S.C.C. File No. 35203

IN THE SUPREME COURT OF CANADA

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

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

FACTUM
AMICUS CURIAE

(Pursuant to Rules 42 & 46 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. Three decades have passed since Patriation. This Reference presents the first opportunity for this Court to examine the comprehensive set of written rules governing constitutional amendments set out in Part V of the *Constitution Act, 1982*.[1] The Court's advisory opinion on the scope and meaning of the amendment formulae in this Reference may well shape future transformations of the Constitution of Canada, beyond present debates on Senate reform.

2. Part V of the *Constitution Act, 1982* is the exclusive roadmap for all formal constitutional amendments in Canada. It safeguards the most fundamental laws and values entrenched in our constitutional order. As one commentator has observed, "[n]othing raises such fundamental questions about a nation's understanding of its basic structures and its statecraft values than its procedure for constitutional amendment".[2] Part V must be construed as a coherent and comprehensive procedural code, consistent with the fundamental principles underlying Canada's constitutional framework and foundational texts.

3. The questions posed on this Reference raise the issue of what constitutes an "amendment to the Constitution of Canada" within the scope of Part V. Certain of the proposals – changes to the term limits and property qualifications for Senators – require amendments to the text of the *Constitution Act, 1867*.[3] On one view, the introduction of an electoral process into the method of selecting Senators alters the constitutional status of the Senate as a non-elective legislative body. Abolishing the Senate entails a reconfiguration of constitutional architecture, as well as amendments to multiple provisions of the Constitution of Canada, including Part V itself.

4. The text, structure, history and underlying principles of Part V reveal that significant constitutional amendments to national institutions, in which the provinces necessarily have an interest, require a commensurate degree of consensus between federal and provincial authorities. The Senate is such an institution. Accordingly, the abolition of the Senate would require unanimous consent of the federal and provincial legislatures, pursuant to section 41 of the

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[1] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
[2] John D Whyte, "'A Constitutional Conference…Shall Be Convened': Living with Constitutional Promises" (1996) 8:1 Constitutional Forum 15 at 15.
[3] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

Constitution Act, 1982. Significant modifications to the constitutional status of the Senate, resulting from changes in the method of selection and tenure of Senators, would require broad consensus as set out in section 42 of the *Constitution Act, 1982*. Removal of the property threshold from the conditions of senatorial qualification can be achieved by Parliament acting alone, under section 44 of the *Constitution Act, 1982*. However, in this case, Parliament's exercise of its amending authority is also subject to the bilateral amendment process prescribed by section 43, given the particular impact of such a change on the residency requirements of Senators from the Province of Quebec.

PART II - STATEMENT OF POINTS IN ISSUE

5. The questions put to this Court may conveniently be grouped into four topics, namely:

(i) **Term Limits**: 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? (Question 1)

(ii) **Consultative Elections**: Can the Parliament of Canada, acting pursuant to either section 44 of the *Constitution Act, 1982* or section 91 of the *Constitution Act, 1867,* establish a consultative election procedure to determine potential nominees for appointment to the Senate, as set out in Bill C-20[4] or Bill C-7?[5] (Questions 2 and 3)

(iii) **Property Qualifications**: 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? (Question 4)

(iv) **Abolition**: Can the Senate be abolished by the general amending procedure (the "7/50" procedure) set out in section 38 of the *Constitution Act, 1982*, or does the "unanimity" procedure found in section 41 apply? (Questions 5 and 6)

[4] Bill C-20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2d Sess, 39th Parl, 2007 (first reading 13 November 2007).
[5] Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, 1st Sess, 41 Parl, 2011 (first reading 21 June 2011).

6. The *amicus curiae* respectfully submits that the answers to these questions should be as follows:

(i) Changes to the tenure of Senators cannot be made unilaterally by Parliament, but require substantial provincial acceptance pursuant to section 42 of the *Constitution Act, 1982*.

(ii) Consultative elections are not authorized by section 44 of the *Constitution Act, 1982*. To the extent that a bill to establish consultative elections amends or purports to amend the Constitution, it can be effective only though the procedure set out in section 42 of the *Constitution Act, 1982*. To the extent that a bill to establish consultative elections does not amend or purport to amend the Constitution, either Parliament or a provincial legislature is competent to enact such legislation.

(iii) Repeal of the property requirements set out in subsections 23(3) and (4) can be made by Parliament pursuant to section 44. Such repeal would amend subsection 23(6), which requires the concurrence of the Province of Quebec in accordance with section 43.

(iv) Abolition of the Senate requires the unanimous approval of the legislatures of the provinces of Canada as well as Parliament.

PART III – SUBMISSIONS OF THE *AMICUS CURIAE*

7. The questions in this Reference ask the Court to determine how certain amendments to the configuration of the Senate can be legally implemented. To answer these questions, the Court must address four issues: First, do all questions merit an answer? Second, what principles govern the interpretation of Part V of the *Constitution Act, 1982*? Third, in light of these principles, what is the proper interpretation of Part V? Fourth, in light of this interpretation, what processes apply to the proposals set out in the reference questions? The submissions below address each of these questions in turn.

A. The Scope of the Court's Jurisdiction and Discretion Not to Answer

8. The Court has discretion to refuse to answer reference questions, even when they are justiciable, if the questions are too imprecise or ambiguous or where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer.[6] That discretion need not be exercised here.

9. The questions posed in this Reference require the Court to determine the proper meaning and scope of the "Procedure for Amending Constitution of Canada" set out in Part V of the *Constitution Act, 1982*. These questions indisputably raise issues of a legal nature; they are not "purely political".[7]

10. Moreover, the questions are formulated with a high degree of specificity. While not all of the proposals set out in the Reference questions relate to specific legislative schemes (and while none of the bills referred to are still before Parliament), the Court's role in the context of advisory opinions is not confined to assessing the constitutional validity of proposed or existing legislation.[8] Even if the questions posed are hypothetical, the Court can provide a complete answer as long as the factual record is complete and the scope of the questions is sufficiently precise.[9] Both criteria are met in this case.

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[6] *Reference Re Secession of Quebec,* [1998] 2 SCR 217 at paras 30-31 [*Secession Reference*].
[7] *Reference Re Canada Assistance Plan*, [1991] 2 SCR 525 at 545-46; *Secession Reference*, *supra* at paras 26-28.
[8] *Supreme Court Act*, RSC 1985, c S-26, s 53; *Secession Reference*, *supra* at paras 24-26.
[9] *Secession Reference*, *supra* at paras 24-31; *Reference Re Authority of Parliament in Relation to the Upper House* (1979), [1980] 1 SCR 54 [*Upper House Reference*].

11. All parties in this Reference have stated emphatically that the Court's role is not to address the merits of the proposed reforms to the Canadian Senate, but to set out the process through which constitutional amendments can be effected within the framework found in our Constitution. This cautionary note must be taken seriously. In answering the Reference questions, the Court should aim to provide answers that do not turn on the specific contours of the proposed changes. Identifying the formula that governs a given amendment is an exercise in characterization. It depends on the type or category of constitutional change that is envisaged, not on its substantive value, possible consequences, or political popularity.

B. The Interpretive Framework for Part V

12. The *Constitution Act, 1982* ushered in a new era of constitutional amendment procedure in Canada. It repealed the amending formula that had applied since 1949[10] and entrenched a novel – and wholly Canadian – procedural code for amending the Constitution of Canada. This new code displaced all of the legal rules and constitutional conventions of formal amendment that were in force at the time.[11] While the pre-1982 practices and precedents may inform the interpretation of Part V, the meaning of Part V is to be found first and foremost in the application of well-established principles of constitutional interpretation and in a contextual understanding of its provisions, read as a whole.

(i) The general rules of constitutional interpretation provide that Part V should be interpreted in light of its text and context

13. Constitutional interpretation begins with the language of the provision in question, and in this sense, the written word is paramount.[12] The constitutional text must be imbued with meaning that it can reasonably bear[13] and, unless ousted by the subject or context, construed according to its "primary and natural sense".[14] It must also be read purposively and progressively.[15] A narrow

[10] *Constitution Act, 1867*, *supra*, s 91(1).
[11] *Reference Re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793 at 806 [*Veto Reference*].
[12] *British Columbia (AG) v Canada (AG); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 SCR 41 at 88 [*BC (AG)*].
[13] *MacDonald v Montreal (City of)*, [1986] 1 SCR 460 at 487.
[14] *BC (AG)*, *supra* at 88, citing *Ontario (AG) v Mercer* (1883), 8 App Cas 767 at 778 (PC).
[15] *Edwards v Canada (AG),* [1930] AC 124 at 136 (PC) [*Edwards*]; *Canada (Combines Investigation Branch, Director of Investigation and Research) v Southam Inc,* [1984] 2 SCR 145 at 155-56 [*Southam*]; *Reference Re Employment Insurance Act (Can), ss 22 and 23,* 2005 SCC 56 at paras 9-10, [2005] 2 SCR 669 [*EI Reference*];

or technical construction of Part V, one that favours form over substance, would erode the "fundamental principle" of progressive interpretation and undermine Part V's role as the only formal mechanism by which the constitutional living tree can grow and expand.[16]

14. Constitutional text must also be read in light of its context.[17] In this Reference, discerning the meaning of Part V entails reading the constitutional provisions in light of their structural, linguistic, historical and jurisprudential context.

