears to be that term limits will encourage turnover in the Senate, improve the effectiveness of Senators, enhance the legitimacy of the Senate, and ensure the Senate is accountable to appointees of the House of Commons.

50. The legal and practical effect of Bill S-4 on newly-appointed individual Senators is to reduce the terms they would have otherwise served under s. 29(2) of the *Constitution Act, 1867* to 8 years. Bill S-4 also places a power of reappointment or renewal in the hands of the Prime Minister. Under Bill C-7, however, newly-appointed individual Senators can only serve a non-renewable term of 9 years.

51. In short, these Bills would have constitutional effects on both candidates for the Senate (which, theoretically, includes all qualified Canadians) and existing Senators. If authorized by s.

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[71] Bill C-7, Preamble, para. 2, AGC Record, Vol. I, Tab 2, p. 10.

[72] Bill C-7, Preamble, para. 4, AGC Record, Vol. I, Tab 2, p. 10.

[73] Senate, *Special Senate Committee on Senate Reform on the subject matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate Tenure)*, (October 2006) (Chair: Daniel Hays, Deputy Chair: W. David Angus), AGC Record, Vol. VI, Tab 25, p. 85 [Senate, *Senate Tenure*].

[74] Senate, *Senate Tenure,* AGC Record, Vol. VI, Tab 25, p. 85.

[75] House of Commons Debates, No. 049 (12 February 2008), p. 2923, AGPEI Record, Tab 9, p. 112.

[76] House of Commons Debates, No. 049 (12 February 2008), p. 2924, AGPEI Record, Tab 9, p. 113.

44 of the *Constitution Act, 1982*, the Bills would also mean that Parliament alone could adopt similar term limits in relation to candidates for, and members of, the House of Commons.

(i) Term Limits Relate to Individuals and Not the Senate as an Institution

52. Prince Edward Island submits that the proposed term limits are "in relation to" individual candidates for the Senate and individual Senators, rather than the "Senate" as a whole. Consequently, they do not fall within s. 44 of the *Constitution Act, 1982*.

53. The individual impact of these Bills is demonstrated by reference to the appointment process for Senators. The power to "summon" individuals to the Senate is conferred on the Governor General by s. 24 of the *Constitution Act, 1867*. The Governor General derives the power to issue writs of summons to qualified persons from that provision. Consequently, the summoning process has been enshrined into the Constitution.

54. Section 24 also provides that every person, once summoned by the Governor General, "subject to the Provisions of this Act ... shall become and be a Member of the Senate and a Senator." Sections 29 through 31 of the *Constitution Act, 1867* then provide for the retirement, resignation, and disqualification of Senators.

55. Individuals who are summoned to the Senate by the Governor General have certain historically-recognized duties. The writ of summons process has been used for centuries in the United Kingdom to command persons to attend Parliament, and there are certain individual duties that flow from issuance of such a writ.[77] The House of Lords Committee for Privileges[78] has considered whether a writ of summons to that House is spent once the recipient attends in response to the writ or continues throughout the term of the writ. The Committee concluded that the writ had ongoing effect.[79] Lord Slynn of Hadley found that a peer attends in response to the writ and then <u>stays on, sits and votes</u> in the House of Lords by virtue of such a writ, and it is not

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[77] Sir William R. Anson, *The Law and Custom of the Constitution* (Oxford, The Claredon Press, 1907), pp. 136-137, AGPEI Authorities, Tab 28.

[78] United Kingdom, House of Lords, *Committee for Privileges*, First Report (18 October 1999), AGPEI Authorities, Tab 29 [House of Lords, *Privileges*].

[79] House of Lords, *Privileges*, p. 5, AGPEI Authorities, Tab 29.

spent when the recipient appears for the first time.[80] Lord Hope of Craighead shared this view that a writ of summons imposes a continuing duty on a member of the House of Lords to attend Parliament and recognized that the writ imposes mandatory duties on the individual recipient – not merely a right or privilege.[81]

56. Under the summons currently issued by the Governor General, the recipient is commanded to appear in the Senate at all times during the term of the writ. The writ also directs that the recipient is being called for the purpose of obtaining advice and assistance. It is not limited as to duration.[82] Consequently, a writ of summons issued by the Governor General, under the Queen's name, pursuant to s. 24 of the *Constitution Act, 1867,* when taken in its proper historical context, demands that the recipient attend in response to the writ and to continue to sit and vote as a member of the Senate and to give counsel as and when requested during his or her membership.

57. Under s. 24 of the *Constitution Act, 1867,* the membership of a Senator pursuant to a writ is, however, "subject to the provisions of this Act" (namely, ss. 29 through 31 of the *Constitution Act, 1867*). By virtue of s. 29(2), a writ of summons issued by the Governor General is only spent or vacated when a Senator retires, resigns, or is disqualified. Thus, legislation imposing the proposed term limits will have an impact on the individual duties of persons who are summoned to the Senate and current Senators – indeed, they will impact the most fundamental of those duties.

58. For this reason, s. 44 of the *Constitution Act, 1982* does not cover any aspect of the proposed term limits, including their renewable, non-renewable, and retroactive elements. The formula is limited by its express terms. Properly read, it only gives Parliament the unilateral power to make laws "in relation to" the Senate as a body. In other words, it may make constitutional changes that deal with the internal affairs and workings of the Senate as an

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[80] House of Lords, *Privileges*, p. 5, AGPEI Authorities, Tab 29.

