COURT FILE NO. 35203

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 INTERVENER ATTORNEY GENERAL OF BRITISH COLUMBIA

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

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PART I - OVERVIEW AND FACTS

a. Overview

1. This reference, as set out in Order P.C. 2013-70, sets out six questions (the "Reference Questions") concerning the amending procedures of Part V of the *Constitution Act, 1982* in the context of potential Senate reform. The Attorney General of British Columbia ("British Columbia") intervenes pursuant to section 53(5) of the *Supreme Court Act*.

2. This reference is not about the merits of the Senate or any particular proposal to reform or abolish it. It is about whether the Constitution permits the federal government to unilaterally implement fundamental changes to the Senate, changes that impact the powers of that body and how and when a person becomes a Senator.

3. The Reference Questions, and British Columbia's responses, can be summarized as follows:

> 1. Can the Parliament of Canada, exercising its legislative authority under section 44 of the *Constitution Act, 1982*, amend the *Constitution Act, 1867* to set term limits for Senators, including making any such terms renewable and/or the term limits retrospective?
>
> No. Term limits impact the powers of the Senate and the method of selecting Senators, and are outside the scope of Parliament's ability to amend unilaterally.
>
> 2. Can the Parliament of Canada through section 91 of the *Constitution Act, 1867* or section 44 of the *Constitution Act, 1982*, set out a consultative procedure to determine public preferences for potential nominees for appointment to the Senate?
>
> No. Even if technically non-binding, the proposed consultation process impacts the powers of the Senate and method of selecting Senators. Neither section 91 nor

section 44 allows Parliament to achieve indirectly what section 42 prevents it from doing directly.

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

Yes. Eliminating subsections 23(3) and (4) does not impact the powers of the Senate or the method of selecting Senators and the proposal falls within the scope of section 44.

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

The Senate can be abolished through the use of the 7/50 Formula; unanimity is not required.

4. While section 44 of the *Constitution Act, 1982,* gives Parliament authority to amend the Constitution in relation to the Senate, this power is limited in scope. British Columbia's position is that these limitations, found primarily in sections 41 and 42, ensure that fundamental features of the Senate cannot be changed without substantial provincial consent.

5. The federal government gives an extraordinarily narrow reading to section 42(1)(a). This interpretation is inconsistent with the language of Part V as well as the fundamental constitutional principle of federalism, which recognizes the provinces' role as equal partners in Confederation.

6. British Columbia takes the position that the provisions of Part V of the *Constitution Act, 1982*, including section 42(1)(a), should be interpreted broadly, purposively and in its historic context. Shortly before the patriation of the Constitution, this Court acknowledged the Senate's

role as an essential part of the Confederation deal. As a result, its fundamental features and essential characteristics could not be changed unilaterally by Parliament.[1] This understanding was incorporated into the provisions of Part V, which did not extend Parliament's power to amend the Constitution without provincial involvement.

Facts

7. British Columbia adopts the facts set out in the factum of the Attorney General of Canada and provides the following additional facts for consideration of this Honorable Court.

b. Creation and Purpose of the Senate

8. In the *Upper House Reference*, this Court recognized that the Senate was created historically as a means of protecting sectional interests:

> A primary purpose of the creation of the Senate, as a part of the federal legislative process, was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation.[2]

9. It was understood by those involved in the conferences and passage of resolutions leading to Confederation in Canada that the function of the Senate was to protect sectional and provincial interests. This provided a counter-balance to the overwhelming influence exercised by the larger provinces in the House of Commons elected on the principle of representation by population. The Senate's important purpose was recognized in the debates on Confederation:

> In order to protect local interests, and to prevent sectional jealousies, it was found requisite that the three great divisions to which British North America is separated, should be represented in the Upper House on the principle of equality. There are three great sections, having different interest, in this proposed Confederation. ... To the Upper House is to be confided the protection of sectional interests ...[3]

10. The Senate was also designed to be a key part of the federal legislative process. When introducing a resolution in the Legislative Assembly of Canada in 1865, John A. MacDonald

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[1] *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 at pp. 60-66 (the "*Upper House Reference") (*AGC Auth., Vol 1, Tab 18)

[2] *Upper House Reference*, at p. 67 (AGC Auth., Vol 1, Tab 18)

[3] Parliamentary Debates on the Subject of Confederation, Hunter, Ross & Co., Quebec 1865) (the "Parliamentary Debates"), 1865, pp. 35-39, Attorney General John A. MacDonald; (AGBC Auth., Vol 1, Tab 9); *Upper House Reference*, at p. 67 (AGC Auth. Vol 1, Tab 18)

commented on the relationship between the two Houses of Parliament, and the independence of the Upper House:

> There would be no use of an Upper House, if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the Lower House. It would be of no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people.[4]

11. This was the bargain struck at Confederation. The colonies would each give up their independence to merge into a federal union relinquishing many of their powers to regulate and legislate. In turn, a Parliament was created, including the Senate - an independent Upper House which was intended to permit and foster the presentation of local and sectional points of view emanating from the provinces. The Senate ensured the provinces had a means by which they could, at least, influence federal legislation impacting their local or sectional interests.

12. As summarized by this Court in the *Upper House Reference*[5]:

> The power to enact federal legislation was given to the Queen by and with the advice and consent of the Senate and the House of Commons. Thus, the body which had been created as a means of protecting sectional and provincial interests was made a participant in this legislative process.

c. Senate Reform

13. Since 1867, there has been almost constant discussion regarding Senate reform, including numerous proposals outlined in the extensive record filed in this case. As the Reference Questions focus on the interpretation of Part V of the *Constitution Act, 1982,* it is not necessary to consider the details and merits of these proposals and recommendations.