(ii) The text of Part V should be read in light of its structural, linguistic, historical and jurisprudential context

(a) Structural Context

15. Part V plays a pivotal role in facilitating the evolution of the Constitution of Canada. An interpretation that is insensitive to this role risks imposing unforeseen constraints on the formal constitutional developments that can be realized in Canada, both today and in the future. In light of this role and these risks, the text of Part V should be read as a general, coherent and comprehensive map that exclusively and exhaustively charts the course of the formal amendment process.

16. The structural context of Part V reveals that the structure and scope of each provision of Part V, and of Part V as a whole, have normative effect. In other words, the language of Part V garners meaning not only from the words used, but also from the internal configuration and content of each provision and of each provision in relation to the others.[18] The structural context of Part V emerges directly from the text of Part V and its overall purpose, yet it draws on both the explicit and implicit dimensions of the text. On this understanding of Part V, each provision is a unit within a coherent whole.

Reference Re Same-Sex Marriage, 2004 SCC 79 at paras 22-23, 29, [2004] 3 SCR 698 [*Same-Sex Marriage Reference*]; *Secession Reference, supra* at para 32; *Reference Re Securities Act*, 2011 SCC 66 at para 56, [2011] 3 SCR 837 [*Securities Reference*].

[16] *Same-Sex Marriage Reference*, *supra* at para 22; *Edwards*, *supra* at 136; *Southam*, *supra* at 155; *EI Reference*, *supra* at paras 9-10; *Secession Reference*, *supra* at para 32; *Securities Reference*, *supra* at para 56.

[17] *Secession Reference*, *supra*; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344 [*Big M*]; *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at para 32, [2009] 3 SCR 407 [*Fastfrate*]; *R v Blais*, 2003 SCC 44 at paras 16-18, [2003] 2 SCR 236 [*Blais*].

[18] See e.g. *Reference Re BC Motor Vehicle Act,* [1985] 2 SCR 486 at 499-513, especially 500-04, 511-13 [*BC Motor Vehicle Act Reference*]; *Big M, supra* at 344.

17. First, the text of each provision of Part V should be read as a principled whole. As discussed in detail below, the itemized matters listed in sections 41, 42, 43 and 44 signal the principled basis of each section. Identifying the idea that ties together the matters addressed within each section contributes to a more complete understanding of its full scope.

18. Second, the provisions of Part V together form a systemic collection of amendment formulae. These formulae are arranged hierarchically and in relation to a general residual provision, namely the "General procedure for amending Constitution of Canada" found in subsection 38(1).[19] Reading Part V in this way allows it, like the Constitution of Canada as a whole,[20] to be imbued with meaning of sufficient generality to achieve relative stability and permanence, but of sufficient specificity to convey the implicit limits of each provision of Part V in future invocations.

19. Third, Part V exists and must be interpreted within its broader structural context. The Constitution of Canada "forms a single entity" and "must be read as a whole".[21] Its individual parts and provisions, both written and unwritten, are linked.[22] Accordingly, Part V of the *Constitution Act, 1982* must be read within this constitutional whole and interpreted by reference to a holistic understanding of the Constitution's internal structure.

(b) Linguistic Context

20. While a plain reading of Part V reveals inconsistencies between the text of the English and French versions,[23] each version is equally authoritative.[24] Even in the absence of textual ambiguity or inconsistency, the English and French versions of Part V "must be read together" to ensure that the meaning ascribed to Part V is discerned from the Constitution as a linguistic whole.[25]

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[19] As will be discussed further below, section 44 provides a separate residual provision for amendments in relation to the Senate.
[20] *Secession Reference*, *supra* at paras 32, 49-51, 148-50.
[21] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal*, 2004 SCC 30 at para 16, [2004] 1 SCR 789; *Secession Reference*, *supra* at paras 50, 148.
[22] *Secession Reference*, *supra* at paras 50, 148.
[23] Compare, for instance, the French and English texts of the *Constitution Act, 1982, supra*, s 43.
[24] *Constitution Act, 1982, supra*, s 57.
[25] *Mahe v Alberta*, [1990] 1 SCR 342 at 370-71; Michel Bastarache et al, *The Law of Bilingual Interpretation* (Markham, ON: LexisNexis, 2008) at 96-101.

(c) Historical Context

21. While the interpretation of Part V must be forward-looking, it must take note of the past. This Court has repeatedly cast its interpretive gaze to the near and distant past in aid of construing the *Constitution Acts, 1867 to 1982*.[26]

22. Indeed, the meaning of constitutional norms must be anchored in their historical context.[27] A purposive understanding of Part V requires that due attention be paid to the legislative history of Part V and the intent of its framers. Further, in this Reference, a historical approach is needed to fully assess the constitutional implications of the proposals set out in the Reference questions and the meaning of the particular items listed in sections 41 and 42 of the *Constitution Act, 1982*. The Court is, of course, not bound by the original intent of the constitution's framers.[28] A strict adherence to the principle of originalism is inconsistent with the Court's well-established commitment to progressive interpretation and the intrinsically dynamic character of the Constitution of Canada.[29]

(d) Jurisprudential Context

23. The process of constitutional interpretation entails examining past judicial statements on the meaning of the provisions in question.[30] In this Reference, the jurisprudential foundation of the analysis must be erected primarily from judicial accounts of constitutional first principles, constitutional amendment generally, and institutional authority and interaction.

24. A jurisprudential dispute implicated in this Reference concerns the continued relevance of the *Upper House Reference*.[31] Like the present case, the *Upper House Reference* raised questions about the limits of Parliament's authority to unilaterally amend the Constitution in order to affect Senate reform. A comprehensive understanding of Part V necessarily comprises

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[26] See e.g. *R v Dubois,* [1985] 2 SCR 350 at 356-63; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 378-85 [*NB Broadcasting*]; *Upper House Reference, supra*; *Secession Reference, supra* at paras 32-48; *Reference Re Resolution to Amend the Constitution,* [1981] 1 SCR 753 [*Patriation Reference*]; *Blais*, *supra*; *Healthcare Services and Support – Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27 at paras 40-68, [2007] 2 SCR 391.

[27] *Secession Reference, supra*; *Fastfrate, supra* at para 32; *Blais, supra* at paras 16-18.

[28] *Same-Sex Marriage Reference, supra* at paras 29-30*; BC Motor Vehicle Act Reference, supra* at 507-09.

[29] Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 2, loose-leaf (updated 2012, release 1) (Toronto: Carswell, 2007) at 60-7 to 60-9.

[30] *Secession Reference, supra* at para 32*; Securities Reference, supra* at para 10.

[31] *Supra*.

the circumstances and outcome of the *Upper House Reference.* Nonetheless, the entrenchment of a complete code governing the process of formal constitutional amendment in the *Constitution Act, 1982* means that today it is not sufficient to ask how the Reference questions would be answered using the framework established in the *Upper House Reference*.

(e) Unwritten Constitutional Principles

25. The process of constitutional interpretation is to be informed by the unwritten constitutional principles that underlie and sustain the Constitution as a whole.[32] This Court frequently invokes unwritten constitutional principles as the starting point of constitutional interpretation.[33] The principles are available not only to "fill…gaps in the express terms of the constitutional text", but also to "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".[34]

26. The unwritten principles are not merely an interpretive aid. While never an "invitation to dispense with the written text of the Constitution", they call on the Court to ascribe meaning to constitutional text that is true to the "lifeblood" that courses through its veins.[35] Thus, even in the absence of a textual ambiguity, unwritten constitutional principles must inform the Court's "overall appreciation" of the meaning of Part V.[36]

27. In this Reference, the central issue with respect to the unwritten constitutional principles is how they are engaged in understanding Part V, and not whether the proposed Senate reforms are consistent with them. The principles of democracy and federalism are of particular relevance to a contextual reading of Part V. Whereas the democracy principle suggests there should be some mechanism by which the constitution can evolve through consensus of the Canadian people, the federalism principle must ensure that any interpretation of Part V affirms the

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[32] *Securities Reference, supra* at paras 53, 55; *Secession Reference*, *supra,* esp. paras 49-54; *Canadian Western Bank v Alberta,* 2007 SCC 22 at paras 21-24, [2007] 2 SCR 3 [*Canadian Western Bank*].
[33] *Securities Reference, supra* at para 53, 55; *Secession Reference, supra*; *Canadian Western Bank, supra* at paras 21-24.
[34] *Reference Re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at para 104 [*Remuneration Reference*]; *Secession Reference, supra* at para 52.
[35] *Secession Reference, supra* at paras 51, 53.
[36] *Secession Reference, supra* at paras 49-51, 148.

coordinate authority of provincial and federal legislatures in the constitutional amendment process.[37]

28. Pursuant to Part V, each level of government has exclusive authority over amendments in relation to matters within its own exclusive interest.[38] Federal and provincial legislatures have joint and indivisible authority over amendments in relation to matters of national interest, such as the country's central institutions, its bilingual character and the rules governing constitutional amendment.[39] By requiring intergovernmental participation and agreement on meaningful modifications to the Constitution of Canada, Part V reflects the cooperative and non-hierarchical character of the modern federal arrangement in Canada.[40] Ultimately, reading Part V in light of the principles of democracy and federalism suggests that the need for federal and provincial consensus on formal modifications to the Constitution of Canada increases in proportion to the significance of the modifications in question.

29. In addition, the unwritten principles of the rule of law and constitutionalism warrant attention in the interpretation of Part V. As this Court explained in the *Secession Reference,* the rule of law and constitutionalism aim to secure an orderly, stable and predictable framework within which Canadian society can operate and political decisions can be made.[41] They call for a constitution that is entrenched beyond majority rule.[42] These principles culminate in Part V, a complete procedural account of the mechanics of formal constitutional amendment.