[81] House of Lords, *Privileges*, pp. 10-11, AGPEI Authorities, Tab 29. It has also been held that the phrase "member of the House of Lords" is simply a reference to the right to sit and vote in that House. See *Mereworth v. Ministry of Justice*, [2011] EWHC 1589 (Ch), para. 18, AGPEI Authorities, Tab 30. A substantially similar phrase is found in s. 24 of the *Constitution Act, 1867*.

[82] Sir John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 2nd ed. (Montreal: Dawson Brothers, 1892), pp. 143-144, AGPEI Authorities, Tab 31.

institution and mere housekeeping matters that do not engage issues of provincial importance, but it is not broad enough to permit Parliament to make unilateral changes to the fundamental duties of these individuals. Any such alteration may only be accomplished under s. 38(1).

59. In this regard, it must be noted that s. 44 uses the words "Senate" and "House of Commons". Unlike other sections of the Constitution, such as s. 18, s. 44 does not refer to the Senate and House of Commons, or their respective members. This indicates that the terms "Senate" and "House of Commons" refer to the Senate and House of Commons as legislative bodies.

60. The word "Senate" is used consistently in Part V, and throughout the Constitution, in this distinct institutional sense. Samuel Patterson and Anthony Mughan have also written that the institutional boundaries of parliamentary upper houses are "well-defined."[83] This interpretation of the term "Senate" is also reinforced by several other sections of the Constitution, which refer to the Senate and the House of Commons as bodies distinct from their members (see, for example, ss. 17, 18, 24, 31(1), 33, 34, and 36 of the *Constitutional Act, 1867*). Finally, this view is supported by the decision of the Court in *New Brunswick Broadcasting*,[84] where Chief Justice Lamer pointed out that our Constitution makes reasonably consistent distinctions between legislatures and their individual component parts. This is exemplified, for example, by its use of the term "Parliament" in some instances and the terms "Senate" and the "House of Commons" in other instances.[85]

61. Section 44 of the *Constitution Act, 1982* must also be read in light of the decision in the *Upper House Reference*, in which the Court concluded that the word "Canada" in the phrase "Constitution of Canada," as it appeared in the now repealed s. 91(1) of the *Constitution Act, 1867*, referred to Canada as a juristic federal unit rather than a geographical one. The power of Parliament to amend the Constitution unilaterally under that section was, consequently, limited to matters of interest only to the federal government. The Court referred to other sections of the

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[83] Samuel C. Patterson and Anthony Mughan, "Senates and the Theory of Bicameralism," p. 19, in Samuel C. Patterson and Anthony Mughan, eds., *Senates: Bicameralism in the Contemporary Word* (Columbus: Ohio State University Press, 1999), AGPEI Authorities, Tab 32.

[84] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, AGPEI Authorities, Tab 33 [*New Brunswick Broadcasting*].

[85] *New Brunswick Broadcasting*, pp. 359-361, AGPEI Authorities, Tab 33.

Constitution that use the term "Canada" in a juristic federal sense. The issue before the Court in this case is strikingly similar, although it relates to the meaning of the word "Senate" rather than the term "Canada."

62. It should not be possible to override fundamental constitutionally-entrenched duties by general or ambiguous words because there is a risk that the full implications of their "unqualified meaning may have passed unnoticed in the democratic process."[86] As illustrated by the *Upper House Reference*, it is particularly important that the language of a constitutional provision, which would allow unilateral action by one party, be kept within its defined boundaries.

(ii) Term Limits Relate to the Powers of the Senate

63. The proposed term limits also relate to the "powers of the Senate" within the meaning of s. 42(1)(b) of the *Constitution Act, 1982*.

64. It must be emphasized that the Attorney General of Canada has failed to present any cogent evidence to this Court to indicate that there would be no impact on those powers. The only evidence placed before the Court is an opinion from a political scientist who asserts that the proposed term limits would not reduce the average number of years that have historically been served by Senators. In the circumstances, the Court is not in a position to advise that term limits fall outside s. 42(1)(b).

65. Absent necessary "factual context" or "factual background" for questions referred for its opinion, the Court has often declined to answer.[87] This Court has also noted that, under the reference procedure, there may be questions that are impossible to answer satisfactorily or safely without the underlying facts.[88] The Court is entitled to exercise its judgment on whether to answer referred questions if it concludes that they do not exhibit sufficient precision to permit cogent answers.[89] Moreover, the Court has discretion to give qualified answers to, or decline to

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[86] *Ex Parte Simms*, p. 11, per Lord Hoffman, AGPEI Authorities, Tab 27.

[87] *Upper House Reference*, pp. 76, 77, and 78, AGPEI Authorities, Tab 1.

[88] *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, p. 227, AGPEI Authorities, Tab 34, quoting Lord Haldane in *Attorney General for British Columbia v. Attorney General for Canada*, [1914] A.C. 153, p. 162.

