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

DANS LA COUR SUPREME DU CANADA

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

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

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

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Table of Contents

PART I
FACTS

A. Overview

1. This reference concerns Senate reform and the key role that the provinces have in discussions aimed at fundamental changes to our Constitution. The design and function of the Senate has been an important constitutional concern for Nova Scotia since the Canadian federation was first proposed. The principles and nature of Canadian federalism have been at the heart of Senate reform discussions and debate between the federal, provincial and territorial governments for many decades. Our Constitution requires a meaningful dialogue between governments when a change to the character and function of the Senate is proposed. Any reform of the manner by which Senators are selected to office, whether those offices can be made subject to term limits and how the Senate might be abolished first requires a dialogue with Nova Scotia and cannot be accomplished unilaterally by the Parliament of Canada.

2. The reference questions cover both historical and current provincial concerns. The historical concerns include the purpose of the Senate as originally established and Nova Scotia's view of it at the time. Of particular concern now is how the amending formula set out in Part V of the *Constitution Act, 1982* operates and how the federal government views its obligations to its provincial and territorial partners in constitutional reform, both in respect of the Senate and in respect of constitutional matters generally. Outside of minor or other housekeeping matters involving federal institutions, dialogue between the federal and provincial governments is required and provincial consent ought to be obtained in advance of an attempt to enact constitutional reform. This position both continues and advances Canadian federalism principles and understanding in our modern democracy.

3. This reference by Canada poses six questions concerning the amending procedures in Part V of the *Constitution Act, 1982*. Part V sets out a formal amending process for the Canadian Constitution, something which did not exist until 1982. A review of Part V, of the history which led to its adoption, and of federal-provincial practice since 1982 reveals

that radical constitutional reforms, such as are proposed by the reference questions, must be secured through the consent of the provinces.

4. The reference questions require a determination of whether provincial consent is required in the event Parliament wishes to enact reforms such as limiting the term of office of Senators, to change the method of selecting Senators for appointment to office, or to abolish the Senate. Both Part V of the *Constitution Act, 1982* and the principles of federalism require that provincial consent be obtained before any these reforms can be enacted.

B. The Senate at Confederation

5. The design of the Senate was first proposed in the 1864 Quebec Resolutions: AGNS Record, Tab 1. As with the post-1867 Confederation period, the pre-Confederation period was much filled with debate over the design of the Senate. A review of that history is instructive to the context and understanding of the present reference questions and constitutional reform initiatives.

6. Like others in the Maritime Provinces, Nova Scotia's anti-Confederates of the day were skeptical of the senate design offered in 1864, the document that was ultimately transformed into the *British North America Act, 1867* and which is now, with amendments, the *Constitution Act, 1867*. The anti-Confederates were troubled by the Senate design even though it was constituted on the basis of regional equality: each division/region – Ontario, Quebec, and the Maritime Provinces (consisting of Nova Scotia, New Brunswick and Prince Edward Island) – were to be assigned 24 members [AGNS Record, Tab 1 *ibid.*, Resolutions 7 and 8, p.1-2]. Anti-Confederates were troubled because of the Senator selection process, which they considered boded ill for Nova Scotia and the region.

7. Led by the redoubtable Joseph Howe, the anti-Confederates assailed the idea of senators appointed by the Governor General, meaning the government of the day, and ultimately the Prime Minister. The issue was not the appointment process *per se*. It was that the appointment would be made by a government dependent upon central Canada (then

Lower and Upper Canada) for its majority in the House of Commons. Such a government, they argued, could not be expected to appoint Senators from the Maritime region who were known publicly to be strong advocates of their respective provinces in particular, or the Maritimes in general. [Howe, Joseph. 1865. *The Botheration Scheme* - No. 1. Halifax Morning Chronicle. 11 January. Library and Archives Canada – AGNS Record, Tab 3; and, Howe, Joseph. 1909 *The Speeches and Public Letters of Joseph Howe, ed. Joseph Andrew Chisholm*, vol 2, 468-492. Halifax Chronicle Publishing Company Limited – AGNS Record, Tab 5 ,] Howe argued that the many quarrels and insurrections within and between Upper and Lower Canada could only lead one to conclude that central Canada could not be trusted either to deal with the Maritime region fairly or to appoint persons to the Senate who would protect Nova Scotia from the schemes of Upper and Lower Canada: *ibid.*

8. In making his argument, it is clear the anti-Confederates supposed that regional loyalty would be the prime motivator of political actors in the new country, and that it would trump potentially competing loyalties – like loyalty to a political party. This might seem odd to Canadians today, who are accustomed to governments that are organized on the basis of disciplined political parties. However, in 1864, there were no national political parties, only the loosely organized political parties of the British North American colonies. Hence, it is easy to see why the anti-Confederate analysis of the Senate was based on the assumption that senators would act on a regional bias. They simply feared it would be the wrong one.

