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 P.C. 2013-70, dated February 1, 2013

FACTUM

OF THE HONOURABLE ANNE C. COOLS, INTERVENER

Pursuant to Rules 37 and 46(11) of the *Rules of the Supreme Court of Canada* (SOR/2002-156)

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> "I think we had better return to the original principle and in the words of Governor Simcoe endeavour to make ours an 'image and transcript of the British Constitution'."
>
> John A. Macdonald, Quebec Conference, October 11, 1864.
>
> "Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles."
>
> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 49.

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Constitutions express the historical foundations on which a country is built, and set out the political principles and structures that define the country. They are by their nature resistant to change, intended to endure beyond the policies and choices of the government of the day.

2. Canada's Constitution, defining its basic political structures, has endured since 1867. This is so in large part due to the efforts given to creating the document in the years leading to Confederation, and because its structures have served Canadians well for almost 150 years.

3. After its creation of the federal union, our Constitution's most fundamental aspect is the system of government it created. This system vests executive power in the Queen, advised by the Privy Council, and legislative power in the "One Parliament for Canada" consisting of the Queen, the Senate and the House of Commons. In 1980, when the constitutionality of Senate reform was last before it, this Court noted the "vital role" the Senate plays in the Canadian federal system. The defining constitutional aspects of the Senate are that it provides for equal regional representation across Canada regardless of population, that Senators are summoned to serve by the Governor General in the Queen's name, and that Senators hold a life tenure. These qualities are in direct contrast to the House of Commons, which provides for elected, term-limited members that represent Canadians by population.

4. These differences are not happenstance. They are the debated, informed and deliberate choice of the Fathers of Confederation after considering different models of government. This included both pre-Confederation Canadian models and the model of the United States, whose potential expansion in the wake of their bloody Civil War was a significant motivation for Confederation. Most conscious of the American experience, the Fathers preferred to adopt a model as closely resembling the British Parliament as Canada's new world status allowed. An Upper House appointed by the Queen and holding life tenure was to mirror the House of Lords

in a country with no hereditary peerage. These differences between the Houses reflect important differences between the constituted functions and structures of upper and lower houses in Westminster parliamentary systems, including the historical relationship between the electoral franchise in representation by population and the power to tax that population.

5. The creation and chosen features for the Canadian Senate were, as was Confederation itself, the product of compromise by all the provinces choosing to unite. Concerns about political power within the union, population changes, and regional and linguistic differences were as alive in 1867 as now. The Senate was the key component of the compromise. George Brown noted that without the the Senate, Confederation could not have "advanced a step."

6. This is not to say that constitutions, and Canada's Constitution, are immutable. To the contrary, the Constitution is a living tree within its own text, and can be amended, even radically, when it no longer reflects the collective will of Canadians on how to govern themselves. As this Court said in the *Quebec Secession Reference*, "[i]t lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory... ." The people of Canada and their "desires" are not homogenous, however. The Constitution can only be amended when there is sufficient consensus among Canadians to warrant changes to the political structures on which the country was founded.

7. As with the resolutions that formed the *BNA Act*, the amending procedures in Part V of the *Constitution Act, 1982* were adopted after extensive constitutional debate. As at Confederation, these procedures reflect a compromise between different interests, competing values and democratic and political consensus. As with the rest of the Constitution, they are premised on the ongoing existence of the basic governmental structures it created. Like all constitutional provisions, the amending provisions are to be interpreted purposively, and in keeping with our constitutional principles and history. They should not be given a narrow or overly technical reading. They are not simply obstacles to get around.

8. The bills referenced in the first three Reference Questions, however, are precisely that. They are efforts to get around the requirements of Part V, to change fundamentally the nature of the Senate without obtaining the consensus necessary to amend the Constitution. Neither s. 44 of the *Constitution Act, 1982* nor s. 91 of the *Constitution Act, 1867* gives any parliament the power to rewrite such fundamental and critical aspects of the Constitution by a simple bill.

9. Similarly, any constitutional amendment purporting to wholly abolish the Senate must be founded on the unanimous consent formula. Removing one of the three legs of the stool on which legislative power in Canada constitutionally sits would fundamentally alter the intended balance of Canada's federation. An upper house with regional representation was critical to the Confederation compromise, and to the writing of the Constitution itself. Senate abolition would effectively rewrite the Constitution. Such rewrite can only be achieved by the agreement of all provinces. Senate abolition would also alter the office of the Queen and the Governor General, the amending formulae themselves, and constitutional language rights. Each of these changes expressly requires unanimous consent under section 41 of the *Constitution Act, 1982*.

10. There is no express amending formula in the Constitution for the outright abolition of its institutions. The Attorney General of Canada ("AG Canada") seeks to draw from this that it should be easier to abolish the Senate than to change the provinces' relative representation in the two Houses, or the composition of this Court. It is no surprise that the Constitution does not contemplate the non-existence of its own constitutent institutions, whether the Senate or the House of Commons. The Constitution creates and preserves the union that is the Confederation, and as a total and complete document, it is premised on the continued existence of its fundamental and essential political structures. A sound approach to Section V interpretation, and thus to the Reference Questions, recognizes the historical context of Confederation, rather than attempting to seize on the "easiest" method to achieve profound constitutional changes.

B. Statement of Facts

1) Introduction of the Intervener

11. The intervener, the Honourable Senator Anne Cools, is the Dean of the Senate, having served for almost 30 years, during the tenure of seven Prime Ministers. She is the first black person appointed to the Senate, and the first black female senator in North America. She sits as an Independent Senator, having previously served for 20 years in the Liberal Caucus and shortly in the Conservative Caucus. Her personal and professional interest in the legal and historical roots of the Constitution have led her to speak in the Senate on constitutional questions, and on Senate reform including legislation raised in the Reference Questions.

12. Senator Cools intervenes in this important Reference to assist the Court by bringing her perspective as Canada's longest-serving active Senator through submissions on the importance

of the historical and legal nature of the Senate's defining features, on their significance to the creation of Canada as a federation, and on the practical impact of these features and the proposed changes to them on the current workings of the Senate, and of the whole Constitution.

2) Legislative History and Context

13. This Court has reiterated that historical context is important to constitutional interpretation.[1] Recognizing this, the AG Canada's statement of facts makes reference to the role of the Senate in Confederation, with the apparent intent of highlighting the "controversy" regarding the nature of the Senate rather than the consensus that was accepted in the Constitution.[2] However, the AG Canada's factual recitation does not provide the full historical context for examining the Senate's role in Confederation and in the Constitution, and focuses to a greater degree on post-Confederation debate over potential Senate reform and the development of the amending provisions. The history of the amending provisions is of course important to interpreting Part V. But not to the exclusion of the historical context of Confederation itself and the Senate's role in the creation of Canada as a nation. Relevant historical context from the years and centuries prior to Confederation is therefore included in the submissions below addressing the Reference Questions.

PART II - INTERVENER'S POSITION ON THE REFERENCE QUESTIONS

14. Senator Cools takes no position on Reference Question 4. Her position on the remaining Reference Questions is the following:

> **Question 1:** It is *not* within the legislative authority of the Parliament of Canada to amend s. 29 of the *Constitution Act, 1867* to provide for term limits for senators by way of simple legislative act pursuant to s. 44 of the *Constitution Act, 1982*.
>
> **Questions 2 and 3**: It is *not* within the legislative authority of the Parliament of Canada to effectively create a *de facto* system of Senate election by way of simple legislative act pursuant to s. 44 of the *Constitution Act, 1982*.
>
> **Questions 5 and 6**: Any amendment that would effectively abolish the Senate of Canada can only be made through the unanimous consent procedure set out in s. 41 of the *Constitution Act, 1982*.

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[1] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at p. 344, AGC Authorities, Tab 15; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Quebec Secession Reference*"), at para. 49, Authorities of the Intervener ("Cools Authorities"), Tab 34.

[2] Factum of the AG Canada, at paras. 46-53, and particularly paras. 51-53, and para. 76.

PART III - ARGUMENT

15. Senator Cools' submissions on the key issues raised by the Reference Questions are presented in three sections. **Section A** addresses the Senate's very existence, and thus its potential abolition (Reference Questions 5 and 6). This section focuses on the historical underpinnings of the Senate as part of Parliament, and the goal of Canada's founders to constitute a system of government reflective of that of the United Kingdom; the role of the Senate in that system; and the importance of the Senate to the very fact of Confederation.

16. **Section B** addresses the life tenure as held by Senators (Reference Question 1), and examines the legal concept of life tenure at common law, its impact on both independence and the legislative process, and considers other offices that hold life tenure, notably judicial offices.

17. **Section C** addresses the Senate as an appointed and non-elected body (Reference Questions 2 and 3), including its historical context, the nature of upper houses, the nature and development of the electoral franchise in Canada, and the present government's legislative efforts to change these constitutional facts without the required constitutionlal amendment.

18. Within these sections, Senator Cools will also provide her perspective on the impact of these issues on the working of the Senate today, to assist the Court by showing how the careful and informed constitutional choices of Sir John A. Macdonald and the other Confederation Fathers still influence Canada's current political and legislative regimes.

19. The goal is not to suggest that the Senate can never be changed, or even abolished. Political examination of even the most central government institutions is healthy and to be encouraged in a vibrant and ever-changing democracy. The questions "Is the Senate working?", "Should the Senate be elected?" and even "Should the Senate exist?" are important ones that should continue to be asked and debated. However, these are not the questions put to this Court on this Reference. The goal of this intervention is to show that the proposals put forward through the Reference Questions are not "modest" adjustments to the Senate's structure, but a fundamental and radical re-write of Canada's political system since Confederation. Changes to such foundational aspects of Canadian governance can and should only be undertaken through constitutional amendment procedures that require more than a majority federal government of the day, or Houses of willing members. They require broader consensus of provincial governments and, ultimately, the people of Canada that both levels of government represent.

A. The Senate as a Foundational Constitutive Aspect of Confederation

20. The Senate exists and functions within a broad constitutional framework, which neither began nor ended in 1867. Rather, our Constitution reflects a single continuous and cohesive framework for governance from 1759 to 1982, and to today. The Constitution as a whole is founded on this framework and assumes the continued existence of its basic governance structures. A constitutional amendment to entirely abolish any of these structures demands the highest level of constitutional agreement, namely federal and provincial unanimity.

21. To put the Senate, and Reference Questions 5 and 6, in proper context it is necessary to consider (1) the importance of the British model in Canada's constitutional development, dating back a century before Confederation; (2) the debate over this model at the time of Confederation leading to its inclusion in the *BNA Act, 1867*; (3) the impact of the model on the current workings of the Senate; and (4) why and how these historical and modern considerations impact the Reference Questions. Each of these is addressed below.

1) Canada's Constitution as the "image and transcript of that of Great Britain"

22. While the specific resolutions that became the *BNA Act* were not drafted, debated and adopted until the 1864 Quebec Conference, the notion that Canadian government ought to be modelled on that of Great Britain dates to the very seeds of Canadian constitutional legislation in the wake of the Treaty of Paris of 1763 and the American Revolutionary War.

23. In 1789, Lord Grenville, at Whitehall, in his despatch to Lord Dorchester in Quebec, expressed the general scope and intention of a new bill to frame a new and improved constitutional order, that became the *Constitutional Act, 1791*.[3] This new order would include representative institutions, and representative assemblies, based on the British model to the extent possible given the circumstances, which included the civil and religious differences between French Canadian and English Canadian inhabitants. Lord Grenville wrote, in part:

> Your Lordship will observe that the general object of this plan is to assimilate the Constitution of that Province to that of Great Britain, as nearly as the difference arising from the manners of the People and from the present Situation of the Province will admit.[4] [emphasis added]

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[3] *Constitutional Act, 1791*, 31 Geo. III, c. 31 (U.K.), Cools Authorities, Tab 3.

[4] Kennedy, W.P.M., Statutes, Treaties and Documents of the Canadian Constitution 1713-1929, Second Edition, (Toronto: Oxford University Press, 1930), pp. 185-188, Cools Authorities, Tab 41.

24. The 1791 division of Upper and Lower Canada was intended to put an end to conflict between the French Canadians and the British, in the belief that creating two separate Colonies would allow both peoples to work out their destinies. The *Constitutional Act, 1791* established representative institutions in the newly divided provinces, a preoccupation of the recently arrived Loyalists, and continued and expanded the guarantees of language, religion and civil law to the French, recently British North Americans.[5]

25. In 1792, Upper Canada's first Lieutenant Governor, John Graves Simcoe, opened the new province's first parliament, consisting of an appointed upper house and an elected house of assembly. In his throne speech closing this first session, Simcoe expressed the imperial government's intentions for the new constitutional system, in a now well-known and repeated description of the new constitution as "the very image and transcript of that of Great Britain":

> … I particularly recommend to you to explain that this Province is singularly blessed, not with a mutilated constitution, but with a constitution which has stood the test of experience, and is the very image and transcript of that of Great Britain, by which she has long established and secured to her subjects as much freedom and happiness as is possible to be enjoyed under the subordination necessary to civilized society. …[6] [emphasis added]

26. The aftermath of War of 1812 saw a hardening of those who controlled government, the legislature and the judiciary, in both Upper Canada with the "Family Compact", and Lower Canada with the "Château Clique." Movements for change were led by the Reformers and the Patriotes. In the absence of judicial independence, with judges and the bench involved in active politics, and with growing public support and political success for the Reformers leading to the civil unrest of the Rebellions of 1837-1838, Lord Durham was commissioned and dispatched to Canada. In his 1839 *Report on the Affairs of British North America*, Lord Durham noted the Reformers' invocation of Simcoe's famous phrase and its conceptual framework:

> The views of the great body of the Reformers appear to have been limited, according to their favourite expression, to the making the Colonial Constitution 'an exact transcript' of that of Great Britain; and they only desired that the Crown should in Upper Canada, as at home, entrust the administration of affairs to men possessing the confidence of the Assembly.[7] [emphasis added]

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[5] *Constitutional Act, 1791*, at ss. 2-5, pp. 2-3, Cools Authorities, Tab 3; Kennedy, W.P.M., The Constitution of Canada, (Toronto: Oxford University Press, 1922), at pp. 84-85, Cools Authorities, Tab 42.

[6] *Journal and Proceedings of the Legislative Council of the Province of Upper Canada, 1792*, p. 11, Cools Authorities, Tab 12.

[7] Report on the Affairs of British North America, from the Earl of Durham, Her Majesty's High Commissioner, [4th Sess. 13th Parl. 2nd Vic., 1839] at pp. 47-48, Cools Authorities, Tab 48. The Patriotes, on the other hand, sought an elected Legislative Council, in reaction to the Council's domination by the predominantly British Château Clique.

27. Lord Durham's Report led to the reunion of the provinces by the *Union Act* (the *British North America Act, 1840)*,[8] which reflected British constitutional structures through the creation of a Parliament with an appointed Legislative Council and an elected Legislative Assembly to replace the legislatures of the two provinces. In 1856, though, the Legislative Council moved to become an elected Upper House, such that at the time of Confederation, it contained both members appointed for life and elected members, and Canada's parliamentarians had experience with both systems.[9]

2) Debating and adopting the "image and transcript of Great Britain" at Confederation

28. Simcoe's words were dominant at the 1864 Quebec Conference. John A. MacDonald, then Attorney General, Canada West, was well familiar with the pattern and practice of constitutional development in the British North American provinces. On October 10, 1864 he moved the fundamental motion that became the Quebec Conference's first resolution:

> That the best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such union can be effected on principles just to the several Provinces.[10]

29. In debate on the resolution, Macdonald stressed the need for continuity and cohesion in constitution-making and nation-building. About the constitution of the future two houses, and the future Senate with its sectional and regional equality, he invoked both Canada's experience with an elective Upper House and Simcoe's conceptual phrase, inviting delegates to unite their efforts in constitution building with the efforts of their constitutional predecessors:

> In order to have no local jealousies and all things conciliatory, there should be a different system in the two chambers. With the Queen as our Sovereign, we should have an Upper and a Lower House. In the former the principle of equality should obtain. In the Lower House the basis of representation should be population, not by universal suffrage, but according to the principles of the British Constitution. In the Upper House there should be equality in numbers. … With respect to the mode of appointments to the Upper House, some of us are in favour of the elective principle. More are in favour of appointment by the Crown. I will keep my own mind open on that point as if it were a new question to me altogether. At present I am in favour of appointment by the Crown. While I do not admit that the elective principle has been a failure in Canada, I think we

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[8] *Union Act (British North America Act, 1840)*, 3 & 4 Vict., c. 35, at ss. 3-5, Cools Authorities, Tab 4.