[89] *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704, p. 708, AGPEI Authorities, Tab 35.

answer, reference questions if the record does not permit a definitive response.[90] Generally, the Court has exercised its discretion to refuse to answer a question where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer.[91]

66. As recognized in the *Upper House Reference*, there is a point, as yet undefined, when term limits can have an impact on the powers of a legislative chamber:

> *At present, a senator, when appointed, has tenure until he attains the age of seventy-five. At some point, a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as "the sober second thought in legislation". The Act contemplated a constitution similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life. The imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate.*[92]

67. The effect of term limits is an issue that has received comment and has, to some extent, been studied in the United States. Term limits were introduced by several state legislatures in the 1990s and are comparable to those proposed in this case.[93] However, these measures were largely experimental because, at the time of their introduction, the legal and constitutional effects were unknown. There is still very little empirical evidence on the subject.[94] Stanley Caress and Todd Kunioka, in their recent book, emphasize that term limits have had far-reaching impact and have reshaped governmental power:

> *On the surface term limits may seem like only a small change in the way legislators gain and retain office. Term limits, technically, only restrict the number of times an incumbent can be reelected and place no further regulations on how legislators seek office. However, while term limits appear to affect only a limited number of incumbent politicians, their impact on the political system has been far-reaching. Restricting incumbent legislator tenure has completely reshaped governmental power in the states that have adopted term limits. Term*

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[90] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para. 10, AGPEI Authorities, Tab 36; and *Secession Reference*, pp. 237-238, AGPEI Authorities, Tab 6.

[91] *Reference re Education System in Island of Montreal*, [1926] S.C.R. 246; *Upper House Reference*, AGPEI Authorities, Tab 36; and *Judges Reference*, para. 257, AGPEI Authorities, Tab 5.

[92] *Upper House Reference*, p. 76, AGPEI Authorities, Tab 1.

[93] David J. Webber, "The Effects of Term Limits on Legislative Representation," Second Annual Conference on State Politics and Policy (May 24-25, 2002), University of Wisconsin-Milwaukee, p. 16, AGPEI Authorities, Tab 37 [Webber, Term Limits].

[94] Stanley M. Caress and Todd T. Kunioka, *Term Limits and Their Consequences, The Aftermath of Legislative Reform*, (Albany: State University of New York Press, 2012), pp. 2-3 and 176-177, AGPEI Authorities, Tab 38 [Caress et al., *Term Limits*].

> *limits, by changing election rules, have altered the selection of the people who make laws, and thus they have had a major influence on public policy. They have dramatically changed the composition of legislative bodies and impacted the authority of the individuals who lead them. They have altered the way legislatures function, and even, in some cases, changed the balance of power between the legislative chambers and the executive branch. Term limits, therefore, need to be studied because their impact has been so significant.*[95]

68. This study by Caress and Kunioka indicates that the primary impacts have been, or may include, weakening the leadership of the assembly, reduced professionalism amongst members, loss of institutional memory, lessened cooperation amongst members, changes in members' career paths and behaviour in office, an overall weakening of the chamber itself, and higher than expected turnover (due to members leaving before the term was up).[96]

69. Noted Canadian experts, such as David Smith, Jennifer Smith and Andrew Heard, have also expressed concern as to the effect of term limits on the independence and strength of the Senate. For his part, Professor David Smith has said that the "provision for non-renewable appointment for a fixed term would result in a chamber characterized by continual turnover. The features now cited as the Senate's strengths of experience, knowledge and perspective would disappear."[97] Similar concern has been expressed for the independent and dispassionate review intended by the framers of the Constitution: "My own view is that a fixed term for [S]enators whether renewable, or elected or appointed, challenges the principle of independence that the Fathers of Confederation sought to entrench in the structure of the Senate and which the Supreme Court of Canada reiterated in 1980."[98] The proposed limits directly relate to the ability of the Senate to serve as "a thoroughly independent body" and its capacity to "canvass dispassionately the measures of the House of Commons."[99]

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[95] Caress et al., *Term Limits*, pp. 1-2, AGPEI Authorities, Tab 38.

[96] Caress et al., *Term Limits*, pp. 110-111, 130-131, 148-149, 151, 156-160, and 172-173, AGPEI Authorities, Tab 38.

[97] Senate, Proceedings of the Standing Committee on Legal and Constitutional Affairs, *Thirteenth Report of the Committee (Bill S-4)* (12 June 2007), p. 8, (Professor David Smith), AGC Record, Vol. VII, Tab 27, p. 107 [Senate, *Thirteenth Report*].

[98] Senate, *Thirteenth Report*, p. 25, (Professor David Smith), AGC Record, Vol. VII, Tab 27, p. 124.

[99] *Upper House Reference*, p. 77, AGPEI Authorities, Tab 1. See also Janet Ajzenstat, ed., *Canada's Founding Debates* (Toronto: University of Toronto Press, 2003), p. 88, (George Brown), AGPEI Record, Tab 4, p. 48.

(iii) Term Limits Relate to the Method of Selecting Senators

70. The proposed term limit changes are also in relation to the "method of selecting Senators" as provided in s. 42(1)(b) of the *Constitution Act, 1982*.

71. The word "method" is expansive and extends to "the mode of operating, or the means of attaining an object." In its proper context, the term speaks of a series of things; that is, "placing several things, or performing several operations, in the most convenient order."[100] The "method of selection" therefore extends to all stages of the process used to choose Senators from beginning to end and includes, for example, the manner in which the qualifications of a candidate are assessed. The phrase is not, as the Attorney General of Canada suggests, limited to the final step in the selection process, being appointment by the Governor General.

72. Deliberate linguistic choices were made by the drafters of the *Constitution Act, 1982*. Section 24 of the *Constitution Act, 1867*, speaks of "summon[ing] qualified Persons to the Senate" and of persons "so summoned" being members of the Senate. Section 42(1)(b) of the *Constitution Act, 1982*, on the other hand, speaks of something different and noticeably broader; that is, "the method of selecting Senators." It is presumed that legislators use language carefully. The same words have the same meaning, and different words have different meanings:

> *When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.*[101]

The Attorney General of Canada wrongly equates the word "summon" with the phrase "method of selecting" in an effort to avoid the application of s. 42(1)(b) of the *Constitution Act, 1982*.

