

**SUPREME COURT OF CANADA**

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| **Citation:** Reference re Senate Reform, 2014 SCC 32 | **Date:** 20140425  **Docket:** 35203 |

**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**

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 112) | The Court |

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reference re senate reform

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

**Indexed as:** Reference re Senate Reform

2014 SCC 32

File No.: 35203.

2013:  November 12, 13, 14; 2014:  April 25.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

reference by governor in council

*Constitutional law — Canadian institutions — Senate — Constitutional amendment — Whether Parliament can unilaterally set fixed terms for Senators — Whether Parliament can unilaterally implement framework for consultative elections for appointments to Senate — Whether Parliament can unilaterally repeal ss. 23(3) and 23(4) of Constitution Act, 1867 requiring that Senators must own land worth $4,000 in province for which they are appointed and have net worth of at least $4,000 — Whether constitutional amendment abolishing Senate may be accomplished by general amending procedure or whether unanimous consent procedure applies — Constitution Act, 1982, ss. 38(1)(2), 41(e), 42(1)(b), (c), 43, 44.*

Pursuant to s. 53 of the *Supreme Court Act*, the Governor in Council referred the following questions to this Court:

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

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

(*b*) a fixed term of ten years or more for Senators;

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

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

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

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

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

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

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

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

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

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

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

(*c*) by abolishing the powers of the Senate and eliminating the representation of provinces pursuant to paragraphs 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*?

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

Held: Questions 1, 2, 3 and 5 are answered in the negative. Question 4 is answered in the affirmative with respect to s. 23(4). A full repeal of s. 23(3) requires a resolution of the legislative assembly of Quebec, pursuant to s. 43 of the *Constitution Act, 1982*. Question 6 is answered in the affirmative. The implementation of consultative elections and senatorial term limits requires consent of the Senate, the House of Commons, and the legislative assemblies of at least seven provinces representing, in the aggregate, half of the population of all the provinces (s. 38 and s. 42(1)(*b*)). The abolition of the Senate requires the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces (s. 41(*e*)).

The Senate is one of Canada’s foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation. Despite ongoing criticism and failed attempts at reform, the Senate has remained largely unchanged since its creation. The statute that created the Senate — the *Constitution Act, 1867* — forms part of the Constitution of Canada and can only be amended in accordance with the Constitution’s procedures for amendment (s. 52(2) and (3), *Constitution Act, 1982*). The concept of an “amendment to the Constitution of Canada”, within the meaning of Part V of the *Constitution Act, 1982*, is informed by the nature of the Constitution, its underlying principles and its rules of interpretation. The Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution’s architecture, that modify the meaning of the constitutional text.

Part V reflects the political consensus that the provinces must have a say in constitutional changes that engage their interests. It contains four categories of amending procedures. The first is the general amending procedure — the “7/50” procedure — (s. 38, complemented by s. 42), which requires a substantial degree of consensus between Parliament and the provincial legislatures. The second is the unanimous consent procedure (s. 41), which applies to certain changes deemed fundamental by the framers of the *Constitution Act, 1982*. The third is the special arrangements procedure (s. 43), which applies to amendments in relation to provisions of the Constitution that apply to some, but not all, of the provinces. The fourth is made up of the unilateral federal and provincial procedures, which allow unilateral amendment of aspects of government institutions that engage purely federal or provincial interests (ss. 44 and 45).

*Question 1: Senatorial Tenure*

A change in the duration of senatorial terms would amend the Constitution of Canada, by requiring a modification to the text of s. 29 of the *Constitution Act, 1867*. The language of s. 42 of the *Constitution Act, 1982* does not encompass changes to the duration of senatorial terms. However, it does not follow that all changes to the Senate that fall outside of s. 42 come within the scope of s. 44. The unilateral federal amendment procedure is limited. It is not a broad procedure that encompasses all constitutional changes to the Senate which are not expressly included within another procedure in Part V. The history, language, and structure of Part V indicate that s. 38, rather than s. 44, is the general procedure for constitutional amendment. Changes that engage the interests of the provinces in the Senate as an institution forming an integral part of the federal system can only be achieved under the general amending procedure. Section 44, as an exception to the general procedure, encompasses measures that maintain or change the Senate without altering its fundamental nature and role.