9. Howe's attack on the Senate was deepened by his appreciation of two other problems that the Maritime provinces faced under the proposed constitution: the first being their standing in the House of Commons, the other being the strategic difficulties that would result from a federation with so few members. With regard to the House of Commons, the problem was the numbers. The proposal was for a body of 194 seats distributed on the principle of representation by population. The Maritime provinces were to be assigned 47 seats. This meant that they would be outnumbered 147 to 47 in the House that really counted under the system of responsible government because the government of the day

was responsible to it. The concern about this situation at the time cannot be overstated – it kept Prince Edward Island ("PEI") out of the federation until 1873.

10. Howe pointed out that the proposed federation would contain only three regions and five provinces – initially four provinces when PEI stepped aside. The upshot, he said, was that the center of power and influence in the country would always remain in central Canada because there were no countervailing forces to offset it. The Maritime provinces had no strategy available to them other than to ally with Ontario against Quebec or with Quebec against Ontario. This was not a recipe for success since the two central provinces could be expected instead to combine against the other provinces whenever their interests dictated such action and the lower provinces would have no other provinces to lean on for protection. He drew the contrast between this state of affairs and that of the United States House of Representatives, in which many states large and small were represented. There, he said, the small states were protected by the competition among the larger states, none of which could dominate the rest.

11. Howe also recognized that the Maritime provinces were not themselves united. Had Maritime union succeeded prior to Confederation, they might have had a stronger hand to play, "but, disunited, it is plain that they must be prey to the spoiler; and having but forty-seven representatives, all told, it is apparent that the Government of the confederacy will always rest upon the overwhelming majority of 147": Howe, 1909, p. 490 – AGNS Record, Tab 5.

12. The anti-Confederates recommended election from the provinces to the Senate instead of appointment by the Governor General. In his *Botheration Letters*, Howe looked favourably on the American Senate, the members of which at that time were elected by the state legislatures – in 1913 the constitution was amended to provide for the direct election of senators, the system that prevails there now: Howe, 1865, p. 1-2 – AGNS Record, Tab 3.

13. Maritime anti-Confederates were not the only critics of the Senate. One of the best known in Canada was Christopher Dunkin, the elected representative of Brome in

Canada East in the assembly of the Parliament of Canada. In his speech to the assembly in the debate over the proposed constitution, Dunkin attacked it for not being a real federation, using the Senate as evidence. If it was supposed to be a "federal" body that represented the provinces, he said, then it was a complete failure because the provinces had no role in appointing its members. But if the Senate was not designed to represent the provinces in the central government, he continued, who would represent them there? His answer was – the cabinet. According to Dunkin, the cabinet would wind up being the institution that advanced the interests of the provinces (Dunkin, Christopher. 1865. Province of Canada. *Parliamentary Debates on the Subject of the Confederation of British North American Provinces*. 493-497. Quebec: Hunter, Rose & Co., Parliamentary Printers. AGNS Record, Tab 2).

14. In the end, an appointed Senate won the day, and many decades were to pass before the idea of an elected body gained any traction in the Maritime provinces. Under the proposed Charlottetown Accord (AGC Record, Vol VIII, Tab 29), which contained a set of far-reaching amendments to the Constitution, the Maritime governments and legislatures signed on to an elected Senate, although the details of the process remained unclear, and in any event the Accord was voted down in a referendum in 1992.

