Court File No.: 35203

IN THE SUPREME COURT OF CANADA

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

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

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

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PART I
STATEMENT OF FACTS

Overview

1. The Attorney General of Manitoba has nothing to add to the extensive record that has been compiled for this reference.

PART II
QUESTIONS IN ISSUE

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

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

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

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

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

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

   Yes. The property qualifications are unrelated to the functioning of the Senate and their removal does not affect the provinces.

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

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

PART III
ARGUMENT

A. Overview

3. Canada is a constitutional democracy and change to its Constitution was never intended to be easy. Every provision of the Constitution has been forged through compromise, beginning with the constitutional conferences in Charlottetown and Quebec that led to the *British North America Act, 1867* (*BNA Act*) and culminating in the major amendments contained in the *Constitution Act, 1982*. Canada's Constitution establishes the rules and structures of our democracy. Fundamental to those rules are the domestic amending provisions set out in Part V of the *Constitution Act, 1982*. These provisions, more particularly ss. 38, 41, 42, 43, 44 and 45 detail the procedures to rewrite the rules into the future. It is Manitoba's submission that these provisions must be read in a manner that respects the overarching principles of federalism and the importance of a strong national consensus before major constitutional changes are adopted.

4. Our Constitution is the very embodiment of federalism. We would not have the Constitution, nor indeed the nation we have today without the federal agreement of 1867. Manitoba submits that federalism, as a "fundamental and organizing principle of the Constitution", must animate and inform this Court's reading of the amending formulae.[1] Federalism is a principle that "inform[s] and sustain[s] the constitutional text." It is one of the "vital unstated assumptions upon which the text is based," and one that "assists in the interpretation of the text."[2] In light of this, it is not surprising that "in interpreting our Constitution, the courts have always been concerned with the federalism principle," and that it "has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution."[3]

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[1] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 32 and 52, Attorney General of Canada's Authorities, Tab 21.
[2] *Reference Re Secession of Quebec* at paras. 49 and 52.
[3] *Reference Re Secession of Quebec* at paras. 56-57.

5. This reference is not about the Senate *per se* or its effectiveness in representing the regions, protecting minority interests or providing a chamber of sober second thought. The essence of this reference is the interpretation and scope of the amending provisions. It is about which governments in the federation have a voice in constitutional change.

B. The Reference Questions

1. Reference Question 1 – Senate Term Limits Cannot be Effected under s. 44

6. The first reference question acknowledges that a constitutional amendment would be required to impose term limits for Senators and asks whether such an amendment could be made pursuant to s. 44 of the *Constitution Act, 1982.* Manitoba submits that s. 44 is narrow in scope and does not permit a fundamental change in the functioning of the Senate to be made through unilateral amendment by the federal Parliament.

7. The Senate has been created through the Constitution as "a thoroughly independent body which [can] canvass dispassionately the measures of the House of Commons."[4] Security of tenure is an essential condition for ensuring independence.[5] The *BNA Act*, s. 29(1) guaranteed an independent Senate by providing that appointees would serve for life.[6] Through a constitutional amendment, the life tenure was altered to impose mandatory retirement at age seventy-five.[7] As explained in the *Upper House Reference* the imposition of a mandatory retirement age for Senators was effected by Parliament under the former s. 91(1) of the *BNA Act.* This allowed for amendments through a joint resolution of both Houses of Parliament and without provincial consent. This Court concluded in the *Upper House Reference* that the federal authority under the former s. 91(1) was limited to those issues that did not in any substantial way affect federal-provincial relationships and that a compulsory retirement age of seventy-five was properly made

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[4] *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (*Upper House Reference)* at p.77, Attorney General of Canada's Authorities, Tab 18.
[5] *Constitution Act, 1867*, s. 99, *Valente v. The Queen*, [1985] 2 S.C.R. 673 at pp. 687 and 694, Attorney General of Manitoba's Authorities, Tab 1.
[6] *Upper House Reference* at p. 77.
[7] *Constitution Act, 1867*, ss. 29(2), *Constitution Act, 1965.*

under the former s. 91(1) because such a change did not affect "the essential character of the Senate."[8]