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[4] *Parliamentary Debates*, 1865 (AGBC Auth., Vol 1, Tab 9)
[5] *Upper House Reference*, p. 68 (AGC Auth., Vol 1, Tab 18)

14. However, the record indicates that Senate reform has been, and continues to be, a matter of significant importance to British Columbia and British Columbians, as it has with the other provinces. British Columbia has put forward various positions on Senate reform and has never taken the position that fundamental reforms to that institution can be unilaterally made by Parliament.[6]

15. Most recently, in March 2013, British Columbia introduced the *Senate Nominee Election Act*[7] as an exposure bill to generate dialogue about Senate reform. The bill, which only received First Reading, provided a legal framework for conducting Senate nominee elections in British Columbia, which could be held to nominate individuals to fill British Columbia's vacancies in the Senate.

d. History of Constitutional Amending Procedures

i. *The British North America Act*

16. When enacted, the *British North America Act* did not provide for a method to amend its provisions through Canadian action alone; any changes had to be made by an Act of the British Parliament.[8]

17. The practice, since 1875, was to seek amendment of that Act by the British Parliament through a joint address of both the Senate and the House of Commons. Prior to 1980, this occurred twenty-two times.[9]

ii. *British North America (No. 2) Act, 1949*

18. In 1949, the *British North America (No. 2) Act, 1949*, added Class 1 to section 91 of the *British North America Act*, allowing the Parliament of Canada to amend the Constitution of

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[6] See, for example, British Columbia's Constitutional Proposals' presented to the First Ministers' Conference on the Constitution, 1978" – p. 126-141 (AGBC Record, Vol 1, Tab 16)
[7] Bill 17, *Senate Nominee Election Act*, 5th Sess. 39th Parl, British Columbia, 2012 (AGBC Record, Vol 1, Tab 14)
[8] *Upper House Reference*, p. 60 (AGC Auth. Vol 1, Tab 18)
[9] *Reference re Amendment of Constitution of Canada*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 (S.C.C.) [the "*Patriation Reference*"], at – pp. 888-891 (AGC Auth. Vol 1, Tab 20)

Canada in some circumstances. In those qualifying circumstances, the need for an enactment of the British Parliament to effect amendments was obviated.[10]

> POWERS OF PARLIAMENT
>
> 91(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.

19. Legislation enacted under section 91(1) dealt with "housekeeping" matters, ones that prior to 1949, would have been referred to the British Parliament without provincial consent anyway. None of the legislation enacted under section 91(1) affected federal-provincial relationships in a substantive way,[11] and enactments of the British Parliament continued to be used to amend the *British North America Act* after 1949 when provincial interests were affected.[12]

20. In 1965, under the authority of section 91(1), Parliament amended section 29, imposing a mandatory retirement age of 75 for Senators.

21. Regardless of whether the amendment was made before or after 1949, there has been a history of substantive provincial consultation and consent on amendments affecting the provinces. As of the time of the *Patriation Reference*:

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[10] *Upper House Reference*, pp. 64-65 (AGC Auth. Vol 1, Tab 18)
[11] *Upper House Reference*, p. 65 (AGC Auth. Vol 1, Tab 18)
[12] *Patriation Reference*, pp. 888-991 (AGC Auth. Vol 1, Tab 20)

> In no instance has an amendment to the *B.N.A. Act* been enacted which directly affected federal-provincial relationships in the sense of changing provincial legislative powers, in the absence of federal consultation with and the consent of all the provinces.[13]

e. **The *Upper House Reference***

22. The breadth of the authority conferred by section 91(1) was the subject of consideration by this Court in 1979 in the *Upper House Reference*. Questions referred by the Governor General in Council asked whether it was within the legislative authority of Parliament, acting alone, to abolish or reform the Senate.

23. This Court concluded that section 91(1) does not give Parliament the power to alter the fundamental character of the Senate:

> "...it is not open to Parliament in respect of the Senate as now constituted to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three Provinces in order to meet the requirement of the proposed federal system. It was that Senate, created by the Act, to which a legislative role was given by s. 91. In our opinion, its fundamental character cannot be altered by unilateral action by the Parliament of Canada and s. 91(1) does not give that power"...[14]

24. Instead, the Court determined that the amendment power conferred by section 91(1) was limited to "housekeeping matters" and "matters of interest only to the federal government".[15]

25. Although the Court declined to answer all of the questions posed, those that were answered were responded to in the negative. Specifically, the federal government could not: repeal sections 21 to 36 of the *British North America Act* and amend other sections to delete any reference to the Senate; change the numbers and proportion of members representing a province or territory; provide for direct election of some or all Senators; or provide that Bills approved by

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[13] *Patriation Reference*, p. 830 (AGC Auth. Vol 1, Tab 20)

the House of Commons could be given the force of law after a certain period of time, notwithstanding that the Senate had not approved them[16].

26. Certain questions were left unanswered on the basis that they could not be categorically answered in the absence of a factual background.[17]

27. The *Upper House Reference* provided significant guidance as to what are fundamental features or essential characteristics of the Senate.

28. The preamble to the *British North America Act* refers to "a constitution similar in principle to that of the United Kingdom". The Upper House in the United Kingdom does not have term limits, and members are appointed rather than elected. This Court noted, at page 77, that:

> It is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons.

29. Although compulsory retirement at age 75 did not change the essential character of the Senate, at some point, "a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as 'the sober second thought in legislation'".[18]

30. In addition, the substitution of a system of election rather than a system of appointment would involve "a radical change" to the Senate.[19]

31. Although the question was not answered, the Court stated that the property qualifications 'may not today have the same importance which they did when the Act was enacted', but the

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[14] *Upper House Reference*, p. 78 (AGC Auth. Vol 1, Tab 18)
[15] *Upper House Reference*, p. 70 (AGC Auth. Vol 1, Tab 18)
[16] *Upper House Reference*, pp. 75-77 (AGB Auth. Vol 1, Tab 18)
[17] *Upper House Refe*rence, p. 55 (AGC Auth. Vol 1, Tab 18)
[18] *Upper House Reference*, p. 76 (AGC Auth. Vol 1, Tab 18)
[19] *Upper House Reference*, p. 77 (AGC Auth. Vol 1, Tab 18)

residence requirement may remain relevant as it relates to the sectional characteristics of the Senate.[20]

32. The *Upper House Reference* confirmed, over the contrary views of the federal government, that the provinces have a role in changes to the fundamental features of the Senate. It is against this background that nine of ten provinces agreed to the amending formulae set out in Part V of the *Constitution Act, 1982.* [21]

f. *Constitution Act, 1982*

33. With the enactment of the *Canada Act, 1982*, the United Kingdom recognized the full sovereign independence of Canada, both legislatively and constitutionally. In proclaiming the *Constitution Act, 1982*, Her Majesty recognized this sovereign independence:

> And Whereas it is in accord with the status of Canada as an independent state that Canadians be able to amend their Constitution in Canada in all respects;[22]

34. The *Constitution Act, 1982* is not a piece of ordinary legislation designed and enacted by a single legislative body. Its contents are the product of extensive negotiations involving the provinces and central government as equal partners of Confederation. Although the Attorney General of Canada refers to "Parliament's intention" in paragraph 81 of its factum, the federal government was only one participant in this process.