73. Section 42(1)(b) of the *Constitution Act, 1982* is also not limited to amendments to s. 24 of the *Constitution Act, 1867*. If so, it would speak of "the summoning of Senators." Instead, the drafters made a number of deliberate choices that must be respected by Parliament. Provincial participation is not limited to just "selecting" Senators, but rather extends to the

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[100] *Black's*, p. 1142, AGPEI Authorities, Tab 24.

[101] *Peach Hill Management Ltd. v. Canada* (2000), 257 N.R. 193 (F.C.A.), para. 12, AGPEI Authorities, Tab 39. See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008), pp. 215-218, AGPEI Authorities, Tab 40.

"method of selecting" Senators. And it is also not confined to "summoning" or "appointing" Senators. The implication from the language chosen by the drafters was that the Provinces would be involved in changes to the process leading up to the actual issuance of the writ of summons (which would include the "method" used to formulate recommendations to the Governor General).

74. The "method of selecting Senators" is also sufficiently broad to capture changes to existing constitutional convention. The Bills would change the manner in which future Prime Ministers formulate their recommendations to the Governor General. Such a change to the existing "precedent" for selecting Senators would be unconstitutional and participation by the Provinces would therefore be expected in our federation even if not required strictly by law.[102]

75. The proposed imposition of a non-renewable term under Bill C-7 also changes the "method of selecting Senators" because it does not allow the Prime Minister or Governor General to consider or appoint an otherwise qualified person who has already served in the chamber.[103] Such a change can only be made under the 7/50 rule.

76. The proposal in Bill S-4 that terms be renewable is also highly objectionable. The Bill removes mandatory retirement as currently required by s. 29(2) of the *Constitution Act, 1982* but, by its silence, leaves the power to select Senators for an unlimited number of terms solely in the hands of the Prime Minister, a member of the Executive.[104] In other words, there would be no constitutionally-based term limit for Senators. The Prime Minister would, as a practical matter, have the sole discretion to decide that one Senator can serve for life and another can serve only 8 or less years. This would increase control over individual Senators and would directly affect the ability of the Senate to serve as a "chamber of independent second sober thought."[105]

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[102] *Patriation Reference*, p. 888, AGPEI Authorities, Tab 14.

[103] The United States Supreme Court has concluded that fixed term limits on members of Congress are unconstitutional because the intent and effect of the limits is to disqualify incumbents from further service, and the qualifications for the office are fundamental, fixed, exclusive, and made uniform by the Constitution. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), p. 837, AGPEI Authorities, Tab 41 [*Thornton*].

[104] In *Thornton*, the Supreme Court supported its decision, in part, by noting the concerns expressed by the framers of the Constitution that granting Congress the power to set the qualifications for its own members was fraught with danger. See *Thornton*, pp. 790-793, AGPEI Authorities, Tab 41.

[105] George Brown had a similar objection. See Janet Ajzenstat, ed., *Canada's Founding Debates* (Toronto: University of Toronto Press, 2003), p. 88, (George Brown), AGPEI Record, Tab 4, p. 48.

77. Senatorial tenure is constitutionally-entrenched and intended to be uniform. The Constitution also contemplated that it would remain consistent. The provisions relating to the qualifications for the Senate and, in particular, the tenure of Senators are "fundamental" in nature.[106] Such changes require participation by the Provinces.

Questions II and III: Selection of Senators

78. Prince Edward Island submits that the changes proposed in these Bills:

(a) represent a change to the method of selecting Senators and, by virtue of s. 42(1)(b) of the *Constitution Act, 1982*, an amendment is necessary pursuant to s. 38(1) of the *Constitution Act, 1982*; and

(b) represent a change affecting a fundamental feature of the Senate, namely its independence and role as a dispassionate chamber of secondary review, and, according to the *Upper House Reference*, such a change cannot be made unilaterally by Parliament.

(i) Bill C-20

79. The full title of Bill C-20 is "An Act to provide for consultations with electors on their preferences for appointments to the Senate."[107] It establishes a federal mechanism for selecting nominees for the Senate. Through a "consultation" administered by the Chief Electoral Officer, the electors in a Province would rank nominees in order of preference. The results of the consultation would be communicated to the Prime Minister and published.

80. The preamble to Bill C-20 expresses a number of principles that are relevant to the interpretation of the Bill, particularly as to its purpose and effect. First, the preamble notes that it is important for the Senate to "evolve" in accordance with the principles of "modern democracy."[108] Second, it states that the Government of Canada has undertaken to explore

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[106] See *Thornton*, AGPEI Authorities, Tab 41.

[107] Bill C-20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, AGC Record, Vol. I, Tab 4, p. 40 [Bill C-20].

[108] Bill C-20, Preamble, para. 1, AGC Record, Vol. I, Tab 4, p. 40.