8. Fundamental to addressing the first reference question is to determine the scope and meaning of s. 44 of the *Constitution Act, 1982*. This section permits unilateral amendment by Parliament of the "Constitution of Canada in relation to . . . the Senate." While on its face, the words are broad, s. 44 must be placed in its historical context. As recognized by this Court in both *Re Resolution to Amend the Constitution*[9] and the *Upper House Reference*, constitutional amendments that affect federal-provincial relationships have, as a matter of convention, only been made after consultation with and the substantial agreement of the provinces. This "substantial agreement" was placed into the written text of the Constitution in 1982 with the inclusion of ss. 38, 41, 43 and 45 of the *Constitution Act, 1982*, all of which require provincial input on matters affecting the provinces. Manitoba submits that s. 44 should similarly be interpreted in a manner that supports this important aspect of federalism. Thus, s. 44 ought to bear the same interpretation as the former s. 91(1). In accordance with the decision in the *Upper House Reference*, the phrase "Constitution of Canada" ought to be interpreted as limited to the constitution of the federal government and the power of unilateral amendment ought to be confined to matters of interest only to that government.[10]

9. Canada argues that the other partners in the federation are only entitled to share in the decision concerning changes to the Senate related to four matters: the powers of the Senate, the method of selecting Senators, the number of Senators to which each province is entitled and the residence qualifications.[11] Any other changes in respect of the Senate may be made by Parliament alone.

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[8] *Upper House Reference* at pp. 65 and 77.
[9] *Re Resolution to Amend the Constitution*, [1981]1 S.C.R. 753 (*Patriation Reference*), Attorney General of Canada's Authorities, Tab. 20.
[10] *Upper House Reference* at p. 70.
[11] Factum of the Attorney General of Canada at paras. 2 and 112.

10. Manitoba submits that the interpretation of s. 44 that the Attorney General of Canada posits is inconsistent with the principles of federalism. The consequence of this interpretation is that Parliament may unilaterally make *any* change to the Constitution related to the executive, Senate or House of Commons not specifically circumscribed by ss. 41 and 42. According to Canada, Parliament's unilateral amending power was massively expanded by the *Constitution Act, 1982*, far beyond this Court's interpretation in the *Upper House Reference*. This was not the intent in enacting s. 44. The legislative history evidences quite the opposite. According to then Justice Minister and Attorney General Jean Chrétien in evidence given before the Special Joint Committee on the Constitution of Canada, the drafters of s. 44 "did not want to change those powers" that existed in s. 91(1). In fact, as then Assistant Deputy Minister of Justice Barry Strayer clarified, "the power itself [in s. 44] is not as broad as the one that was given in s. 91(1). The power given in s. 48 [which became s. 44] relates only to the executive government."[12]

11. Canada, then, did not purport to expand its power beyond that delineated in the former s. 91(1) as interpreted by this Court. Nor would the provinces in 1982 likely have agreed to a clause with such effect, particularly after successfully resisting Canada's argument that its amending power under s. 91(1) was expansive in the *Upper House Reference*. The provinces had raised concerns about the scope of the former s. 91(1) since its inception.[13] The federal government's position on that section, which it unsuccessfully advanced before this Court in the *Upper House Reference*, was that the power was sweeping and comprehensive save for the specific limitations written into the section.[14] It now attempts essentially the same argument in respect of s. 44.

12. Despite the Attorney General of Canada's arguments to the contrary, there is good reason not to treat the items enumerated in the subsections of ss. 41 and 42 of the *Constitution Act, 1982* as an exhaustive circumscription of the power in s. 44. Nowhere in Part V is there explicit reference to amendments affecting the independence of the Senate or its functioning as a chamber of sober second thought. Does this mean Parliament is free to change the core purpose

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[12] *Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (1980-1981), Thursday, November 13, 1980 at 4:112, Record of the Attorney General of Quebec, Vol. 1, Tab 6, p. 122. Emphasis added.

[13] *Statement of Honourable O.E. Lang, Minister of Justice to Special Joint Committee on the Constitution*, August 31, 1978, Record of the Attorney General of Nunavut, Tab 4, p. 108.