35. As outlined below, there is evidence that sheds light on the background and development of Part V as part of this bargain struck among entities sharing power in a federation.

36. The origin of Part V, which sets out the process for future amendments, is the April 1981 proposal of eight provincial premiers,[23] referred to as the "April Accord Amending Formula".

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[20] *Upper House Reference*, p. 76 (AGC Auth. Vol 1, Tab 18)
[21] *Constitution Act, 1982*, PART V (Appendix B, AGBC Factum)
[22] Proclamation of *Constitution Act, 1982*, May 12, 1982, SI 82-97 (AGBC Auth. Vol 1, Tab10)
[23] Alberta, British Columbia, Manitoba, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Quebec, Saskatchewan

Agreement to use this formula in the patriated constitution was reached at the First Ministers' Agreement on the Constitution in November 1981. In the November 1981 Agreement on the Constitution, the First Ministers (except for the Premier of Quebec) agreed to the following point:

> (2) Amending Formula
>
> -Acceptance of the April Accord Amending Formula with the deletion of Section 3 which provides for fiscal compensation to a province which opts out of a constitutional amendment. [24]

37. A comparison of the text confirms the April Accord Amending Formula did form the basis for Part V. What is now section 44 is referred to as section 7, while section 42 is referred to as section 10. Recognition of the "constitutional equality of provinces as equal partners in Confederation" was a key principle underlying this amending formula[25].

38. The April Accord Amending Formula contained explanatory notes. Section 7's note read as follows:

> This provision allows Parliament, acting alone, to amend those parts of the Constitution of Canada that relate solely to the operation of the executive government of Canada at the federal level or to the Senate or House of Commons. Some aspects of certain institutions important for maintaining the federal-provincial balance, such as the Senate and the Supreme Court, are excluded from this provision and are covered by sections 9 and 10. This provision is intended to replace section 91(1) of the B.N.A. Act.[26]

39. Previously, in October 1980, the federal government tabled its "Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada". This proposal, which also had explanatory notes, contained a provision very similar to section 7. [27] Section 48 read, "Subject to section 50, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate or House of Commons."[28]

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[24] Anne Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) Vol. II at pp. 804-904 ("*Bayefsky*") (AGBC Auth., Vol 1, Tab 8); Nunavut Record, p. 233
[25] *Bayefsky*, p. 806 (AGBC Auth., Vol 1, Tab 8); Nunavut Record, p. 189
[26] *Bayefsky*, p. 810 (AGBC Auth., Vol 1, Tab8); Nunavut Record, p. 196
[27] *Bayefsky*, p. 756-757 (AGBC Auth., Vol 1, Tab 8)
[28] *Bayefsky*, p. 756 (AGBC Auth., Vol 1, Tab 8)

40. Even the federal explanatory note confirms the section was not intended to expand Parliament's ability to amend the Constitution on its own:

> This section, together with section 50, would clarify and limit the existing power of Parliament pursuant to section 91, class 1 of the B.N.A. Act to amend the Constitution and that class would be repealed when Part V comes into force.[29]

41. Testimony of then-Minister of Justice Chretien confirms that this provision was not designed to increase the scope of Canada's ability to amend the Constitution without provincial involvement. He noted that "The drafter did not want to change those powers" of section 91(1), and that the provision could be used, for example, to change the quorum of the Senate.[30]

Relevant Excerpts of Provisions of Part V of the *Constitution Act, 1982*

> **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.
>
> **…**
>
> **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

[29] *Bayefsky*, p. 756 (AGBC Auth., Vol 1, Tab 8)
[30] PEI Record, pp. 154 and 156

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.

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.

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

. . .

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.

42. The formula set out in section 38 is the default amending formula known as the 7/50 Formula. Unless otherwise specified in Part V, an amendment to the Constitution requires the use of this formula.[31]

43. Section 41 lists certain matters that require unanimous consent to amend. Section 42 specifies that amendments that relate to listed matters require the use of the 7/50 Formula. These include "the powers of the Senate and the method of selecting Senators".

[31] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 ("*Constitution Act, 1982*"), PART V, (Appendix B, AGBC Factum)

PART II - POINTS IN ISSUE

BRITISH COLUMBIA'S POSITION ON THE ISSUES

44. The Reference Questions are set out in Order P.C. 2013-70, attached as Appendix A to this factum. The Reference Questions all raise the issue of the proper construction of sections 38, 41, 42, and 44 of the *Constitution Act, 1982*, and British Columbia's answers can be summarized as follows:

a) The answer to Reference Questions 1 to 3 is no. These questions, whether viewed aggregately or separately, suggest constitutional amendments that would result in fundamental changes to the powers of the Senate and method of selecting Senators and are outside of Parliament's ability to enact unilaterally. As a result, the proposed reforms require the use of the 7/50 Formula.
b) The answer to Reference Question 4 is yes.
c) The answer to Reference Question 5 is yes and question 6 is no. Amending the Constitution to abolish the Senate would require the use of the 7/50 Formula.

PART III - STATEMENT OF ARGUMENT

A. Overview

45. This case is not about the merits of the suggested reforms, or the desirability for greater democratic legitimacy for the Senate. The central issue is whether the federal government can unilaterally implement fundamental Senate reform without engaging the provinces and amending the constitution through the 7/50 Formula.

46. The key issue in this reference is the scope of authority section 44 provides to Parliament to amend the constitution without the involvement of the provinces – the breadth of this exception to the 7/50 Formula.

47. In order to achieve its objective of unilateral reform, the Attorney General of Canada has proposed a narrow, formulaic and literal interpretation of section 42 of the *Constitution Act, 1982*. It is the federal government's view that "Provincial involvement of any kind in changes to the Senate was only contemplated for a few matters."