C. The Interpretation of Part V

(i) The Scope of Part V

30. Given the language of the amending formulae set out in Part V,[43] the initial inquiry in any determination of how a constitutional change must be implemented is whether the proposed

[37] *Securities Reference, supra* at para 71.
[38] *Constitution Act, 1982*, *supra,* ss 44, 45.
[39] *Constitution Act, 1982*, *supra,* ss 38, 41, 42, and 43.
[40] *Securities Reference, supra* at para 71; *Canadian Western Bank, supra* at paras 21-24; *Secession Reference, supra* at paras 55-60.
[41] *Secession Reference, supra* at paras 70, 78.
[42] *Secession Reference, supra*, at paras 72-78.
[43] Sections 38(1), 41, 42, 43 and 47(1) each prescribe a formula for how an "amendment" to the "Constitution of Canada" "may be made". Also, section 44 provides that Parliament may exclusively made laws "amending the Constitution of Canada" in relation to certain matters.

action falls within the scope of Part V of the *Constitution Act, 1982*. In any given case, the relevant inquiry will always be: Is the proposal an amendment to the Constitution of Canada within the meaning of Part V?[44]

31. The "Constitution of Canada" comprises 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".[45] This system includes codified, uncodified, legal and political dimensions. The definition is necessarily broad as it allows for the Constitution to be exhaustive yet flexible.[46] Within this definition, the components of the Constitution of Canada fall into four broad categories: constitutional texts (as amended and interpreted), constitutional architecture, unwritten constitutional principles, and unentrenched components.[47] In this Reference, the constitutional components subject to amendment under Part V are constitutional texts and architecture.

32. The former category includes those documents that are enumerated in subsection 52(2) of the *Constitution Act, 1982*. Those listed texts have a primary but non-exhaustive place in determining constitutional norms.[48] They include both the *Constitution Act, 1867* and the *Constitution Act, 1982*, as amended and interpreted.[49]

33. The latter category, constitutional architecture, encompasses the "internal architecture" or "basic structure" of the Constitution.[50] This architecture is erected from the explicit and implicit links between individual elements of the Constitution of Canada.[51] It establishes relationships

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[44] Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49 UTLJ 519 at 575-83. Note that Part V sets out one amending formula that does not expressly refer to the "Constitution of Canada". Section 45 provides: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province."

[45] *Patriation Reference*, *supra* at 874; *Secession Reference*, *supra* at paras 32, 148.

[46] *Secession Reference, supra* at para 32.

[47] These unentrenched components cover, first, common law and statutory rules that are 'constitutional' insofar as they crystallize constitutional conventions or "bear[] on the operation of an organ of the government" (*Ontario Public Service Employees' Union v Ontario (AG)*, [1987] 2 SCR 2 at 40 [*OPSEU*]) and, second, elements of the political constitution, such as conventions and the workings of Parliament: *Patriation Reference, supra* at 880-84; *Secession Reference, supra* at para 32; *Osborne v Canada (Treasury Board),* [1991] 2 SCR 69 at 86-88 [*Osborne*]; *Ontario English Catholic Teachers' Assn v Ontario (AG)*, 2001 SCC 15 at paras 63-64, [2001] 1 SCR 470 [*Ontario Teachers*].

[48] *Secession Reference, supra* at para 32; *NB Broadcasting, supra* at 375-78; *Remuneration Reference, supra* at para 92.

[49] *Constitution Act, 1982*, *supra*, s 52(2).

[50] *Secession Reference, supra* at para 50; *OPSEU, supra* at 57.

[51] *Secession Reference, supra* at para 50.

between levels and branches of government and between the state and the individual.[52] In addition, it contemplates the existence of certain political institutions and the "basic structural imperatives" that govern them.[53] Ultimately, the architecture of the Constitution of Canada is inherently embedded within the constitutional text, infusing each provision with an animating connection to the Constitution as a whole.

34. The procedures for constitutional amendment set out in Part V do not apply to all types of constitutional change. Part V is concerned only with formal amendments to the Constitution of Canada, that is, amendments requiring action by the legislative bodies of the provincial and federal governments. A constitutional change implemented by formal means is itself entrenched within the Constitution of Canada and part of Canada's "supreme law".[54]

35. Furthermore, the meaning of "Constitution of Canada" for the purposes of Part V does not extend to the entire "global system" of constitutional components. It is not necessary, within the present Reference, to determine whether unwritten constitutional principles are subject to amendment through the process set out in Part V. Nonetheless, it must be noted that Part V does not apply to the unentrenched components of the Constitution of Canada. Defining "Constitution of Canada" in such broad terms for the purposes of Part V would, in effect, legally entrench the entire political constitution and subject it to enforcement by the courts, a result contrary to the fundamental purpose and premises of a political constitution.[55]

36. Accordingly, an amendment to the Constitution of Canada for the purposes of Part V refers to formal legislative action that modifies, in purpose or effect, the text of the constitutional instruments listed in subsection 52(2). The same is true of constitutionally entrenched norms that are not expressly found in the constitutional text, but which emerge from a proper interpretation of the Constitution as a whole, including those constitutional interpretations that have been pronounced by this Court.

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[52] *R v Demers,* 2004 SCC 46 at para 86, [2004] 2 SCR 489 (per LeBel J).
[53] *OPSEU, supra* at 57.
[54] *Constitution Act, 1982*, *supra,* ss 52(1), 52(3).
[55] The political constitution evolves through informal means. Moreover, the unentrenched legal constitution evolves through the "ordinary" processes of the common law and legislative amendment: *Secession Reference, supra* at para 98; *Osborne, supra* at 86-88; *Patriation Reference*, *supra* at 880; *Veto Reference, supra* at 803; *Ontario Teachers, supra* at paras 63-65.

37. In addition, an amendment to the Constitution of Canada for the purposes of Part V refers to formal legislative action that modifies, in purpose or effect, the internal architecture of the Constitution of Canada. Such an amendment would likely require an amendment to the text, as properly interpreted, of a constitutional instrument listed in s 52(2). In this regard, Part V would apply for the reasons set out above. In addition, given the stabilizing character of the constitutional architecture and the potentially de-stabilizing effects of architectural amendments, most amendments to basic constitutional structure will be classified within Part V.

(ii) The Classification of Amendments within Part V

38. Once it is confirmed that a proposal constitutes a constitutional amendment within the scope of Part V, the next question is: Where does the amendment fall within Part V? Answering this question is a classification exercise. Akin to the 'pith and substance' analysis in division of powers cases,[56] this exercise involves construing both the proposed amendment and the "heads of amendment" set out in Part V. Determining what questions to ask at both steps of the classification exercise requires a proper understanding of Part V, in particular the nature and meaning of its primary operative provisions – sections 38, 41, 42, 43, 44, 45 and 47[57] – and the ways in which these provisions fit together.

(a) The degree of consensus required to amend the Constitution of Canada depends on the subject and significance of the amendment

39. The provisions of Part V specify the degrees of consensus that must be met before an amendment to the Constitution of Canada can be officially proclaimed. Together, the provisions set out the general procedural rule for implementing amendments to the Constitution of Canada (s 38(1)), along with its exceptions (ss 41, 43, 44, 45) and variations (ss 42, 47). Individually, each provision assigns a particular degree of consensus to a particular class of amendments.

1. Section 38

40. Section 38, entitled "General procedure for amending Constitution of Canada", is the residual provision of Part V. It sets out, as a general rule, the requisite degree of consensus

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[56] See *Securities Reference, supra* at paras 63-65 and *Canadian Western Bank, supra* at paras 25-27.

[57] The remaining provisions of Part V – sections 39, 40, 46, 48 and 49 – deal with particulars of the amendment process.

required for formal constitutional amendments in relation to matters and provisions that do not trigger any other formula.

41. Section 38 is commonly known as the “7/50” formula because, given Canada’s current provincial composition, the threshold set by subsection 38(1) is met if, in addition to Parliament, the legislative assemblies of seven provinces comprising at least fifty percent of the provinces’ total population adopt the requisite resolutions.

42. Section 38 provides for an “opt out” mechanism. Pursuant to subsection 38(2), amendments that “derogate[] from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province” must be authorized by resolutions supported by a “majority of the members” (not merely a majority of votes) in the Senate, the House of Commons and the requisite legislative assemblies. Pursuant to subsection 38(3), non-consenting provinces can opt out of the application of the “supermajority” amendments contemplated by subsection 38(2).

2. Section 41

43. Section 41 is an exception to the general rule set out in subsection 38(1). It subjects some constitutional matters to the greatest possible degree of entrenchment without wholly precluding their formal amendment. Pursuant to section 41, amendments in relation to certain matters may be accomplished only with the unanimous consent of Parliament and all of the provincial legislatures.

44. Read as a whole, section 41 provides that the political authorities of each federal unit must agree on any changes to the most foundational elements of the Constitution of Canada.

45. First, the express wording of section 41 establishes that unanimity is required in order to make amendments in relation to the constitutional monarchy and the offices of its representatives in Canada (41(*a*)).

46. Second, unanimous consent is required for amendments that engage both the federalism principle at the national level (thereby requiring meaningful levels of input by both provincial and Parliamentary actors) and issues of unique interest to one or some provinces (thereby

warranting a veto for those provinces). Such amendments include those in relation to the "Senate floor" rule, which accords a minimum level of political representation in the House of Commons for provinces with small and/or declining populations (41(*b*)); subject to section 43, the use of the English and French language, which protects the interests of linguistic minorities against national majorities (41(*c*));[58] and the composition of the Supreme Court of Canada, which contemplates guaranteed representation of Quebec's civil law tradition in the nation's highest court (41(*d*)).