15. The pro-Confederationists, or unionists, in the Maritimes supported the Senate as a properly constituted parliamentary upper house modeled as closely as possible on the premier parliamentary system in the world – that of Great Britain. They also argued that equal representation in the Senate was a very favourable allocation of seats, putting the Maritime region on a par with Ontario and Quebec. They expected that the region's interests would be well protected there. As noted by the Attorney General of Canada in his Factum (paras. 47-51), John A. Macdonald identified the purpose of the Senate as proposed and how or if it might be expected to assist the provinces.

16. In his defence of the Senate to the Canadian Parliament, Macdonald had to deal explicitly with the issue of appointment over election. It must be recalled that in 1864 two of the colonies, Canada and PEI, were experimenting with elected upper chambers. Why, then, the reversion to appointment? One reason was the position of the Maritime delegates to

the Quebec conference at which the proposed constitution was drafted. According to Macdonald, with the exception of PEI, the Maritime delegates showed a "general disinclination" to the elective principle, favouring instead nomination by the Crown: "We resolved then, that the constitution of the Upper House should be in accordance with the British system as nearly as circumstances would allow": MacDonald, J.A.. 1865. *Province of Canada. Parliamentary Debates on the Subject of the Confederation of British North American Provinces.* 25-36. Quebec: Hunter, Rose & Co., Parliamentary Printers; AGNS Record, Tab 4, p. 25-36. Thus, according to Macdonald, the Maritime delegates were mostly staunch devotees of the British parliamentary system.

17. The Maritimers' 'general disinclination' was hardly sufficient reason to defend the shift to appointment, but it set the stage for Macdonald's central thesis that the Senate was intended to function more or less like the House of Lords, that is, as a parliamentary upper house of sober second thought. Of course, it could not be like the Lords since, as Macdonald explained, there was no comparable social order to generate such a body that, at that time, was composed largely of hereditary peers, plus bishops and law lords. Nevertheless, the Senate would be an institution of some *gravitas*, since its members were to be appointed for life and had to own real property of a not-insignificant amount as a condition of membership.

18. Since the function of the Senate was sober second thought, then it was essential that its members have the independence to undertake the task. Macdonald stated that appointment for life would guarantee such independence. Once appointed, a senator was beyond the reach of the government of the day. Further, the Senate's membership was limited to 24 senators per region, and the government could not meet opposition in the Senate by appointing enough additional senators to beat it back (this feature changed at the London conference in December, 1866, where the Quebec Resolutions were transformed into the *British North America Act, 1867*; under ss. 26-28, provision is made for the appointment of additional senators: AGC Authorities, Tab 33). Critics argued that this was a recipe for deadlock, particularly since the Senate in legal terms was almost equal in power to the House of Commons. Macdonald responded that appointment would

keep senators from contemplating such destructive tactics. An elected Senate, he said, was far more likely to produce deadlock than an appointed one. Carefully, he buttressed his point by reference to the experiment in pre-Confederation Canada with an elected Senate, implying that the elected senators were proving troublesome for the government of the day – often a government that he led: MacDonald, J.A., 1865, *supra*, AGNS Record, Tab 4, p. 36.

19. It is apparent from Macdonald's lengthy presentation of the proposed Senate in the debate in the Canadian Parliament that he did not discuss it from a federal standpoint. Once he got past mention of the "novel" idea of equal regional (formerly referred to as "sectional") representation based on the "principle of equality" of each region, he moved immediately to its legislative *bona fides* as an upper house in the national parliament of a new nation. It was to be a national institution and it was to carry out the function of sober second thought in a measured way. This characterization of the purpose and role of the Senate remains an essential feature of the Constitution today.

C. The Senate after Confederation

20. The Attorney General of Canada, by his Factum and Record, reviews in some detail the history of constitutional reform since Confederation. The Attorney General of Nova Scotia will not add to the Record in this regard. It is worth noting, however, that in the time after Part V of the *Constitution Act, 1982* was put in place to deal with amendments to the Constitution, the federal and provincial governments met twice to discuss issues concerning Senate reform, resulting in the *1987 Constitutional Accord* (the Meech Lake Accord) and, subsequently, the *1992 Charlottetown Constitutional Accord.* AGC Factum, paras 39-40.

PART II

QUESTIONS IN ISSUE

21. The reference questions to be answered by this Court are attached as Appendix "A" to the Factum of the Attorney General of Canada. A summary of the questions and the answers of the Attorney General of Nova Scotia are as follows:

1. Can the Parliament of Canada, exercising its legislative authority under s. 44 of the *Constitution Act, 1982*, amend the *Constitution Act, 1867* to set term limits for Senators, including making any such terms renewable and/or the term limits retrospective?