48. Such an interpretation is unsupportable when considered in light of previous Supreme Court of Canada jurisprudence, the Senate's role as part of Canada's federal system, and the wording of Part V of the *Constitution Act, 1982*.

49. The Constitution must be interpreted broadly and purposively, and in a manner that reconciles central and regional interests. Unlike an ordinary statute, the *Constitution Act, 1982*, is not the act of a single level of government, but a compromise between equal and co-ordinate authorities. Interpretation cannot rely on a narrow reading of the text, and the words used must be interpreted in the context of the fundamental principles, in particular the principle of federalism, identified in the *Secession Reference*. [32]

[32] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, (the "*Secession Reference")*, p. 240 (AGC Auth. Vol 2, Tab 21)

50. The proper interpretation of the text of Part V of the *Constitution Act, 1982* generally, and sections 42 and 44 in particular, is one that recognizes that Parliament cannot alter fundamental features and essential characteristics of the Senate without involving the provinces. Section 44 is the successor to former section 91(1) of the *British North America Act*, and has not significantly increased the breadth of Parliament's amending powers.

51. The reforms suggested in the Reference Questions clearly impact the powers of the Senate and method of selecting Senators. The suggested reforms, other than those relating to property qualification, alter how and when a person becomes a Senator and will impact the Senate's ability to function as a thoroughly independent body; they are far from the "housekeeping" matters, or ones solely of interest to the federal government, that are authorized by section 44.

52. When section 44 is construed in the context of the Constitution as a whole, including consideration of the underlying principle of federalism, it is clear that provincial involvement is contemplated for all significant changes to the Senate.

53. British Columbia, along with the other provinces, has a key interest in any fundamental change to the institution designed to protect regional interests in the federal legislative process. The Constitution recognizes this interest by requiring that the reforms proposed by the Reference Questions, with one exception, be made through the 7/50 Formula

B. Principles of Constitutional Interpretation

54. Part V of the *Constitution Act, 1982,* must be interpreted broadly and purposively, in a manner that while acknowledging the primacy of the written text, also recognizes the unique nature of the Constitution, which is different in character from an enactment of a single level of government.

55. This Court has explicitly rejected a narrow and technical interpretation of the Constitution, instead adopting a broad and purposive approach that recognizes the Constitution as a "living tree". [33]

56. British Columbia agrees with the Attorney General of Canada's position that Part V needs to be placed in its proper linguistic, philosophic and historical contexts. However, the Attorney General of Canada relies too heavily on its narrow interpretation of the linguistic context, ignoring not only the historic context, but also the wording of Part V, the unique nature of the Constitution and the unwritten constitutional principles.

57. In paragraphs 93 and 95 of its factum, the Attorney General of Canada refers to unwritten constitutional principles as "interpretive tools" that can only be relied on where there is a gap or ambiguity in the text. The Attorney General of Canada's factum lacks any reference to the key unwritten constitutional principle of federalism, and dismisses the applicability of the "protection of minorities" by failing to consider the protection of regional interests as a component of that principle.

58. This position highlights a fundamental misconception that underpins the Attorney General of Canada's narrow, literal interpretation of section 42. The unwritten constitutional principles are not mere secondary sources to assist with the interpretation of the text of the Constitution in limited circumstances. These principles are part of the Constitution itself, and need to be considered when construing Part V.

59. The *Secession Reference* confirms that the Constitution also embraces unwritten rules and includes "the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian State."[34] While not an

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[33] *Edwards v AG for Canada*, [1930] A.C. 124 at 136-7 (living tree reference) (AGBC Auth., Vol 1, Tab1); Re *Manitoba Language Rights*, [1985] 1 S.C.R. 721 ("*Manitoba Language Rights*"), p. 751 (AGBC Auth., Vol 1, Tab 3); *Secession Reference*, p. 248, para. 50 (AGC Auth., Vol II, Tab 21)*; Reference re Securities Act*, [2011] 3 S.C.R. 837 ("*Securities Reference")*, paras. 7, 54-62 (AGBC Auth., Vol 1, Tab 7); *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, p. 366 (AGBC Auth., Vol 1, Tab 2); *Reference re Prov. Electoral Boundaries (Sask.*), [1991] 2 S.C.R. 158, p. 179-180 (AGBC Auth., Vol 1, Tab 4); *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 para. 23 (AGBC Auth., Vol 1, Tab 5).

[34] *Secession Reference*, p. 239 (AGC Auth., Vol II, Tab 21)

invitation to dispense with the express written terms[35], these principles "inform and sustain" the text of the Constitution, and are "the vital unstated assumptions upon which the text is based".[36]

60. As summarized by this Court in paragraph 148 of that decision:

> We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

61. Recognizing the primacy of the express words written text does not relegate unwritten constitutional principles to mere secondary sources:

> The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a living tree.... [37]

62. The issues raised by the Reference Questions concern the role of a key central institution of Canada's federation and the scope of the provinces' rights to participate in the evolution of our Constitution in relation to it. This is not a circumstance where the express written words of the text have a single clear meaning; therefore the foundational principles play a role in interpreting the text of Part V of the *Constitution Act, 1982*[38].

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[35] *Secession Reference*, p. 249 (AGC Auth., Vol 2, Tab 21)
[36] *Secession Reference*, p. 247 (AGBC Auth., Vol 1, Tab 6)
[37] *Secession Reference*, p. 248, para 52 (AGC Auth., Vol 2, Tab 21)
[38] *Constitution Act, 1982*, PART V (Appendix B, AGBC Factum)

Federalism

63. Canada is a federal union where power is shared between the provinces and the federal government. The significance of the adoption of a federal form of government, with a central Upper House based on regional equality, cannot be exaggerated. [39]

64. The principle of federalism recognizes the diversity of the components of the federation, and that the scheme of the *Constitution Act, 1867* established a central government in which provinces were represented.[40] This principle demands respect for the maintenance of a constitutional balance between federal and provincial powers[41]. The central government and the provinces are equal partners in Confederation and "one power may not be used in a manner that effectively eviscerates another."[42]

65. The unwritten principle of federalism has "exercised a role of considerable importance in the interpretation of the written provisions of our Constitution"[43], an approach recently confirmed by this Court in the *Securities Reference.*[44]

66. As a result, the proper approach to the interpretation of Part V must involve the federalism principle, "which as from the beginning been the lodestar by which the courts have been guided". [45]

Protection of Minorities

67. Although the minorities contemplated in 1867 are different than those that may be primarily contemplated today, the expansion of the concept of "minorities" does not mean that protection of political and regional diversity are unimportant today, or no longer animating principles of the Constitution.