[9] *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, (Quebec: Hunter, Rose & Co., 1865) ("*Confederation Debates*"), at pp. iii-iv, vii, Cools Authorities, Tab 14.

[10] Minutes of the Quebec Conference, in Pope, J., Confederation: Being A Series of Hitherto Unpublished Documents Bearing On The British North America Act, (Toronto: Carswell, 1895), at pp. 5, 38-39, Cools Authorities, Tab 13.

> had better return to the original principle and in the words of Governor Simcoe endeavour to make ours an "image and transcript of the British Constitution."[11]

30. Macdonald and the delegates at Quebec were also conscious of the other options of government that might be considered for Canada's Constitution, including that of the United States. The potential expansionist desires of the United States was itself a strong argument in favour of a Canadian federation as a matter of national security. The calamitous difficulties in the American federation were top-of-mind for the Canadian Fathers in considering potential political structures. The American Civil War was ongoing as they debated Confederation, and the American federal structure was seen as contributing to that War. Macdonald made direct reference in his remarks on the First Quebec Resolution to the War and the "weaknesses in the United States Constitution."[12] On the completion of his remarks, and without amendment, Macdonald's motion carried unanimously.

31. That the constitution of the new federation should be based on that of Great Britain was then the subject of a distinct resolution, the third to be debated and carried at the Conference:

> In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and to the promotion of the best interests of the people of these Provinces, desire to follow the model of the British Constitution, so far as our circumstances will permit.[13]

32. In early 1865, the Quebec Resolutions were presented and debated in the legislative assemblies and councils. Another great Confederation Father, George Brown, later a senator, noted the importance of the Senate in Confederation in no uncertain terms:

> But the very essence of our compact is that the union shall be federal and not legislative. Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they would have equality in the Upper House. On no other condition could we have advanced a step.[14] [emphasis added]

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[11] Discussions in Conference at the Quebec Conference, in Pope, *supra*, at pp. 57-58, Cools Authorities, Tab 13.

[12] Discussions in Conference at the Quebec Conference, in Pope, *supra*, at pp. 54-57, Cools Authorities, Tab 13. See also *Confederation Debates*, at p. 32 [John A. Macdonald, Feb. 6, 1865], Cools Authorities, Tab 14; and Lower, A.R.M. and Scott, F. et. al., "Theories of Canadian Federalism Yesterday and Today", in Evolving Canadian Federalism, (Durham: Duke University Press, 1958), pp. 19-21, Cools Authorities, Tab 44.

[13] Minutes of the Quebec Conference, in Pope, *supra*, at pp. 9-10, 32, 39, Cools Authorities, Tab 13.

[14] *Confederation Debates*, at p. 88 [George Brown, Feb. 8, 1865], Cools Authorities, Tab 14; MacKay, Robert A., The Unreformed Senate of Canada, (Toronto: McClelland & Stewart, 1963), p. 38, Cools Authorities, Tab 47; *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 ("*Senate Reference (1980)*"), p. 67, Cools Authorities, Tab 31.

33. These foundational Quebec Resolutions were again debated and adopted at the London Conference in December 1866, in effectively identical form.[15] The first three resolutions, providing for union of the provinces in a federal system with a federal government modelled on that of Great Britain, were carried forward into the *BNA Act* through its preamble:

> WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom: … [emphasis added]

34. As this Court noted in the *Provincial Judges Reference*, the reference in the preamble of the *Constitution Act, 1867* to the desire for "a Constitution similar in Principle to that of the United Kingdom" recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution. The preamble also "indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged."[16]

3) The British Parliamentary model defines Canadian legislative power today

35. The foregoing brief history illustrates that the Senate was a central aspect of the plan at Confederation to create a system modeled on that of the UK, and a critical feature of Confederation itself. As this Honourable Court described it in the *Senate Reference (1980)*, "The Senate has a vital role as an institution forming part of the federal system created by the Act."[17]

36. This vital role has not changed since this Court considered it in 1980, nor indeed since Confederation. In Senator Cools' experience, having been appointed to the Senate not long after the *Senate Reference (1980)*, the Senate continues to provide the vital role designed for it at Confederation. It provides an objective, independent and experienced review of legislation. It proposes non-money bills, and it debates, proposes amendments to and even blocks or defeats legislation if not considered in the public interest.[18] Through its committees, it hears witnesses and evidence both on particular legislation and on broader policy issues.

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[15] Resolutions of the London Conference, in Pope, *supra*, at pp. 98-99, Cools Authorities, Tab 13.

[16] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at paras. 94-96, Cools Authorities, Tab 35.

[17] *Senate Reference (1980)*, at pp. 66, Cools Authorities, Tab 31.

[18] As a recent example on which Sen. Cools spoke in the Senate, Bill C-377 was a controversial bill to amend the *Income Tax Act* to require unions to disclose payments to outside groups. Despite a Conservative Senate majority, the Senate agreed to the bill only with significant amendments that effectively removed the import of the legislation.

37. Importantly, through these functions the Senate acts as a degree of practical attenuation of the powers vested in the House of Commons and, increasingly, in the government of the day, which must consider the Senate's role in the legislative process when drafting and presenting legislation, or face legislative amendment, delay or defeat. The choices of 1867 are thus not simply artefacts, but define current Canadian legislative and political reality.

4) Impact of the historical context on Reference Questions 5 and 6

a) The role of history in the proper approach to constitutional interpretation

38. As this Court stated in the *Quebec Secession Reference*, "Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles."[19] This appreciation of the historical context is an important part of a proper approach to constitutional interpretation, which "rests on giving a purposive interpretation to the wording of the sections."[20] This Court has on numerous occasions considered the historical context and its expression in the preamble, in interpreting the Constitution's provisions.[21] In particular, this Court extensively considered this history and the preamble in interpreting amending provisions in the *Senate Reference (1980)*.[22]

39. The historical and constitutive context of the creation of Canada's legislative institutions discussed above must be considered in asking whether the Senate may be entirely abolished through a constitutional amendment over the objections of a province, as could be the case if the section 38 amendment formula were to apply.

40. The AG Canada gives little heed to the context of Confederation itself in his argument, and attempts to dismiss this history and the preamble itself by disdaining "original intent" construction.[23] With respect, raising this straw man does not assist this Court. Considering the historical importance of adopting a constitutional and legislative structure modelled on Great Britain does not mean "slavish adherence to original intent." This Court has often referenced and relied on the preamble and the historical context of Confederation while it rejects original

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[19] *Quebec Secession Reference*, *supra*, at para. 49, Cools Authorities, Tab 34.

[20] *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at p. 409, Cools Authorities, Tab 27.

[21] See, *e.g.*, *Quebec Secession Reference*, *supra*, at paras. 33-48, Cools Authorities, Tab 34; *Provincial Judges Reference*, *supra*, at paras. 94-109, Cools Authorities, Tab 35; *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 72, Cools Authorities, Tab 18; *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721, at paras. 63-66, Cools Authorities, Tab 33.

[22] *Senate Reference (1980)*, *supra*, at pp. 66-67, 76-77, Cools Authorities, Tab 31.

[23] Factum of the AG Canada, at para. 85.

intent construction.[24]

41. Nor do post-Confederation changes to the House of Lords affect the Questions before this Court or the relevant approach to interpretation.[25] Unlike the UK, Canada is a federal state with a written constitution that reflects the interests of the provinces, representing regional and historical distinctions within Canada. By contrast, in the UK, the nature of the House of Lords can be, and has been, amended by simple statute.[26] In any case, none of the changes to the House of Lords have been akin to those proposed by the Questions. The House of Lords has not been abolished, nor made an elected house or one with term limits. Thus despite the power to legislatively amend the nature of House of Lords, the UK has not adopted the measures that the Prime Minister claims are necessary to give "democratic legitimacy" to an Upper House.[27]

42. Historical proposals for reform, and statements regarding the "desirability" and "purpose" of the reforms put forward by the current government, are also irrelevant.[28] This Reference is not about whether the Senate *should be* reformed or abolished, as the AG Canada concedes.[29] The fact that Senate reform has been the subject of debate, or is desired by the current government or even a broader constituency, does not help answer the Reference Questions. Indeed, one must question whether the Questions would be necessary if the contemplated proposals had the popular support intimated by the AG Canada.

43. The recent history of reform proposals in fact speaks against the AG Canada's assertions in two ways. First, while concerted efforts have been undertaken for constitutional reform of various kinds, including Senate reform and the Meech Lake and Charlottetown accords, these proposals have all failed. Canadians' desire for reform, or these reforms, may not be as unanimous as the AG Canada contends. Second, even after the enactment of Part V of the Constitution, Senate reform proposals, including the Meech Lake Accord's proposal that Senators be chosen from lists submitted by the provinces, and the Charlottetown Accord's

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[24] *Ontario Hydro*, *supra*, at para. 150, Cools Authorities, Tab 27; see also references in notes 21 and 22 above.

[25] See Factum of the Attorney General, at para. 85 and fn. 119.

[26] E.g., *House of Lords Act, 1999*, in which representation in the House of Lords by the hereditary peerage was largely, although not exclusively, replaced by those with a life peerage. See also *Ontario Public Service Employees' Union v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at para. 79, Cools Authorities, Tab 27.

[27] Factum of the AG Canada, at paras. 119, 129.

[28] Factum of the AG Canada, at (a) paras. 37-44 and 54-56; and (b) 113-123 and 131-135.

[29] Factum of the AG Canada, at para. 74.

proposal for an elected Senate, have been founded on extensive consultation and provincial agreement, rather than on the mere legislative bill of a government of the day.

b) The nature of an amendment to abolish the Senate

44. The Senate's central role in our constitutional history is reflected throughout the *Constitution Act, 1867*. The entire document presumes the continued existence of the Senate. After constituting the Parliament of Canada as the Queen, the Senate and the Commons, the rest of the Constitution, not surprisingly, is premised on the Senate's existence. In addition to the fifteen sections (ss. 21 to 36) that directly define the nature and composition of the Senate, the Senate is referred to, either by name or with reference to the plural "Houses," in provisions addressing: the Constitution of the Parliament of Canada (s. 17); Parliamentary privileges (s. 18); the limitation on membership in the House of Commons (s. 39); the Constitution of the House of Commons (s. 51A); the Royal Assent (ss. 55 to 57); the tenure of office of Lieutenants Governor (s. 59); the federal heads of power (s. 91); the tenure of office of judges and their removal (s. 99); the oath of allegiance (s. 128); bilingualism in the Houses of Parliament (s. 133); and the 1982 Act Part V amending provisions (ss. 38 to 47).[30]

45. An amendment to abolish the Senate, like any amendment, must leave the Constitution of Canada a comprehensible, cohesive and integral text. It would not be enough, as suggested in Reference Questions 5(a) and (c), to simply introduce a provision stating that the Senate is abolished, or to abolish its powers and eliminate representation of the provinces without amending the above provisions. In no small degree, then, Senate abolition would not be a mere amendment of Canada's Constitution so much as a wholesale rewrite of it.

c) Section 41 of the *Constitution Act, 1982* applies to Senate abolition

46. Section 41 states that unanimous consent of the provinces is necessary for amendments "in relation to" five listed matters. On its face, the s. 41 unanimous consent procedure was adopted in respect of defining and foundational characteristics of Canada: the office of the Queen and her representatives, regional representation in the Houses and on this Court, and bilingualism. The very existence of the Senate falls within this general category as a defining and foundational characteristic of Canada and by analogy attracts the s. 41 amending formula.

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[30] *Constitution Acts, 1867* and *1982*, attached. The AG Canada's summary of provisions "relevant to the Senate" is thus inadequate, being limited to the Preamble, s. 17 and ss. 21-29: Factum of the AG Canada, at paras. 5-9.

47. Senate abolition would also be an amendment in relation to three of the five itemized matters in s. 41. First, it would be an amendment in relation to the "office of the Queen," within s. 41(*a*). The Senate is one of the two Houses that, with the Queen, comprise Parliament as a unitary entity. This was a central facet of building the Canadian Constitution as the "image and transcript of the British Constitution." Abolishing one of Parliament's constitutent elements necessarily amends the role of the other two.[31] The Senate is also the House in which the Queen or her representative sits, acts and participates in her parliament,[32] and is the house of the parliaments, where the three parts assemble as the One Parliament for Canada. Further, the appointment of Senators and the Senate Speaker are powers of the Queen through the Governor General.[33] Tellingly, Queen Victoria's proclamation uniting the provinces into "One Dominion under the Name of Canada" named the senators first summoned to the Senate, as selected from the legislative councillors.[34] Senate abolition would thus fundamentally alter the office and powers of the Queen and Governor General.[35] In fact, it would abolish a large portion of parliamentary government, constitutional monarchy and Canadian constitutionalism.

48. Second, Senate abolition would amend the amending formulae in Part V, within s. 41(*e*). Each of the procedures in ss. 38, 41 and 43 requires Senate resolutions. Sections 46 and 47, on the initiation of the amendment procedure, also assume the Senate's existence and would require amendment upon Senate abolition. Amendments to these Part V provisions would be required for them to be comprehensible in the new context of an abolished Senate.

49. These changes would be substantive. The Senate's role in constitutional amendment is not merely "incidental," but one of its important legislative functions. As discussed above, the Senate, by design, is an independent and regionally representative deliberative body, which will have valuable insight into, and may even oppose, a change in any of the foundational principles of the Constitution. At the same time, having ultimate control over constitutional amendment rest in the provincial and federal elected houses is also a justifiable interest in a

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[31] The AG Canada effectively admits this, recognizing that the "newly-defined Parliament (now consisting of the Queen and the House of Commons) would inherit" the powers of the Senate: Factum of the AG Canada, at para. 165.

[32] Indeed, the Queen or her representative, the Governor General, cannot enter the House of Commons.

[33] *Constitution Act, 1867*, ss. 24, 26, 27, 32 and 34, attached.

[34] *A Proclamation for Uniting the Provinces of Canada, Nova Scotia, and New Brunswick into One Dominion under the Name of Canada*, May 22, 1867, Cools Authorities, Tab 5. This was required by s. 25 of the *BNA Act, 1867*, repealed as spent in 1893: *Constitution Act, 1867*, attached, at p. 8.

[35] *In re The Initiative and Referendum Act*, (1916), 27 Man.R. 1, aff'd [1919] A.C. 935 (J.C.P.C.), Cools Authorities, Tab 23.

democracy. Part V reflects this balance by including the Senate in each of the amending formulae, while allowing for the House of Commons to proceed, exceptionally, without a Senate resolution under s. 47. At patriation, had the provinces and the federal government believed that the Senate was immaterial to constitutional amendment, they could have left the Senate out of ss. 38(1)(*a*), 41, 43 and 46. Instead, they deliberately included the Senate as a legislative house that can initiate, consider, and adopt resolutions for constitutional amendments, and whose approval must be either obtained, or wilfully overridden by a second adoption of the House of Commons resolution. Taking the Senate out of this process would be a material change in relation to the amending procedures of the Constitution.

50. The AG Canada tries to avoid application of s. 41(*e*). He argues that Senate abolition would not be "in pith and substance" an amendment to Part V "because abolition of the Senate is not a matter in relation to the amendment of the amending procedures."[36] This statement is simply circular and thus unhelpful. The AG Canada's argument that the Senate is not an "essential actor" in amendment, because it has no absolute veto under s. 47, is also specious.[37] The fact that the Senate has only a "suspensive veto" does not mean that it is not a relevant actor, or that removing it from the amending formula is not a change to the formula. Prince Edward Island also has no veto in respect of amendments under s. 38.[38] Yet expressly removing P.E.I. from s. 38 would clearly be a momentous change to the amending formula.