[14] *Statement of Honourable O.E. Lang*, p. 109.

of the upper chamber by virtue of s. 44? Similarly, while "powers of the Senate" is included in s. 42(1)(b), the powers of the House of Commons and executive government are not. Does this mean Parliament is free to expand those powers? Could it transfer legislative authority from the Commons to the executive? Could Parliament unilaterally amend s. 4 of the *Constitution Act, 1982* to extend the maximum duration of a House of Commons to longer than five years? The answer, of course, is no. The reason is that there are other constitutional rules and principles at play which must constrain the amending power in s. 44. The former s. 91(1) contained explicit exceptions, but this fact did not prevent this Court from applying other constitutional restraints to the power.[15] Thus, there is no reason for this Court to depart from its ruling in the *Upper House Reference* that amendments which affect fundamental features of the Senate are not within the unilateral power of Parliament.[16] The scope of s. 44 remains limited to matters of interest only to the federal government.

13. Returning to the issue of term limits, this Court recognized in the *Upper House Reference* that term limits might impair the functioning of the Senate as a body of sober second thought.[17] It is difficult to draw a meaningful distinction between term limits of eight, nine or ten years or any of the other options set out in sub-paragraphs (a) – (d) and (f) of reference question 1. The ultimate concern must be ensuring that the role of the Senate as an independent body is not impaired. Those that are called upon to serve the public in the important role of Senator must be free of any perception that their decision-making is motivated by outside influences. Those that fulfill this role almost always serve until the end of their formal working career. Terms limits of any length alter that reality and may lead to the perception that decisions could be influenced by the desire to garner favour.

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[15] *Upper House Reference*.
[16] *Upper House Reference* at p. 78.
[17] *Upper House Reference* at p. 76.

14. Term limits raise the possibility of seeking the government's favour in order to receive a benefit. Question 1 (e) contemplates one such benefit being renewal for a second term. Since renewal would be directly related to finding favour with the government, allowing for renewable Senate terms would profoundly affect independence. Thus, such an amendment would impair the functioning of the Senate since its independence could not be guaranteed. There are numerous other benefits that could be bestowed on a Senator at the end of a fixed Senate term including ambassadorships and appointments to various boards and tribunals. The Constitution guarantees tenure to age seventy-five so the public can have some assurance that decision-making is free of these considerations.

15. In his factum, the Attorney General of Canada argues that imposing term limits would not create a profound or structural change.[18] He notes that the mean number of years of Senate service since 1965 has been 11.3 years with the median being 9.8 years. These numbers speak to the policy issues that might be considered for Senate reform. However, the numbers do not speak to the principles of federalism and who should decide whether Senators should be appointed for a prescribed term.

16. These numbers also reflect the reality that there is no need to impose term limits to accomplish the goal of a vibrant Senate that is continually being refreshed with new appointments. The current method for selecting Senators provides a wide discretion that can be exercised to appoint individuals who are nearing the mandatory retirement age of seventy-five. Appointing individuals later in their career accomplishes two goals. First, it recognizes many past years of accomplishments and second, it ensures that the time served in the Senate is reasonable to make a worthy contribution. There is no need for a constitutional amendment to gain whatever benefit term limits are seen to have.

17. Thus, Manitoba submits that question 1 ought to be answered in the negative. Term limits would change the fundamental character of the Senate and would impact the provinces. As such the provinces must be involved in any constitutional amendments that would impose term limits on Senate appointments.

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[18] Factum of the Attorney General of Canada at para. 124.

2. Reference Questions 2 and 3 – Senate Appointment Consultations by Election

18. Questions 2 and 3 seek advice from this Court on whether the Parliament of Canada may unilaterally enact the particular consultation processes detailed in Bill C-20 (2007)[19] and Bill C-7 (2011).[20] These Bills both provide for elections as a means to consult the general population on Senate appointments. Under both Bills the election is non-binding.