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[39] *Secession Reference*, p. 241 (AGC Auth., Vol 2, Tab 21)
[40] *Secession Reference*, para. 58, p. 251 (AGBC Auth., Vol 1, Tab 6)
[41] *Securities Reference*, para. 61, p. 867 (AGBC Auth., Vol 1, Tab 6)
[42] *Securities Reference*, para. 7 (AGBC Auth., Vol 1, Tab 7)
[43] *Secession Reference*, para. 57, 251 (AGBC Auth., Vol 1, Tab 6)
[44] *Securities Reference*, para. 55, p. 865 (AGBC Auth., Vol 1, Tab 7)
[45] *Secession Reference*, para. 56, p. 251 (AGBC Auth., Vol 1, Tab 6)

68. Contrary to the Attorney General of Canada's statement at paragraph 98 of its factum, the *Secession Reference* did recognize a special role for the Senate as it relates to the protection of minorities. In paragraph 81 of the decision, this Court noted that protection of minority rights "was clearly an essential consideration" in the constitutional structure established at Confederation. The decision then references page 71 of the *Upper House Reference*, which in turn refers to the role of the Senate protecting the interests of minorities in the central legislative process.

Democracy

69. The underlying principle of democracy frequently requires substantial consensus before our Constitution can be amended. Support of an enhanced majority prior to amendment ensures that minority interests (which, as noted above, include regional interests) must be addressed before changes affecting those interests are enacted. [46]

Summary of Proper Interpretation Principles

70. British Columbia submits that the proper interpretation of Part V of the *Constitution Act, 1982* is a liberal and purposive one; one that recognizes that the *Constitution Act, 1982* is not an enactment of one level of government, but rather a compromise between equal and co-ordinate authorities.

71. The written text of Part V must be interpreted in light of the unwritten principles that also form part of our Constitution. While these unwritten principles do not override the express written words in the text, they do inform the construction of those words, and must be considered as part of the appropriate construction methodology.

[46] *Secession Reference*, para. 77, p. 260 (AGC Auth., Vol II, Tab 21)

C. Proper Interpretation of Sections 42 and 44

72. This Reference is the first time this Court will consider the scope of sections 42 and 44 of the *Constitution Act, 1982*. It is British Columbia's position that the proper interpretation of section 44, especially when considered in conjunction with section 42, acknowledges the importance of provincial participation in the amending process where provincial interests are at stake. Such an approach is consistent with a purposive wording of the text, as well as the unwritten constitutional principles outlined above.

73. It is British Columbia's position that as noted by the explanatory notes to both the April Accord Amending Formula and the federal government's October 1980 proposal, section 44 is the successor to section 91(1), and the authority provided by the two provisions is virtually identical.

74. The result is that the scope of section 44 is limited to changes that are of only federal interest, or are of a "housekeeping" nature. The matters listed in section 42(1)(b) and (c) should be read broadly, consistent with the Senate's role as an independent, appointed chamber designed to protect regional interests, and the unwritten constitutional principles of federalism and democracy. There is nothing in the text of Part V, the unwritten constitutional principles, or previous jurisprudence of this Court which supports a narrow and limited right of participation for the provinces when making constitutional amendments to the fundamental features and essential characteristics of the Senate.

75. In advocating for a very broad power to make unilateral amendments, the Attorney General of Canada is repeating arguments made in the *Upper House Reference* regarding the scope of section 91(1). The results should be the same: Parliament cannot alter the fundamental features or essential characteristics of the Senate unilaterally. Provincial involvement and consent, through the 7/50 Formula, is required.

76. It is worth observing that section 91(1) contained broader wording than section 44, and both enumerate a number of exceptions. Despite the opening phrase of section 91(1), "The amendment from time to time of the Constitution of Canada, except....", this Court in the *Upper*

House Reference found Parliament was not empowered to fundamentally alter the institution without provincial consent.

77. There is nothing to suggest that section 44, despite more constrained wording, has provided Parliament with a significantly increased ability to amend the Constitution own than it possessed under section 91(1). Section 44 had not given Parliament the broad extra powers the federal government now seeks.

78. Accepting the interpretation advanced by the Attorney General of Canada requires accepting that a mere two years after having their right to participate in Senate reform confirmed by this Court, nine provinces voluntarily relinquished most of that right, agreeing that significant Senate reform is solely within the purview of the central government. There is no historical evidence for such a remarkable claim, and the wording of Part V does not support it.

79. It is also inconsistent with the fact that the April Accord Amending Formula, which formed the basis for Part V, was a provincial proposal, based on the underlying principle that the provinces are equal partners in confederation. Concern for constitutional equality is inconsistent with the meaning the Attorney General of Canada would attach to Part V.

80. The Attorney General of Canada's interpretation is also inconsistent with the federal government's position as to the scope of what eventually became section 44. Both the explanatory notes to the federal government proposal, and the testimony of the then Minister of Justice, confirm that the federal government was not attempting to expand its power in this regard.

81. It would offend the federal principle if a change to the fundamental nature of the Senate could be effected without provincial participation. Canada was formed as a federal union and the existence of a legal power of the central government to unilaterally change the Constitution in key ways is inimical to the concept of federalism.[47]

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[47] *Patriation Reference*, p. 878 (AGC Auth. Vol 1, Tab 20)

82. As a result of the proper construction of section 44, all matters not of a "federal only" or "housekeeping" nature, must fall within section 42(1) or 38, the general amending provision. In either circumstance, the 7/50 Formula would apply.

83. The language of section 42(1) supports this interpretation of section 44. The section does not place any restrictions on the phrase "powers of the Senate and method of appointing Senators", and there is no basis for so viewing the provision. In addition, the opening words of section 42(1) say "in relation to" the enumerated matters. The words "in relation to" are inconsistent with the federal government's proposed interpretation that there are very few matters that fit within the scope of this phrase.