51. The AG Canada's argument on s. 41(*e*) is also internally inconsistent. He proposes a "pith and substance" analysis to argue that Senate abolition is not an amendment to Part V. Recognizing that Senate abolition cannot possibly be a matter for simple parliamentary statute under s. 44, however, the AG Canada argues that abolition would "necessarily affect the powers and characteristics of the Senate mentioned in s. 42."[39] However, by the AG Canada's own logic, abolition of the Senate is not a matter that in "pith and substance" goes to the *powers* of the Senate as used in s. 42(*b*): it goes to its very existence. The AG Canada cannot propose a "pith and substance" analysis to exclude Senate abolition from s. 41(*e*), while simultaneously proposing a "necessarily affect" analysis to ensure that it falls within s. 42(*b*) and not s. 44.

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[36] Factum of the AG Canada, at para. 153.

[37] Factum of the AG Canada, at paras. 163-164.

[38] Even in light of *An Act respecting constitutional amendments*, S.C. 1996, c. 1, often known as the *Regional Veto Act*, AGC Record, Vol. II, Tab 14, s. 1.

[39] Factum of the AG Canada, at para. 155.

52. Third, Senate abolition would be an amendment in relation to "the use of the English or the French language", within s. 41(*c*). Section 133 of the *Constitution Act, 1867* guarantees bilingualism in "the Houses of the Parliament of Canada." While it may seem that the impact of Senate abolition on s. 133 is only tangential, this would again ignore the historical context of the Senate's importance in Confederation as a bridge between French and English, Quebec and the other provinces. Equal regional representation in the Senate, including the fixed representation of Quebec, was a compromise without which Confederation could not have "advanced a step." One of the key principles that the Senate signified, and continues to signify, is the politically equal representation of the primarily French citizens of Quebec. The constitutional assurance in s. 133 and s. 41(*e*) that English and French are preserved as equal languages in the legislative business of Canada would be adversely affected by the abolition of the legislative body that preserves regional, and implicitly linguistic, representation regardless of population changes.[40]

d) No express amending formula for Senate abolition in Part V of the *Constitution Act, 1982*

53. Reference Questions 5 and 6 are put to this Court in large part because Part V of the Constitution does not expressly reference "abolition of the Senate." It is submitted that the absence of an express amending formula for abolition renders the historical and foundational context all the more important.

54. It is no surprise that Part V contains no express formula to abolish the Senate. Constitutions are formative and not destructive instruments. They bring together, they do not take apart. Nor do they contemplate the complete non-existence of their own constitutent institutions. The Constitution also provides no formula for abolition of the House of Commons, the judiciary, or the federation itself. This Court stated in *OPSEU v. Ontario (Attorney General)* that "the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions…."[41] Whether that political institution is a "freely elected legislative body" as was considered in *OPSEU*, or the Senate or the judiciary, the underlying presumption of the Constitution is that its prescribed structures and institutions, on which the Confederation is founded, will remain.

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[40] An amendment to s. 133 to provide that the Senate could conduct its business in English alone would clearly fall within s. 41(*e*). It would be odd if it were easier to abolish the Senate entirely than permit it to speak only English, recognizing that both would clearly be drastic changes to the legislative structures of Canada.

[41] *OPSEU v. Ontario (AG)*, *supra*, at p. 57, Cools Authorities, Tab 28.

55. This is true even when constitutional amendment is directly contemplated. When the potential to amend the Constitution was given to Parliament in 1949 by s. 91(1), this Court recognized that "the continued existence of the Senate as part of the federal legislative process is implied in the exceptions provided in s. 91(1)."[42]

56. The AG Canada argues that a "careful analysis of the text" suggests that Senate abolition can be achieved by the s. 38 general amending formula, since Senate abolition is not expressly referenced in s. 41. This mechanical and semantic argument put forward by the AG Canada is not the appropriate approach to consider such a fundamental constitutional question, and ignores the historical context in which the Senate was created and continues today. This Court stated in the *Reference re Manitoba Language Rights* that it:

> …cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution.[43] [emphasis added]

57. The AG Canada's argument is premised on its assertion that Part V should be considered "exhaustive" and "comprehensive." Yet Part V cannot be considered wholly exhaustive, either in the sense of contemplating every possible amendment to the Constitution, or in the sense of listing within s. 41 every possible amendment that might require unanimous approval. As to the former, this Court in the *Quebec Secession Reference* considered the "radical and extensive" amendment to the Constitution that would be required for the secession of a province, and recognized that the nature and process for such an amendment are not addressed in the Constitution.[44] Part V therefore cannot be considered to exhaustively address every contemplated or possible amendment to the Constitution.

58. As to the latter, the AG Canada's approach, that assumes that any amendment not expressly listed in s. 41 must be possible by the s. 38 formula, leads to absurd results. It would mean, for example, that although s. 42 expressly adopts the s. 38 amending formula in respect of

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[42] *Senate Reference (1980)*, *supra*, at pp. 73-74, Cools Authorities, Tab 31.

[43] *Reference re Manitoba Language Rights*, *supra*, at para. 65, Cools Authorities, Tab 33. The reference to "contextual and purposive interpretation" makes clear that ascertaining the "intent of the makers of our Constitution" does not invoke the notion of "original intent" as the concept is used in American constitutional interpretation.

[44] While some argued that secession went beyond mere amendment, this Court concluded that regardless of the profundity of the constitutional changes, they would nonetheless be amendments to the Constitution of Canada: *Quebec Secession Reference*, *supra*, at para. 84, Cools Authorities, Tab 34.

"the powers of the Senate and the method of selecting Senators", the very same formula would apply in respect of removal of the Senate entirely, even though that is *not* referred to in s. 42.

59. Similarly, the AG Canada's approach means that changing the composition of this Court requires provincial unanimity under s. 41(*d*), but complete abolition of the Court would be easier to achieve, since s. 42(1)(*d*) providing for the s. 38 formula in relation to this Court is only "subject to paragraph 41(*d*)."[45] A more appropriate purposive approach recognizes that ss. 41(*d*) and 42(1)(*d*) inherently assume the continued existence of this Court and therefore address matters other than its complete abolition. Indeed, taking the AG Canada's approach to its logical extreme would mean that it would be easier to amend the Constitution to abolish the whole judiciary, or drastically reduce its independence by amendment of s. 99, than it would be to provide that this Court could have only two judges from Quebec,[46] since abolition of the judiciary or drastic reduction of its independence is not provided for in s. 41.[47]

60. Taking s. 38 to be the invariable default in the absence of express mention in s. 41 would also mean that even a fundamental amendment such as making the House of Commons an appointed rather than elected body would be easier to achieve than permitting a province to have fewer members than the number of Senators it had in 1982, since the election of members of the House of Commons is not provided for in s. 41.

61. These results run contrary to the AG Canada's own recognition that "[g]enerally speaking, the more profound the change, the more exacting is the procedure,"[48] underscoring the inappropriateness of the approach. The better approach considers Part V in the context of the whole Constitution and its historical framework, and points to the conclusion that unanimous federal and provincial consent is necessary to amend the Constitution to abolish one of its constituent institutions.

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[45] Indeed, the AG Canada's approach would render s. 42(1)(*d*) redundant, since s. 38 would apply by default.

[46] Or to provide that it must have three from Western Canada, or even, arguably, that it be composed of judges or advocates of at least *fifteen* years standing: *Supreme Court Act*, ss. 5 and 6, Cools Authorities, Tab 10.

[47] Senate abolition would also affect the independence of judges. Under s. 99, superior court judges are only removable "on address of the Senate and House of Commons", and judges of this Court and other federal courts have the same tenure (see para. 78, *infra*). Abolition of one of the bodies required to recommend a judge's removal, particularly the more independent body, would make removal easier and the judiciary less independent.

[48] Factum of the AG Canada, at para. 124.

B. Life Tenure – Reference Question 1

62. Senators "hold [their] place in the Senate for life." Whether one favours the notion of life tenure for Senators or not, it cannot be argued that such tenure is not a defining part of the essence of Canada's Senate as it was constituted and since.[49]

63. Reference Question 1 asks whether Parliament, acting unilaterally, can change the Senate from a body of individuals holding office for life to one in which members sit for a fixed term. This is not a "relatively modest" constitutional change. It is a fundamental change to the nature of the office of Senator and to the Senate itself as an upper house and one arm of the "One Parliament for Canada." It would also be an amendment in relation to the office of the Queen. For both reasons, unanimous consent of the provinces is necessary. At the very least, such an amendment would require provincial support through the general amending formula of section 38. It cannot be undertaken by simple statute pursuant to s. 44.

64. To assist this Court in answering Reference Question 1, the submissions below address: (1) the deliberate constitutional decision at Confederation to create an Upper House consisting of Senators with life tenure; (2) the legal nature of life tenure, with a comparison to other officeholders with a constitutional life tenure, namely the judiciary, and consideration of retirement age; (3) the impact of life tenure on the workings of the Senate; and (4) why and how these historical and modern considerations impact the Reference Questions.

1) Life Tenure as an independence feature of the "image and transcript of Great Britain"

65. The adoption of life tenure as the model for the Senate was a conscious choice made from among the available options at Confederation. John A. Macdonald spoke to the issue directly in the Confederation Debates in the Legislative Assembly on February 6, 1865. He noted that the life tenure was deliberately chosen as the best available manner of making the Canadian Upper House a close parallel to the hereditary British Upper House:

> We resolved then, that the constitution of the Upper House should be in accordance with the British system as nearly as circumstances would allow. An hereditary Upper House is impracticable in this young country. … <u>The only mode of adapting the English system to the Upper House, is by conferring the power of appointment on the Crown (as the English peers are appointed), but that the appointments should be for life</u>. [emphasis added][50]

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[49] *Constitution Act, 1867*, section 29(1), attached; *Senate Reference (1980), supra*, at pp. 76-77, Cools Authorities, Tab 31.

[50] *Confederation Debates*, at p. 35 [John A. Macdonald, Feb. 6, 1865], Cools Authorities, Tab 14.

66. The "tenure for life" thereby created a legal estate granted to the senator, a New World echo of the tenure of hereditary Lords. Macdonald's observation that members of the Canadian Senate were to be "men of the people and from the people" was simply a recognition that a hereditary Upper House was impossible in Canada. The goal was nonetheless to create a model of the Upper House based on the House of Lords, and the life appointment was the most feasible manner of doing so.[51] As this Court observed in the *Senate Reference (1980)*, the implementation of a life appointment was designed to reflect "a constitution similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life," and represents a "fundamental feature" of the Senate.[52]

67. The decision to create a Senate consisting of members appointed for life was not mere mimicry, however. It represented a desire to create as independent an Upper House as possible. John A. MacDonald noted, "[i]t must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch…"[53] Speaking in the Assembly, George Brown responded directly to the issue of term limits, which he had initially favoured, and in particular to a potential nine year term limit. He noted that this would affect senators' independence and that the desire was "to render the Upper House a thoroughly independent body – one that would be in the best position to canvass dispassionately the measures of [the House of Commons], and stand up for the public interest in opposition to hasty and partisan legislation."[54]

68. This deliberate choice by the Fathers of Confederation who had carefully and diligently studied the various constitutional options available to them was part of the very constitutional design of the Parliament of Canada. It was also a choice made in the context of the historical legal nature of life tenure in appointed offices.

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[51] The AG Canada's statement (para. 50) that Macdonald's "men of the people" comment shows that he "envisioned a Senate that was not like the House of Lords" considerably overstates the case. Macdonald was in fact addressing whether an independent Senate might create legislative deadlock. He argued that this was not the case in the UK, and was even less likely in Canada since Senators were "men of the people" who would interact with citizens daily and thus be unlikely to interfere with legislation reflecting the will of the people. The point was thus made in favour of making the Canadian Senate akin to the House of Lords, and not as an expression of an intent to create a different body: *Confederation Debates*, at pp. 36-37 [John A. Macdonald, Feb. 6, 1865], Cools Authorities, Tab 14.

[52] *Senate Reference (1980)*, at pp. 76-77, Cools Authorities, Tab 31.

[53] *Confederation Debates*, at p. 36 [John A. Macdonald, Feb. 6, 1865], Cools Authorities, Tab 14.

[54] *Confederation Debates*, at p. 90 [George Brown, Feb. 8, 1865], Cools Authorities, Tab 14. The AG Canada's factum references this passage (para. 49), but does not note that Mr. Brown was directly addressing the possibility of having Senators with term limits. See also *Senate Reference (1980)*, *supra*, at p. 77, Cools Authorities, Tab 31.

2) ***Life tenure in an office at common law***

a) Life tenure in office as an incorporeal hereditament

69. At common law, offices were recognized as a form of property right, one of the ten sorts of *incorporeal hereditaments*. Blackstone described offices as follows:

> V. Offices, which are a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments; whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators. … [italics in original; underlining added][55]

70. Every office attaches a tenure in that office, and invokes the ancient law of tenure. *Jowitt's Dictionary of English Law* defines tenure in office and its origins in the law of property:

> Tenure in its general sense is a mode of holding or occupying: thus we speak of the tenure of an office, meaning the manner in which it is held, especially with regard to time (tenure for life, tenure during good behaviour), and of tenure of land in the sense of occupation or tenancy … .
>
> In its more technical sense, tenure signifies the mode in which all land in England is theoretically owned and occupied. … The manner of his possession is called tenure, and the extent of his interest is called an estate (q.v.).[56]

71. This connection with the common law lineage of property is reflected in the text of the *Constitution Act, 1867* itself. Section 29, under the heading "Tenure of Place in Senate," states that a Senator shall "hold his place in the Senate for life." This Court commented on this traditional connection between land-holding and the tenure in office held by senior civil servants appointed during good behaviour ("tenured appointments") in *Wells v. Newfoundland*, noting that such tenured appointments stemmed from feudal concepts: "The tendency was for offices to be hereditary; they were estates, intimately connected with land-holding. Sometimes they were granted for life."[57] This Court in *Wells* held that the feudal overtones of tenured appointments were anachronistic in respect of the employment of civil servants, but recognized that "exceptions are necessary for judges, ministers of the Crown and others who fulfill

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[55] Blackstone, Sir William, Commentaries on the Laws of England. In Four Books, Book 2, pg. 36, in the new edition by Robert Malcolm Kerr, LL.D. (London, 1857), Vol. II., "Of the Rights of Things", at p. 36, Cools Authorities, Tab 37.

[56] *Jowitt's Dictionary of English Law*, Vol. 2, (London: Sweet & Maxwell Ltd., 1959), at p. 1734, Cools Authorities, Tab 40.

[57] Emden, C.S., The Civil Servant in the Law and the Constitution (1923), at p. 18, as quoted in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 25, Cools Authorities, Tab 36.

constitutionally defined state roles." The relationship between the state and such officeholders, including senators, is dictated by the terms and conventions of the Constitution and is an "integral part of 'the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the backbone of our constitutional system'."[58]

b) Comparison to the life tenure of the judiciary

72. The feature of the British Upper House that life tenure was designed to implement was its independence: "altogether independent of the Sovereign, of the Lower House, and of the advisers of the Crown."[59] The independence of thought and action that is the grant of life tenure is not exclusive to senators. When considering the historical and constitutional concept of the life estate granted to senators, it is informative to consider the other officeholders whose independence through life estate is guaranteed in the Constitution as described in *Wells*, namely the section 96 judges. Both senatorial and judicial independence through life tenure are set out in specific constitutional provisions, and both are reflections of the preamble's call for "a Constitution similar in Principle to that of the United Kingdom."[60]

73. As with the notion that Canada's Constitution should be an "image and transcript" of that of Great Britain, the concept of judicial independence has its roots in the 18th century and before. The 1701 *Act of Settlement* protected judicial independence, particularly from the King's displeasure. It made judges' appointments *quamdiu se bene gesserint*, *i.e.*, during good behaviour:

> That after the said Limitation shall take Effect as aforesaid, Judges Commissioners be made *Quamdiu se bene gesserint*, and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them.[61]

74. While an appointment on good behaviour may be for a limited term,[62] where no term is specified, an unlimited appointment during good behaviour such as that in the *Act of Settlement*

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[58] *Wells*, *supra*, at paras. 31-32, Cools Authorities, Tab 36; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 3, Cools Authorities, Tab 20; *Provincial Judges Reference*, *supra*, at para. 134, Cools Authorities, Tab 35.