"means" to enable the Senate to better reflect the "democratic values" of Canadians.[109] Finally, it affirms that the Government of Canada is "committed to pursuing comprehensive Senate reform" to make it a "democratically elected body."[110] Interestingly, the preamble also expressly acknowledges that the consultation process set forth in Bill C-20 is an interim measure by the Government of Canada "pending the pursuit of a constitutional amendment under subsection 38(1) of the *Constitution Act, 1982* to provide a means of direct election."[111]

81. Bill C-20 provides that the federal Chief Electoral Officer will exercise general direction and supervision over the new "consultation" process.[112] The Governor General may order a consultation of the electors of a Province to take place in conjunction with either a general election for members of the House of Commons or a general election for members of the provincial legislature.[113] Such an order would specify, for each province, the number of places in the Senate for which electors are to be consulted.[114] In effect, a list of potential nominees could be created under the Bill.

82. Nominees for the Senate would also be under many of the same obligations as candidates for the House of Commons or the provincial legislature, including requirements in relation to deposits,[115] official agents,[116] auditors,[117] lists of residents,[118] and political party endorsements.[119] Similar restrictions are imposed in relation to advertising, surveys, and financing.[120] Under the proposal, electors are to express their preferences by marking the ballot by means of consecutive numbers.[121] It is also worth noting that Bill C-20, while using the word "consultation" throughout, actually incorporates, directly or by reference, many substantive provisions of the

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[109] Bill C-20, Preamble, para. 2, AGC Record, Vol. I, Tab 4, p. 40.
[110] Bill C-20, Preamble, para. 3, AGC Record, Vol. I, Tab 4, p. 40.
[111] Bill C-20, Preamble, para. 4, AGC Record, Vol. I, Tab 4, p. 40.
[112] Bill C-20, s. 3, AGC Record, Vol. I, Tab 4, pp. 48-49.
[113] Bill C-20, ss. 12-13, AGC Record, Vol. I, Tab 4, pp. 50-51.
[114] Bill C-20, s. 13(4), AGC Record, Vol. I, Tab 4, p. 51.
[115] Bill C-20, s. 21(1)(b), AGC Record, Vol. I, Tab 4, p. 56.
[116] Bill C-20, s. 34, AGC Record, Vol. I, Tab 4, pp. 59-60.
[117] Bill C-20, s. 35, AGC Record, Vol. I, Tab 4, p. 60.
[118] Bill C-20, s. 19(1)(e), AGC Record, Vol. I, Tab 4, p. 55.
[119] Bill C-20, s. 19(1)(a)(v), AGC Record, Vol. I, Tab 4, p. 54.
[120] Bill C-20, ss. 59-96, AGC Record, Vol. I, Tab 4, pp. 68-84.
[121] Bill C-20, s. 47(3) , AGC Record, Vol. I, Tab 4, p. 62.

Canada Elections Act and provides that words and expressions used in Bill C-20 "have the same meaning as in the *Canada Elections Act* unless a contrary intention appears."[122]

(ii) Bill C-7

83. Bill C-7 is entitled "An Act respecting the selection of senators and amending the *Constitution Act, 1867* in respect of Senate term limits."[123] It includes a schedule to the Bill that sets out the provincial legislative framework for selecting Senators that must be "substantially" adopted by the Provinces in order for Senate nominees selected in a Province to be considered by the Prime Minister in making his recommendations to the Governor General.[124] In short, Bill C-7 contemplates the enactment of Senate selection legislation by the Provinces and, potentially, a patchwork of selection methods throughout the country.

84. The preamble to Bill C-7 expresses a number of principles that are relevant to the interpretation of the Bill. Again, the preamble notes that it is important for the Senate to "evolve" in accordance with "modern democratic" principles.[125] It also states that the Government of Canada has undertaken to explore "means" to enable the Senate to better reflect the "democratic values" of Canadians.[126] The preamble explains that it is appropriate for prospective Senators to be "determined by democratic election by the people" of the Province being represented.[127] It speaks of a framework for "the text of legislation governing such elections."[128] Finally, Bill C-7 provides that Parliament has the jurisdiction to amend the Constitution in relation to the Senate by virtue of s. 44 of the *Constitution Act, 1982*.[129]

85. The preamble also refers to a meeting of the First Ministers of Canada in 1987, where it was agreed that, as an "interim measure" until the Senate was reformed, persons summoned to

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[122] Bill C-20, s. 2(2) , AGC Record, Vol. I, Tab 4, p. 48.

[123] Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, AGC Record, Vol. I, Tab 2, p. 10 [Bill C-7] [emphasis added].

[124] Bill C-7, s. 3, AGC Record, Vol. I, Tab 2, p. 11.

[125] Bill C-7, Preamble, para. 1, AGC Record, Vol. I, Tab 2, p. 10.

[126] Bill C-7, Preamble, para. 2, AGC Record, Vol. I, Tab 2, p. 10.

[127] Bill C-7, Preamble, para. 4, AGC Record, Vol. I, Tab 2, p. 10 [emphasis added].

[128] Bill C-7, Preamble, para. 5, AGC Record, Vol. I, Tab 2, p. 10 [emphasis added].

[129] Bill C-7, Preamble, para. 8, AGC Record, Vol. I, Tab 2, p. 11.

the Senate would be chosen from a list of persons submitted by the Province to be represented.[130] The inclusion of all of the First Ministers in the negotiation of this interim agreement appears to run counter to the position taken by the Attorney General of Canada that Parliament has exclusive authority to reform the Senate by way of Bill C-7.