84. Illustrative of the federal government's restrictive interpretation is the Attorney General of Canada's position that "method of selecting Senators" in section 42(1)(b) will only be engaged if there is an "outright removal" of the Prime Minister's authority to propose, or the Governor General's authority to summon: essentially a direct change to section 24 of the *Constitution Act, 1867*.[48] According to this position, anything short of a dramatic overhaul to section 24 can be implemented by Parliament alone.

85. This position requires reading "method of selecting Senators" as the equivalent of "summoning qualified persons". The Governor General's act of summoning a qualified person is just a discrete, final, formal step. In contrast, "method of selecting" is a broad phrase contemplating an entire process; the French "mode" is possibly broader still. If the two phrases were to mean the same thing, the same wording would have been used. The Fulton Favreau Formula did use such narrow wording, and it was not adopted by the drafters of Part V.[49]

86. Further, this position on when section 42 will be engaged for the "method of selecting Senators" ignores the possibility that changes to the selection process short of directly impacting the Governor General's power to summon may have an impact on the powers of the Senate. As will be discussed, *infra*, the proposed reforms regarding consultation could have a fundamental

[48] AGC Factum, para. 140
[49] AGC Record, Vol. XV, Tab 104, p. 183

impact on the powers of the Senate – in particular its independence and democratic legitimacy. As such, section 42 is engaged and the 7/50 Formula must be used.

87. Similarly, it is an unreasonably narrow interpretation to limit the "powers of the Senate" to the ability to pass or reject legislation. The powers of the Upper House include its function as a "thoroughly independent body", and its role of "sober second thought" and protection of regional interests in the federal legislative process. The powers of the Senate must be understood functionally rather than formalistically.

88. An interpretation of section 44 authorizing broad unilateral amendments to the Constitution in relation to fundamental features of the Senate, would also authorize similar fundamental amendments in relation to the House of Commons and the executive. The only reference in section 42(1) to the House of Commons is the principle of proportional representation. As a result, if the Attorney General of Canada's position is correct, the federal government could make significant amendments to the House of Commons and executive. For example, a unilateral amendment could be made to section 4 of the *Charter*, changing the circumstances under which the House of Commons might be continued for more than five years. Under the federal government's interpretation, such a change could be affected without provincial participation even though it was a change of a significant nature and with broad implications.

89. Section 44 does not have the breadth of scope, nor section 42 the limits, the Attorney General of Canada urges. Like its predecessor, section 91(1), section 44 allows Parliament to unilaterally amend in matters of interest to the federal government or of a "housekeeping" nature only. Matters that impact the Senate's fundamental features or essential characteristics should not occur at the whim of the federal government; a proper interpretation of sections 42 and 44 confirms that these matters require the involvement of the provinces and the use of the 7/50 Formula.

Response to the Reference Questions

Reference Question 1

90. The key issue posed by the first Reference Question is not the appropriate length or renewability of a fixed term appointment, but the mechanism by which the term of office of a Senator can be changed from one that is unlimited (subject to a mandatory retirement age) to one that is fixed.

91. All of the proposed reforms suggested in Reference Question 1 amount to a fundamental change to the method of selecting Senators and the powers of the Senate. They require the use of the 7/50 Amending Formula and do not fall within the scope of the amendment power in section 44.

92. Term limits place restrictions on the unfettered discretion to select Senators. Those who have been appointed have been removed from the pool of eligible candidates as a new qualification of "has not previously served as a Senator" has been indirectly added to those listed in section 23.

93. The proposed term limits fundamentally impact the purpose and function of the Senate, and in particular its independence. Reducing the tenure to between 8 and 10 years, the length of only two Parliaments, would allow a Prime Minister that is elected for two terms to appoint the entire Senate. Such universal term limits would have a direct ability on the Senate's functioning as a "thoroughly independent" body and an institution for sober second thought. Whether such a change is a positive one is not the issue; it is a fundamental change in relation to the powers of the Senate and therefore the involvement of all constitutional partners is required.

94. Imposing a fixed term is fundamentally different than imposing a mandatory retirement age of 75; this Court in the *Upper House Reference* confirmed that amendment was either of a "housekeeping" nature or of federal government importance only. Even with a forced retirement at age 75, security of tenure remained.

95. The same cannot be said if an amendment changes the appointment of Senators from one that is tenured to retirement to one based on a fixed, and possibly renewable, term. As this Court noted at page 76 of the *Upper House Reference*, at some point a reduction in the term of office might impair the functioning of the senate. If the function of the Senate is impaired, clearly its powers will be impacted. It is difficult to determine with any precision when that point of impairment may occur and, in British Columbia's view, that is why a change to a fixed term appointment as proposed by any of the options in Reference Question 1, are outside the scope of section 44. It is not possible to take a "wait and see" approach to determine exactly how a change impacts the powers of the Senate. If a proposed amendment is in relation to the powers of the Senate, the lack of consensus as to how those powers may change does not eliminate the need for provincial consent and the amendment is outside of the scope of section 44.

96. An analogy could be drawn to the potential introduction of fixed, and possibly renewable, appointment terms for the judiciary. Without question this would be viewed as a fundamental change. While there is a clear distinction between the independence of the judiciary and the role of the Senate, a wholesale alteration of term appointment cannot be seen as a "housekeeping" matter, or one that only concerns the central government so as to fit under section 44.

97. British Columbia's position is that a change from a tenure to retirement to a specified fixed, and possibly renewable, term does alter an essential characteristic of the Senate. A person in a position for a limited period of time, or one who has their continued appointment subject to the discretion of another, has a different role than someone with security of tenure. Security of tenure is directly related to the ability to exercise independence where serving as a chamber of sober second thought. Altering the current tenure decreases the ability to act independently, which in turn changes the powers of the Senate in the federal legislative process.

98. Renewable terms provide an even greater limit to independence. The Reference Questions provide no details or legislative proposal as to how this would occur. Bill S-4 is silent on the matter; if that Bill were re-introduced and passed, it would be possible to renew the appointment of Senators.