19. The Attorney General of Canada argues that Parliament has the unilateral authority to enact an electoral consultative process, either under s. 91 of the *Constitution Act, 1867* or under s. 44 of the *Constitution Act, 1982*.[21] He asserts that the legislation has no significant impact because it does not remove the Prime Minister's ultimate discretion.[22] The Attorney General references the Alberta elections to support this conclusion. Under the Alberta process, four of the election winners have not been appointed and only five of the ten people whose names have been submitted to the Queen's Privy Council, have received Senate appointments. This, according to the Attorney General of Canada, demonstrates that many factors may be relevant to the appointment decision and that consultation by election does not narrow the range of candidates that may be summoned to the Senate.[23]

20. Manitoba submits that the attempt by the Attorney General of Canada to portray Bills C-20 and C-7 as benign is not correct. Holding elections for Senators, even elections that are non-binding, will profoundly affect the operation of the Senate. Parliament cannot alter the operation of the Senate through legislation passed under s. 91 of the *Constitution Act, 1867*. A constitutional amendment is required to impact the operation of the Senate. Further, a constitutional amendment cannot be enacted under s. 44 because the provinces are affected by the impact that non-binding elections would have on both the democratic process and on the Senate itself.

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[19] *An Act to provide for consultations with the electors on their preferences for appointments to the Senate* (first reading 13 November 2007) (Bill C-20), Record of the Attorney General of Canada, Vol. I, Tab 4.
[20] *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits* (*the Senate Reform Act*) (first reading 21 June 2011) (Bill C-7), Record of the Attorney General of Canada, Vol. I, Tab 2.
[21] Factum of the Attorney General of Canada at para. 136.
[22] Factum of the Attorney General of Canada at para. 130.
[23] Factum of the Attorney General of Canada at para. 132.

21. A non-binding election impacts the Provinces because such a process affects fundamental democratic principles. Asking the electors for their opinion and then ignoring it only serves to lessen respect for the importance of participatory democracy. Canada's election turnouts are already dismal with only 58.8% of eligible voters voting in the 2008 general election and 61.1% voting in the 2011 general election.[24] Non-binding elections will do nothing to improve these numbers and have the potential to further weaken them. Nevertheless, the decision to hold non-binding elections is a policy choice that could be adopted. However, it cannot be adopted unilaterally by Parliament under s. 44 because of its impact on the provinces. The partners in the federation are entitled to a say on such a fundamental change.

22. More directly, non-binding elections would affect Senate operations and the ability of the Chamber to perform its role as an institution that represents regional interests. The proposals would create a hodgepodge of appointment processes which would weaken the credibility of the Senate. Some members of the Senate would be appointed because they were elected; others would be appointed even though they were not elected; some would be appointed from provinces that choose to hold elections and others from provinces that decline to hold such elections. If an election system can be implemented by simple legislation or by unilateral constitutional amendment, then successive Prime Ministers can impose elections and remove elections with relative ease, thus creating further inconsistencies.

23. The potential is that an inconsistent appointment process will create a hierarchy of Senators with those who have been elected seemingly having more legitimacy than those who have not. Both Bills C-7 and C-20 speak in their preambles of the desirability of elections. Bill C-7 states 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 . . ." Bill C-20 speaks of the desire of the Government of Canada "to better reflect democratic values" and to provide a method "for ascertaining the preferences of electors." Thus, while the Attorney General of Canada argues in his factum that the consultative process has no legal significance, the reality is that the Bills that form the basis of the reference questions bestow enhanced validity

[24] Elections Canada, *Voter Turnout at Federal Elections and Referendums*, (online: http://www.elections.ca/content.aspx?section=ele&dir=turn&document=index&lang=e), Attorney General of Manitoba's Authorities, Tab 2.

on one class of Senators. Those that are elected are more "appropriate" or "preferable" according to the Bills. The result for the provinces is that if their Senators are not elected, they will have less legitimacy and may not be seen by the population as credibly fulfilling the role that the Constitution envisions. Moreover, since the Prime Minister is not bound to appoint the winner of the election, a Prime Minister could weaken a province's Senate representation by choosing an alternate candidate.

24. Thus, while the Attorney General of Canada seeks to characterize Bills C-7 and C-20 as merely setting up a means for consultation, relying on non-binding elections to undertake consultations has the potential to impact the operation of the Senate with some Senators believing themselves to be, or being seen to be, more empowered than others. As such, Parliament cannot impose this type of consultation regime by simple legislation. A constitutional amendment is required. That amendment cannot be made under s. 44 of the *Constitution Act, 1982* as that provision ought to be interpreted as only permitting amendments that do not impact the provinces.