   No. Term limits affect the independence of the Senate and cannot be unilaterally imposed by Parliament.

2. Can the Parliament of Canada, exercising its legislative authority under s. 91 of the *Constitution Act, 1867* or under s. 44 of the *Constitution Act, 1982* provide for a consultative procedure in the form set out in *Bill C-20 (2007)* or *Bill C-7 (2011)* to determine public preferences for potential nominees for appointment to the Senate?

   No. Undertaking consultation by non-binding elections impacts the functioning of the Senate and does not fall within Parliament's unilateral authority.

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

   Yes. The property qualifications are unrelated to the functioning of the Senate and their removal does not affect the provinces. The property qualifications for Senators appointed from Quebec, set out in s. 23(6) of the *Constitution Act, 1867* would remain.

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

The general amending procedure cannot be used to abolish the Senate. The Senate can only be abolished through the unanimity procedure set out in s. 41 of the *Constitution Act, 1982*.

PART III
ARGUMENT

A. Introduction

22. A review of the Records filed by Canada and Nova Scotia reveals that the Constitution and its design has been the subject of much discussion and compromise between the federal and provincial governments since before Confederation. The Constitution reflects, from its inception, compromise between the provincial and the federal governments. The amending provisions of Part V of the *Constitution Act, 1982* equally reflects the necessary provincial-federal dialogue at the heart of our democracy. It is Nova Scotia's submission that Part V must be read in a manner that respects the constitutional principles of federalism and the need for a national consensus before major constitutional changes are adopted.

23. As this Court recognized in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 32 and 52 (AGC's Authorities, Tab 21), federalism is a "fundamental and organizing principle of the Constitution", which animates and informs this Court's reading of the amending formulae. As a principle, federalism informs and sustains the constitutional text, providing the necessary assistance in a proper and thorough interpretation of that text. Our courts necessarily turn to the federalism principle in interpreting the Constitution: *ibid,* at paras. 49, 52, 56-57.

24. Although the Attorney General of Canada has focused on Senate reform in particular, this reference really is about the meaning and application of the amending provisions which

impact on the place and role that provinces have in discussions aimed at changing fundamental aspects of our Constitution.

B. The Reference Questions

1) Senate Term Limits Cannot be Effected under s. 44

25. The Attorney General of Canada argues that term limits may be imposed unilaterally by Parliament through the application of s. 44 of Part V, *Constitution Act, 1982* because the imposition of a term limit does not represent a significant change to the Senate. The Attorney General of Canada posits that exclusive Parliamentary control is granted for everything not listed as an exception in ss. 41 or 42; because those sections do not specifically list tenure, there is no bar to Parliament's unilateral exercise of power under s. 44. Parliament, he argues, unilaterally limited Senator tenure in the past, terminating a Senator's service at 75 years of age, which change survived this Court's scrutiny in the *Upper House Reference*.

26. Section 29(1) of the *British North America Act*("*BNA Act*"), guaranteed an independent Senate by providing that appointees to the Senate would serve for life: *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 ("*Upper House Reference*") at p. 77, AGC's Authorities, Tab 18. This was an important feature of the debates and compromises leading to the creation and adoption of the Constitution. The imposition of a mandatory retirement age for Senators was effected by Parliament under the former s. 91(1) of the *BNA Act*, which provided for amendments through the presentation of a joint resolution of both Houses of Parliament and without provincial consent.

27. In the *Upper House Reference* this Court determined that the federal authority under s. 91(1) of the *BNA Act* was limited to those issues that did not in any substantial way affect federal-provincial relationships and that a compulsory age of seventy-five was a change which could be made under the former s. 91(1) because such a change did not affect "the essential character of the Senate": *ibid.*, at pp. 65 and 77. The Court held Parliament's authority was to extend only to what was an internal housekeeping matter of Parliament's

control over its own legislative process: *ibid.* at p 65. There is nothing to suggest the 1982 amendments overrule, or were intended to change, this Court's determination in the *Upper House Reference*. Nova Scotia submits that constitutional conventions continue to apply.