47. Third, section 41 ensures that Part V – the rules safeguarding the entrenchment and evolution of the Constitution of Canada – can be changed only with the unanimous consent of each constitutive member of the federation as a whole (41(*e*)). Applying the unanimity threshold to amendments to Part V is of logical necessity.

48. Section 41 is the most onerous exception to subsection 38(1). Reading the provision as a whole in light of its context reveals its underlying purpose and principled basis, namely to apply to amendments of the utmost constitutional significance within Canada's federal arrangement. Accordingly, section 41 applies to proposed changes to the foundational terms and conditions of the Canadian union, as secured in the watershed constitutional moments of the country's history. Any proposed amendment engaging this principle and of similar transformative significance to the types of matters expressly listed in section 41 should be subject to its unanimity threshold.

3. Section 42

49. Section 42 is a particularization and variation of the general section 38 rule. It establishes a class of amendments that are subject to the 7/50 threshold of consent set out in section 38(1), but which are not subject to the "super majority" requirement or the provincial opt out scheme set out in subsections 38(2) to (4).

50. Read as a whole, subsection 42(1) prescribes the degree of consensus required to modify key elements of national institutions. The express wording of section 41 establishes that, first, the

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[58] Section 41(c) is subject to section 43, which provides that "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". Section 43 is discussed in greater detail in Part IIIC(b)(i)(4), below.

7/50 principle must be satisfied in order to change the principle of proportionate representation in the House of Commons (42(1)(*a*)), the powers of the Senate and the method of selecting Senators (42(1)(*b*)), the number of Senators by which a province is entitled to be represented in the Senate and the residence qualifications of Senators (42(1)(*c*)), and the Supreme Court of Canada (42(1)(*d*)).

51. In addition, subsection 42(1) protects the stability of the "7/50" formula itself. Both the extension of existing provinces into the territories (42(1)(*e*)) and the creation of new provinces (42(1)(*f*)) would change the precise number and configuration of provinces that would satisfy the two-thirds and fifty percent thresholds set by subsection 38(1). Therefore, just as changing the unanimity formula requires unanimous consent, constitutional changes that would unseat the 7/50 threshold as sufficient to satisfy subsection 38(1) require the approval of seven provinces that comprise fifty percent of the population.

52. Reading section 42 as a whole in light of its context reveals that within Part V, section 42 is a particularization of the general rule. It further reveals that section 42 is intended to deal with amendments to the essential features of national institutions that engage the interests of the provinces fully but equally, and which are "indivisibly related to the implementation of the federal principle".[59] These types of amendments are properly subject to the 7/50 threshold set out in subsection 38(1), as they require the consensus of a majority of the provinces but not any particular province. At the same time, they are properly particularized outside of subsection 38(1) because, given the interests at stake, it is neither feasible nor principled to permit some provinces to "opt out" of amendments secured pursuant to section 42. For the reasons set out above with respect to section 41, amendments in relation to matters not expressly listed in section 42, but which engage the same principle and implicate the same measure of significance or intensity, should be captured within the scope of section 42 and subject to the consensus threshold set out in subsection 38(1).

4. Section 43

53. Section 43 provides that an amendment in relation to any provision that applies to at least one, but not all, provinces must be authorized by Parliament and the provinces concerned.

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[59] *OPSEU, supra* at 40.

54. Unlike sections 41 and 42, which are triggered by amendments in relation to certain "matters", section 43 is triggered by amendments in relation to certain "provisions". More specifically, section 43 applies to amendments to constitutional provisions that apply to at least one, but not all, provinces. The triggering issue is one of scope and it is resolved by looking to the constitutional provision being amended, not to the enactment proposing the amendment.[60]

55. Looking to linguistic context, the English text of section 43 suggests that its application is permissive ("An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all provinces…may be made…"). However, the French text reveals that when a proposed amendment to the Constitution of Canada is in relation to a provision that applies only to "certaines provinces", the application of section 43 is mandatory ("Les dispositions de la Constitution du Canada applicables à certaines provinces seulement ne peuvent être modifiées que…"). Moreover, the English text indicates that the provincial consent required to satisfy section 43 is that of "each province to which the amendment applies". This must be read together with the broader onus prescribed by the French text, which directs that the consent required is that "de l'assemblée législative de chaque province concernée".

5. Section 44

56. Section 44 establishes another exception to the general rule. It provides that some amendments to the Constitution of Canada can be made by Parliament alone. More specifically, it provides: "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".[61]

57. Section 44 is an exception to subsection 38(1) in part because it carves out a segment of amendments to the Constitution of Canada that can be achieved by Parliament alone. Further, it is an exception because it carves out a subset of constitutional amendments – those in relation to the executive government of Canada, the Senate and the House of Commons – for which it, and

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[60] *Hogan v Newfoundland (AG)*, 2000 NFCA 12 at para 82, 183 DLR (4th) 225 [*Hogan*], leave to appeal dismissed, *Hogan v Newfoundland (AG)*, [2000] SCCA No 191.

[61] Note that the French text of section 44 is slightly different than the English. It provides: "Sous réserve des articles 41 et 42, le Parlement a compétence exclusive pour modifier les dispositions de la Constitution du Canada relatives au pouvoir exécutif fédéral, au Sénat ou à la Chambre des communes".

not subsection 38(1), is the residual provision. In this sense, Section 44 provides the residual amending formula for those matters in relation to the Senate not captured by section 41 or 42.

58. A contextual reading of section 44 establishes that this provision pertains only to non-essential matters or matters in relation to the constitution of the federal government, both subjects in which the provinces have no significant interest.

59. First, reading section 44 in light of the other provisions of Part V shows that section 44 was intended to have limited scope. Section 44 was expressly made subject to sections 41 and 42. These latter two sections ensure that amendments in relation to matters that are "indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union"[62] are implemented only with the consent and approval of some configuration of Parliament and the provincial legislatures. It follows that section 44 itself can only apply to matters within the Constitution of Canada that are, in the words of this Court in the *Upper House Reference,* within the "constitution of the federal government, as distinct from the provincial governments".[63] Once the federalism principle or the core features of the union are engaged, the scope of section 44 is spent and one of the other amending formulae must apply.

60. This interpretation is supported by the scope and subject of the provision immediately following section 44. Whereas the heading of section 44 is "Amendments by Parliament", the heading of section 45 is "Amendments by provincial legislatures". Further, whereas section 44 provides that, subject to sections 41 and 42, Parliament alone can amend the Constitution of Canada in relation to the executive government, House of Commons and the Senate, section 45 provides that, subject to section 41, a provincial legislature alone can amend the constitution of the province.

61. Reading sections 44 and 45 together suggests that each provision carves out a segment of constitutional amendments that only engage the interests of one level of government and authorize that level of government to unilaterally enact them. Amendments in relation to matters that fall outside those exclusive spheres of interest must be implemented pursuant to an

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[62] *OPSEU, supra* at 40.
[63] *Upper House Reference, supra* at 70.

amending procedure that requires a certain degree of cooperation and coordination between the two levels of government.

62. Second, a narrow understanding of section 44 is consistent with the historical context of Part V. The legislative history of Part V establishes that framers of the *Constitution Act, 1982* never intended for the scope of section 44 to extend beyond the scope of its predecessor, section 91(1) of the *Constitution Act, 1867.*

63. Third, a broad interpretation of section 44 would have untenable constitutional implications. If section 44 was, for example, intended to apply to all matters in relation to the Senate, the House of Commons and the executive government of Canada other than those expressly listed in sections 41 and 42, amendments with profoundly transformative effects on the state of the union could be made by Parliament alone at the provinces' expense. For example, on this interpretation, abolition of the Senate – a matter not expressly listed in section 42 – would fall, it would seem, within Parliament's exclusive authority pursuant to section 44. This is an absurd result. Indeed, the Attorney General of Canada concedes that, at a minimum, the degree of consensus required to effect abolition is that of the 7/50 formula. Similarly, the Reference questions do not contemplate achieving abolition by virtue of anything less than the subsection 38(1) procedure.

6. Section 47

64. Finally, section 47 provides for a variation of the general operation of sections 38, 41, 42 and 43. Amendments made under these sections can be made without the consent of the Senate if the Senate fails to adopt a resolution approving of an amendment within six months of the House of Commons' corresponding resolution and if the House then adopts its resolution again.

65. The operation of section 47 eliminates the need for Senate approval in cases where a constitutional amendment is proclaimed with the requisite degree of provincial consent (i.e. pursuant to sections 38, 41, 42 and 43). However, section 47 does not apply to amendments that

are enacted by Parliament alone under section 44. Such amendments, which do not receive any measure of formal provincial consent, come into effect only following Senate approval.[64]

(b) Part V is a complete procedural code and establishes a hierarchy of amendment formulae

66. As stated above, Part V is a complete procedural code that exclusively and exhaustively prescribes the final steps to be followed when legally and formally amending the Constitution of Canada. Shortly after Patriation, the Court explained in the 1982 *Veto Reference,* that the *Constitution Act, 1982* established Part V as the set of procedural rules governing constitutional amendment that wholly unseated the rules existing at the time and exhausted the issue of constitutional amendment procedures in Canada.[65]

67. Part V's status as a complete code is affirmed by subsection 52(3) of the *Constitution Act, 1982*, which is itself a textual expression of the principles of constitutionalism and the rule of law. Subsection 52(3) provides that formal amendment to the Constitution of Canada can only take place in accordance with the authority set out therein. Part V – the "Procedure for Amending Constitution of Canada" – prescribes that authority.