25. Further, the consultative election mechanism Canada proposes amounts to a change to the method of selecting Senators. As set out in s. 42(1)(b), this type of amendment must be made in accordance with the general amending formula in s. 38. The Attorney General of Canada argues that "method of selecting Senators" for the purposes of s. 42(1)(b) refers exclusively to s. 24 of the *Constitution Act, 1867* which empowers the Governor General to summon qualified persons to the Senate from time to time.[25] There is no force to this argument, however. If the drafters had wished to reference s. 24, they would have done so. The difference in the words must be ascribed some meaning. The *selection* of Senators is the process that precedes their summoning.

26. To endorse Canada's reading would require a significant interpretive leap, one that belies the textual, plain language approach the Attorney General otherwise urges upon this Court. It would also require a blind eye to be turned to the historical context of Senate reform efforts and the development of the amending formulae. This history, as the Attorney General of Canada thoroughly reviews in his factum, suggests that the drafter of Part V of the *Constitution Act, 1982* was keenly aware of the various proposals for democratization of the Senate, and was providing

[25] Factum of the Attorney General of Canada at para. 90.

a mechanism for instituting such processes.[26] The inclusion of "method of selecting Senators" in s. 42(1)(b) reflects the drafter's recognition that adopting any democratic process - consultative elections included - for the Upper House would require a constitutional amendment, and one that would demand substantial provincial consent.

27. Moreover, Canada's proposition that the Governor General's summoning authority under s. 24 could be altered by the s. 38 formula is incorrect, since by virtue of the *Letters Patent Constituting the Office of the Governor General and Commander-in-Chief of Canada, (1947),* that authority forms part of the Office of the Governor General.[27] As such, it would be susceptible to amendment only by unanimous consent under s. 41 of the *Constitution Act, 1982*.

28. This does not mean that the Prime Minister cannot undertake consultations in advance of a Senate appointment or that Parliament cannot mandate a process for this to occur. It is the particular type of consultation that is set out in the reference questions that is unconstitutional because it affects the operation of the Senate. Other types of consultations such as seeking input from the premiers would enhance the appointment process and would not affect the operation of the Senate in a manner that impacts the provinces. This type of consolation process could be put in place informally or by Parliament acting unilaterally either under s. 91 of the *Constitution Act, 1867* or by constitutional amendment under s. 44 of the *Constitution Act, 1982.* Our Constitution is flexible enough to allow incremental progress to take place with relative ease. However major changes, such as non-binding elections for Senators, cannot occur without a strong national consensus. This is the essence of federalism.

29. Therefore, the Attorney General of Manitoba submits that reference questions 2 and 3 be answered in the negative.

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[26] Factum of the Attorney General of Canada at pp. 11-26.

[27] Factum of the Attorney General of Canada at paras. 140-141; *Letters Patent Constituting the Office of the Governor General and Commander-in-Chief of Canada, (1947).* In *Canada Gazette*, Part I, vol. 81, p. 3014 [reproduced in R.S.C. 1985, App. II, No. 31] at para. II, Attorney General of Manitoba's Authorities, Tab 3.

3. Reference Question 4 – Property Qualifications Can be Removed by Parliament

30. The Attorney General of Manitoba agrees that s. 44 is the proper amending procedure to use to remove the property qualifications for Senators now found in ss. 23(3) and (4) of the *Constitution Act, 1867*. The property qualifications are unrelated to the functioning of the Senate. They are not an indicator of a person's competence or character to serve as a Senator.

31. Removing the property qualifications does not impact the provinces and for this reason is precisely the type of amendment that is properly made by the federal Parliament under s. 44.

4. Reference Questions 5 and 6 – Abolition of the Senate Requires Unanimous Consent

32. Section 41 of the *Constitution Act, 1982* lists five specific matters in the Constitution that require unanimous consent of the Senate, the House of Commons and the legislative assembly of each province in order to be amended. One of these matters, as set out in paragraph (e), is that any amendment of the provisions in Part V of the *Constitution Act, 1982* requires unanimity.

33. There are twelve references to the Senate or Senators in Part V: s. 38 (1)(a), s. 38(2), s. 41, s. 41(b), s. 42(1) (b) (2 references), s. 42(1) (c) (2 references), s. 43, s. 44, s. 47 (2 references). Yet the Attorney General of Canada argues that it does not amount to an amendment of these sections to remove the references to the Senate. The reason for this, according to Canada, is that the Senate's consent to any amendments under ss. 38, 41, 42 or 43 (but not s. 44) may be dispensed with after 180 days, if the House of Commons again adopts the resolution.[28] Thus, Canada appears to argue that Senate consent is meaningless and merely incidental to the amendment process.