28. It is submitted that tenure is an essential element of the character of the Senate and thus outside of Parliament's exclusive power. Tenure and independence were key components of the compromise made by Nova Scotia and the provinces when they entered into Confederation.

29. This Court states in the *Quebec Secession Reference*, *supra*, at para. 32 (AGC's Book of Authorities, Tab 21):

> In order to endure over time, a constitution must contain a comprehensive set of [unwritten] rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.

30. The Court has recognized as a general principle that Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces (*Upper House Reference*, p 64). The Senate was a term of the union, and therefore, arguably, beyond the capacity of Parliament to modify unilaterally: *Patriation Reference* [1981] 1 SCR 753, per headnote, pp 757, 764-5; AGC's Book of Authorities, Tab 20.

31. In examining the scope of s. 44 of the *Constitution Act, 1982*, it is apparent on its face the section permits unilateral amendment by Parliament of the "Constitution of Canada in relation to … the Senate". This is not dissimilar to the words found in s. 91(1) of the *Constitution Act, 1867*, now repealed, "The amendment from time to time of the Constitution of Canada…"), AGC Authorities, Tab 33. Consistent with the decision in the *Upper House Reference*, *supra*, at p. 70, the phrase "Constitution of Canada" should

be interpreted as limited to the constitution of the federal government and the power of unilateral amendment should be confined to matters of interest only to that government.

32. As recognized in the *Patriation Reference* and in the *Upper House Reference*, constitutional amendments which affect federal-provincial relationships have, as a matter of convention, only been made after consultation with and the substantial agreement of the provinces. This requirement of "substantial agreement" is continued in the text of Part V of the *Constitution Act, 1982* in sections 38, 41, 43 and 45. These provisions all require provincial participation and dialogue on matters affecting the provinces. Section 44, Nova Scotia submits, should be read in a manner which supports such provincial input and dialogue as required by the principles of federalism. Section 44 ought not to be read in the overly narrow manner argued for by the Attorney General of Canada. That narrow view is not consistent with the principles of federalism.

33. That narrow interpretation would permit Parliament to unilaterally make any change to the Constitution related to the executive, Senate or House of Commons not specifically enumerated by ss. 41 and 42. Such a significant expansion of Parliament's authority is not consistent with this Court's interpretation of that constitutional authority in the *Upper House Reference*. There is no satisfactory evidence this was the intent of s. 44 of Part V. Canada's interpretation and approach was rejected by this Court in respect of s. 91(1); the Record does not disclose that the provinces abandoned the principles of federalism after the decision in *Upper House Reference* in order to permit Canada to accomplish in s. 44 what was rejected by the provinces in respect of the scope of the earlier power in s. 91(1).

34. Canada's position that the imposition of term limits would somehow bring the operation of the Senate more into line with "modern democratic principles" ignores the reality that both the method of selection, whether by appointment or election, and the duration of the term of office/membership were hotly contested matters by those opposed and in favour of a Canadian Confederation in the 1860's. Ultimately, the provinces compromised in 1867 in respect of the very matters now underlying these reference questions. Canada's present position had been previously rejected over 100 years ago for reasons which have not changed over time.

35. As recognized in the *Upper House Reference* at p. 76, term limits might impair the functioning of the Senate as a body of sober second thought. The various lengths of term limits proposed in the reference questions all require careful consideration not to impair the functioning of the Senate as a body independent of the House of Commons. Term limits raise the perception that Senate decisions can be influenced by a desire to seek the government's approval or favour, particularly where there is a possibility of a renewable term, as contemplated within reference question 1(e). Such a possibility is inimical to the required independence of the Senate.

36. A Senate appointment is a lifetime opportunity to serve the interests of Canada to the age of 75. The creation of term limits of the sort contemplated in the reference questions opens the possibility that, upon the completion of a Senate term, a Senator might be rewarded in a number of ways, including further appointments to boards, tribunals, or a variety of other offices. Such possibility may erode the independence of the Senate.