[59] *Confederation Debates*, at p. 36 [John A. Macdonald, Feb. 6, 1865], Cools Authorities, Tab 14; *Senate Reference (1980)*, *supra*, at p. 77, Cools Authorities, Tab 31.

[60] *Beauregard*, *supra*, at p. 72, Cools Authorities, Tab 18; *Provincial Judges Reference*, *supra*, at para. 105, Cools Authorities, Tab 35; *Senate Reference (1980)*, *supra*, at pp. 69, 77.

[61] *Act of Settlement, 1701*, 1700 12 & 13 Will. 3 c. 2 (U.K.), Cools Authorities, Tab 1.

[62] See, as one of many potential examples, the Chairperson of the Canadian Human Rights Tribunal, appointed to hold office during good behaviour for a term of not more than seven years: *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, at s. 48.2, Cools Authorities, Tab 8; *Bell Canada v. Canadian Telephone Employees Assn.*, 2003 SCC 36, [2003] 1 S.C.R. 884, at paras. 13, 24, Cools Authorities, Tab 19.

creates a life tenure or life estate. This had been confirmed shortly before the *Act of Settlement* in the 1692 case of *Harcourt v. Fox*, where a 1689 statute providing for appointment of the clerk of the peace for a county by the *custos rotulorum* "for so long time only as he shall well demean himself in the office" was recognized to create an "estate *for life* in his office independent upon the *custos*, and determinable upon the good behaviour of the party" [emphasis in original].[63]

75. Professor Lederman, in his seminal paper on judicial independence published in the context of proposed limitations on the judicial life estate by creating a retirement age (discussed further below), discussed *Harcourt v. Fox* and noted that:

> Appeal was taken by writ of error to Parliament and the judgments of the justices of the King's Bench were there affirmed. The Attorney-General, presumably before the House of Lords, is reported to have given his opinion as follows:
>
> > When an office is granted *quandiu se bene gesserit*, it is a freehold, and to last during the parties' life. It is so even in the case of the King, whose grant shall be taken most strictly against himself. If the king grant an office *quandiu se bene gesserit*, it is a freehold for life. [emphasis added].[64]

76. Professor Lederman quoted Alpheus Todd's 1887 text on Parliamentary Government in England, on the legal effect of the grant of office during good behaviour. Dr. Todd wrote:

> The legal effect of the grant of an office during "good behaviour" is the creation of an estate for life in the office. Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour. But like any other conditional estate, it may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and, thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. … When the office is granted for life, by letters patent, the forfeiture must be enforced by a *scire facias*. These principles apply to all offices, whether judicial or ministerial, that are held during good behaviour. [emphasis added][65]

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[63] *Harcourt v. Fox* (1693), 1 Show. 506, 89 Eng. Rep. 720 (K.B.), aff'd in Parliament, Show. Parl. Ca. 158, at p. 734 (*per* Holt CJ); see also pp. 726 (*per* Eyres J.) and 728 (*per* Gregory J.), Cools Authorities, Tab 21; Lederman, W.R., "The Independence of the Judiciary" (1956), 34 Cdn. Bar Rev., 769 and 1139, at p. 784, Cools Authorities, Tab 43 [Prof. Lederman's article was published over the course of two separate issues of the *Canadian Bar Review*]. See also *Hammond v. McLay* (1869), 28 U.C.R. 463, in which the Upper Canada Court of Error and Appeal very shortly after Confederation recognized the finding in *Harcourt v. Fox*, and distinguished between freehold life tenure appointments on good behaviour and those at the pleasure of the Crown: Cools Authorities, Tab 22.

[64] Lederman, W.R., *op. cit.*, at p. 784, Cools Authorities, Tab 43.

[65] Todd, A., Parliamentary Government in England (London: Longmans, Green and Co., 1887), Vol. II, pp. 857-858, as quoted in Lederman, W.R., *op. cit.*, at p. 786, Cools Authorities, Tab 43.

77. The constitutional importance of judicial independence has been recognized by this Court, but it was not ever thus. Unlike in Great Britain, the notion of judicial independence, as well as responsible government, did not apply in early colonial Canada. This caused much unrest in Upper and Lower Canada pre-Confederation.[66] The *BNA Act, 1867* in s. 99 on tenure and s. 100 on salaries, was clear in language that conceptually matched the *Act of Settlement*. Section 99 states, under the heading "Tenure of Office of Judges of Superior Courts":

> The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.[67]

78. Like tenure is statutorily granted to the judges of this Court and other s. 101 Courts.[68] The legislative history is such that the life tenure of judges is described in the words "during good behaviour," while the life tenure of Senators in s. 29 expressly uses the words "for life." The effect is the same, however, in that each creates a constitutional life estate in the office, not lost except by forfeiture. For the judiciary, such forfeiture is defined by what constitutes "good behaviour" at common law, such as that described by Dr. Todd in the passage above. For the Senate, the grounds for forfeiture are set out in s. 31, titled "Disqualification of Senators." In either case, removal can only be based on the office holder's own incapacity or misconduct. This Court has held that the tenure of judges to hold office "during good behaviour" subject to removal on an address of both Houses of Parliament represents the "highest degree of constitutional guarantee of security of tenure."[69]

79. An appointment for life, creating a freehold life estate in the office, is thus of a different essential nature, and is a different constitutional concept, than an office for a fixed term, whether renewable or not. Life tenure as an ancient, tried and enduring constitutional concept is the legal and contitutional guarantee of independence. It is alive in our Constitution and, for sound reasons, it is not easily altered. Judicial independence and Senate independence, both by life tenure, are tied by their historical and constitutional contexts. This context must inform the appropriate approach to any proposed amendment that would abolish the constitutionally ordered life tenure. The similar constitutional positions of the independence of senators and

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[66] See Lederman, W.R., *op. cit.*, at pp. 1145-1158, Cools Authorities, Tab 43.

[67] *Constitution Act, 1867*, at s. 99, AGC Authorities, Tab 33, at p. 31.

[68] *Supreme Court Act*, R.S.C. 1985, c. S-26, at s. 9, Cools Authorities, Tab 10; *Federal Courts Act*, R.S.C., 1985, c. F-7, at s. 8, Cools Authorities, Tab 9; *Tax Court of Canada Act*, R.S.C., 1985, c. T-2, at s. 7, Cools Authorities, Tab 11.

[69] *R. v. Valente*, [1985] 2 S.C.R. 673, at paras. 26 and 29, Cools Authorities, Tab 30.

judges has provided for comity between the institutions of our Constitution, as between the Sovereign's superior courts and the Sovereign's High Court of Parliament. Blackstone called this relationship of comity between the governance branches the "balance" of the Constitution.[70] It is central to the working and stability of our Constitution, and was key to Confederation. The federal government can no more amend the constitution by simple bill to remove Senate life tenure than it can legislate to amend the life tenure of the judiciary by simple bill.

c) Mandatory retirement age does not affect the nature of life appointment

80. That s. 29 was amended in 1965 to provide for retirement at age 75 does not support the contention that Parliament can change the life term of senators to a fixed term without provincial consent. Such an argument is legally, constitutionally, and historically unsound.

81. The 1965 amendment did not purport to change the existence of a life appointment: s. 29(1) continues to provide that a Senator shall "hold his place in the Senate for life." Instead, to address concerns about mental fitness, it refined the concept of "life" by saying that the life appointment is "subject to" subsection (2), which provides for the retirement age of 75. Importantly, the retirement age does not depend on the Senator's age at appointment, the date of appointment, the sitting of Parliament, nor the Senator's length of service. The amendment did not change the basic nature of the life estate, nor make it an appointment on good behaviour for a fixed term. Providing for fixed terms for senators regardless of age, however, would be a total negation and repeal of the law of Senate life tenure, not a refinement of it or a reasonable limitation on it as in s. 29(2). This is so whether the fixed term is for one year, nine years, or more, whether it is renewable, or whether it applies to current or future senators.

82. It is relevant that even the adoption of a retirement age was recognized as a significant constitutional amendment when earlier contemplated for s. 96 superior court judges. While judges of this Court and the Exchequer Court had a statutory retirement age of 75 since 1927,[71] imposition of a retirement age for s. 96 judges required a constitutional amendment. Professor Lederman, in his 1956 article on judicial independence written in the context of this debate, referred to *Harcourt v. Fox* and the legal nature of tenure of office, and concluded that the "constitutional guarantee of tenure for life" made constitutional amendment necessary.[72]

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[70] Blackstone, *op. cit.*, at Vol. I, p. 153, referring to the balance between constituent parts of the parliament.

[71] *An Act to amend the Supreme Court Act, 1927*, 17 Geo. V, c. 38, Cools Authorities, Tab 7.

[72] Lederman, W.R., *op. cit.*, at pp. 785 and 1161, Cools Authorities, Tab 43.

83. In 1960, both Prime Minister Diefenbaker and his Senate Government Leader Senator Aseltine noted the constitutional nature of the amendment, and the importance of the provinces' unanimous consent, obtained by then AG Canada Davie Fulton's correspondence with the provincial Attorneys General.[73] Like the 1960 amendment for judicial retirement age, the 1965 introduction of senatorial retirement age required constitutional amendment. However, the mechanism used was s. 91(1) of the *Constitution Act*, added in 1949 to grant Parliament legislative authority over amendments to the Constitution, subject to certain limited exceptions such as amendments to provincial heads of power, school and language rights.[74]

84. This Court considered the 1965 amendment and the s. 91(1) power in the *Senate Reference (1980)*. The Court described this amendment, together with other amendments involving readjustment of representation in the House and Senate, as federal "housekeeping" matters that "did not in any substantial way affect federal-provincial relationships." The Court, noting that life tenure in the Senate was modelled on the House of Lords, directly constrasted the issue of retirement age with the potential imposition of term limits, stating that unlike term limits, "[t]he imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate." [75]

85. Given their constitutional and historical roots and parallels, reference to the tenure of judges is helpful in assessing the relative constitutional impact of retirement age limits and term limits. The imposition of compulsory retirement, though recognized as a significant constitutional change, did not adversely affect judicial independence. This Court's comments in *Valente* that the life tenure represented the "highest degree of constitutional guarantee of security of tenure" were made with the retirement age in force. However, constitutional action to alter the life estate in judicial office, or to impose term limits for judges, would have a significant impact on judicial independence, and would fundamentally alter the nature of judicial office. The same is true of Senate independence, the "essential character" of the Senate, and the office of Senator.

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[73] *Debates of the House of Commons*, June 14, 1960 (Prime Minister Diefenbaker), Cools Authorities, Tab 15; *Debates of the Senate*, June 21, 1960 (Sen. Aseltine), Cools Authorities, Tab 16. A resolution was passed by the Quebec Legislative Council and Legislative Assembly.

[74] *Constitution Act, 1867*, s. 91(1), repealed by the *Constitution Act, 1982*, attached (see fn 44).

[75] *Senate Reference (1980)*, *supra*, at pp. 76-77, Cools Authorities, Tab 31.

3) Current impact of life tenure on the workings of the Senate

a) The choices of 1867 impact the Senate in 2013

86. The historical importance of life tenure is reflected in its practical importance to the operations of the Senate today. As Senator Cools' public record demonstrates, the institutional independence created by life tenure has a direct role in a senator's ability to take positions and vote guided by her belief in the best interests of Canadians, rather than by the potential effect of such vote or decision on her professional status or her life after politics. Confidence in the independence of the office allows a Senator to act and vote based on her conscience and experience, even if her stance may be politically unwanted by the government or the party.

87. The life tenure also means that the Senate acts as an effective "reminder of governments past" and of elections past. It is also an institutional means of stability, and a bulwark of resistance against despotism, the potential for which has always been the great weakness of parliamentary government. The current Senate is composed of members appointed on the advice of five different prime ministers. By life tenure, some senators have acquired considerable experience and knowledge. This fundamental aspect of the Senate acts as a mechanism to ensure that legislative change is not overly radical, and that momentous changes in the way in which Canadians are governed cannot easily be made by the government of the day without a broader base of representative approval.

b) Arguments regarding the impact of the removal of life tenure

88. Comparing life terms to senators' average length of service is of little value. As with all life appointments (with or without a mandatory retirement age), some appointees will serve shorter and some longer terms. Comparing averages deliberately excludes the impact on institutional knowledge and memory of long-serving senators, such as Senator Cools.

89. Reliance on the average length of senators' actual service also inherently dismisses the very structure of life tenure that creates the independence. This Court has stated that institutional independence derives from "objective conditions or guarantees," and that these "objective guarantees define that status" of independence (emphasis in original).[76] Reference to average terms is no substitute for the objective conditions and guarantees that create the status

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[76] *Valente*, *supra*, at p. 689, Cools Authorities, Tab 30; *Provincial Judges Reference*, *supra*, at para. 112, Cools Authorities, Tab 35; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405, at paras. 126-133, Cools Authorities, Tab 24.

of independence. Again, a parallel to the judiciary can be drawn. A calculation of average years of judicial service would not change the fact that imposing a term appointment on judges would significantly alter the structural guarantees of judicial independence.

90. The AG Canada's submissions on the impact of term limits are also self-contradictory. He claims that the averages show that imposing term limits "does not represent a significant change to the Senate," yet asserts that they are needed since the Senate's "legitimacy as a democratic institution" is at stake without them.[77] He also relies on Professor Manfredi's opinion that Bill C–7 would not affect Senate independence, but ignores Professor Manfredi's opinion that "non-renewability is a key element of the Senate's independence," when asserting that renewable and non-renewable term limits are on the same constitutional footing.[78]

91. Ultimately, opinion on whether term limits could be imposed without affecting independence is irrelevant. The confederating parties determined at Confederation that the best way to create the desired independence, and to parallel the House of Lords, was by life tenure. Their decision was enshrined in the Constitution. The opinion of a subsequent government or expert that Senate independence could be preserved while imposing term limits in no way alters the fact that it would be a significant constitutional amendment to do so.

4) Impact on Reference Question 1

a) Section 44 does not authorize Parliament to change the life tenure of Senators

92. Life tenure has a unique status at common law. The decision at Confederation to grant such tenure to Senators was an informed one, made to maximize the independence of the Senate by creating a body with characteristics similar to the House of Lords. Whether this structure is a good or bad thing, or whether it can be improved upon, is clearly the subject of debate. But this feature of our Parliament's structure is so profoundly, legally and historically significant, that it would be inherently contradictory that this structure itself could be changed by simple legislative amendment on the initiative of the government of the day, without the agreement of the provinces, the regions, that the Senate represents.

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[77] Factum of the AG Canada, at paras. 126, 129. The comparison is also not fully representative of the Reference Questions. While the AG Canada on a number of occasions refers to proposed terms of "eight to ten years", the Reference Question in fact refers to terms of "eight years or less", leaving the door open for much shorter terms.

[78] Factum of the AG Canada, at paras. 27, 127; Opinion of Prof. Christopher P. Manfredi, AGC Record, Vol. XVI, Tab 105, at para. 48.