The imposition of fixed terms for Senators engages the interests of the provinces by changing the fundamental nature or role of the Senate. Senators are appointed roughly for the duration of their active professional lives. This security of tenure is intended to allow Senators to function with independence in conducting legislative review. The imposition of fixed senatorial terms is a significant change to senatorial tenure. Fixed terms provide a weaker security of tenure. They imply a finite time in office and necessarily offer a lesser degree of protection from the potential consequences of freely speaking one’s mind on the legislative proposals of the House of Commons. The imposition of fixed terms, even lengthy ones, constitutes a change that engages the interests of the provinces as stakeholders in Canada’s constitutional design and falls within the rule of general application for constitutional change — the 7/50 procedure in s. 38.

*Questions 2 and 3: Consultative Elections*

Introducing a process of consultative elections for the nomination of Senators would change our Constitution’s architecture, by endowing Senators with a popular mandate which is inconsistent with the Senate’s fundamental nature and role as a complementary legislative chamber of sober second thought. The view that the consultative election proposals would amend the Constitution of Canada is supported by the language of Part V of the *Constitution Act, 1982*. The words employed in Part V are guides to identifying the aspects of our system of government that form part of the protected content of the Constitution. Section 42(1)(*b*) provides that the general amending procedure (s. 38(1)) applies to constitutional amendments in relation to “the method of selecting Senators”. This broad wording includes more than the formal appointment of Senators by the Governor General and covers the implementation of consultative elections. By employing this language, the framers of the *Constitution Act, 1982* extended the constitutional protection provided by the general amending procedure to the entire process by which Senators are “selected”. Consequently, the implementation of consultative elections falls within the scope of s. 42(1)(*b*) and is subject to the general amending procedure, without the provincial right to “opt out”. It cannot be achieved under the unilateral federal amending procedure. Section 44 is expressly made “subject to” s. 42 — the categories of amendment captured by s. 42 are removed from the scope of s. 44.

*Question 4: Property Qualifications*

The requirement that Senators have a personal net worth of at least $4,000 (s. 23(4), *Constitution Act, 1867*) can be repealed by Parliament under the unilateral federal amending procedure. It is precisely the type of amendment that the framers of the *Constitution Act, 1982* intended to capture under s. 44. It updates the constitutional framework relating to the Senate without affecting the institution’s fundamental nature and role. Similarly, the removal of the real property requirement that Senators own land worth at least $4,000 in the province for which they are appointed (s. 23(3), *Constitution Act, 1867*) would not alter the fundamental nature and role of the Senate. However, a full repeal of s. 23(3) would render inoperative the option in s. 23(6) for Quebec Senators to fulfill their real property qualification in their respective electoral divisions, effectively making it mandatory for them to reside in the electoral divisions for which they are appointed. It would constitute an amendment in relation to s. 23(6), which contains a special arrangement applicable to a single province, and consequently would fall within the scope of the special arrangement procedure. The consent of Quebec’s National Assembly is required pursuant to s. 43 of the *Constitution Act, 1982*.

*Questions 5 and 6: Abolition of the Senate*

Abolition of the Senate is not merely a matter relating to its “powers” or its “members” under s. 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*. This provision captures Senate *reform*, which implies the continued existence of the Senate. Outright abolition falls beyond its scope. To interpret s. 42 as embracing Senate abolition would depart from the ordinary meaning of its language and is not supported by the historical record. The mention of amendments in relation to the powers of the Senate and the number of Senators for each province presupposes the continuing existence of a Senate and makes no room for an indirect abolition of the Senate. Within the scope of s. 42, it is possible to make significant changes to the powers of the Senate and the number of Senators. But it is outside the scope of s. 42 to altogether strip the Senate of its powers and reduce the number of Senators to zero. The abolition of the upper chamber would entail a significant structural modification of Part V. Amendments to the Constitution of Canada are subject to review by the Senate. The Senate can veto amendments brought under s. 44 and can delay the adoption of amendments made pursuant to ss. 38, 41, 42, and 43 by up to 180 days. The elimination of bicameralism would render this mechanism of review inoperative and effectively change the dynamics of the constitutional amendment process. The constitutional structure of Part V as a whole would be fundamentally altered. Abolition of the Senate would therefore fundamentally alter our constitutional architecture — by removing the bicameral form of government that gives shape to the *Constitution Act, 1867* — and would amend Part V, which requires the unanimous consent of Parliament and the provinces under s. 41(*e*) of the *Constitution Act, 1982*.