34. The Attorney General of Manitoba submits that in fact the opposite is true, and the Senate is an integral part of the amendment process. The role of the Senate as the chamber of sober second thought was specifically entrenched in Part V of the *Constitution Act, 1982* to ensure that any changes to the country's supreme laws would receive rigorous examination. The suspensive veto allows an opportunity for reflection. The Senate does not play an incidental role in the amendment process; it plays a critical role.

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[28] Factum of the Attorney General of Canada at para. 164.

35. Moreover, the Senate's consent is required for an amendment under s. 44 and cannot be dispensed with. This section separately references Parliament, the House of Commons and the Senate. Canada argues that the definition of Parliament in s. 17 of the *Constitution Act, 1867* could be amended (pursuant to s. 38) so as to remove the Senate as part of Parliament.[29] Assuming this to be correct, such an amendment does not address that there are twelve places in Part V that reference the Senate as distinct from Parliament. These references cannot be made to disappear through the ruse of an amendment to s. 17. At best, an amendment as suggested by Canada would make the references to Parliament and the House of Commons in the Constitution synonymous. It would not remove the references to the Senate in Part V.

36. Further, s. 41 requires unanimous consent in order to amend "the office of the . . . Governor General". One of the express constitutional powers of the Governor General is the power to summon Senators.[30] This authority of the Governor General does not disappear if the Senate is removed from the definition of Parliament. This power can only be removed with unanimous consent, as set out in s. 41 of the *Constitution Act, 1982.*

37. All of this demonstrates that the amending formulae in the *Constitution Act, 1982* presuppose the continued existence of the Senate. This cannot be altered without an amendment to Part V. Thus, the Attorney General of Manitoba submits that the Senate can only be abolished by a specific amendment under s. 41 of the *Constitution Act, 1982* that removes all the references to the Senate in the Constitution, including the twelve references in Part V of the *Constitution Act, 1982.* Therefore, Reference Questions 5(a), (b) and (c) should be answered in the negative and Reference Question 6 should be answered in the affirmative. Requiring unanimity before altering a major aspect of the Canadian democratic system gives an equal voice to each partner in the federation.

C. Conclusion

38. There may very well be compelling reasons for Senate reform, but that is irrelevant to the issues to be decided on this reference. There are no compelling reasons to depart from our nation's tradition of respect for federalism. The difficulties presented by constitutional change

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[29] Factum of the Attorney General of Canada at para. 165.
[30] *Constitution Act, 1867*, s. 24.

are certainly not a reason. The failure to reach consensus on Senate reform in the past is certainly not a reason. A disinclination to engage the provinces is certainly not a reason.

39. The Attorney General of Canada's position in this reference reduces to the proposition that convenience should trump federalism. It would be convenient for the federal government to make unilateral amendments which satisfy unfulfilled promises for Senate reform. It would also be convenient if the Senate could be more easily abolished through the general amending formula, rather than requiring unanimity. Convenience, however, is not a cornerstone of a federal constitutional democracy.

40. Canada would shrug off the constitutional restraints on its unilateral amending power, restraints that were both interpreted by this Court and were intended by the drafters of our Constitution to promote the values and principles of federalism. The result is that the federal government would be free, in its sole purview and discretion, to alter institutions central to our democratic system of government in ways that affect the provinces. In attempting to reach this result, Canada has explicitly asked this Court to ignore the principle of federalism. Federalism, however, cannot be so easily dismissed from constitutional interpretation. Federalism means an equal partnership in matters of shared importance through engagement, discussion, consensus and compromise. In Manitoba's submission, our Constitution demands nothing less for the significant changes contemplated in this reference.

PART IV

ORDER SOUGHT CONCERNING COSTS

41. The Attorney General of Manitoba does not seek any costs in this reference.

PART V

ORDER SOUGHT

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

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

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The Attorney General of Manitoba

Charles Murray
Counsel for the Respondent
The Attorney General of Manitoba

PART VI

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PART VII

LEGISLATION

Bills

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

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

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

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