86. Bill C-7 states that the framework for the "the selection of Senate nominees" is contained in the accompanying schedule.[131] The proposed legislation also provides that, if a Province or territory enacts legislation that is "substantially in accordance" with the framework legislation set out in the schedule, then the Prime Minister "must consider" the names of the individuals selected by that Province in recommending Senate nominees to the Governor General.[132] Section 1 of the schedule to Bill C-7 further provides that Senators appointed for a province "should" be chosen from the list of nominees generated through the election held in the Province.[133]

87. In brief, under the federal framework, the selection of Senate nominees must be on the basis of an election held in conjunction with a provincial general election, or a municipal election, or on another date determined by an order in council.[134] Basic requirements include that the election be conducted by provincial electoral officials in accordance with the legislation prescribed in the schedule and in accordance with the local electoral laws. [135]

88. Parliament is obviously vested with the authority to pass ordinary legislation in relation to the Senate under s. 91 of the *Constitution Act, 1867*. An obvious example is the *Parliament of Canada Act*, R.S.C. 1985, c. P-1. The essence of this Reference, however, is whether Parliament can proceed unilaterally with Bill C-20 or Bill C-7. It is therefore necessary to ascertain the purpose and effect of the Bills and the scope of the authority held by Parliament under s. 44 of the *Constitution Act, 1982*.

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[130] Bill C-7, Preamble, para. 3, AGC Record, Vol. I, Tab 2, p. 10.
[131] Bill C-7, s. 2, AGC Record, Vol. I, Tab 2, p. 11.
[132] Bill C-7, s. 3, AGC Record, Vol. I, Tab 2, p. 11 [emphasis added].
[133] Bill C-7, Schedule, s. 1, AGC Record, Vol. I, Tab 2, p. 13.
[134] Bill C-7, Schedule, s. 2, AGC Record, Vol. I, Tab 2, p. 13.
[135] Bill C-7, Schedule, s. 7, AGC Record, Vol. I, Tab 2, p. 15.

(iii) Selection Processes Affect Fundamental Features of the Senate

89. The Attorney General of Canada places considerable emphasis on the fact that the discretion of the Prime Minister is "preserved" and "not removed" by the Bills and that the authority of the Governor General is "untouched." But even the Attorney General of Canada eventually concedes that the proposed legislation is aimed at "reforming the appointment process"[136] and that the legislation "commits the Prime Minister to consider the results of a consultative process."[137]

90. While the Attorney General of Canada goes to considerable effort to emphasize that a "consultation" is not an "election," the legislative text suggests otherwise. It is held under the supervision of existing electoral officials, involves candidates and nominations from political parties, and is subject to campaign rules in relation to financing and advertising. Results are also published and communicated to the Prime Minister.[138]

91. In the *Upper House Reference*, this Court held that "mak[ing] the Senate a wholly or partially elected body would affect a fundamental feature of that body"[139] and, for that reason, it was not open to Parliament to effect such a change unilaterally. It went to the root of the original bargain struck by the Provinces. The federal preference for the term "consultation" must be considered against this legal backdrop.

92. This Court also found in the *Upper House Reference* that the direct election of Senators – in whole or in part – would not be permissible by way of unilateral action by Parliament. It was found to affect a fundamental feature of the Senate:

> *The substitution of a system of election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom", where the Upper House is not elected. In creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could*

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[136] AGC Factum, para. 97. The Attorney General of Canada also observes, at paragraph 108 of the factum, that the proposed reforms are aimed at "encouraging popular participation in the appointment process."

[137] AGC Factum, para. 130.

[138] Bill C-20, s. 58, AGC Record, Vol. I, Tab 4, p. 67.

[139] *Upper House Reference*, p. 77, AGPEI Authorities, Tab 1.

> *canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life. To make the Senate a wholly or partially elected body would affect a fundamental feature of that body.*[140]

93. To the extent it is suggested that the result of a "consultation" is not binding upon the Prime Minister or determinative of the selection of Senators by the Governor General, the strength and effect of the democratic principle in Canada cannot be ignored. The theoretical discretion vested in the Prime Minister and, in turn, the Governor General to "summon" qualified persons to the Senate would be constrained, both in law and in fact, by the results of a consultation. In substance, there would be little difference between a Senator summoned after election and one called after consultation. Democracy is an unwritten constitutional principle that is capable of giving rise to substantive obligations. It cannot be ignored when considering the effect of the Bills upon the textual authority granted to the Governor General.

94. In the *Secession Reference*, this Court considered the effect of a referendum result on the ability of a Province to secede from Canada. While the Court noted that such a result had no direct role or legal effect under the Constitution, it concluded that the "democratic principle ... would demand that considerable weight be given to a clear expression by the people of Quebec ..." and that "an expression of the democratic will of the people of a province carries weight."[141] That expression was held to impose a reciprocal obligation on other constitutional actors to negotiate.[142] This was so notwithstanding the absence of any substantive obligation to negotiate in the actual text of the Constitution. A similar observation was made by the Court in the *Patriation Reference*. Writing of the principles and values that inform the Constitution, this Court described the democratic principle as follows: "the powers of the state must be exercised in accordance with the wishes of the electorate."[143]

95. The selection processes being proposed would affect fundamental features of the Senate, namely its independence and its role as a dispassionate chamber of secondary review. According to the decision of this Court in the *Upper House Reference*, such changes cannot be made

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[140] *Upper House Reference*, p. 77, AGPEI Authorities, Tab 1 [emphasis added].
[141] *Secession Reference*, p. 265, AGPEI Authorities, Tab 6.
[142] *Secession Reference*, p. 265, AGPEI Authorities, Tab 6.
[143] *Patriation Reference*, p. 880, AGPEI Authorities, Tab 14 [emphasis added].

unilaterally by Parliament. Participation by the Provinces is necessary.