68. That Part V is a self-contained code of amending procedures is obvious from its structure. Part V is arranged as a series of exceptions[66] and variations[67] to a general rule.[68] The general rule is residual. When an amendment to the Constitution of Canada does not trigger any of the variations or exceptions, the general, residual rule will apply. Part V is therefore structurally designed to accommodate all possible formal amendments to the Constitution of Canada.

69. Moreover, the logic of Part V establishes that it is a complete procedural code. The provisions of Part V construct a hierarchy of amending procedures that establishes a cascading scheme of consensus thresholds that attach to constitutional amendments according to their subject and significance. At the top of the hierarchy is section 41. It entails the most onerous

[64] If, for political reasons, an amendment falling within Parliament's section 44 jurisdiction was enacted pursuant to sections 38(1) or 41 instead, the amendment would receive extensive provincial consent and thus could be proclaimed in force without senatorial approval by virtue of the section 47 process.
[65] *Veto Reference, supra* at 806.
[66] *Constitution Act, 1982, supra*, ss 41, 43, 44, 45.
[67] *Constitution Act, 1982, supra*, ss 42, 47.
[68] *Constitution Act, 1982*, *supra*, s 38(1).

threshold – the unanimous consent of Parliament and the provincial legislatures. At the bottom is the residual procedure set out in subsection 38(1). In between are the exceptions and variations described above. The logic of the hierarchy is such that any formal amendment to the Constitution of Canada will be captured by the formulae set out in Part V.

70. More specifically, when determining which amending procedure applies to a proposed amendment, the first inquiry should be whether the amendment falls within the scope of section 41. If so, the highest level of consensus – unanimity – is warranted. If not, working downwards within the hierarchy, the focus shifts to section 42. The question is: Does the proposed amendment fall within the scope of subsection 42(1)? If yes, then the 7/50 formula, as modified by subsection 42(2), applies. If not, the inquiry proceeds to consider whether the proposal seeks to amend a provision of the Constitution of Canada that applies only to one or some provinces. If so, then the bilateral or multilateral procedures set out in section 43 apply. Otherwise, the analysis turns to sections 44 and 45. The question is: Does the proposal amend the constitution of only one level of government? If yes, the procedure set out in section 44 (federal) or section 45 (provincial) will apply. If not, the inquiry reaches the bottom tier of the hierarchy. Here, a proposed amendment that has escaped the application of each exception and variation will be governed by the residual amending procedure, as set out in section 38(1).

71. It is of note that, in some cases, the procedure found to apply by virtue of the hierarchy will be supplemented or varied by section 43 or section 47. As will be discussed below in the analysis of the fourth Reference question, an amendment governed by section 44 might also trigger the bilateral or multilateral process set out in section 43. Further, section 47 might vary the application of sections 38, 41, 42, and 43 in cases where the Senate fails to adopt a resolution authorizing the amendment.

72. Part V's status as a complete code is not affected by external enactments or interpretations, such as section 35.1 of the *Constitution Act, 1982,*[69] the *Secession Reference,* the

[69] Section 35.1 of the *Constitution Act, 1982*, added to the *Constitution Act, 1982* by virtue of the section 38(1) amendment procedure (SI/84-102), provides: "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."

"*Regional Veto Act*",[70] or submissions that constitutional amendment requires consultation with representatives of aboriginal peoples or officials of the Territories, that bear on the constitutional amendment process. Part V is a set of constitutionally entrenched rules governing the final steps of the formal amendment process. It provides for the level of consensus that must be achieved before a constitutional amendment can be officially and finally proclaimed as part of the Constitution of Canada. In contrast, section 35.1, the *Secession Reference* and duties to consult and negotiate with territorial or aboriginal representatives set out obligations to consult and negotiate that apply prior to the engagement of the Part V procedures. Moreover, the *Regional Veto Act* limits when a Minister of the Crown can move for a resolution to authorize an amendment to the Constitution of Canada under section 38(1).[71] These limits are statutory and subject to repeal or amendment by virtue of the ordinary legislative process. They do not alter the foundational, constitutional rules set out in Part V. In the event that the *Regional Veto Act* did alter those rules, it would constitute an amendment of the Constitution of Canada within the meaning of Part V and require provincial consent in order to be operative.

(c) The classification of amendments within Part V depends on the matter and significance of the amendment and the scope of the provision being amended

73. This understanding of Part V establishes that in order to confidently match a proposed amendment to the appropriate amending process, two inquiries are required. At the first stage of the inquiry, both the purpose and effect of the amendment are relevant.[72] The objective is to determine the "true nature" and meaning of the proposed amendment, which is a question of substance and essence rather than technicality or form.[73]

74. A further objective is to assess the significance of the proposed amendment. This is a question of the extent and character of the amendment on the Constitution of Canada. Answering this question requires an understanding of the particulars of both the proposed amendment and the Constitution of Canada as it exists prior to the amendment. Only by having a firm grasp on

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[70] *An Act respecting constitutional amendments,* SC 1996, c 1 [*Regional Veto Act*].
[71] *Regional Veto Act, supra*, s 1(1).
[72] This is akin to the pith and substance analysis: *Securities Reference, supra* at paras 63-64; *Canadian Western Bank, supra* at para 27.
[73] *Canadian Western Bank, supra* at para 26.

that which is being changed, as well as that which will effect the change, can the true subject and character of the proposed amendment be determined.

75. Once the first stage of the characterization exercise is complete, it is then necessary to determine whether the amendment is in relation to a matter or provision that triggers an exception to subsection 38(1) or whether the general procedure applies. Both the matter and the scope of what is being amended are relevant. The matter being amended will determine whether section 41, 42, or 44 applies. The scope of what is amended – that is, a provision that applies to at least one but not all provinces or the constitution of a province – will determine whether sections 43 or 45 apply.

76. Similarly, it will always be necessary to look beyond the explicit wording of the text of the provisions of Part V. If a proposed amendment is not, *prima facie*, in relation to any of the matters identified in the amending formulae, it remains to be determined whether the amendment, in either subject or significance, purpose or effect, falls within the principled bases of the amending formulae. If it is not so captured, the 7/50 formula set out in subsection 38(1) – the residual formula – will apply.

77. This framework suggests that, in relation to the Senate, constitutional amendments that purport to alter the fundamental architecture of the Constitution of Canada will fall within the purview of section 41 and will require unanimity. Constitutional amendments affecting the Senate in any respect in which the provinces have a significant interest are governed by section 42. All other constitutional amendments in relation to the Senate can be accomplished by Parliament acting unilaterally, under section 44, as the residual amending formula with respect to this subject matter.

D. Application of Principles and Structure to Reference Questions

(i) Constitutional Status of the Senate

78. The constitutional status of the Senate can be determined from the text of the *Constitution Act, 1867* (properly interpreted in light of the principles of constitutional interpretation set out above), from the position of the Senate in the architecture of the Constitution, and from the decisions of this Court assessing the historical context of the Senate.

79. Sections 21 to 36 of the *Constitution Act*, 1867 provide explicit constitutional requirements for the appointment, qualification and disqualification of Senators. Of importance for this Reference, the *Constitution Act*, 1867 prescribes the qualifications for appointment, which include ownership of property in the province of appointment (s 23), the method of summoning by the Governor-General (ss 24, 26 and 32) and the tenure of Senators (s 29). Taken together, and read in light of the Preamble to the *Constitution Act, 1867*, these provisions also establish that the Constitution of Canada only contemplates an unelected Senate.

80. In addition, based on the historical record, this Court has identified two essential features of the Senate: first, that it operate as a "thoroughly independent body which could canvass dispassionately the measures of the House of Commons" and provide "sober second thought in legislation",[74] and, second, that it "afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation".[75]

81. It is in this context that the proposals set out in the Reference questions should be assessed.

(ii) Changes to Term Limits – Reference Question 1

82. Each of the proposals with respect to tenure would constitute an amendment to section 29 of the *Constitution Act, 1867,* as amended by the *Constitution Act, 1965,* by which the federal government unilaterally amended senatorial tenure from life to age 75. The question to be considered in relation to the proposed amendments to tenure is, then, which amending formula under Part V applies.

83. Tenure is not specifically referenced in section 42 of the *Constitution Act, 1982*. It does not follow that the authority to amend the tenure of Senators resides in section 44. Section 44 is a residual power applicable only if the subject matter is not included within section 41 or within section 42, interpreted in a broad, purposive and contextual manner.

84. As stated above, section 42 governs constitutional amendments that seek to change the essential features of national institutions in a manner that engages the interests of the provinces

[74] *Upper House Reference, supra* at 76, 77.
[75] *Upper House Reference*, *supra* at 67.

fully but equally and is indivisibly related to the implementation of the federal principle. Moving from life tenure to a fixed term of office, whatever its duration, is a qualitative change to the nature of the tenure of Senators. The introduction of term limits changes a key feature of the Senate, and relates to its core functions. A constitutional amendment of this scope and significance is captured by the broad interpretation of section 42 previously described.