37. The ability of the Senate to remain an independent body providing a sober second thought to House bills by the equally represented regional interests of Canada could be altered by the imposition of term limits. The proposed terms might ensure one party could control the Senate when that party wins consecutive governments in the House of Commons, such could preclude a proper opposition and debate, key principles of our modern democracy. With the current terms which expire at 75 years of age, no single or consecutive governments are guaranteed direct control over the composition of the Senate. The impact of partisan politics within the current Senate appointment process is minimized between successive governments. The appointment process was itself an attempt to guarantee that the Upper Chamber was insulated from mercurial popular or party sentiment. An 8 or 9 year term with the current appointment process would arguably undermine each of these guarantees.

38. Further, on any of the proposed term limits, it is clear that upon the completion of a specified term, a Senator is no longer qualified to serve, regardless of age. This alters the "method of selecting Senators", thus falling directly within the meaning of s. 42(1)(b), thus attracting the general amending formula of s. 38.

39. None of the provisions of Part V expressly reference the ability to amend the independence of the Senate or its functioning as a chamber of sober second thought. One cannot conceive, however, that Parliament may unilaterally alter the intended and stated purpose of the Senate by use of s. 44. This Court's decision in the *Upper House Reference* stands today for the premise that amendments which affect fundamental features of the Senate are not within the unilateral power of Parliament. Nova Scotia submits the scope of s. 44 remains limited to matters of interest only to the federal government.

40. Thus, Nova Scotia submits that question 1 ought to be answered in the negative. Term limits would necessarily change the fundamental character of the Senate and would impact the provinces. The provinces must be a party to any constitutional amendments that would impose term limits on Senate appointments.

2) Senate Appointment Consultations by Election are Not Within s. 44

41. Reference questions 2 and 3 seek advice from this Court on whether Parliament may employ s. 44 of the *Constitution Act, 1982* to unilaterally enact the consultation processes described in Bill C-20 (2007) and Bill C-7 (2011): AGC's Record, Vol. 1, Tab 4 and Vol. 1, Tab 2 respectively. These Bills both provide for elections as a means of consulting the general public on Senate appointments.

42. The Attorney General of Canada argues in his Factum that the Senate appointment process is not changed by the proposed consultation processes. The discretion to look at any factor the Prime Minister considers relevant remains and the proposed consultations do not remove that discretion. At most, it is said, it commits the Prime Minister to consider the results of a consultative process. At its highest, that sort of change amounts to a constraint on the Prime Minister's conventional authority to submit the names of Senate nominees to the Governor General; it does not demand resort to the amending procedures in ss. 41 or 42: AGC's Factum, para 130. Thus, he argues, it comes within the exclusive unilateral power of Parliament to amend pursuant to s. 44 of Part V.

43. The Attorney General of Canada's position is that there is nothing to prevent Parliament from adopting a law respecting popular consultation on Senate appointments, but the only binding procedure under the Constitution will be the procedure now in place until it is altered by a 7/50 amendment.

44. Canada's position understates the following duty imposed on the Prime Minister as contained in s. 3 of Bill C-7:

> 1. If a province or territory has enacted legislation that is substantially in accordance with the framework set out in the schedule, the Prime Minister, in recommending Senate nominees to the Governor General, must consider names from the most current list of Senate nominees selected for that province or territory.
>
> (emphasis counsel's)

45. That obligation is set out again in s. 1 of the Schedule to Bill C-7, which is the framework for the selection of Senators:

> 1. Senators to be appointed for a province or territory should be chosen from a list of Senate nominees submitted by the government of the province or territory.

46. Thus, while it is argued by the Attorney General of Canada that senatorial elections are non-binding on the Prime Minister's discretion, it is clear that the reference questions and the underlying Bills require some consideration of the fact that the Prime Minister is intended to have a duty to consider the names resulting from those elections.

47. Section 42 of the *Constitution Act, 1982* provides that the general amending formula set out in s. 38 is required if an amendment is in respect of "the powers of the Senate and the method of selecting Senators". Is a law creating a duty compelling a Prime Minister to consider a list of elected nominees for any Senate appointment a change to the method of selecting Senators, or simply an advisory gloss? Arguably, such proposed consultations are an improper backdoor attempt at amending the Constitution in a way that ignores the amending formula and the requirement for provincial approval. Nova Scotia submits the

proposed consultation process is a change to the way Senators are appointed and it ought to be presented to the provinces and tabled as a formal constitutional amendment seeking provincial consent.