**Cases Cited**

**Referred to:** *Projet de loi fédéral relatif au Sénat (Re)*, 2013 QCCA 1807 (CanLII); *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Edwards v. Attorney‑General for Canada*, [1930] A.C. 124; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

**Statutes and Regulations Cited**

Bill C‑7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, 1st Sess., 41st Parl., 2011, cl. 3, Sch., cl. 1.

Bill C‑20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess., 39th Parl., 2007.

Bill C‑60, *An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters*, 3rd Sess., 30th Parl., 1978, cls. 62 to 70.

Bill S‑4, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Sess., 39th Parl., 2006.

*Constitution Act, 1867*, preamble, ss. 17, 22, 23(3), (4), (5), (6), 24, 29, 32, 35, 37, 53, 91(1), 92(1).

*Constitution Act, 1965*, S.C. 1965, c. 4, s. 1.

*Constitution Act, 1982*, Part V, ss. 38, 41, 42, 43, 44, 45, 47, 52.

*Supreme Court Act*, R.S.C. 1985, c. S‑26, s. 53.

**Authors Cited**

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 5e éd. Cowansville, Qué.: Yvon Blais, 2008.

Cameron, Jamie. “To Amend the Process of Amendment”, in Gérald‑A. Beaudoin et al., *Federalism for the Future: Essential Reforms*. Montréal: Wilson & Lafleur, 1998, 315.

Canada. *Constitutional Accord: Canadian Patriation Plan*. Ottawa, 1981.

Canada. *Constitutional Conference: Proceedings*. Ottawa: Information Canada, 1971.

Canada. Department of Justice. *The Amendment of the Constitution of Canada*. Ottawa: Queen’s Printer, 1965 (Minister: Guy Favreau).

Canada. Legislature. *Parliamentary Debates on the subject of the Confederation of the British North American Provinces*, 3rd Sess., 8th Provincial Parliament of Canada. Quebec: Hunter, Rose & Co., 1865.

Canada. Minister of State for Federal‑Provincial Relations. *Constitutional Reform: House of the Federation*. Ottawa: Government of Canada, 1978 (Minister: Marc Lalonde).

Canada. Senate and House of Commons. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 53, 1st Sess., 32nd Parl., February 4, 1981, pp. 50, 67‑68.

Canada. Senate and House of Commons. *The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada: Final Report*. Ottawa: Queen’s Printer, 1972 (Joint Chairs: Gildas L. Molgat and Mark MacGuigan).

Canada. Standing Senate Committee on Legal and Constitutional Affairs. *Report on Certain Aspects of the Canadian Constitution*. Ottawa: Minister of Supply and Services, 1980 (Sub‑committee Chair: Maurice Lamontagne).

Canada. Task Force on Canadian Unity. *A Future Together: Observations and Recommendations*. Ottawa: Minister of Supply and Services, 1979 (Co‑chairs: Jean‑Luc Pepin and John P. Robarts).

Canada. *The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada*. Ottawa: Government of Canada, 1980.

Cheffins, Ronald I. “The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications” (1982), 4 *S.C.L.R.* 43.

Côté, Charles‑Emmanuel. “L’inconstitutionnalité du projet d’élections fédérales sénatoriales” (2010), 3 *R.Q.D.C.* 81.

Cyr, Hugo. “L’absurdité du critère scriptural pour qualifier la constitution” (2012), 6 *J.P.P.L.* 293.

Desserud, Don. “Whither 91.1? The Constitutionality of Bill C‑19: An Act to Limit Senate Tenure”, in Jennifer Smith, ed., *The Democratic Dilemma: Reforming the Canadian Senate*. Montréal and Kingston: McGill‑Queen’s University Press, 2009, 63.