99. There is no way to know if a renewal would be based on a repeat of a consultation process or merely be at the discretion of the Governor General on the recommendation of the Prime Minister. Having a Senator's term renewal based solely on the recommendation of a Prime Minister would clearly alter the independence of the Senators, and of the Senate. It would necessarily affect the Senate's capacity to function as a deliberative body as Senators would have to consider how each decision may impact the chances of term renewal.

100. Furthermore, if term renewals were combined with fixed terms, it is easy to see how the Senate's current level of democratic legitimacy would be undermined, impairing the ability of the Senate to function as a protector of regional interests. Such a change would reduce the "powers of the Senate", as set out in section 42(1)(b).

101. The determination of the type of term a Senator is appointed for is a fundamentally important political question – one that the federal government and the provinces should decide together and, if there is to be a change, be implemented through the 7/50 Formula. British Columbia submits that all components of Reference Question 1 should be answered in the negative.

Reference Questions 2 and 3 – Consultation

102. Reference Questions 2 and 3 discuss two proposals to enact legislation providing for non-binding elections for Senators; one a direct consultation with the electorate of each province (Question 2) and the other establishing a framework whereby provincial and territorial legislatures could enact their own consultative legislation (Question 3). Under either proposal, the Prime Minister is bound to consider the results of the consultative process.

103. The *Senate Nominee Election Act* demonstrates British Columbia's desire to participate in the Senate reform process. This exposure bill, which had no impact on other provinces or territories, and did not purport to limit the Prime Minister's discretion, is distinguishable from the proposals in Questions 2 and 3.

104. Currently, other than the qualifications set out in section 23, there are no restrictions on the selection of Senators – the Prime Minister has an unfettered ability to make recommendations to the Governor General. The Senate is purely an appointed body and the electorate has no direct say in the process of selecting Senators.

105. A required consultation process is a restriction on this discretion; a mandatory election process, even one without binding results, adds an additional step to the appointment process. As the Prime Minister is bound to consider the results, it places a limit on the discretion and involves the public in a manner that is manifestly different than envisioned by the appointment process agreed to in 1867. Whether this consultation is a worthy change is not the issue on this Reference; it changes the method of selection in a significant way from appointment to a hybrid process involving non-binding elections. Such a change is beyond the scope of amendments Parliament can make under section 44.

106. This Court in the *Upper House Reference* made it clear that moving away from an appointed Senate was to affect a fundamental feature of that body:

> Sub-question (e) paragraph (iv) deals with the possible selection of all or some members of the senate by direct election by the public. The substitution of a system of election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom", where the Upper House is not elected. In creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life. To make the Senate a wholly or partially elected body would affect a fundamental feature of that body. We would answer this sub-question in the negative.[50]

107. Although the Attorney General of Canada places a great deal of reliance on its position that the consultation process is completely different from elections, British Columbia's position is that the distinction is much finer than the Attorney General of Canada suggests.

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[50] *Upper House Reference*, p. 77 (AGC Auth., Vol 1, Tab 20)

108. In the same way that a constitutional convention developed so that the Governor General only appoints Senators recommended by the Prime Minister, so too could a constitutional convention develop whereby the Prime Minister always recommends people selected through the consultation process. The development of such a convention would be consistent with the constitutional principles of democracy. If Senators were selected through the consultation process, whether through a new convention or Prime Ministerial practice, it would change the institution from one of appointed Senators, to one of Senators selected indirectly by the electorate.

109. The fact that these indirectly-elected Senators would still be formally summoned under section 24 would not obscure the fundamental change from an Upper House similar in principle to that in the United Kingdom. A Senate with Senators selected through a consultation process would result in an Upper House appointed in name only. It would have virtually the same democratic legitimacy as if Senators were directly elected. This greater democratic legitimacy would have a major impact on the provinces and would affect the level of power wielded by the Senate.

110. Section 91 of the *Constitution Act, 1867* does not authorize Parliament to implement non-binding elections for the Senate. As demonstrated by the preamble to Bill C-7, it is the federal government's view that it is appropriate those summoned to the Senate "be determined by general election".[51] This consultation process envisioned by Reference Questions 2 and 3 is designed to increase the democratic legitimacy of the Senate, and would directly impact its function and powers. If section 91 authorized such fundamental change, the result in the *Upper House Reference* would have been different.

111. Neither section 44 nor section 91 allows Parliament to do indirectly what section 42 does not allow them to do directly. British Columbia submits that the answer to Reference Questions 2 and 3 is no.

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[51] Bill C-7, (AGC Record, Vol. 1, Tab 2)

Reference Question 4

112. In the *Upper House Reference*, this Court noted that the property qualifications of Senators in section 23 may "not today have the importance which they did when the Act was enacted". Although this Court declined to answer the question on qualifications in that case, the Court's comment strongly suggested that property qualifications were not a fundamental feature or essential characteristic of the Senate. This is to be contrasted with the Court's comment on residency requirements.

113. British Columbia agrees that the property requirements are no longer a matter of importance and their elimination would not impact a fundamental feature or essential characteristic of the Senate. These property qualifications do not have the same importance as in 1867 and do not impact the powers of the senate or method of appointing Senators.

114. Such a change would be analogous to the imposition of mandatory retirement at age 75 that Parliament enacted through section 91(1) of the *British North America Act*. As a result, the elimination of property qualifications is within Parliament's power under section 44.

115. British Columbia submits that the answer to Reference Question 4 is yes.

Reference Questions 5 and 6

116. British Columbia's position is that a constitutional amendment to abolish the Senate would fall under the section 38 amending procedure.

117. Section 38(1) is the general amending procedure for the Constitution. If a matter does not fall within one of the four exceptional sections (41, 43, 44 or 45), the amendment may be made through the 7/50 formula. It is undisputed that abolition does not fall within sections 43, 44 or 45; the only question is whether section 41 applies so as to require unanimity.

118. It is British Columbia's position that abolition of the Senate does not fall within any matters listed in section 41. It is clear from a reading of Part V as a whole, that unanimity is to be the rare exception rather than the rule for Canadian Constitutional amendments. Such an interpretation is consistent with the pre-1982 convention that substantial, but not unanimous, consent of the provinces is required for even the most significant amendments.[52] Even amendments related to patriation, the adoption of the *Charter* and a domestic amending procedure unanimity was not required. The same would have applied for abolition of the Senate prior to 1982.