85. Limiting the term of office of Senators to the age of 75 did not effect such a qualitative change. Under the previously enacted subsection 91(1) of the *Constitution Act, 1867,* this Court held that it was within the constitutional authority of Parliament to unilaterally reduce the tenure of Senators from life to the age of 75, on the basis that the "imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate."[76]

86. The Court also stated that, "[a]t 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'."[77] It is reasonable to suppose that Senators for whom service in the Senate is limited to short terms will be less capable of providing the degree of sober second thought that is at the core of the Senate's constitutional function, and that the imposition of term limits and renewable mandates may, and in some circumstances almost certainly will, affect the independence of the Senate. The impact of particular term limits is uncertain and it is arguable that *any* term limits that leave Senators looking for either re-appointment or other employment when they finish their term are capable of affecting the Senator's independent assessment of legislation.

87. Nonetheless, it is not necessary for the Court to determine this issue by drawing a line based on untested assumptions as to the length of time that is necessary for Senators to function with the degree of independence contemplated for their office.

88. The preferable approach is to recognize that there is a qualitative difference between life tenure and fixed terms of office (renewable or not and retrospective or not), one that goes to an essential condition of the independence of the Senate as a national institution in which provinces have an interest. Such a change falls within the principled basis of section 42, and the Court

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[76] *Upper House Reference, supra* at 77.
[77] *Upper House Reference*, *supra* at 76.

should leave the question of what, if any, restrictions on tenure are appropriate to be determined through political deliberations undertaken within the amendment process prescribed by this provision.

89. On this analysis the response to the first question is that Parliament does not have the authority under section 44 to amend section 29 of the *Constitution Act, 1867* in the proposed ways.

(iii) Consultative Elections – Reference Questions 2 and 3

90. Questions 2 and 3 ask whether it is within Parliament's authority under either section 91 of the *Constitution Act, 1867* or section 44 of the *Constitution Act, 1982* to enact legislation that creates an electoral framework for establishing the population's preferences for nominees to the Senate. Question 2 refers to a process administered at the federal level, as set out in Bill C-20, the *Senate Appointment Consultations Act*. Question 3 refers to a provincially-administered process, as set out in Bill C-7, the *Senate Reform Act*.

91. These are the only proposals among the Reference questions that would not require any change to the text of the Constitution of Canada. Thus a threshold question is whether federal legislation, in the form of Bill C-7, Bill C-20 or some other alternative, that authorizes non-binding elections to determine the population's preferences for nominees to the Senate amends the Constitution. If it does, the Federal Government seeks to support the validity of the legislation by reference to section 44 of the *Constitution Act*, 1982. If it does not, the Federal Government relies on Parliament's general powers under section 91 of the *Constitution Act*, *1867*.

92. Both Bill C-7 and C-20 prescribe the rules for, *inter alia*, election officials, nominations of candidates (including endorsements by political parties), voting eligibility, voting, counting the ballots and compiling the list of Senate nominees, campaign financing and advertising, and offences and enforcement.[78] Each Bill incorporates, by reference or directly, the applicable federal and provincial electoral legislation.[79]

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[78] Bill C-20, *supra*; Bill C-7, *supra*.
[79] See e.g. Bill C-20, *supra*, ss 2(1), 2(2), 9, 35(3)(*e*), 44, 45, 46, 73(1), 80(4), 97, 100(4), 102, 103, 106(2), 106(4); Bill C-7, *supra*, Schedule, ss 5(2), 5(4), 8, 24, 27, 29(5), 31, 32, 41-44.

93. The preamble of each Bill proclaims that "it is important that Canada's representative institutions, including the Senate, continue to evolve in accordance with the principles of modern democracy and the expectations of Canadians" and that the "Government of Canada has undertaken to explore means to enable the Senate better to reflect the democratic values of Canadians and respond to the needs of Canada's regions".

94. The Preamble to Bill C-7 further provides that "it is appropriate that those whose names are submitted to the Queen's Privy Council for Canada for summons to the Senate be determined by democratic election by the people of the province or territory that a senator is to represent". Pursuant to section 3 of Bill C-7, if a province or territory enacts legislation that is "substantially in accordance" with the elective framework set out in the Bill and compiles a list of Senate nominees from such an election, the Prime Minister "must consider" those nominees when recommending Senate appointees to the Governor General. Section 1 of the prescribed electoral framework crystallizes the "basic principle" that Senators appointed for a province or territory "should be chosen" from the list of nominees submitted by the government of that province or territory.[80]

95. Neither Bill C-7 nor Bill C-20 strips the Governor General of his authority to summon Senators under sections 24, 26 and 32 of the *Constitution Act, 1867*. Further, both bills state Parliament's desire to "maintain the essential characteristics of the Senate within Canada's parliamentary democracy as a chamber of independent, sober second thought".

96. Questions 2 and 3 should be answered by means of the same two-step framework applicable to the other proposals in this Reference. This requires a determination of whether statutes authorizing consultative elections are amendments to the Constitution of Canada within the meaning of Part V, and, if so, where these amendments fall within Part V. On this matter, the two *amici curiae* have different perspectives.

97. From one perspective, the analysis leads to the conclusion that both Bill C-7 and C-20 would constitute amendments to the Constitution of Canada within the meaning of Part V and fall within the scope of subsection 42(1). On this view, Questions 2 and 3 should be answered in the negative. Parliament cannot unilaterally enact Bill C-7 or C-20 under either section 91 of the

[80] Bill C-7, *supra*, Schedule, s 1.

Constitution Act, 1867 or section 44 of the *Constitution Act, 1982*. Both schemes require provincial consent that satisfies the 7/50 threshold.

98. From a second perspective, the analysis leads to the conclusion that legislation authorizing non-binding elections to determine electoral preferences for Senate nominees do not constitute an amendment to the Constitution of Canada within the meaning of Part V. Parliament has the power to authorize consultative elections under section 91 of the *Constitution Act, 1867*.

99. These two analyses are set out below.

(a) Considerations suggesting consultative elections necessarily amend the Constitution.

100. The first question in answering reference questions 2 and 3 is: Are Bills C-7 and C-20 amendments to the Constitution of Canada within the meaning of Part V?

101. At this first stage, the answer will be obvious when the proposed enactment modifies, whether by addition or deletion, the explicit text of the Constitution of Canada. This is not the case with respect to Bills C-7 and C-20. Neither Bill expressly proposes that any words be added to, or deleted from, any instrument identified in subsection 52(2). This is, however, not determinative. At this stage, it is also necessary to consider whether the proposed schemes modify the entrenched parts of the Constitution of Canada in ways that are not immediately obvious from a *prima facie* review of the explicit words used. Our Constitution is not a technical collection of words to be strictly read, but a dynamic set of texts to be interpreted and understood substantively.

102. In this Reference, the entrenched part of the Constitution of Canada that would be amended by Bills C-7 and C-20 is the non-elected status of Senate. This status is entrenched in the Constitution of Canada by the text of the *Constitution Act, 1867.* By virtue of sections 24, 26 and 32 of the *Constitution Act, 1867*, the Constitution of Canada only contemplates an unelected Senate. This is confirmed by the Preamble to the *Constitution Act, 1867*. In the *Upper House Reference,* the Court rejected the argument that Parliament could unilaterally transform the Senate into an elected house in part because the Preamble, which referred to “a constitution

similar in principle to that of the United Kingdom", guaranteed that the Senate of Canada would be an unelected upper chamber.[81]

103. Moreover, the non-elected status of Senators is a fundamental feature of the Senate, entrenched in the configuration of Parliament that was agreed to at the time of Confederation and has remained unchanged in its fundamental dimensions. The Court in the *Upper House Reference* held:

> 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.[82]

104. Indeed, the Court in that *Reference* held that the transformation of the unelected status of Senate would "involve a radical change in the nature of one of the component parts of Parliament."[83] It was therefore necessarily a change that required federal and provincial consensus. Similarly, today, the "method of selecting Senators" is entrenched in subsection 42(1) of the *Constitution Act, 1982*, the provision intended to protect the key features of centralized institutions that, like the Senate, necessarily engage the federalism principle. By virtue of this entrenchment, the Constitution of Canada protects the principal character of the constitutional method of selecting Senators, namely that it preserve the independence of Senate and therefore not be tied to an electorate, an electoral process, or a popular mandate.

105. The creation of an electoral system like those contemplated in Bills C-7 and C-20 would change the non-elected status of the Senate in a qualitative and substantive way. At present, Senators are summoned by the Governor General, at the Prime Minister's recommendation. The process is intended to preserve the Senate's constitutional independence. Keeping the selection of Senators at arm's length from clear expressions of the public will – and the expectations and representative responsibilities that accompany them – is inherent in the current, and historical, constitutional design of the Senate, as well as of the other institutions of governance, such as the House of Commons, that are constitutionally linked to the independent operation of the Senate.

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[81] *Upper House Reference, supra* at 77.
[82] *Upper House Reference, supra* at 77.
[83] *Upper House Reference, supra* at 77.

106. In contrast, the character of the appointment and status of Senators selected from amongst the winners of consultative elections would differ fundamentally from that entrenched within the current constitutional configuration. In this respect, the experience of consultative elections in Alberta provides no basis to conclude otherwise. The express federal invitation to set up an electoral framework, and the commitment to consider their result, as found in Bill C-7, provides an unprecedented context that would enhance the significance of the election of senatorial candidates. The appointment and status of Senators selected by virtue of these elections would be tied to an expression of the popular will, as determined by an intricate electoral process in which provincial and territorial populations cast their votes for individual senatorial candidates, all of whom campaigned under the banner of a political party or as an independent, having set out an electoral program for voters to consider. These elections would take place within frameworks endorsed by Parliament and expressly conceived of, as stated in the legislative Preambles, as more democratic and more legitimate than the current appointment process. This is undoubtedly a change to the Senate's non-elected status as it is now entrenched in the Constitution of Canada.