93. The AG Canada is correct that the amending procedures generally reflect a philosophy that "the more profound the change, the more exacting is the procedure." However, it is legally and historically incorrect to say that "Changing term limits is neither profound nor structural."[79] The proposed legislation does not "change" term limits. It implements term limits and thereby revokes the life estate. Term appointments and life appointments are different common law and constitutional notions. Negation and repeal of the life tenure chosen at Confederation as a defining Senate feature cannot be described or considered simply as a matter "in relation to…the Senate."

b) Section 41(*a*) or section 38 of the *Constitution Act, 1982* apply

94. This conclusion is reinforced by examining the specific constitutional amendments set out in ss. 41 and 42. The Reference Questions do not ask what the relevant amending formula for introducing term limits would be if s. 44 does not apply, but it is submitted that one of the formulae requiring provincial agreement must be used to create and impose Senate term limits.

95. The grant to senators of a life estate in the Senate is a grant ultimately derived from the Sovereign. Removing the grant of a life estate therefore effects an amendment in relation to the office of the Queen, and requires consent of all provinces pursuant to s. 41(*a*) of the *Constitution Act, 1982*, for the reasons discussed above in considering Senate abolition.

96. At the very least, revoking the life estate would amend the powers of the Senate, the method of selecting Senators (life appointment being different mode of selection than term appointment), and the very nature of the Senate itself. It would also of necessity entail other changes, such as consequent changes to House of Commons members' terms that would be required to preserve the constitutional balance between the two Houses. These changes to the balance achieved at Confederation are not within the legislative authority of Parliament acting pursuant to s. 44. They can and should be undertaken only if they reflect and proceed from the consensus demonstrated by constitutional amendment with provincial support.

c) Retrospectivity and retroactive removal of Senators: Questions 1(f) and (g)

97. Finally, it is submitted that the retroactive removal of Senators granted a life estate is not possible, and particularly not by mere legislation. As discussed, the legal concept of the life estate is such that it grants an estate that even the grantor cannot subsequently revoke. "It is so

[79] Factum of the AG Canada, at para. 124.

even in the case of the King, whose grant shall be taken most strictly against himself."[80] It is this quality that makes it the instrument for the utmost level of independence.

98. Thus in the same way that Parliament could not by simple legislation remove a life-tenured judge from office other than for breach of good behaviour, Parliament cannot simply legislate to remove the life tenure of a sitting Senator that has been granted by the Queen. The AG Canada's only response to this is to suggest that they should be permitted to retroactively revoke life tenures so as to "remedy a perceived mischief." Life tenure granted by the Sovereign would be wholly meaningless if the views of the government as to "perceived mischief" were enough to permit its revocation. Further, the "mischief" that is apparently in the mind of the AG Canada is the Constitution itself, and the life tenures granted by the Governor General on the advice of five different Prime Ministers, including the current one. The current constitutional structure cannot be described as a "mischief" requiring or permitting a remedy of revocation and abridging of granted life estates.

C. Appointment of Senators – Reference Questions 2 and 3

99. The *Senate Appointment Consultations Act* (Bill C-20) and the *Senate Reform Act* (Bill C-7) each seek to create a system for the election of Senators. In Bill C-20, this is done under the guise of "consultation," while Bill C-7 is more open in calling it an "election." Regardless of nomenclature, what is proposed in each is indeed an election, by an election process administered by Canada's Chief Electoral Officer, with qualified electors, and only qualified electors, casting ballots in support of candidates nominated for a public office. The AG Canada accepts that a constitutional amendment with provincial consensus is required to provide for what he terms "direct election" of the Senate, yet seeks to justify indirect election in the name of "consultation" and "consideration." But this Court has held in constitutional cases for over a century that a legislative body cannot do indirectly what it cannot do directly.[81]

100. A purposive reading of the amending provisions recognizes that provincial consensus for constitutional amendment is not simply an obstacle to get around, but an important part of the federal compact. These efforts reflected in these bills to avoid the amending formulae by

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[80] *Harcourt v. Fox*, *supra*, at p. 750, Cools Authorities, Tab 21.

[81] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 114 *per* Bastarache J. concurring, Cools Authorities, Tab 29; *Reference re: Fisheries Act, 1914 (Canada)*, [1928] S.C.R. 457, at p. 474, Cools Authorities, Tab 32; *North Cypress (Rural Municipality) v. Canadian Pacific Railway Co.* (1905), 35 S.C.R. 550, at p. 557, *per* Girouard J., Cools Authorities, Tab 26.

indirectly implementing a fundamental change in the makeup of the Senate are discreditable. The bills seek to engage the electoral process and machinery for a purpose unknown to constitutional law, an election to determine the "preferences" of eligible voters, rather than the will of the people. This attempt to effectively create an electoral franchise for the Senate where none exists cannot be justified through protests that the formal appointment mechanism would remain the same. The constitutional requirement for provincial consensus cannot, and should not, be avoided by the use of contrived workarounds or side schemes, to create a form of quasi-election not legally or constitutionally recognized.

101. To assist the Court in answering Reference Questions 2 and 3, Senator Cools will address: (1) the historical context of the decision to constitute a Senate of appointed rather than elected senators; (2) the nature of the electoral franchise in s. 41, and the role of the Chief Electoral Officer; (3) the difference between upper and lower houses; (4) the impact of a quasi-election process on the workings of the Senate; and (5) how these factors affect whether the proposed legislation can be enacted, either as simple non-amending legislation by s. 91 of the *Constitution Act, 1867*, or as a constitutional amendment by s. 44 of the *Constitution Act, 1982*.

1) An appointed Senate as an aspect of the "image and transcript of Great Britain"

102. As discussed above, Canada's founders gave extensive consideration to the possibility of creating an Upper House that was elective, even with life tenure, a proposal of Alexander Hamilton's in his "Draft of a Constitution for the United States".[82] As the AG Canada points out, there were voices in favour of both elective and nominative procedures.

103. At the Quebec Conference, it was consideration of an elected Upper House that led Macdonald to quote Governor Simcoe and speak in favour of making the Canadian Constitution "an image and transcript of the British Constitution."[83] Speaking in the Assembly, while recognizing that the "arguments for an elective Council are numerous and strong," Macdonald again referred to the British model, noting that "nomination by the Crown is of course the system which is most in accordance with the British Constitution."[84]

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[82] "Hamilton's Draft of a Constitution for the United States", in Madison, J., Debates in the Federal Convention of 1787, ed. Hunt, G. & Scott, JB (New York: Oxford Univ. Press, 1920), at Article III, §1 and §6, Cools Authorities, Tab 39. The U.S. Constitution ultimately did not adopt an elective Senate, but rather Senators named by the State Legislatures. Direct election of U.S. Senators did not occur until the 17th amendment was ratified in 1913.

[83] Discussions in Conference at the Quebec Conference, in Pope, *supra*, at pp. 57-58, Cools Authorities, Tab 13.

[84] *Confederation Debates*, at p. 35 [John A. Macdonald, Feb. 6, 1865], Cools Authorities, Tab 14.

104. The decision for an appointed Senate was again not simply mimcry of the British, though. It represented a consensus compromise that addressed specific concerns of the regional representatives. In particular, representation by population threatened loss of political power to Ontario, whose population had recently surpassed that of Quebec and was increasing. The appointed regionally representative Senate was a compromise and counterbalance to the elected House of Commons. As George Brown put it, "Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House."[85] This extraordinary compromise in Canadian political structures was crucial to Confederation.

2) The Electoral Franchise and the Chief Electoral Officer

105. As with the decision to adopt life tenure as a central feature of the Senate, the decision at Confederation that the Senate would be a nominative rather than elective body was made against the backdrop of the common law. In particular, the notion of an elected House of Commons was being considered in the context of the electoral franchise first granted to electors in Nova Scotia in 1758, and later to Upper and Lower Canada by the *Constitutional Act, 1791*.[86]

106. Electoral franchise, or suffrage, describes the Sovereign's grant of power to the citizen to vote and elect representatives, or to stand for election to the lower house. Called representation, this grant of power by the Sovereign to the subject was, and is, the Sovereign's instrument by which her subjects share and join in Her Majesty's Government. As with tenure in office, the franchise is an incorporeal hereditament, with roots in property law. As *Jowitt's Dictionary of English Law* describes it:

> At common law, a franchise is a royal privilege or branch of the Crown's prerogative, subsisting in the hands of a subject, either by grant or by prescription. (2 Bl. Comm. 37)…
> A franchise is an incorporeal hereditament …; it not only authorises something to be done, but gives the owner the right of preventing all other persons from interfering with its exercise: …
> In ancient times, among other franchises usually granted by the Crown to a new borough on its incorporation, was the right of sending burgesses to Parliament;

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[85] *Confederation Debates*, at p. 88 [George Brown, Feb. 8, 1865] and p. 35 [John A. Macdonald, Feb 6, 1865]: "We found a general disinclination on the part of the Lower Provinces to adopt the elective principle.", Cools Authorities, Tab 14.

[86] *Constitutional Act, 1791*, 31 Geo. III, c. 31 (U.K.), at s. 20, pp. 8-9, Cools Authorities, Tab 2. Although the Royal Proclamation of 1763 had provided for the calling of a legislative assembly in Quebec when circumstances required, no such assembly was called until the wave of Loyalists in the early 1780s arrived with expectations of a British form of representative government, leading ultimately to the *Constitutional Act, 1791*.

> and hence franchise came to mean the right to elect members of parliament, whether in boroughs or counties (12 Co.Rep. 120).[87]

107. As an exercise of the royal prerogative, the electoral franchise, with its power of representation in the House of Commons, was the constitutional instrument by which the individual subject-citizen shared in the Sovereign's governance of the body politic. Joseph Chitty, in his famous 1820 treatise wrote:

> As the fountain of privilege the King possesses various powers. …
>
> On similar principles is founded the right of the Crown to hold and confer peculiar lucrative powers and franchises. The jura coronae or rights of the Crown, so long as they are attached to the King, are called prerogatives; but when such prerogatives are delegated to a subject, they acquire the appellation of franchise; for all franchises are derived from the King (a). A franchise is defined (b) to be a royal privilege or branch of the royal prerogative subsisting in the hands of a subject, by grant from the King. …
>
> In its more extensive sense the term franchise signifies every description of political right which a freeman may enjoy and exercise. …[88]

108. Historically, this franchise was granted by the Sovereign personally by royal prerogative instruments. In modernity, this grant of power, still enacted by the Sovereign, has been done by instrument of the electoral franchise acts of Parliament. The federal electoral franchise in Canada is expressly limited, by s. 41 of the *Constitution Act, 1867*, to the franchise to elect members to the House of Commons.[89] That franchise expanded over the first 90 years of Confederation through various electoral franchise acts to move away from its patriarchal and property-based heritage,[90] and to ultimately become full universal franchise in 1960 with the full enfranchisement of aboriginal peoples and a constitutional *Charter* right.[91] But that right has always remained limited to a vote for the House of Commons.

109. In Canada, all the electoral franchise acts are enacted pursuant to s. 41 of the *Constitution Act, 1867*. This includes the 1920 *Dominion Elections Act (An Act Respecting the Election of Members of the House of Commons and the Electoral Franchise)*, which created the role of Chief Electoral Officer as a successor to the Clerk of the Crown in Chancery, giving him the same life

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[87] Jowitt, *op. cit.*, at Vol. 2, p. 831, Cools Authorities, Tab 40; see also Blackstone, *op. cit.*, at Vol. II, pp. 17-18, 37.

[88] Chitty, J., Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject, (London, Butterworth and Son: 1820), at pp. 118-119, Cools Authorities, Tab 38.

[89] *Constitution Act, 1867*, s. 41, attached; see also Office of the Chief Electoral Officer of Canada, A History of the Vote in Canada, 2007, at p. xi, Cools Authorities, Tab 46.

[90] *Dominion Elections Act*, S.C. 1920, c. 46, at s. 38, Cools Authorities, Tab 6.

[91] *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* at s. 3, attached.

tenure as a judge of this Court and the powers of the former Clerk in respect of elections.[92] The Chief Electoral Officer remains a creature of s. 41, being charged with administering the Canadian federal electoral franchise.

3) The Relationship between the Electoral Franchise and Upper and Lower Houses

110. The relationship between the electoral franchise and the lower house, and its limitation to that house, has its roots in issues of taxation, and the relationship between taxation and representation as these developed in British parliamentary institutions.

111. The 1689 *Bill of Rights*, an important milestone in the history of parliamentary democracy on which Canada's political system is based,[93] entrenched both the right to representation by population in the House of Commons, and the requirement that Parliament approve any raising of taxes. The representation by population that was the House of Commons meant that there would be "no taxation without representation." The importance of this constitional relationship between elective principles and the control of the raising and spending of taxes is reflected in the pre-Confederation development of the franchise and Canada's political structures from the *Constitutional Act, 1791*,[94] through Lord Durham's Report of 1839,[95] and the resulting *Union Act, 1840* which expressly required any taxation bill to originate in the Legislative Assembly.[96]

112. This link between the elective nature of the Lower House and its powers over taxation and the purse is now entrenched in ss. 53 and 54 of the *Constitution Act, 1867*. It represents a key historical difference between upper and lower houses. The potential for legislative conflict on this important point if the Senate were elected was addressed in the Legislative Council by Alexander Campbell, himself an elected member, during the Confederation Debates:

> The real danger of collision would be where one Chamber invaded the prerogatives of the other, and that danger, if it existed at all, would be greatly increased were the Legislative Council made elective. (Hear, hear.) If the members were elected they might say, "We come from the people just as directly as the members of the Assembly do, and our authority is, therefore, as full and complete

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[92] *Dominion Elections Act*, S.C. 1920, c. 46, at ss. 18-19, Cools Authorities, Tab 6.

[93] See *Quebec Secession Reference*, at para. 63, AGC Authorities, Tab 34.

[94] *Constitutional Act, 1791*, ss. 46 and 47,pp. 19-20, Cools Authorities, Tab 2.

[95] Durham Report, *op. cit.*, at pp. 47-48, Cools Authorities, Tab 48; see also Lucas, C.P., Lord Durham's Report on the Affairs of British North America (Oxford: Clarendon, 1912), at p. 34, Cools Authorities, Tab 45.

[96] *Union Act (British North America Act, 1840)*, 3 & 4 Vict., c. 35 (U.K.), at ss. 43, 57, Cools Authorities, Tab 4. This is also a feature of Hamilton's draft constitution (Article II, §7), Cools Authorities, Tab 39, and ultimately the U.S. Constitution: *Constitution of the United States*, Art. 1, s. 7, Cools Authorities, Tab 2.

> as theirs. Nay, more, for where we each represent 1000 electors, they only each represent 300, and we have, therefore, as much right to initiate money bills and impost bills as they have."… This would be the way to provoke collisions, and with an elective Council it was not unlikely at all to be resorted to.[97]

113. This backdrop makes clear both that the *Constitution Act, 1867* granted no federal electoral franchise for the Senate as it did for the House of Commons in s. 41, and that there were sound reasons behind this constitutional choice.

4) The effect of appointment on the current workings of the Senate

114. The choice in 1867 to create an appointed Senate affects the nature of the Senate and Senators to this day. Appointed Senators, like appointed judges, come to their positions and their decision-making free from the electoral process. They are not indebted to individuals or entities who may have assisted in their nomination or election, those who may have raised funds for an election campaign, or those who may assist in a re-election. They can make decisions based on conscience and best judgment, without reference to campaign promises or platforms. Whether this is considered an inherently good or bad thing, the government's proposals of necessity change that fact and thus the nature of the Senate, regardless of whether individual senators have similar "professional and life experience."[98]

115. In addition, the strength of the Senate as a deliberative body, and as the body in which Canada's regions are equally represented, depends on the equality of its members' voices. Yet both of the legislative proposals set out in the government's bills would result in a heterogeneous Senate (in transition or in perpetuity), in which different senators would claim authority based on different nominating or elective processes. As the AG Canada himself notes, "Some provinces may choose not to participate", with the result that the Senate would consist of a mix of elected and unelected Senators. The result can only be conflict, disorder and the discrediting of members.

5) The proposed legislation is not constitutional

116. This Court has previously recognized that substituting a system of election for a system of appointment would involve a "radical change" in the nature of one of the component parts of

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[97] *Confederation Debates*, at p. 23 [Alexander Campbell, Feb. 6, 1865], Cools Authorities, Tab 14. See also p. 21, where Mr. Campbell addressed concerns regarding the relationship between an elective Senate and the issue that would could arise as to representation by population; and p. 37, where John A. Macdonald expressed similar concerns.