(iv) Selection Processes Relate to the Method of Selecting Senators

96. The preamble to Bill C-20 acknowledges that a "direct election" would require a constitutional amendment under s. 38 of the *Constitution Act, 1982*. While it is claimed by the Attorney General of Canada that there is no "direct" election upon a technical reading of the Bills, statutory interpretation is not an exercise devoid of common sense.[144] A "consultation" is an election and a change in relation to the "method of selecting" Senators. As noted above, the phrase "method" is broad and extends to the whole selection process from beginning to end. Bills C-20 and C-7 change the "method" used to select Senators. An amendment pursuant to s. 42(1)(b) of the *Constitution Act, 1982* is therefore required.

97. This position is also supported by the evidence of Mr. Chrétien, Mr. Tassé, and Mr. Strayer before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. When asked specifically about changes to the selection process for Senators, Mr. Tassé explained on behalf of Mr. Chrétien that, under the text of the original proposal, such changes could have been done by "Parliament, the House of Commons and the Senate alone."[145] However, the text was changed because, according to Mr. Tassé, it "was not the right thing" and changes to the method of selecting Senators were to "be done in conjunction with Parliament and the Provinces."[146]

98. The Attorney General of Canada argues mainly in support of Bill C-20 and puts forward the same submissions in support of Bill C-7. However, in addition to the general objections noted above, the argument that s. 42(1)(b) of the *Constitution Act, 1982* is engaged is further strengthened in the case of Bill C-7. The full title of the proposed legislation states unequivocally that it relates to the method used to select Senators: "An Act respecting the selection of senators ...". Section 2 of the Bill is similarly clear, stating that "[t]he framework in

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[144] See e.g. *Blais*, para. 30, AGPEI Authorities, Tab 2. See also *R. v. Puskas*, [1998] 1 S.C.R. 1207, para. 14, AGPEI Authorities, Tab 43. See further *R. v. A.D.H.*, 2013 SCC 28, para. 83, AGPEI Authorities, Tab 42, where Moldaver and Rothstein J.J. observed that "when one steps back from the mechanistic and often result-driven application of the seemingly endless and at times contradictory tools of statutory interpretation, common sense may, and generally will, prove to be the best guide to statutory interpretation."

[145] Special Senate Committee Minutes (4 February 1981), p. 53:68, AGPEI Record, Tab 7, p. 158.

[146] Special Senate Committee Minutes (4 February 1981), p. 53:68, AGPEI Record, Tab 7, p. 158.

the schedule sets out a basis for the selection of Senate nominees." Bill C-7 is obviously and directly aimed at "the method of selecting Senators," and an amendment pursuant to s. 38(1) of the *Constitution Act, 1982* is necessary.

(v) Selection Processes Violate Constitutional Convention

99. Bills C-7 and C-20 also violate existing constitutional convention. As the Attorney General of Canada has recognized, there is "a long-established constitutional convention as memorialized in a 1935 Minute of Council, [where] it is the sitting Prime Minister who recommends appointments to the Governor General, who then accepts the recommendations."[147] In the *Patriation Reference*, this Court held that "it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional, although it entails no direct legal consequence."[148] When that principle is read together with the acknowledgement by the Attorney General of Canada that the "consultative" processes in Bills C-20 and C-7 do "[amount] to a constraint on the Prime Minister's conventional authority,"[149] it is clear that the proposed Bills are unconstitutional in the general sense, and the participation of the Provinces is required in order to alter the existing "precedent"[150] for selecting Senators. Respectful federalism demands nothing less from Parliament.

Question IV: Property Qualifications for Senators

100. Prince Edward Island submits that the removal of the property qualifications can likely be done under s. 44 of the *Constitution Act, 1982*.

101. Such feudalistic and outmoded requirements for candidacy potentially violate s. 2 of the *Charter*.[151] Moreover, in the *Upper House Reference*, this Court reviewed the various legislative changes enacted by Parliament pursuant to s. 91(1) of the *Constitution Act, 1867* and observed

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[147] AGC Factum, para. 8.

[148] *Patriation Reference*, p. 883, AGPEI Authorities, Tab 14.

[149] AGC Factum, para. 130.

[150] *Patriation Reference*, p. 888, AGPEI Authorities, Tab 14. It is worth noting that the preamble to Bill C-7 even recognizes the 1987 agreement of the First Ministers that persons summoned to the Senate would be chosen from lists submitted by the Provinces.

[151] A potential right of candidacy is discussed in Gary Ahrens and Nancy Hauserman, "Fundamental Election Rights: Association, Voting, and Candidacy" (1980) 14:3 Val. U.L. Rev. 463, AGPEI Authorities, Tab 44.

that the changes "dealt with what might be described as federal 'housekeeping' matters" and "did not in any substantial way affect federal-provincial relationships."[152] According to the Court, the unilateral power of amendment vested in Parliament related "to the constitution of the federal government in matters of interest only to that government."[153]

102. The Court also hinted in the *Upper House Reference* that the property qualifications for Senators, unlike the residence qualifications for Senators, may not have the same relevance to the fundamental features of the Senate.[154] The former were described as being different from the residency obligations for Senators, which touch on an essential characteristic of the Senate.[155] Parliament is therefore likely capable of repealing the property qualifications for Senators for two reasons:

(a) First, the proposed changes relate to the internal constitution of the federal government alone and do not affect the interests of the Provinces in any meaningful way. Section 44 of the *Constitution Act, 1982*, which is similar in scope to s. 91(1) of the *Constitution Act, 1867*, authorizes action by Parliament in such circumstances.