107. On this analysis, it is irrelevant whether the consultative electoral schemes contemplated by Bill C-7 or C-20 are binding or non-binding, good or bad, constraining of constitutional conventions or otherwise. The key is whether the proposed enactments modify the entrenched dimensions of the Constitution of Canada. Reimagining the selection of Senators so as to attach it to an expression of democratic will is a palpable change to the constitutionally entrenched character of the Senate and its Senators as unelected and independent. It thus constitutes an amendment to the Constitution of Canada within the meaning of Part V.

108. Given this conclusion, the analysis moves to the second stage, classification. The question is: Where do Bills C-7 and C-20 fit within Part V? That is, which amending formula governs their enactment? The second stage calls for an assessment of the quality and significance of the proposed constitutional change.

109. In this instance, the answer at the second stage is straightforward in light of the analysis at the first. The non-elected status of Senate is entrenched by virtue of, *inter alia*, "method of selecting Senators". A qualitative change of that status is, by logical necessity, an amendment to the Constitution of Canada in relation to a matter set out in subsection 42(1)(*b*).

110. Moreover, by virtue of the principled basis of Part V and its provisions, section 42 preserves the integral features of Canada's principal institutions of governance – the House of Commons, the Senate, the Supreme Court of Canada – until the requisite degree of consensus is secured for their amendment. The Senate's non-elected status is part of its defining character within the current constitutional configuration. The schemes set out in Bills C-7 and C-20 alter that status. Such a qualitative change clearly falls within the principled parameters of subsection 42(1). This would be the case even without the express inclusion of "method of selection" in subsection 42(1)(*b*). It follows that the enactment of Bills C-7 and C-20 can be accomplished only upon reaching the requisite level of federal and provincial consent, as prescribed by subsection 42(1) and, correspondingly, subsection 38(1).

(b) Considerations suggesting Consultative elections do not amend the Constitution

111. Because the proposals to authorize consultative elections do not require the amendment of any of the text of the Constitution, a starting point in assessing whether they amend the Constitution in some other way is to determine what is the law of the constitution that governs the selection of Senators.

112. An essential feature of the Senate in our Constitution is that it is non-elected – that is, Senators are appointed by the Governor-General, not directly elected. All parties, including the Attorney General of Canada,[84] agree that if the proposals were to elect Senators directly, they would require an amendment to section 24. This would in turn require application of the 7/50 amending formula under section 42 of the *Constitution Act,* 1982 as an amendment in relation to the method of selecting Senators.

113. The other constitutional element relating to the selection of Senators is the convention that in appointing Senators, the Governor-General acts on the advice of the Prime Minister and that the Prime Minister has unfettered discretion in providing this advice. This convention has been variously characterized as reflecting the prerogative of the Prime Minister or simply a basic convention of responsible government.[85]

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[84] Factum of the Attorney General of Canada, para 143.

[85] See comments of Senator Hays and Professor Hogg at the first Senate Committee hearing on Bill S-4: Senate, Special Committee on Senate Reform, *Proceedings*, 39th Parl, 1st Sess, No 4 (20 September 2006) at 4:41-4:43.

114. Under the proposal to hold consultative elections at either the federal or provincial level, neither of these constitutional features would be altered. The Prime Minister would continue to advise the Governor-General on the appointment of Senators and the Governor-General would continue to appoint Senators pursuant to section 24. Specific bills (such as Bill C-7, to be discussed later in this section) might impose additional features that could affect these two constitutional provisions, but within the framework of the Reference questions, non-binding legislation to consult the population of each province or territory as to its preferences for potential nominees for appointment to the Senate would not, on that account alone, affect either the non-elected status of the Senate or the unfettered discretion of the Prime Minister to advise the Governor-General and accordingly would not amend the Constitution.

115. There appear to be two principal arguments against this position. Many of the provincial Attorneys General argue that in substance, these elections would become binding on the Prime Minister because of political pressures to respect the democratic will. This argument is not consistent with the experience relating to the Alberta consultative elections, where the "winner" has been appointed in some cases, and passed over in others. Experience demonstrates that as long as the election is truly non-binding, as is the case for the Alberta process, Prime Ministers will maintain their unfettered discretion to recommend whatever candidate the Prime Minster regards as appropriate, which is consistent with all our constitutional provisions.

116. The second argument against this position is that when an individual is appointed after "winning" an election, that individual will have greater democratic legitimacy which is not consistent with the non-elective status of the Senate. This argument also does not appear to be based on the experience under the Alberta process, or on any other evidence. Legitimacy is a concept that may be relevant to the Senate, but it is difficult to see how it applies to individual Senators if they are appointed pursuant to the requirements of section 23 and 24 of the *Constitution Act, 1867*.

117. If the proposals did amend the Constitution, it is difficult to see how they could be enacted under section 44. The Attorney General of Alberta has suggested[86] that such legislation can be supported as relating to the Executive Government of Canada, but the constitutional

[86] Factum of the Attorney General of Alberta, para 36.

process for the appointment of Senators does not relate to the executive but rather to what has been described as the "special prerogative of the Prime Minister".[87]

118. However in the absence of any change to a part of the Constitution, it does not appear that legislation authorizing consultative elections can be said to amend the Constitution. Thus the question becomes whether such legislation can be supported under section 91 of the *Constitution Act*, 1867.

119. The argument that legislation to authorize consultative elections can be supported under section 91 is based on the proposition that it is always open to a Government to consult the Canadian population on any topic of importance to that Government and that there is no constitutional principle that constrains such a consultation.

120. The holding of a non-binding consultative election is more akin to a referendum than a direct election. The authority for Parliament to conduct such non-binding elections is analogous to its power to enact legislation to establish a referendum that is "basically a consultative process, a device for the gathering of opinions" which would be "a matter of legislative policy and not of constitutional law."[88]

121. Legislation that authorizes such a consultative election does not require the amendment of the text of the Constitution, nor does it change any constitutional convention. There is no constitutional principle that dictates how the Prime Minister will exercise his or her discretion to recommend to the Governor-General the appointment of a new Senator. As long as the proposed Senator meets the qualifications of section 23, the Prime Minister is at liberty to recommend anyone, having consulted anyone or no one.

122. The Attorneys General of New Brunswick and British Columbia have argued[89] that it is open to provincial legislatures to enact consultative election legislation, but not open to Parliament to do so. The analysis appears to turn on the assumption that the federal process would be "essentially" a direct election of Senators. It is common ground among all that a direct

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[87] See e.g. Order-in-Council PC 1935-3374 and comments of Senator Hays in Senate, Special Committee on Senate Reform, *Proceedings*, 39th Parl, 1st Sess, No 4 (20 September 2006) at 4:42.

[88] *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, at 1032 and 1041, and see Factum of Saskatchewan, paras 58-60.

[89] Factum of New Brunswick, paras 41-48; Factum of British Columbia paras 102-11.

election of Senators would require a constitutional amendment. But there is no obvious reason why provincial legislatures would be authorized to hold advisory elections on a matter in which they have no constitutional role, but Parliament would not.

123. The better view is that either level of government may authorize the conduct of consultative elections, as long as they are non-binding and advisory only.

124. If legislation establishing consultative elections does not in principle amend the Constitution, it does not follow that either Bill C-20 or Bill C-7 would pass constitutional muster. Bill C-7 in particular raises difficulties because of the requirement in the bill that the Prime Minister "must consider" the results of the election, which derogates from the unfettered discretion a Prime Minister possesses in the recommendation process. By requiring the Prime Minister to consider the "winner" the statute purports to graft a statutory obligation onto a constitutional prerogative, exposing the Prime Minister to judicial review as to the adequacy of his consideration and necessarily affecting how the recommendation process proceeds.

125. The conclusion that truly consultative elections do not offend the Constitution does not depend on whether the elections are organized at a national level, as in Bill C-20, or a provincial level, as in Bill C-7. It requires only that the elections have no binding legal effect.

(c) Conclusion

126. Despite their different views regarding the answer to Questions 2 and 3, the *amici curiae* agree that:

(i) It is not within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the *Constitution Act, 1982*, to enact legislation concerning consultative elections that amend the Constitution of Canada. Any such amendment must be made through the process set out in section 42 of the 1982 *Act*.

(ii) Whether it is within the legislative authority of the Parliament of Canada, acting pursuant to section 91 of the *Constitution Act, 1867*, to enact legislation that provides a means of consulting the population of each province or territory as to its preferences for potential nominees for appointment to the Senate depends upon whether such legislation

amends the Constitution of Canada. If it does, Parliament lacks the legislative authority to enact the legislation unilaterally. If it does not, Parliament has the legislative authority pursuant to section 91 of the *Constitution Act, 1867*.

(iv) Repeal of Property Requirements – Question 4

127. Reference question 4 relates to the repeal of the property requirements for Senators under subsections 23(3) and 23(4) of the *Constitution Act, 1867*. Such repeal constitutes a change to constitutional text and is, thus, a constitutional amendment within the meaning of Part V.

128. A threshold question as to which amending formula within Part V applies arises as to whether these sections could be repealed without effectively amending subsection 23(6), which contains property requirements specific to the Province of Quebec.