48. As it currently stands, so long as the nominee meets a set of basic constitutional qualifications, the Prime Minister can recommend whomever he or she wishes to the Governor General to be appointed to the Senate.

49. Holding elections as proposed by Canada will without question affect the operation of the Senate. It is clear that Parliament cannot alter the operation of the Senate through legislation enacted under s. 91 of the *Constitution Act, 1867*; a constitutional amendment is required to change the operation of the Senate. Section 44 cannot be employed as proposed by Canada because of the impact such elections would have on the democratic process and on the Senate.

50. Nova Scotia supports and encourages the enhancement of Canadian democracy. However, as this Court noted in the *Quebec Secession Reference*, *supra*, at 240 (AGC's Book of Authorities, Tab 21), democracy is but one of the fundamental and organizing principles of the Constitution; others include "federalism", "constitutionalism and the rule of law" and "respect for minorities."

51. The Senate has a vital role as an institution forming part of the federal system created by the *Constitution Act, 1867*: *Upper House Reference, supra,* at 66. The Court noted that under the Constitution, the Upper House was not and is not an elected body: *ibid.* The Senate was created as part of the federal Parliament as a means of protecting sectional, or regional, interests: *ibid.* at 67. The Court, *ibid.* at 58, was asked whether Parliament had the authority to change the method of selection of members of the Upper House, including the following methods:

(a) Conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant governors in Council, some members of the Upper House, and, if a legislative assembly has not selected such

members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor in Council, and

(b) Conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,

(c) Conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or

(d) Providing for the direct election of all or some of the members of the Upper House by the public.

52. The Court declined to rule on parts of this question as it determined it did not have a sufficiently developed factual basis upon which to adjudicate, but it did deal with the method described in (d), direct election by the public. The Court stated 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. The preamble to the Constitution referred to "a constitution similar in principle to that of the United Kingdom", where the Upper House is not elected. The Court continued, at 77, as follows:

> In creating the Senate in the manner provided in the *Act*, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life. To make the Senate a wholly or partially elected body would affect a fundamental feature of that body. We would answer this question in the negative.

53. Bill C-7, Nova Scotia submits, amends the "method of selecting senators". The Prime Minister's legal authority to select nominees for appointment to the Senate will be constrained by the provision that s/he "must consider" the list of Senate nominees who were elected from a province and territory. As such, Parliament cannot impose the type of consultation scheme proposed by simple legislation. Instead, a constitutional amendment is required and such amendment cannot be made under s. 44 of the *Constitution Act, 1982* as s. 44 should be interpreted as only allowing amendments that do not impact the provinces. As set out in s. 42(1)(b), the type of amendment at issue must be made pursuant to the general amending formula provided in s. 38.

54. Nova Scotia submits that the Prime Minister is not presently constrained in his ability to consult in advance of a Senate appointment. However, the scheme proposed through the reference questions is not constitutional because of its impact on the method of Senate selection and on the operation of the Senate and on the provinces. It might be that other types of consultations which would enhance the appointment process while not affecting the Senate in a manner that impacts the provinces can be achieved through unilateral action by Parliament; however, the changes proposed in the reference questions cannot be effected through unilateral action pursuant to either s. 91 of the *Constitution Act, 1867* or s. 44 of the *Constitution Act, 1982*. Significant changes, such as the suggested non-binding elections for Senators, can only occur through consultation with the provinces pursuant to the amending formula set out in s. 38 of the *Constitution Act, 1982*.

55. The Attorney General of Nova Scotia submits that the reference questions 2 and 3 be answered in the negative.

3) Parliament May Remove Property Qualifications

56. The Attorney General of Nova Scotia agrees that s. 44 of the *Constitution Act,* 1982 is the proper amending procedure to remove the property qualifications for Senators set out in ss. 23(3) and (4) of the *Constitution Act, 1867*.

57. The property qualifications as they relate in our modern society are not as important today as in 1867. The property qualifications in issue do not relate to the proper

functioning of the Senate and are not an indicator of a person's competence or character to serve as a Senator. To remove those qualifications from ss. 23(3) and (4) does not significantly impact the provinces.