(b) Second, the proposed changes appear to be the type of housekeeping or tailoring measures envisioned by the Court in the *Upper House Reference* as falling within the exclusive authority of Parliament. The changes do not appear to relate to any of the fundamental features or essential characteristics identified by this Court.

Questions V and VI: Abolition of the Senate

103. It is the position of Prince Edward Island that the Senate cannot be abolished unless, at a minimum, the requirements in s. 41 of the *Constitution Act, 1982* are met. Satisfying the process

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[152] *Upper House Reference*, p. 65, AGPEI Authorities, Tab 1.

[153] *Upper House Reference*, p. 71, AGPEI Authorities, Tab 1.

[154] *Upper House Reference*, p. 76, AGPEI Authorities, Tab 1.

[155] Those characteristics included: the protection of the various sectional and provincial interests in Canada in relation to the enactment of federal legislation; and the presence of a thoroughly independent body that can review dispassionately the legislation passed by the House of Commons. See *Upper House Reference*, pp. 67-68 and 77, AGPEI Authorities, Tab 1.

outlined in s. 38(1) would not be sufficient. The abolition of the Senate would require an amendment to Part V, and s. 41(e) requires unanimous consent for any amendment to Part V.

104. The Attorney General of Canada argues that the Senate can simply be abolished under the 7/50 rule and, once that is accomplished (by removing the word "Senate" from the definition of "Parliament"), any reference to the Senate in Part V of the Constitution will be "spent" and no longer have any effect. However, any change to Part V of the *Constitution Act, 1982* (for example, deleting its multiple references to the Senate) requires an "amendment" to Part V and such an amendment would be covered by the unanimity rule. In this regard, it must be emphasized that s. 41(e) requires unanimous consent to "an amendment to Part V" and the word "an," in this context, means "any."

105. Legislation that changes a constitution must also be express and specifically identify the constitutional provision being amended.[156] The references to the Senate in Part V cannot be rendered obsolete in the manner suggested by the Attorney General of Canada. Constitutional changes are held to a higher standard. It has been held that they are not subject to implied obsolescence.[157]

106. In addition, the argument that, after abolition, references to the Senate in Part V can simply be ignored is contrary to the actual text of Part V and the statements made by this Court in the *Upper House Reference* about the vital role the Senate plays in our constitutional order. The Senate can initiate the amending process under s. 46(1) of the *Constitution Act, 1982* and most of the amending procedures set forth in Part V cannot be satisfied without a Senate resolution.

107. Section 41(e) of Part V of the *Constitution Act, 1982* also contains mandatory "manner and form" provisions.[158] Consequently, the prescribed process must be followed in order to produce a valid amendment. If the Senate resolutions contemplated by Part V cannot be passed because the Senate no longer exists, the sections of Part V that require the resolutions would be rendered inoperative. It is hard to imagine that the drafters of the *Constitution Act, 1982*

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[156] *The Earl of Antrim's Petition*, [1967] 1 A.C. 691, AGPEI Authorities, Tab 45 [*Earl of Antrim*].
[157] *Earl of Antrim*, p. 724, AGPEI Authorities, Tab 45.
[158] *R. v. Mercure*, [1988] 1 S.C.R. 234, pp. 277-279, AGPEI Authorities, Tab 46.

intended Parliament to be capable of abolishing a core federal institution and rendering most of Part V, including provincial rights to initiate constitutional amendments, inoperative. Section 47(1) also does not resolve this dilemma for the Attorney General of Canada. It cannot be invoked unless the amendment is presented to the Senate, and the Senate has an opportunity to consider it.

108. Furthermore, abolition of the Senate may offend the "basic structure" doctrine.[159] That doctrine arises out of the interpretation of the limitations inherent in the term "amend."[160] In other words, a change to the "basic structure" of a constitution is a revision – not an amendment. The basic structure of the Constitution can be discerned from the preamble, its specific terms, and the unwritten principles that provide its foundation. In our federation, that structure includes the Senate.[161] It is a core institution and cannot be abolished absent negotiation with the Provinces.

PART IV – COSTS

109. The Attorney General of Prince Edward Island does not seek any costs in this Reference.

PART V – ORDER SOUGHT

110. The Attorney General of Prince Edward Island submits that questions in this Reference should be answered as follows: (1) no; (2) no; (3) no; (4) yes; (5) no; and (6) no.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of August, 2013.

D. Spencer Campbell, Q.C. Rosemary Scott, Q.C. Jonathan M. Coady

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[159] *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, p. 57, AGPEI Authorities, Tab 47 [*OPSEU*].

[160] Craven, Alteration, AGPEI Authorities, Tab 23.

[161] *OPSEU*, p. 57, AGPEI Authorities, Tab 47.

PART VI – TABLE OF AUTHORITIES

OTHER SOURCES **Paragraph**

PART VII – LEGISLATION

1. Bill C-7, AGC Record, Vol. I, Tab 2.

2. Bill S-4, AGC Record, Vol. I, Tab 3.

3. Bill C-20, AGC Record, Vol. I, Tab 4.

APPENDIX A – REFERENCE QUESTIONS

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

(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?