129. In the absence of subsection 23(6), the requirements to hold $4,000 in real property in the province for which the Senator is appointed (s 23(3)) and to own $4,000 in real and personal property (s 23(4)) could be repealed under section 44. The property requirements (unlike residency requirements) are not referenced in section 42 and do not, in the contemporary world, have the degree of significance as to require provincial concurrence. This Court observed in the *Upper House Reference* that "property qualifications may not today have the importance which they did when the [1867] Act was enacted."[90] The provinces who have taken a position on this point appear to have accepted that such a change would not require their active involvement.

130. However, the repeal of subsections 23(3) and (4) would amend subsection 23(6) and therefore different considerations must apply. Subsection 23(6) reads as follows:

> 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.

131. Subsection 23(6) relates solely to the Province of Quebec and thus, as set out above, cannot be amended without the concurrence of the Province of Quebec in accordance with section 43. This conclusion is reinforced by the mandatory formulation of the French version of section 43. Section 43 applies to amendments in relation to "any provision that applies to one or more, but not all, provinces".

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[90] *Upper House Reference, supra* at 76.

132. While subsections 23(3) and (4) are of general application, their repeal would require a simultaneous amendment to subsection 23(6) as, for Senators from Quebec, that provision ties the Real Property Qualification that would be repealed to the residence requirement that would remain. The effect of repealing the Real Property Qualification would be that each Senator from Quebec would have to be resident in the Electoral Division for which he or she had been appointed, which has not to date been necessary.

133. Thus Parliament cannot repeal subsections 23(3) and (4) without also addressing the consequential effect on subsection 23(6). That subsection can only be amended with the concurrence of Quebec in accordance with section 43 of the *Constitution Act, 1982*.

(v) Abolition of the Senate – Questions 5 and 6

134. There is no doubt that abolishing the Senate would constitute a constitutional amendment. Question 5 outlines different means through which such a change would be accomplished, each of which constitutes an amendment to the Constitution of Canada within the scope of Part V. All of the modes of abolition would involve a direct amendment to the existing text of the *Constitution Acts 1867 to 1982*, or the adoption of additional constitutional text that would indisputably alter the substance of the constitution.

135. The question, then, is to determine which one of the amending formulae of Part V would govern such a change. In this respect, the difference between the modes of abolition set out in Question 5 does not change the analysis. In particular, the proposal to "abolish[…] the powers of the Senate and eliminate[e] the representation of provinces pursuant to paragraphs 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*" does not alter the purpose, scope and significance of the amendment. In all cases, the proposed amendments aim to, and would result in, the abolition of the Senate. It is this matter that must be situated within one or the other of the provisions of Part V.

136. The unanimity threshold set out in section 41 applies to amendments that, in purpose or effect, rearrange the constitutional architecture. The Constitution of Canada, as it has been agreed to over time by Canada's federal units, contemplates the existence of certain foundational

political institutions and a "basic constitutional structure" or "internal architecture".[91] These architectural institutions undoubtedly include, at a minimum, the Crown, the Senate, and "freely elected legislative bodies at the federal and provincial levels."[92] The abolition of any one of these institutions would necessarily entail dramatic reallocations of constitutional authority and responsibility between new or existing constitutional actors. The result would be a fundamentally altered configuration of the Canadian constitutional order.

137. Abolition of any architectural institution of the Constitution of Canada is not a matter specifically listed in Part V. However, such abolition would constitute such a profound constitutional rearrangement – one of the most profound amendments that can be contemplated while remaining within the confines of the existing constitutional order – that it clearly corresponds to the principled basis that animates section 41, namely, that the most significant constitutional amendments merit the highest level of consensus. Such amendments, given their subject and significance, fall within the scope of the unanimity threshold set out in section 41.

138. This view is further bolstered by the reference to the Senate in section 41(*b*), which provides that consent of each province is required to change "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".

139. It is true that the primary political institutions contemplated by the Constitution of Canada are expressly implicated within the procedures set by Part V. On a purely textual level, the Senate has a role in the amending procedures (ss 38(1)(*a*), 38(2), 41, 43, 44, 46). Subject to section 47, formal constitutional amendments cannot come into force without the cooperative effort of the House of Commons, Senate, Governor General, and the Queen's Privy Council.[93] It follows that the abolition of one of these institutions would amount to an amendment of Part V, thereby triggering the unanimity threshold by virtue of subsection 41(*e*). Such a classification of the amendment providing for abolition leads to the same result as a principle-based approach.

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[91] *OPSEU*, *supra* at 57; *Secession Reference, supra* at para 50.

[92] *OPSEU, supra* at 57. The institutions contemplated by the very nature of the Canadian Constitution likely also include the judiciary, including a final national court. As this Court unanimously explained in the *Securities Reference, supra* at para 55, "[i]nherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers…That impartial arbiter is the judiciary". See also *Remuneration Reference, supra* at para 124.

[93] *Constitution Act, 1982*, *supra,* ss 38, 41-48.

140. However, classifying the abolition of an architectural institution as falling within subsection 41(e) fails to provide guidance on whether the dismantling of other institutions of governance not specifically listed in Part V – such as the judiciary or the Crown – would similarly trigger the unanimity requirement. Moreover, dealing with the issue of abolition under subsection 41(e) is unsatisfying. It avoids the core issue at stake in such circumstances, namely, the profound constitutional change that would flow not merely from the amendment's incidental effect of modifying the Part V procedures, but more fundamentally from the resulting renovation of Canada's constitutional architecture.

141. Moreover, classifying an amendment calling for abolition of the Senate as a matter falling within section 44 because "abolition" is not expressly listed in sections 42 or 41 would fall afoul of the general principle set out by Beetz J in *OPSEU, supra* that neither level of government can unilaterally and "substantially interfere with the operation of th[e] basic constitutional structure."[94] Even more fundamentally, such a classification would contravene the spirit of Part V, which is animated by the underlying constitutional principle of federalism. This principle entails that constitutional decision-making in relation to matters, like the abolition of the Senate, that engage the federalism principle or the foundational terms of the Canadian union are made with coordinate participation and consent of Parliament and the provincial legislatures.

142. It follows that the Senate cannot be abolished by the general amending procedure (the "7/50" procedure) set out in section 38 of the *Constitution Act, 1982*. Abolition of the Senate requires the unanimous approval of the legislatures of the provinces and territories of Canada as well as Parliament.

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[94] *OPSEU, supra* at 57.

PART IV - SUBMISSIONS RELATING TO COSTS

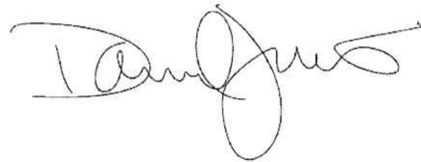
143. The *amicus curiae* does not seek costs and asks that costs not be awarded against it.

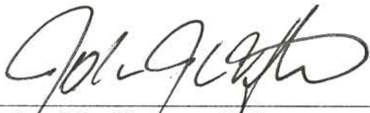
PART V - REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

144. The *amicus curiae* requests the opportunity to make oral submissions at the hearing of the Reference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

DATED at the City of Vancouver in the Province of British Columbia and the City of Montréal in the Province of Québec this 17th day of September 2013





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PART VI -TABLE OF AUTHORITIES

CASELAW

Tab No.		Cited at paragraph:
1.	*British Columbia (AG) v Canada (AG); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 SCR 41	13
2.	*Canada (Combines Investigation Branch, Director of Investigation and Research) v Southam Inc,* [1984] 2 SCR 145	13
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3.	*Canadian Western Bank v Alberta,* 2007 SCC 22, [2007] 2 SCR 3	25, 28, 38, 73
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4.	*Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995	120
5.	*Healthcare Services and Support – Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27, [2007] 2 SCR 391	21
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7.	*New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319	21, 32
8.	*Ontario English Catholic Teachers' Assn v Ontario (AG)*, 2001 SCC 15, [2001] 1 SCR 470	31,35

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9.	*Osborne v Canada (Treasury Board),* [1991] 2 SCR 69	31, 35
10	*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 SCR 789	19
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11.	*R v Demers,* 2004 SCC 46, [2004] 2 SCR 489	33
12.	*R v Dubois,* [1985] 2 SCR 350	21
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13.	*Reference Re BC Motor Vehicle Act,* [1985] 2 SCR 486	16, 22
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14.	*Reference Re Canada Assistance Plan*, [1991] 2 SCR 525	9
15.	*Reference Re Employment Insurance Act (Can), ss 22 and 23,* 2005 SCC 56, [2005] 2 SCR 669	13
16.	*Reference Re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3	25, 32, 136

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17.	*Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 **[Book of Authorities of AG of Canada, Vol II, Tab 22; Book of Authorities of AG of British Columbia, Tab 5]**	13, 22
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18.	*Reference Re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 **[Book of Authorities of AG of Ontario, Tab 8; Book of Authorities of AG of Prince Edward Island, Tab 11]**	13, 23, 25, 27, 28, 38, 73, 136

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22.	John D Whyte, "'A Constitutional Conference…Shall Be Convened': Living with Constitutional Promises" (1996) 8:1 Constitutional Forum 15 at 15	2
23.	Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 2, loose-leaf (updated 2012, release 1) (Toronto: Carswell, 2007) at 60-7 to 60-9	22
24.	Michel Bastarache et al, *The Law of Bilingual Interpretation* (Markham, ON: LexisNexis, 2008) at 96-101	20
	Order-in-Council PC 1935-3374 **[Record of Attorney General of Canada in Reply, Volume 14, Tab 103, p. 198]**	117
25.	Senate, Special Committee on Senate Reform, *Proceedings*, 39th Parl, 1st Sess, No 4 (20 September 2006) at 4:36 to 4:54	113, 117
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