Heard, Andrew. “Constitutional Doubts about Bill C‑20 and Senatorial Elections”, in Jennifer Smith, ed., *The Democratic Dilemma: Reforming the Canadian Senate*. Montréal and Kingston: McGill‑Queen’s University Press, 2009, 81.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., vol. 1. Toronto: Carswell, 2007 (updated 2013, release 1).

McCormick, Peter, Ernest C. Manning and Gordon Gibson. *Regional Representation: The Canadian Partnership.* Calgary: Canada West Foundation, 1981.

Monahan, Patrick J., and Byron Shaw. *Constitutional Law*, 4th ed. Toronto: Irwin Law, 2013.

Newman, Warren J. “Defining the ‘Constitution of Canada’ Since 1982: The Scope of the Legislative Powers of Constitutional Amendment under Sections 44 and 45 of the *Constitution Act, 1982*” (2003), 22 *S.C.L.R.* (2d) 423.

Newman, Warren J. “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada” (2007), 37 *S.C.L.R.* (2d) 383.

Pelletier, Benoît. *La modification constitutionnelle au Canada*. Scarborough, Ont.: Carswell, 1996.

Pelletier, Benoît. “Réponses suggérées aux questions soulevées par le renvoi à la Cour suprême du Canada concernant la réforme du Sénat” (2013), 43 *R.G.D.* 445.

Pinard, Danielle. “The Canadian Senate: An Upper House Criticized Yet Condemned to Survive Unchanged?”, in Jörg Luther, Paolo Passaglia and Rolando Tarchi, eds., *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*. Milan: Giuffrè, 2006, 459.

Scott, Stephen A. “Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes” (1982), 20 *U.W.O. L. Rev.* 247.

Smith, David E. *The Canadian Senate in Bicameral Perspective*. Toronto: University of Toronto Press, 2003.

Tremblay, Guy. “La portée élargie de la procédure bilatérale de modification de la Constitution du Canada” (2011), 41 *R.G.D.* 417.

Walters, Mark D. “The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C‑7” (2013), 7 *J.P.P.L.* 37.

Walters, Mark D. “Written Constitutions and Unwritten Constitutionalism”, in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory*. New York: Cambridge University Press, 2008, 245.

Whyte, John D. “Senate Reform: What Does the Constitution Say?”, in Jennifer Smith, ed., *The Democratic Dilemma: Reforming the Canadian Senate*. Montréal and Kingston: McGill‑Queen’s University Press, 2009, 97.

Woehrling, José. “Le recours à la procédure de modification de l’article 43 de la Loi constitutionnelle de 1982 pour satisfaire certaines revendications constitutionnelles du Québec”, in Pierre Thibault, Benoît Pelletier and Louis Perret, eds., *Essays in Honour of Gérald‑A. Beaudoin: The Challenges of Constitutionalism*. Cowansville, Qué.: Yvon Blais, 2002, 449.

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. Questions 1, 2, 3 and 5 are answered in the negative. Question 4 is answered in the affirmative with respect to s. 23(4). A full repeal of s. 23(3) requires a resolution of the legislative assembly of Quebec, pursuant to s. 43 of the *Constitution Act, 1982*. Question 6 is answered in the affirmative.

Robert J. Frater, Christopher M. Rupar and Warren J. Newman, for the Attorney General of Canada.

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The Honourable Serge Joyal, P.C., on his own behalf.

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Sébastien Grammond, Mark C. Power, Jennifer Klinck and Perri Ravon, for the intervener Fédération des communautés francophones et acadienne du Canada.

Serge Rousselle, for the intervener Société de l’Acadie du Nouveau‑Brunswick Inc.

Daniel Jutras, John J. L. Hunter, Q.C., Brent B. Olthuis, Claire E. Hunter and Kate Glover, for the *amicus curiae*.