[98] Factum of the AG Canada, at para. 133, quoting Manfredi Opinion, AGC Record, Vol. XVI, Tab 105, para. 46, p. 30.

Parliament.[99] It is submitted that the draft legislation is such a constitutional change, which change is not possible under s. 91 of the *Constitution Act, 1867*, and cannot be justified under s. 44 of the *Constitution Act, 1982* as being merely "in relation to the Senate."

a) The legislation effects a constitutional change to nature of the Senate

117. Section 24 of the *Constitution Act, 1867* specifies that Senators are to be summoned by the Governor General, in the Queen's name. There are two ways of reading this section. The first is a purposive and historical reading, in which the extensive debate over whether the Canada's Upper House should be nominative or elective and the historical connection between the electoral franchise and the popular nature of the Lower House is considered. On this reading, s. 24 creates a Senate whose very nature is that it is appointed not elected, and that summons by the Queen is not simply a question of the process to be followed at the time of appointment.

118. The other reading, proposed by the AG Canada, is a narrow one that contends that as long as the ultimate method by which Senators are named is a summons by the Governor General, then the methods by which those Senators come to be named is irrelevant, even if the body becomes effectively elected rather than nominative in the process. Such a reading is inconsistent with the historical context of the Constitution, both at Confederation and patriation, and ought to be rejected. Such a reading is the epitome of putting form over substance – the form of the process by which appointment is effected is put over the substance of the Senate being a nominative rather than elective body. This Honourable Court has recently affirmed that "courts have never shied away from putting substance ahead of form."[100]

119. The purpose of both Bills C-20 and C-7 has been plainly stated, in both the legislation itself and in government statements, namely to bring "democratic" (*i.e.*, elective), principles to the selection of Senators. The preamble to Bill C-7 states that it is appropriate that those whose names are submitted for summons to the Senate "be determined by democratic election."[101]

120. The Hon. Peter Van Loan, Government House Leader and sponsor of Bill C-20, noted that the intent of the bill was that "[f]or the first time ever, Canadians across Canada will have a

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[99] *Senate Reference (1980)*, *supra*, at p. 77, Cools Authorities, Tab 31.

[100] *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443, at para. 45, Cools Authorities, Tab 25.

[101] Bill C-7, preamble, para. 4, AG Record, Vol. I, Tab 2, p. 9; see also Bill C-20, preamble, paras. 2-4, AG Record, Vol. I, Tab 4, p. 45; Factum of the AG Canada, at paras. 19, 108, 121, 138.

direct say in who should represent them in the Senate."[102] The result of passage and implementation of this legislation is clear: at least some, but likely not all, Senators would have obtained their positions in the Senate as the direct result of an electoral process.

121. The AG Canada contends that Senatorial elections would not remove the Prime Minister's discretion. However, the constitutionality of a change to the Parliamentary structures in existence since Confederation cannot rest on mere assurances regarding the degree to which a particular Prime Minister will give weight to election results. The AG Canada implicitly recognizes that if the appointment process became a mere rubber-stamp approval of the election outcome, then a *de facto* direct election would be created unconstitutionally. Yet if this is the case, the constitutionality of the legislation would depend on how it is being implemented, and this Court would have to retain oversight over whether the appointment process – or even individual appointments – have been made with undue regard to the outcome of an election, an untenable situation.[103]

122. Further, the AG Canada's reliance on discretion assumes that the discretion would or could be exercised in a manner contrary to the very purpose of the proposed legislation. The "democratization" of the Senate would not be achieved in any meaningful way if the results of an election were not then used as the basis for recommendations for Senate appointments. Otherwise, the entire process, conducted at great expense to the taxpayer, would be futile, and the public left uncertain about whether they were or were not electing senators.

123. The AG Canada dismisses the impact on Senate independence created through an electoral process by noting that Senators appointed to one non-renewable term after an election could remain independent.[104] This suggestion ignores both the practical impact on independence of an election campaign and the associated campaign support and fundraising that is typically involved. It is also inconsistent with the AG Canada's own assertion that renewable and non-renewable terms are on the same constitutional footing. The choice of how senatorial independence is to be achieved is set out in the Constitution. That choice can be

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[102] Evidence before the Legislative Committee on Bill C-20, March 5, 2008, at p. 2, Cools Authorities, Tab 17.

[103] This is made clear by the AG Canada's own reliance on the appointment of those elected under Alberta's *Senatorial Selection Act* (paras. 132-133). If the appointment ratio of the first ten people elected under that Act is relevant to the constitutionality of the legislation, as the AG Canada contends, then the appointment ratio of the next ten and the following ten must equally be relevant.

[104] Factum of the AG Canada, at para. 134.

changed through constitutional amendment, but it cannot be changed through simple legislation based on an assertion that independence might not be affected.

124. Bill C-7 would also effect a constitutional change by legislatively making it the sole purview of the Prime Minister to make recommendations for Senate appointment. The office of Prime Minister itself has no independent constitutional existence, other than through implicit reference to the British parliamentary form of government. The Constitution provides that Senators are summoned by the Governor General on the advice of the Privy Council, and it is only through the convention of applying a 1935 Minute of a Committee of the Privy Council that it has become the Prime Minister's privilege rather than that of the Privy Council at large.[105]

b) Section 91 cannot be used to avoid the amending formulae or create a franchise

125. As the bills at issue effect a "radical" constitutional change, s. 91 of the *Constitution Act, 1867* provides Parliament with no jurisdiction to enact them. The amending formulae of Part V of the *Constitution Act, 1982* have constitutional importance and value. These bills, however, treat them as mere obstacles to get around. Bill C-20 effectively states that it is trying to achieve election indirectly since constitutional amendment has not been achieved:

> WHEREAS the Government of Canada is committed to pursuing comprehensive Senate reform to make the Senate an effective, independent and democratically elected body that equitably represents all regions;
>
> WHEREAS the Government of Canada has undertaken — pending the pursuit of a constitutional amendment under subsection 38(1) of the *Constitution Act, 1982* to provide for a means of direct election — to create a method for ascertaining the preferences of electors in a province on appointments to the Senate within the existing process of summoning senators;[106] [emphasis added]

126. The government proposing the bill was conscious of the difficulty of achieving the necessary political consensus for amendment, notwithstanding its statements regarding the extent of popular support for Senate reform. The Hon. Mr. Van Loan said to the Legislative Committee on Bill C-20: "If we were to wait to have a consensus among the provinces for how to change the Senate, the wait would be, at least so far, over 140 years."[107]

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[105] Minute of Meeting of the Committee of the Privy Council, PC 3374, Oct. 25, 1935, AGC Record, Vol. XIV, Tab 103.

[106] Bill C-20, *Senate Appointment Consultations Act*, Preamble, AGC Record, Vol. I, Tab 4, p. 45. Given this statement in the Bill that it is designed as a precursor to direct election, the AG Canada's assertion that "fears raised by some who argue that this is simply a precursor to a directly-elected Senate are overstated" is surprising.

[107] Evidence before the Legislative Committee on Bill C-20, March 5, 2008, at p. 3, Cools Authorities, Tab 17.

127. Mr. Van Loan's statement highlights that the legislative proposals in the bills parallel in certain respects constitutional amendments previously proposed but not adopted. Under the Meech Lake Accord, the Constitution would have been amended to require the Prime Minister to choose senators from lists nominated by the provincial government. Under the Charlottetown Accord, senators would have been elected at the provincial level. In both cases, the federal and provincial participants recognized that such changes would require constitutional amendment adopted pursuant to the amending formulae laid down in 1982.[108] The proposals put forward in Bill C-20 and Bill C-7 seek to achieve the same goal, without having to achieve the provincial agreement that was previously recognized as necessary and which, notably, was ultimately not achieved in past efforts to reform the Senate.

128. As both of these proposals change the constitutional nature of the Senate, neither can can be effected simply by legislation under s. 91 of the *Constitution Act, 1867*. Peace, order and good government is not a mandate to avoid the amending formulae. Section 91 also holds no power to create by bill a new federal electoral franchise to elect the Senate, contrary to the current constitutional structure. Nor can s. 91 be invoked to deploy the Chief Electoral Officer, whose constitutional origins are owed solely to administering House of Commons elections under s. 41, to implement that new electoral franchise, per s. 3 of Bill C-20. Even less does s. 91 justify the creation of a conditional federal franchise dependent on provincial action, as is contemplated in Bill C-7.

c) The proposed legislation is not justified by s. 44 of the *Constitution Act, 1982*

129. Finally, the AG Canada makes brief reference to the possibility that Parliament could enact Bill C-20 or Bill C-7 pursuant to s. 44 of the *Constitution Act, 1982*.[109] This submission is untenable. First, resort to s. 44 by definition recognizes that a constitutional amendment is occuring. But the subject matter of these bills, and thus of the constitutional amendment, is the method for selecting Senators. Indeed, Bill C-7 is titled *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*. Mr. Van Loan similarly stated in introducing Bill C-20 that it relates to the "important question of how to deal with how

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[108] Notably, s. 4 of the Charlottetown Accord called for a constitutional amendment to recognize that Parliament could provide for matters relating to the election of senators (s. 23(1)), and the provinces could provide for "the *indirect* election of senators" (s. 23(2)), effectively what is being proposed in the bills before this Court. Draft Legal Text based on the Charlottetown Accord, Oct. 9, 1992, AGC Record, Vol. VIII, Tab 29, p. 102.

[109] Factum of the AG Canada, at para. 147.

we select people to represent Canadians in the Senate."[110] As s. 44 is at the very least subject to s. 42, such an amendment to the Constitution cannot be achieved by a unilateral federal bill.

130. Second, neither bill purports to amend the Constitution nor indicates what part(s) of the Constitution would be amended by the bill.[111] Any legislation to amend Canada's Constitution under s. 44 must surely specify without ambiguity what aspects of the Constitution are being amended and how. Such details are important to both the constitutionality of the legislation and its political and legislative position. Reference Questions 2 and 3 are specific to these Bills, and this Court should not answer other abstract questions regarding other legislation that might possibly be drafted to purportedly amend aspects of the Constitution.[112]

D. Conclusion

131. As stated at the outset, constitutions are inherently resistant to change. The amending formulae in Part V reflect this and form the basis for this Court's observation that "Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it."[113] Legislation that seeks shortcuts to constitutional change or reform is not in keeping with a purposive approach to constitutional interpretation.

PART IV - COSTS

132. Senator Cools seeks no costs, and asks that none be awarded against her.

PART V - ORDER SOUGHT

133. The Honourable Anne C. Cools therefore respectfully asks that this Honourable Court answer Reference Questions 1 (all parts), 2, 3 and 5 (all parts) with the answer "No", and Reference Question 6 with the answer "Yes".

134. Senator Cools further respectfully requests the opportunity to provide oral submissions at the hearing of this Reference.

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[110] Evidence before the Legislative Committee on Bill C-20, March 5, 2008, at p. 1, Cools Authorities, Tab 17.

[111] See evidence of Warren Newman to the Legislative Committee on Bill C-20, March 5, 2008, at pp. 8-9, Cools Authorities, Tab 17.

[112] *Senate Reference (1980)*, *supra*, at pp. 76-77, Cools Authorities, Tab 31.

[113] *Quebec Secession Reference*, *supra*, at para. 77, Cools Authorities, Tab 34.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

NICHOLAS MCHAFFIE

Of Counsel for the Intervener,
The Honourable Anne C. Cools

PART VI - TABLE OF AUTHORITIES

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PART VII - STATUTES AND RULES

A. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) (without Schedules)

B. *Constitution Act, 1982,* being Schedule B to 1982, c. 11 (U.K.) (without Schedule)

CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

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CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3 (U.K.)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(*29th March 1867*)

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America: [(1)]

I. PRELIMINARY

Short title

1. This Act may be cited as the *Constitution Act, 1867*. [(2)]

2. Repealed. [(3)]

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(1) The enacting clause was repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). It read as follows:

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

(2) As amended by the *Constitution Act, 1982*, which came into force on April 17, 1982. The section originally read as follows:

1. This Act may be cited as *The British North America Act, 1867*.

(3) Section 2, repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), read as follows:

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II. UNION

Declaration of Union

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly. [(4)]

Construction of subsequent Provisions of Act

4. Unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act. [(5)]

Four Provinces

5. Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick. [(6)]

Provinces of Ontario and Quebec

6. The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form Two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick

7. The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

[(4)] The first day of July, 1867, was fixed by proclamation dated May 22, 1867.

[(5)] Partially repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section originally read as follows:

> **4.** The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

[(6)] Canada now consists of ten provinces (Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland and Labrador) and three territories (Yukon, the Northwest Territories and Nunavut).

For further details, see endnote 1.

Decennial Census

8. In the general Census of the Population of Canada which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III. EXECUTIVE POWER

Declaration of Executive Power in the Queen

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

Application of Provisions referring to Governor General

10. The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.

Constitution of Privy Council for Canada

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

All Powers under Acts to be exercised by Governor General with Advice of Privy Council, or alone

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of

the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada. [7]

Application of Provisions referring to Governor General in Council

13. The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

Power to Her Majesty to authorize Governor General to appoint Deputies

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor General such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor General himself of any Power, Authority, or Function.

Command of Armed Forces to continue to be vested in the Queen

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

Seat of Government of Canada

16. Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.

IV. LEGISLATIVE POWER

Constitution of Parliament of Canada

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Privileges, etc., of Houses

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons

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[7] **See footnote (65) to section 129, below.**

House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof. [8]

First Session of the Parliament of Canada

19. The Parliament of Canada shall be called together not later than Six Months after the Union. [9]

20. Repealed. [10]

THE SENATE

Number of Senators

21. The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators. [11]

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[8] Repealed and re-enacted by the *Parliament of Canada Act, 1875*, 38-39 Vict., c. 38 (U.K.). The original section read as follows:

18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

[9] Spent. The first session of the first Parliament began on November 6, 1867.

[10] Section 20, repealed by the *Constitution Act, 1982*, read as follows:

20. There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first sitting in the next Session.

Section 20 has been replaced by section 5 of the *Constitution Act, 1982*, which provides that there shall be a sitting of Parliament at least once every twelve months.

[11] As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.) and modified by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53, and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

The *Manitoba Act, 1870*, added two senators for Manitoba; the *British Columbia Terms of Union* added three; upon admission of Prince Edward Island four more were provided by section 147 of the *Constitution Act, 1867*; the *Alberta Act* and the *Saskatchewan Act* each added four. The Senate was reconstituted at 96 by the *Constitution Act, 1915*. Six more senators were added upon union with Newfoundland, and one senator each was added for Yukon and the Northwest Territories by the *Constitution Act (No. 2), 1975*. One senator was added for Nunavut by the *Constitution Act, 1999 (Nunavut)*.

Representation of Provinces in Senate

22. In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:

1. Ontario;
2. Quebec;
3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;

which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented in the Senate by one member each.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada. **(12)**

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(12) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.), the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53 and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:

22. In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions:

1. Ontario;

2. Quebec;

3. The Maritime Provinces, Nova Scotia and New Brunswick;

which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by Twenty-four Senators; Quebec by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.

In the case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.

The reference in section 22 to the Consolidated Statutes of Canada is a reference to the Consolidated Statutes of 1859.

Qualifications of Senator

23. The Qualifications of a Senator shall be as follows:

(1) He shall be of the full age of Thirty Years;

(2) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities;

(5) He shall be resident in the Province for which he is appointed;

(6) In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division. **(13)**

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(13) Section 44 of the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2, provided that, for the purposes of that Part (which added one senator for Nunavut), the word "Province" in section 23 of the *Constitution Act, 1867* has the same meaning as is assigned to the word "province" by section 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended, which provides that the term "province" means "a province of Canada, and includes Yukon, the Northwest Territories and Nunavut".