119. In particular, British Columbia does not view the abolition of the Senate as an amendment to Part V. Abolition of the Senate was not included in section 41, although had been the subject of debate long before 1980. Excluding abolition from that list of matters requiring unanimity must be viewed as a deliberate choice, and the drafters' decision should be respected.

120. Unless otherwise indicated with Part V, the general amending formula applies. Abolition of the Senate has not been so indicated in section 41. When determining whether a proposed amendment fits within section 41, the dominant purpose should be considered. The purpose of Senate abolition would not be to change the amending formula, and section 41(e) was not designed to indirectly expand the scope of amendments requiring unanimity. Therefore, the 7/50 Formula would apply to any proposed amendment to abolish the Senate.

121. Section 47 supports an interpretation that any post-abolition amendments would be consequential. The constitution can already be amended under sections 38, 41, 42 or 43 without a resolution of the Senate in specified circumstances.

122. The Province submits that Reference Question 5 should be answered in the affirmative, and Reference Question 6 should be answered in the negative.

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[52] *Reference re Amendment of Canadian Constitution*, [1982] S.C.J. No. 101, [1982] 2 S.C.R. 793 (S.C.C.) [the "*Quebec Veto Reference*"], pp. 811-812 (AGC Auth., Vol 1, Tab 19)

Conclusion

123. It is British Columbia's position that any fundamental changes to the Senate should not be made unilaterally, but rather, in consultation with the provinces.

124. British Columbia is not taking a position on the desirability or efficacy of proposed Senate reform or abolition in this reference; rather, the issue in the case at bar is the appropriate amending formula applicable to changes to the Constitution of Canada, a regime reached by partnerships between provinces and the federal government. The fact that the federal Parliament lacks constitutional authority to change the term of appointments and introduce a process for non-binding elections, does not prevent meaningful reform to the Senate. It is open to the federal government and the provinces to work together to consider issues of Senate reform in a manner which is consistent with the language of Part V, and which respects constitutional conventions and the constitutional division of powers. Answering the Reference Questions as proposed by British Columbia is not the end of the matter; it is simply the beginning.

PART IV - COSTS

125. The Attorney General of British Columbia does not seek costs nor should costs be awarded against her.

PART V - ORDER SOUGHT

126. The Attorney General of British Columbia respectfully requests that the questions referred to the Court by the Governor in Council on February 1, 2013, be answered as follows:

1. no
2. no
3. no
4. yes
5. yes
6. no

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Victoria, British Columbia,
this 4th day of September, 2013.

"Nancy Brown"
Nancy E. Brown

Barbara Carmichael

Counsel for the Intervener Attorney General of British Columbia

PART VI – TABLE OF AUTHORITIES

Case	**Paras.**
Edwards v. AG for Canada, [1930] A.C. 124	**55**
Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357	**55**
Manitoba Language Rights, [1985] 1 S.C.R. 721	**55**
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Reference re Amendment of Constitution of Canada, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 (S.C.C.) (the "*Patriation Reference*")	**17, 21, 81**
Reference re Prov. Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158	**55**
Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698	**55**
Reference re Secession of Quebec, [1998] 2 S.C.R. 217, (the "*Secession Reference*")	**49, 59, 60, 61, 63, 64, 65, 66, 69**
Reference re Securities Act, [2011] 3 S.C.R. 837 (the "*Securities Reference"*)	**55, 64, 65**

Other:

British North America (No. 2) Act, 1949, c. 81, section 91	**18**
Constitution Act, 1867	**3, 64, 73, 75, 76, 77, 84, 89, 110, 111, 114**
Constitution Act, 1982	**1, 3, 4, 5, 6, 13, 32, 33, 34, 37, 43, 44, 46, 47, 48, 49, 50, 51, 52, 54, 58, 62, 70, 72, 73, 74, 76, 77, 80,**

	82, 83, 84, 86, 88, 89, 91, 95, 96, 100, 105, 111, 113, 117, 118, 119, 120, 121
Parliamentary Debates on the Subject of Confederation, Hunter, Ross & Co., Quebec 1865 (the "*Parliamentary Debates, 1865*")	**10**
Proclamation of *Constitution Act, 1982*, May 12, 1982, SI 82-97	**33**

VII – RELEVANT STATUTES

		TAB#
British Columbia Terms of Union, 16 May, 1871	AGBC RECORD	1
Senatorial Selection Act, S.B.C. 1990, c.70	"	2
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 4th Sess, 34th Parl, (19 July 1990)	"	3
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 4th Sess, 34th Parl, (24 July 1990)	"	4
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 4th Sess, 34th Parl, (25 July 1990)	"	5
Constitutional Amendment Approval Act, R.S.B.C. 1996, c.67	"	6
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 4th Sess, 34th Parl, (12 March 1991)	"	7
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 4th Sess, 34th Parl, (14 March 1991)	"	8
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 4th Sess, 34th Parl, (19 March 1991)	"	9

Bill M 202, *Senatorial Election Act*, 2nd Sess, 36th Parl, British Columbia, 1997 (first reading 03 April 1997).	AGBC RECORD	10
Bill M 215, *Senate Nominee Election Act*, *3rd* Sess, 39th Parl, British Columbia, 2012 (first reading 2 June 2011).	"	11
Bill M 213, *Senate Election Act*, 4th Sess, 39th Parl, British Columbia, 2012 (first reading 6 March 2012).	"	12
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 4th Sess, 39th Parl, (6 March 2012)	"	13

APPENDIX A - REFERENCE QUESTIONS

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

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

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

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

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

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

(f) limits to the terms for Senators appointed after October 14, 2008 as set out in subclause 4(1) of Bill C-7, the *Senate Reform Act;* and

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

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

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

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

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

(a) by inserting a separate provision stating that the Senate is to be abolished as of a certain date, as an amendment to the *Constitution Act, 1867* or as a separate provision that is outside of the *Constitution Acts, 1867(0 1982* but that is still part of the Constitution of Canada;

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

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

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

APPENDIX B - *The Constitution Act, 1982*, PART V

PART V
PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada

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

(A) resolutions of the Senate and House of Commons; and

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

Majority of members

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

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.