The following is the opinion of

The Court —

1. Introduction
2. The Senate is one of Canada’s foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation. Yet from its first sittings, voices have called for reform of the Senate and even, on occasion, for its outright abolition.
3. The Government of Canada now asks this Court, under s. 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to answer essentially four questions: (1) Can Parliament unilaterally implement a framework for consultative elections for appointments to the Senate? (2) Can Parliament unilaterally set fixed terms for Senators? (3) Can Parliament unilaterally remove from the *Constitution Act, 1867* the requirement that Senators must own land worth $4,000 in the province for which they are appointed and have a net worth of at least $4,000? and (4) What degree of provincial consent is required to abolish the Senate?
4. We conclude that Parliament cannot unilaterally achieve most of the proposed changes to the Senate, which require the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces. We further conclude that abolition of the Senate requires the consent of all of the provinces. Abolition of the Senate would fundamentally change Canada’s constitutional structure, including its procedures for amending the Constitution, and can only be done with unanimous federal-provincial consensus.
5. This said, our conclusions are tied to the specific questions that were put before the Court. Our role is not to speculate on the full range of possible changes to the Senate. Rather, the proper role of this Court in the ongoing debate regarding the future of the Senate is to determine the legal framework for implementing the specific changes contemplated in the questions put to us. The desirability of these changes is not a question for the Court; it is an issue for Canadians and their legislatures.
6. The Reference Questions
7. On February 1, 2013, the Governor in Council issued Order in Council P.C. 2013-70, which referred the following questions to this Court, under s. 53 of the *Supreme Court Act*:

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

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

(*b*) a fixed term of ten years or more for Senators;

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

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

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

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

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

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

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

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

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

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

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

(*c*) by abolishing the powers of the Senate and eliminating the representation of provinces pursuant to paragraphs 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*?