Section 2 of the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53, provided that for the purposes of that Act (which added one senator each for the Yukon Territory and the Northwest Territories) the term "Province" in section 23 of the *Constitution Act, 1867* has the same meaning as is assigned to the term "province" by section 28 of the *Interpretation Act*, R.S.C. 1970, c. I-23, which provides that the term "province" means "a province of Canada, and includes the Yukon Territory and the Northwest Territories".

Summons of Senator

24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

25. Repealed. **(14)**

Addition of Senators in certain cases

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly. **(15)**

Reduction of Senate to normal Number

27. In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty-four Senators and no more. **(16)**

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(14) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

25. Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

(15) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.). The original section read as follows:

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

(16) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.). The original section read as follows:

27. In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

Maximum Number of Senators

28. The Number of Senators shall not at any Time exceed One Hundred and thirteen. [17]

Tenure of Place in Senate

29. (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Retirement upon attaining age of seventy-five years

(2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years. [18]

Resignation of Place in Senate

30. A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators

31. The Place of a Senator shall become vacant in any of the following Cases:

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate;

(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;

(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;

(4) If he is attainted of Treason or convicted of Felony or of any infamous Crime;

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[17] As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.), the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53, and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:

28. The Number of Senators shall not at any Time exceed Seventy-eight.

[18] As enacted by the *Constitution Act, 1965*, S.C. 1965, c. 4, which came into force on June 2, 1965. The original section read as follows:

29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

(5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

Summons on Vacancy in Senate

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

Questions as to Qualifications and Vacancies in Senate

33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

Appointment of Speaker of Senate

34. The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead. **(19)**

Quorum of Senate

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

Voting in Senate

36. Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

The House of Commons

Constitution of House of Commons in Canada

37. The House of Commons shall, subject to the Provisions of this Act, consist of three hundred and eight members of whom one hundred and six shall be elected for Ontario, seventy-five for Quebec, eleven for Nova Scotia, ten for New

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(19) Provision for exercising the functions of Speaker during his or her absence is made by Part II of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 (formerly the *Speaker of the Senate Act*, R.S.C. 1970, c. S-14). Doubts as to the power of Parliament to enact the *Speaker of the Senate Act* were removed by the *Canadian Speaker (Appointment of Deputy) Act, 1895*, 2nd Sess., 59 Vict., c. 3 (U.K.), which was repealed by the *Constitution Act, 1982*.

Brunswick, fourteen for Manitoba, thirty-six for British Columbia, four for Prince Edward Island, twenty-eight for Alberta, fourteen for Saskatchewan, seven for Newfoundland, one for the Yukon Territory, one for the Northwest Territories and one for Nunavut. [(20)]

Summoning of House of Commons

38. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

Senators not to sit in House of Commons

39. A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

Electoral districts of the four Provinces

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:

1. ONTARIO

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2. QUEBEC

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

[(20)] The figures given here result from the application of section 51, as enacted by the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I, and amended by the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2, and readjustments made pursuant to the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3. The original section (which was altered from time to time as the result of the addition of new provinces and changes in population) read as follows:

37. The House of Commons shall, subject to the Provisions of this Act, consist of one hundred and eighty-one members, of whom Eighty-two shall be elected for Ontario, Sixty-five for Quebec, Nineteen for Nova Scotia, and Fifteen for New Brunswick.

3. Nova Scotia

Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

4. New Brunswick

Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member. [21]

Continuance of existing Election Laws until Parliament of Canada otherwise provides

41. Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely, — the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution, — shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote. [22]

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[21] Spent. The electoral districts are now established by proclamations issued from time to time under the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3, as amended for particular districts by Acts of Parliament (see the most recent *Table of Public Statutes and Responsible Ministers*).

[22] Spent. Elections are now provided for by the *Canada Elections Act*, S.C. 2000, c. 9; qualifications and disqualifications of members by the *Parliament of Canada Act*, R.S.C. 1985, c. P-1. The right of citizens to vote and hold office is provided for in section 3 of the *Constitution Act, 1982*.

42. Repealed. [(23)]

43. Repealed. [(24)]

As to Election of Speaker of House of Commons

44. The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

As to filling up Vacancy in Office of Speaker

45. In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

Speaker to preside

46. The Speaker shall preside at all Meetings of the House of Commons.

Provision in case of Absence of Speaker

47. Until the Parliament of Canada otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons for a Period of Forty-eight consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall during the Continuance of such Absence of the Speaker have and execute all the Powers, Privileges, and Duties of Speaker. [(25)]

[(23)] Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

42. For the First Election of Members to serve in the House of Commons the Governor General shall cause Writs to be issued by such Person, in such Form, and addressed to such Returning Officers as he thinks fit.

The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

[(24)] Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

43. In case a Vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the Parliament in this Behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such Vacant District.

[(25)] Provision for exercising the functions of Speaker during his or her absence is now made by Part III of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1.

Quorum of House of Commons

48. The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers, and for that Purpose the Speaker shall be reckoned as a Member.

Voting in House of Commons

49. Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

Duration of House of Commons

50. Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer. **(26)**

Readjustment of representation in Commons

51. (1) The number of members of the House of Commons and the representation of the provinces therein shall, on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time, subject and according to the following rules:

Rules

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the population of the province by the electoral quotient and rounding up any fractional remainder to one.

2. If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province on the date of the coming into force of the *Constitution Act, 1985 (Representation)*, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

3. After the application of rules 1 and 2 and section 51A, there shall, in respect of each province that meets the condition set out in rule 4, be added, if nec-

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(26) The term of the 12th Parliament was extended by the *British North America Act, 1916*, 6-7 Geo. V., c. 19 (U.K.), which Act was repealed by the *Statute Law Revision Act, 1927*, 17-18 Geo. V, c. 42 (U.K.). See also the *Constitution Act, 1982*, subsection 4(1), which provides that no House of Commons shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members, and subsection 4(2), which provides for continuation of the House of Commons in special circumstances.

essary, a number of members such that, on the completion of the readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces is as close as possible to, without being below, the number obtained by dividing the population of that province by the total population of all the provinces.

4. Rule 3 applies to a province if, on the completion of the preceding readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces was equal to or greater than the number obtained by dividing the population of that province by the total population of all the provinces, the population of each province being its population as at July 1 of the year of the decennial census that preceded that readjustment according to the estimates prepared for the purpose of that readjustment.

5. Unless the context indicates otherwise, in these rules, the population of a province is the estimate of its population as at July 1 of the year of the most recent decennial census.

6. In these rules, "electoral quotient" means

(*a*) 111,166, in relation to the readjustment following the completion of the 2011 decennial census, and

(*b*) in relation to the readjustment following the completion of any subsequent decennial census, the number obtained by multiplying the electoral quotient that was applied in the preceding readjustment by the number that is the average of the numbers obtained by dividing the population of each province by the population of the province as at July 1 of the year of the preceding decennial census according to the estimates prepared for the purpose of the preceding readjustment, and rounding up any fractional remainder of that multiplication to one.

Population estimates

(1.1) For the purpose of the rules in subsection (1), there is required to be prepared an estimate of the population of Canada and of each province as at July 1, 2001 and July 1, 2011 — and, in each year following the 2011 decennial census in which a decennial census is taken, as at July 1 of that year — by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time. [(27)]

[(27)] As enacted by the *Fair Representation Act*, S.C. 2011, c. 26, s. 2, which came into force on royal assent on December 16, 2011.

The section, as originally enacted, read as follows:

51. On the Completion of the Census in the Year One Thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces shall be readjusted by such Authority, in such Manner, and from such Time, as the Parliament of Canada from Time to Time provides, subject and according to the following Rules:

(1) Quebec shall have the fixed Number of Sixty-five Members:

(2) There shall be assigned to each of the other Provinces such a Number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of Quebec (so ascertained):

(3) In the Computation of the Number of Members for a Province a fractional Part not exceeding One Half of the whole Number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One Half of that Number shall be equivalent to the whole Number:

(4) On any such Re-adjustment the Number of Members for a Province shall not be reduced unless the Proportion which the Number of the Population of the Province bore to the Number of the aggregate Population of Canada at the then last preceding Re-adjustment of the Number of Members for the Province is ascertained at the then latest Census to be diminished by One Twentieth Part or upwards:

(5) Such Re-adjustment shall not take effect until the Termination of the then existing Parliament.

For further details, see endnote 2.

Yukon Territory, Northwest Territories and Nunavut

(2) The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1985, shall be entitled to one member, the Northwest Territories as bounded and described in section 2 of chapter N-27 of the Revised Statutes of Canada, 1985, as amended by section 77 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member, and Nunavut as bounded and described in section 3 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member. [(28)]

Constitution of House of Commons

51A. Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province. [(29)]

Increase of Number of House of Commons

52. The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes; Royal Assent

Appropriation and Tax Bills

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of Money Votes

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

[(28)] As enacted by the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. Note that the description of the territory of Yukon is now set out in Schedule 1 to the *Yukon Act*, S.C. 2002, c. 7, which replaced R.S.C. 1985, c. Y-2. Subsection 51(2) was previously amended by the *Constitution Act (No. 1), 1975*, S.C. 1974-75-76, c. 28, and read as follows:

(2) The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1970, shall be entitled to one member, and the Northwest Territories as bounded and described in section 2 of chapter N-22 of the Revised Statutes of Canada, 1970, shall be entitled to two members.

[(29)] As enacted by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.).

Royal Assent to Bills, etc.

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

Disallowance by Order in Council of Act assented to by Governor General

56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

Signification of Queen's Pleasure on Bill reserved

57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

V. PROVINCIAL CONSTITUTIONS

Executive Power

Appointment of Lieutenant Governors of Provinces

58. For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada.

Tenure of Office of Lieutenant Governor

59. A Lieutenant Governor shall hold Office during the Pleasure of the Governor General; but any Lieutenant Governor appointed after the Commencement of the First Session of the Parliament of Canada shall not be removeable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons

within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

Salaries of Lieutenant Governors

60. The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada. [30]

Oaths, etc., of Lieutenant Governor

61. Every Lieutenant Governor shall, before assuming the Duties of his Office, make and subscribe before the Governor General or some Person authorized by him Oaths of Allegiance and Office similar to those taken by the Governor General.

Application of Provisions referring to Lieutenant Governor

62. The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

Appointment of Executive Officers for Ontario and Quebec

63. The Executive Council of Ontario and of Quebec shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely, — the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in Quebec the Speaker of the Legislative Council and the Solicitor General. [31]

Executive Government of Nova Scotia and New Brunswick

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act. [32]

Powers to be exercised by Lieutenant Governor of Ontario or Quebec with Advice, or alone

65. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain

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[30] Provided for by the *Salaries Act*, R.S.C. 1985, c. S-3.

[31] Now provided for in Ontario by the *Executive Council Act*, R.S.O. 1990, c. E.25, and in Quebec by the *Executive Power Act*, R.S.Q., c. E-18.

[32] A similar provision was included in each of the instruments admitting British Columbia, Prince Edward Island, and Newfoundland. The Executive Authorities for Manitoba, Alberta and Saskatchewan were established by the statutes creating those provinces. See footnote (6) to section 5, above.

and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice or with the Advice and Consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec. [33]

Application of Provisions referring to Lieutenant Governor in Council

66. The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the Advice of the Executive Council thereof.

Administration in Absence, etc., of Lieutenant Governor

67. The Governor General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant Governor during his Absence, Illness, or other Inability.

Seats of Provincial Governments

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely, — of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Legislative Power

1. Ontario

Legislature for Ontario

69. There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario.

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[33] **See footnote (65) to section 129, below.**

Electoral districts

70. The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act. **(34)**

2. Quebec

Legislature for Quebec

71. There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec. **(35)**

Constitution of Legislative Council

72. The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

Qualification of Legislative Councillors

73. The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

Resignation, Disqualification, etc.

74. The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant.

Vacancies

75. When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

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(34) Spent. Now covered by the *Representation Act, 2005*, S.O. 2005, c. 35, Schedule 1.

(35) *An Act respecting the Legislative Council of Quebec*, S.Q. 1968, c. 9, provided that the Legislature for Quebec shall consist of the Lieutenant Governor and the National Assembly of Quebec, and repealed the provisions of the *Legislature Act*, R.S.Q. 1964, c. 6, relating to the Legislative Council of Quebec. Now covered by the *National Assembly Act*, R.S.Q. c. A-23.1. Sections 72 to 79 following are therefore completely spent.

Questions as to Vacancies, etc.

76. If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a Vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

Speaker of Legislative Council

77. The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead.

Quorum of Legislative Council

78. Until the Legislature of Quebec otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

Voting in Legislative Council

79. Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

Constitution of Legislative Assembly of Quebec

80. The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed. **(36)**

3. Ontario and Quebec

81. Repealed. **(37)**

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(36) ***An Act respecting the electoral districts*, S.Q. 1970, c. 7, provides that this section no longer has effect.**

(37) **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:**

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than Six Months after the Union.

Summoning of Legislative Assemblies

82. The Lieutenant Governor of Ontario and of Quebec shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

Restriction on election of Holders of offices

83. Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec any Office, Commission, or Employment, permanent or temporary, at the Nomination of the Lieutenant Governor, to which an annual Salary, or any Fee, Allowance, Emolument, or Profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office. [38]

Continuance of existing Election Laws

84. Until the legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely, — the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution, — shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

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[38] Probably spent. The subject-matter of this section is now covered in Ontario by the *Legislative Assembly Act*, R.S.O. 1990, c. L.10, and in Quebec by the *National Assembly Act*, R.S.Q. c. A-23.1.

Provided that, until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote. [(39)]

Duration of Legislative Assemblies

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer. [(40)]

Yearly Session of Legislature

86. There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session. [(41)]

Speaker, Quorum, etc.

87. The following Provisions of this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say, — the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly.

[(39)] Probably spent. The subject-matter of this section is now covered in Ontario by the *Election Act*, R.S.O. 1990, c. E.6, and the *Legislative Assembly Act*, R.S.O. 1990, c. L.10, and in Quebec by the *Election Act*, R.S.Q. c. E-3.3 and the *National Assembly Act*, R.S.Q. c. A-23.1.

[(40)] The maximum duration of the Legislative Assembly of Quebec has been changed to five years. See the *National Assembly Act*, R.S.Q. c. A-23.1. See also section 4 of the *Constitution Act, 1982*, which provides a maximum duration for a legislative assembly of five years but also authorizes continuation in special circumstances.

[(41)] See also section 5 of the *Constitution Act, 1982*, which provides that there shall be a sitting of each legislature at least once every twelve months.

Constitution Act, 1867

4. Nova Scotia and New Brunswick

Constitutions of Legislatures of Nova Scotia and New Brunswick

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act. [(42)]

5. Ontario, Quebec, and Nova Scotia

89. Repealed. [(43)]

6. The Four Provinces

Application to Legislatures of Provisions respecting Money Votes, etc.

90. The following Provisions of this Act respecting the Parliament of Canada, namely, — the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, — shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General,

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[(42)] Partially repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), which deleted the following concluding words of the original enactment:

> and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless soooner dissolved, continue for the Period for which it was elected.

A similar provision was included in each of the instruments admitting British Columbia, Prince Edward Island and Newfoundland. The Legislatures of Manitoba, Alberta and Saskatchewan were established by the statutes creating those provinces. See footnote (6) to section 5, above.

See also sections 3 to 5 of the *Constitution Act, 1982*, which prescribe democratic rights applicable to all provinces, and subitem 2(2) of the Schedule to that Act, which sets out the repeal of section 20 of the *Manitoba Act, 1870*. Section 20 of the *Manitoba Act, 1870* has been replaced by section 5 of the *Constitution Act, 1982*. Section 20 read as follows:

> **20.** There shall be a Session of the Legislature once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in one Session and its first sitting in the next Session.