58. A potential anomaly might exist upon the repeal of ss. 23(3) and (4) given that the property qualification in s. 23(6) is proposed by Canada to continue to be retained in the case of Quebec: *Constitution Act, 1867,* AGC Authorities, Tab 33. Subsection 23(6) will require a Quebec Senator to have his real property qualification, but without ss. 23(3) and (4), what that "qualification" is and why that property qualification is retained is not explained by the Attorney General of Canada in his Factum.

4) Abolition of the Senate Requires Unanimous Consent

59. A review of ss. 38, 41, 42, 43, 44 and 47 of Part V informs the observation that the Senate is a necessary part of the constitutional amendment process. The abolition of the Senate would fundamentally alter that amendment process and, as a result, such an amendment to the provisions of Part V of the *Constitution Act, 1982* requires unanimity.

60. The Attorney General of Canada argues, at para 163 of his Factum, the Senate is not an "essential actor in relation to any of the multilateral amending procedures". He argues that the removal of the references to the Senate from Part V is insignificant overall because the Senate's required consent to any amendments under ss. 38, 41, 42 or 43 may be dispensed with after 180 days should the House of Commons again adopt the resolution: para. 164. However, that position ignores several key components of Part V and the Senate's entrenched critical constitutional role as a chamber of sober second thought. That responsibility extends to the Senate's suspensive veto powers.

61. Section 41 requires unanimous consent in order to amend the office of the Governor General. The Governor General has the express constitutional authority to summon Senators pursuant to s. 24 of the *Constitution Act, 1867*. Altering the definition of Parliament to remove the Senate does not affect the Governor General's authority – that power can only be altered upon unanimous consent pursuant to s. 41 of the *Constitution Act, 1982.*

62. The existence of the Senate underlies the ability to apply and recognize provincial rights to appropriate representation in the House of Commons as required by s. 41(1)(b) of the *Constitution Act,* 1982.

63. The right of the Provinces to be represented in the Senate of Canada is spelled out in s. 22 of the *Constitution Act, 1867*: AGC Authorities, Tab 33. If there is no Senate, the meaning of s. 41(b) is changed, leading to a change to Part V. A Senate resolution must authorize any change to Part V. Without a Senate, the constitutional amending process will necessarily be changed in the future.

64. Section 41(e) of Part V states any amendment to "this Part" requires unanimous consent as the removal of the requirement of a resolution of the Senate for future constitutional amendment can only result from a change to Part V of the *Constitution Act, 1982.* The abolition of a key structure which was pivotal to Confederation without unanimous consent of the provinces is difficult to comprehend in our modern democracy. The merit of the proposed reform is not in issue in this reference. That the Senate and Senate design was of critical concern to the provinces at Confederation is a factor which supports provincial participation in the proposed Senate reform initiatives. The principles of federalism require such participation. Unanimity ought to be required before such a significant feature of our Constitution is changed; such requirement is intended to allow the provinces to have a meaningful voice at the Canadian constitutional table.

65. The Attorney General of Nova Scotia submits, therefore, that reference questions 5(a), (b) and (c) should be answered in the negative and that reference question 6 should be answered in the affirmative.

C. Summary

66. The reference questions require a determination of whether provincial consent is required in the event Parliament wishes to enact reforms such as limiting the term of office of Senators, to change the method of selecting Senators for appointment to office, or to abolish the Senate. Nova Scotia submits that both Part V of the *Constitution Act, 1982*

and the principles of federalism require that provincial consent be obtained before any these suggested reforms can be enacted.

PART IV

ORDER SOUGHT CONCERNING COSTS

67. The Attorney General does not seek any costs in this reference.

PART V
ORDER SOUGHT

68. The Attorney General of Nova Scotia submits that reference questions 1, 2, 3 and 5 should be answered in the negative. Reference questions 4 and 6 should be answered in the affirmative.

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

Edward Gores, Q.C.
Counsel for the Respondent
The Attorney General of Nova Scotia

PART VI

TABLE OF AUTHORITIES

PART VII

LEGISLATION

1. Bill C-20 (2007), An Act to provide for consultations with the electors on their preferences for appointments to the Senate (First reading 13 November 2007)

   Record of the Attorney General of Canada, Vol. 1, Tab 4

2. Bill C-7 (2011), An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits (the Senate Reform Act) (first reading 21 June 2011)

   Record of the Attorney General of Canada, Vol. 1, Tab 2