[(43)] Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

> **89.** Each of the Lieutenant Governors of Ontario, Quebec and Nova Scotia shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

VI. DISTRIBUTION OF LEGISLATIVE POWERS

Powers of the Parliament

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. [(44)]

1A. The Public Debt and Property. [(45)]

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance. [(46)]

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

[(44)] A new class 1 was added by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.). That Act and class 1 were repealed by the *Constitution Act, 1982*. The matters referred to in class 1 are provided for in subsection 4(2) and Part V of the *Constitution Act, 1982*. As enacted, class 1 read as follows:

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

[(45)] The original class 1 was re-numbered by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.), as class 1A.

[(46)] Added by the *Constitution Act, 1940*, 3-4 Geo. VI, c. 36 (U.K.).

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. [47]

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. [48]
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

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[47] Legislative authority has been conferred on Parliament by other Acts. For further details, see endnote 3.

[48] Class 1 was repealed by the *Constitution Act, 1982*. As enacted, it read as follows:

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Section 45 of the *Constitution Act, 1982* now authorizes legislatures to make laws amending the constitution of the province. Sections 38, 41, 42 and 43 of that Act authorize legislative assemblies to give their approval by resolution to certain other amendments to the Constitution of Canada.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

    (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

    (*b*) Lines of Steam Ships between the Province and any British or Foreign Country:

    (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

NON-RENEWABLE NATURAL RESOURCES, FORESTRY RESOURCES AND ELECTRICAL ENERGY

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(*a*) exploration for non-renewable natural resources in the province;

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

"Primary production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section. [49]

EDUCATION

Legislation respecting Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section. [50]

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[49] Added by section 50 of the *Constitution Act, 1982*.

[50] Alternative provisions have been enacted for four provinces. For further details, see endnote 4.

Quebec

93A. Paragraphs (1) to (4) of section 93 do not apply to Quebec. [51]

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick

Legislation for Uniformity of Laws in Three Provinces

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Old Age Pensions

Legislation respecting old age pensions and supplementary benefits

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter. [52]

Agriculture and Immigration

Concurrent Powers of Legislation respecting Agriculture, etc.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

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[51] Added by the *Constitution Amendment, 1997 (Quebec)* (*see* SI/97-141).

[52] Amended by the *Constitution Act, 1964*, 12-13 Eliz. II, c. 73 (U.K.). As originally enacted by the *British North America Act, 1951*, 14-15 Geo. VI, c. 32 (U.K.), which was repealed by the *Constitution Act, 1982*, section 94A read as follows:

94A. It is hereby declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions.

VII. JUDICATURE

Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, etc.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age. **(53)**

Salaries, etc., of Judges

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada. **(54)**

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(53) Amended by the *Constitution Act, 1960*, 9 Eliz. II, c. 2 (U.K.), which came into force on March 1, 1961. The original section read as follows:

99. The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(54) Now provided for in the *Judges Act*, R.S.C. 1985, c. J-1.

General Court of Appeal, etc.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada. **(55)**

VIII. REVENUES; DEBTS; ASSETS; TAXATION

Creation of Consolidated Revenue Fund

102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

Expenses of Collection, etc.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

Interest of Provincial Public Debts

104. The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.

Salary of Governor General

105. Unless altered by the Parliament of Canada, the Salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon. **(56)**

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(55) See the *Supreme Court Act*, R.S.C. 1985, c. S-26, the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

(56) Now covered by the *Governor General's Act*, R.S.C. 1985, c. G-9.

Appropriation from Time to Time

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

Transfer of Stocks, etc.

107. All Stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

Transfer of Property in Schedule

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

Property in Lands, Mines, etc.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same. **(57)**

Assets connected with Provincial Debts

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable for Provincial Debts

111. Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

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(57) Manitoba, Alberta and Saskatchewan were placed in the same position as the original provinces by the *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.).

These matters were dealt with in respect of British Columbia by the *British Columbia Terms of Union* and also in part by the *Constitution Act, 1930*.

Newfoundland was also placed in the same position by the *Newfoundland Act*, 12-13 Geo. V1, c. 22 (U.K.).

With respect to Prince Edward Island, see the Schedule to the *Prince Edward Island Terms of Union*.

Debts of Ontario and Quebec

112. Ontario and Quebec conjointly shall be liable to Canada for the Amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Assets of Ontario and Quebec

113. The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the Property of Ontario and Quebec conjointly.

Debt of Nova Scotia

114. Nova Scotia shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon. **(58)**

Debt of New Brunswick

115. New Brunswick shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Payment of interest to Nova Scotia and New Brunswick

116. In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half-yearly Payments in advance from the Government of Canada Interest at Five per Centum per Annum on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

Provincial Public Property

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

118. Repealed. **(59)**

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(58) The obligations imposed by sections 114, 115 and 116, and similar obligations under the instruments creating or admitting other provinces, are now to be found in the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26.

(59) Repealed by the *Statute Law Revision Act, 1950*, 14 Geo. VI, c. 6 (U.K.). For further details, see endnote 5.

Further Grant to New Brunswick

119. New Brunswick shall receive by half-yearly Payments in advance from Canada for the Period of Ten Years from the Union an additional Allowance of Sixty-three thousand Dollars per Annum; but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five per Centum per Annum on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars. **(60)**

Form of Payments

120. All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council.

Canadian Manufactures, etc.

121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Continuance of Customs and Excise Laws

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada. **(61)**

Exportation and Importation as between Two Provinces

123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation. **(62)**

Lumber Dues in New Brunswick

124. Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of

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(60) Spent.

(61) Spent. Now covered by the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), the *Customs Tariff*, S.C. 1997, c. 36, the *Excise Act*, R.S.C. 1985, c. E-14, the *Excise Act, 2001*, S.C. 2002, c. 22 and the *Excise Tax Act*, R.S.C. 1985, c. E-15.

(62) Spent.

New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues. [(63)]

Exemption of Public Lands, etc.

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

Provincial Consolidated Revenue Fund

126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX. MISCELLANEOUS PROVISIONS

General

127. Repealed. [(64)]

Oath of Allegiance, etc.

128. Every Member of the Senate or House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Gover-

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(63) These dues were repealed in 1873 by 36 Vict., c. 16 (N.B.). Also, see *An Act respecting the Export Duties imposed on Lumber*, etc. (1873) 36 Vict., c. 41 (Canada), and section 2 of the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26.

(64) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

> **127.** If any Person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of Canada or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a Place in the Senate shall thereby vacate his Seat in such Legislative Council.

nor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

Continuance of existing Laws, Courts, Officers, etc.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act. **(65)**

Transfer of Officers to Canada

130. Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made. **(66)**

Appointment of new Officers

131. Until the Parliament of Canada otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

Treaty Obligations

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

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(65) The restriction against altering or repealing laws enacted by or existing under statutes of the United Kingdom was removed by the *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.), except in respect of certain constitutional documents. Comprehensive procedures for amending enactments forming part of the Constitution of Canada were provided by Part V of the *Constitution Act, 1982*.

(66) Spent.

Use of English and French Languages

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages. [(67)]

[(67)] A similar provision was enacted for Manitoba by section 23 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (confirmed by the *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.)). Section 23 reads as follows:

> **23.** Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both these languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Sections 17 to 19 of the *Constitution Act, 1982* restate the language rights set out in section 133 in respect of Parliament and the courts established under the *Constitution Act, 1867*, and also guarantee those rights in respect of the legislature of New Brunswick and the courts of that province.

Sections 16, 20, 21 and 23 of the *Constitution Act, 1982* recognize additional language rights in respect of the English and French languages. Section 22 preserves language rights and privileges of languages other than English and French.

ONTARIO AND QUEBEC

Appointment of Executive Officers for Ontario and Quebec

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say, — the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of Quebec the Solicitor General, and may, by Order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof, and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof. **(68)**

Powers, Duties, etc. of Executive Officers

135. Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute, or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works. **(69)**

Great Seals

136. Until altered by the Lieutenant Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

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(68) Spent. Now covered in Ontario by the *Executive Council Act*, R.S.O. 1990, c. E.25 and in Quebec by the *Executive Power Act*, R.S.Q. c. E-18.

(69) Probably spent.

Construction of temporary Acts

137. The words "and from thence to the End of the then next ensuing Session of the Legislature," or Words to the same Effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada if the Subject Matter of the Act is within the Powers of the same as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively if the Subject Matter of the Act is within the Powers of the same as defined by this Act.

As to Errors in Names

138. From and after the Union the Use of the Words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any Deed, Writ, Process, Pleading, Document, Matter, or Thing shall not invalidate the same.

As to issue of Proclamations before Union, to commence after Union

139. Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several Matters and Things therein proclaimed, shall be and continue of like Force and Effect as if the Union had not been made. **(70)**

As to issue of Proclamations after Union

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant Governor of Ontario or of Quebec, as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and continue of the like Force and Effect in Ontario or Quebec as if the Union had not been made. **(71)**

Penitentiary

141. The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec. **(72)**

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(70) Probably spent.

(71) Probably spent.

(72) Spent. Penitentiaries are now provided for by the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

Arbitration respecting Debts, etc.

142. The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a Resident either in Ontario or in Quebec. [73]

Division of Records

143. The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence. [74]

Constitution of Townships in Quebec

144. The Lieutenant Governor of Quebec may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a Day to be appointed therein, constitute Townships in those Parts of the Province of Quebec in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

X. INTERCOLONIAL RAILWAY

145. Repealed. [75]

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[73] **Spent. See pages (xi) and (xii) of the Public Accounts, 1902-1903.**

[74] **Probably spent. Two orders were made under this section on January 24, 1868.**

[75] **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14, (U.K.). The section read as follows:**

> **145.** Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada; Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement, within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

XI. ADMISSION OF OTHER COLONIES

Power to admit Newfoundland, etc., into the Union

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland. **(76)**

As to Representation of Newfoundland and Prince Edward Island in Senate

147. In case of the Admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a Representation in the Senate of Canada of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland the normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the Three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of Prince Edward Island, whether Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen. **(77)**

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(76) All territories mentioned in section 146 are now part of Canada. See footnote (6) to section 5, above.

(77) Spent. See footnotes (11), (12), (15), (16) and (17) to sections 21, 22, 26, 27 and 28, above.

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

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[80] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

DEMOCRATIC RIGHTS

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. **(81)**

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be. **(82)**

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months. **(83)**

MOBILITY RIGHTS

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

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(81) See section 50, and footnotes (40) and (42) to sections 85 and 88, of the *Constitution Act, 1867*.

(82) Replaces part of Class 1 of section 91 of the *Constitution Act, 1867*, which was repealed as set out in subitem 1(3) of the schedule to the *Constitution Act, 1982*.

(83) See footnotes (10), (41) and (42) to sections 20, 86 and 88 of the *Constitution Act, 1867*.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. **(84)**

OFFICIAL LANGUAGES OF CANADA

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. **(85)**

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(84) Subsection 32(2) provides that section 15 shall not have effect until three years after section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985.

(85) Section 16.1 was added by the *Constitution Amendment, 1993 (New Brunswick)* (*see* SI/93-54).

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. **(86)**

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. **(87)**

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. **(88)**

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. **(89)**

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. **(90)**

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. **(91)**

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

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(86) **See section 133 of the *Constitution Act, 1867* and footnote (67).**

(87) ***Ibid*.**

(88) ***Ibid*.**

(89) ***Ibid*.**

(90) ***Ibid*.**

(91) ***Ibid*.**

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. **(92)**

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province. **(93)**

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have

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(92) See, for example, section 133 of the *Constitution Act, 1867* and the reference to the *Manitoba Act, 1870* in footnote (67) to that section.

(93) Paragraph 23(1)(*a*) is not in force in respect of Quebec. See section 59, below.

all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

GENERAL

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. **(94)**

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools. **(95)**

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

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(94) Paragraph 25(*b*) was repealed and re-enacted by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102). Paragraph 25(*b*) originally read as follows:

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

(95) See section 93 of the *Constitution Act, 1867* and footnote (50).

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

APPLICATION OF CHARTER

Application of Charter

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Constitution Act, 1982

CITATION

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. **(96)**

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. **(97)**

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(96) Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

(97) Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

PART III

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(*a*) promoting equal opportunities for the well-being of Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

(*c*) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. **(98)**

PART IV

CONSTITUTIONAL CONFERENCE

37. Repealed. **(99)**

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(98) See footnotes (58) and (59) to sections 114 and 118 of the *Constitution Act, 1867*.

(99) Section 54 of the *Constitution Act, 1982* provided for the repeal of Part IV (section 37) one year after Part VII came into force. Part VII came into force on April 17, 1982 repealing Part IV on April 17, 1983. Section 37 read as follows:

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

PART IV.I

CONSTITUTIONAL CONFERENCES

37.1 Repealed. [100]

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA [101]

General procedure for amending Constitution of Canada

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

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

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

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the

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[100] Part IV.1 (section 37.1), which was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102), was repealed on April 18, 1987 by section 54.1 of the *Constitution Act, 1982*. Section 37.1 read as follows:

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

[101] Prior to the enactment of Part V, certain provisions of the Constitution of Canada and the provincial constitutions could be amended pursuant to the *Constitution Act, 1867*. See footnotes (44) and (48) to section 91, Class 1 and section 92, Class 1 of that Act, respectively. Other amendments to the Constitution could only be made by enactment of the Parliament of the United Kingdom.

members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent

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

Revocation of dissent

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

Restriction on proclamation

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

Idem

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

Compensation

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

Amendment by unanimous consent

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

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

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

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

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

(*e*) an amendment to this Part.

Amendment by general procedure

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

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

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

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

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

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

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

Exception

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

Amendment of provisions relating to some but not all provinces

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

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

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

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

Amendments by Parliament

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

Amendments by provincial legislatures

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

Initiation of amendment procedures

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

Revocation of authorization

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

Amendments without Senate resolution

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

Computation of period

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

Advice to issue proclamation

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

Constitutional conference

49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part. **(102)**

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(102) A First Ministers Meeting was held June 20-21, 1996.

PART VI

AMENDMENT TO THE CONSTITUTION ACT, 1867

50. [(103)]

51. [(104)]

PART VII

GENERAL

Primacy of Constitution of Canada

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

Constitution of Canada

(2) The Constitution of Canada includes

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

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

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

Amendments to Constitution of Canada

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

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

[(103)] The text of this amendment is set out in the *Constitution Act, 1867*, as section 92A.

[(104)] The text of this amendment is set out in the *Constitution Act, 1867*, as the Sixth Schedule.

Repeal and consequential amendments

54. Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada. **(105)**

54.1 Repealed. **(106)**

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada. **(107)**

English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

English and French versions of this Act

57. The English and French versions of this Act are equally authoritative.

Commencement

58. Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada. **(108)**

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(105) Part VII came into force on April 17, 1982 (*see* SI/82-97).

(106) Section 54.1, which was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102), provided for the repeal of Part IV.1 and section 54.1 on April 18, 1987. Section 54.1 read as follows:

54.1 Part IV.1 and this section are repealed on April 18, 1987.

(107) The French Constitutional Drafting Committee was established in 1984 with a mandate to assist the Minister of Justice in that task. The Committee's Final Report was tabled in Parliament in December 1990.

(108) The Act, with the exception of paragraph 23(1)(*a*) in respect of Quebec, came into force on April 17, 1982 by proclamation issued by the Queen (*see* SI/82-97).

Commencement of paragraph 23(1)(*a*) in respect of Quebec

59. (1) Paragraph 23(1)(*a*) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Authorization of Quebec

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec. **(109)**

Repeal of this section

(3) This section may be repealed on the day paragraph 23(1)(*a*) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Short title and citations

60. This Act may be cited as the *Constitution Act, 1982*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.

References

61. A reference to the "*Constitution Acts, 1867 to 1982*" shall be deemed to include a reference to the "*Constitution Amendment Proclamation, 1983*". **(110)**

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(109) No proclamation has been issued under section 59.

(110) Section 61 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102). See also section 3 of the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I and the *Constitution Amendment, 1987 (Newfoundland Act)* (*see* SI/88-11).