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

1. To illustrate the content of the proposed changes, the questions refer to Bills S-4, C-20, and C-7. While Bills S-4 and C-20 were tabled respectively in 2006 and 2007, Bill C-7 was given first reading on June 21, 2011. All three bills died on the Order Paper.
2. Bill S-4 would replace the current senatorial term of office — which lasts until the attainment of the age of 75 — with renewable eight-year terms.
3. Bills C-20 and C-7 each set out a detailed framework for consultative elections of “nominees” for Senate office. Under Bill C-20, the names of the winners of national consultative elections would be submitted to the Prime Minister of Canada, for consideration by him or her when recommending nominees to the Governor General for vacant Senate seats.
4. Similarly, Bill C-7 provides that Senators would sit for a non-renewable nine-year term and sets out a model statute for provincial and territorial legislation creating consultative elections. It provides that the Prime Minister “must” consider names from the lists of successful candidates: cl. 3. Its appended model statute states the principle that Senators “should be chosen” from among those candidates: cl. 1 of the Schedule.
5. This Court is not the first to consider the questions posed by the Reference. When Parliament introduced Bill C-7, the Government of Quebec asked the Quebec Court of Appeal to advise whether the proposed changes to the Senate could be achieved unilaterally by Parliament.
6. The Court of Appeal held that Parliament could not unilaterally change the terms for Senators or introduce consultative elections for the appointment of Senators: *Projet de loi fédéral relatif au Sénat (Re)*, 2013 QCCA1807 (CanLII) (the “*Quebec Senate Reference*”). Rather, it found that these changes fall under s. 42 of the *Constitution Act, 1982* and require the consent of the legislative assemblies of at least two-thirds of the provinces that represent, in the aggregate, at least half of the population of all the provinces. In its view, the framers of the *Constitution Act, 1982* intended to constitutionally entrench the *status quo* with respect to the Senate until the day when broad federal-provincial consensus could be obtained on the matter of Senate reform.
7. Although the Court of Appeal was not directly asked to consider how the Senate could be abolished, it expressed the view that abolition would require unanimous provincial consent: para. 29. It reasoned that abolition of the Senate would amend by implication the procedures for constitutional amendment in Part V of the *Constitution Act, 1982*, something which can only be done with unanimous provincial consent under s. 41(*e*) of the Act.
8. The Senate
9. It is appropriate to briefly introduce the institution at the heart of this Reference.
10. The framers of the *Constitution Act, 1867* sought to adapt the British form of government to a new country, in order to have a “Constitution similar in Principle to that of the United Kingdom”: preamble. They wanted to preserve the British structure of a lower legislative chamber composed of elected representatives, an upper legislative chamber made up of elites appointed by the Crown, and the Crown as head of state.
11. The upper legislative chamber, which the framers named the Senate, was modeled on the British House of Lords, but adapted to Canadian realities. As in the United Kingdom, it was intended to provide “sober second thought” on the legislation adopted by the popular representatives in the House of Commons: John A. Macdonald, Province of Canada, Legislative Assembly, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd Sess., 8th Prov. Parl. (the “*1865 Debates*”), February 6, 1865, at p. 35. However, it played the additional role of providing a distinct form of representation for the regions that had joined Confederation and ceded a significant portion of their legislative powers to the new federal Parliament: *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at paras. 164-66, *per* LeBel J. While representation in the House of Commons was proportional to the population of the new Canadian provinces, each region was provided equal representation in the Senate irrespective of population. This was intended to assure the regions that their voices would continue to be heard in the legislative process even though they might become minorities within the overall population of Canada: George Brown, *1865 Debates*, February 8, 1865, at p. 88; D. Pinard, “The Canadian Senate: An Upper House Criticized Yet Condemned to Survive Unchanged?”, in J. Luther, P. Passaglia and R. Tarchi, eds., *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006), 459, at p. 462.
12. Over time, the Senate also came to represent various groups that were under-represented in the House of Commons. It served as a forum for ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process: B. Pelletier, “Réponses suggérées aux questions soulevées par le renvoi à la Cour suprême du Canada concernant la réforme du Sénat” (2013), 43 *R.G.D.* 445 (« Réponses suggérées »), at pp. 485-86.
13. Although the product of consensus, the Senate rapidly attracted criticism and reform proposals. Some felt that it failed to provide “sober second thought” and reflected the same partisan spirit as the House of Commons. Others criticized it for failing to provide meaningful representation of the interests of the provinces as originally intended, and contended that it lacked democratic legitimacy.
14. In the years immediately preceding patriation of the Constitution, proposals for reform focused mainly on three aspects: (i) modifying the distribution of seats in the Senate;[[1]](#footnote-1) (ii) circumscribing the powers of the Senate;[[2]](#footnote-2) and (iii) changing the way in which Senators are selected for appointment.[[3]](#footnote-3) These proposals assumed the continued existence of an upper chamber, but sought to improve its contribution to the legislative process.
15. In 1978, the federal government tabled a bill to comprehensively reform the Senate by readjusting the distribution of seats between the regions; removing the Senate’s absolute veto over most legislation and replacing it with an ability to delay the adoption of legislation; and giving the House of Commons and the provincial legislatures the power to select Senators: *Constitutional Amendment Act, 1978* (Bill C-60), June 20, 1978, cls. 62 to 70. The bill was not adopted and, in 1980, this Court concluded that Parliament did not have the power under the Constitution as it then stood to unilaterally modify the fundamental features of the Senate or to abolish it: *Reference re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (“*Upper House Reference*”).
16. Despite ongoing criticism and failed attempts at reform, the Senate has remained largely unchanged since its creation. The question before us now is not whether the Senate should be reformed or what reforms would be preferable, but rather how the specific changes set out in the Reference can be accomplished under the Constitution. This brings us to the issue of constitutional amendment in Canada.
17. The Part V Amending Procedures
18. The statute that created the Senate — the *Constitution Act, 1867* — forms part of the Constitution of Canada and can only be amended in accordance with the Constitution’s procedures for amendment: s. 52(2) and (3), *Constitution Act, 1982*. Consequently, we must determine whether the changes contemplated in the Reference amend the Constitutionand, if so, which amendment procedures are applicable.
19. Before answering these questions, we discuss constitutional amendment in Canada generally. We examine in turn the nature and content of the Constitution of Canada, the concept of constitutional amendment, and the Constitution’s procedures for amendment.
    1. The Constitution of Canada
20. The Constitution of Canada is “a comprehensive set of rules and principles” that provides “an exhaustive legal framework for our system of government”: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“*Secession Reference*”), at para. 32. It defines the powers of the constituent elements of Canada’s system of government — the executive, the legislatures, and the courts — as well as the division of powers between the federal and provincial governments: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*,[1997] 3 S.C.R. 3 (“*Provincial Court Judges Reference*”), at para. 108. And it governs the state’s relationship with the individual. Governmental power cannot lawfully be exercised, unless it conforms to the Constitution: s. 52(1), *Constitution Act, 1982*; *Secession Reference*, at paras. 70-78; *Reference re* *Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 (“*Supreme Court Act Reference*”), at para. 89.
21. The Constitution of Canada is defined in s. 52(2) of the *Constitution Act, 1982* as follows:

**52. . . .**

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

The documents listed in the Schedule to the *Constitution Act, 1982* as forming part of the Constitutioninclude the *Constitution Act, 1867*. Section 52 does not provide an exhaustive definition of the content of the Constitution of Canada: *Supreme Court Act Reference*, at paras. 97-100; *Secession Reference*, at para. 32.

1. The Constitution implements a structure of government and must be understood by reference to “the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning”: *Secession Reference*, at para. 32; see generally H. Cyr, “L’absurdité du critère scriptural pour qualifier la constitution” (2012), 6 *J.P.P.L.* 293. The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp.155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136; *R. v. Big M Drug Mart Ltd.*,[1985] 1 S.C.R. 295, at p. 344; *Supreme Court Act Reference*, at para. 19*.* Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law: *Secession Reference*; *Provincial Court Judges Reference*; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.
2. These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an “internal architecture”, or “basic constitutional structure”: *Secession Reference*, at para. 50; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57; see also *Supreme Court Act Reference*, at para. 82. The notion of architecture expresses the principle that “[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole”: *Secession Reference*, at para. 50; see also the discussion on this Court’s approach to constitutional interpretation in M. D. Walters, “Written Constitutions and Unwritten Constitutionalism”, in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008), 245, at pp. 264-65. In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.
   1. Amendments to the Constitution of Canada
3. The concept of an “amendment to the Constitution of Canada”, within the meaning of Part V of the *Constitution Act, 1982*, is informed by the nature of the Constitution and its rules of interpretation. As discussed, the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution’s architecture.
   1. The Part V Amending Procedures
4. Part V of the *Constitution Act, 1982* provides the blueprint for how to amend the Constitution of Canada (see Appendix). It tells us what changes Parliament and the provincial legislatures can make unilaterally, what changes require substantial federal and provincial consent, and what changes require unanimous agreement.

(1) History

1. The Part V amending formula reflects the principle that constitutional change that engages provincial interests requires both the consent of Parliament and a significant degree of provincial consent. Prior to patriation, constitutional amendment in Canada required the adoption of a law by the British Parliament following a joint resolution addressed to it by the Senate and the House of Commons, since the *Constitution Act, 1867* was an Act of the British Parliament. There was no formal requirement for consultation with the provinces. However, in practice, throughout the 20th century, the federal government consulted with the provinces on constitutional amendments that directly affected federal-provincial relations, and obtained their consent before putting a joint address to the British Parliament: Canada, Minister of Justice, *The Amendment of the Constitution of Canada* (1965) (“Favreau”), at pp. 15-16. By the time of patriation, this practice had ripened into a constitutional convention requiring substantial consent to constitutional change directly affecting federal-provincial relations: *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 (the “*Patriation Reference*”), at pp. 889-95; *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793.
2. Beginning in the 1930s, the federal government and the provinces held a series of conferences to discuss the possibility of adopting a formal amending formula. This produced several proposals: see in particular the Fulton-Favreau formula in Favreau, at pp. 110-15; and the Victoria Charter, in *Constitutional Conference: Proceedings* (1971), App. B. In October 1980, amid efforts to achieve broad constitutional reform, the federal government tabled a new proposed amending formula in the House of Commons and the Senate: “Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada”, in *The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada* (1980). In response, the provincial premiers developed a counter-proposal that became the template for Part V of the *Constitution Act, 1982* — the “April Accord” of 1981: *Constitutional Accord: Canadian Patriation Plan* (1981).
3. The April Accord, and ultimately Part V, reflect the political consensus that the provinces must have a say in constitutional changes that engage their interests. The “underlying purpose” of these documents is “to constrain unilateral federal powers to effect constitutional change”: P. J. Monahan and B. Shaw, *Constitutional Law* (4th ed. 2013), at p. 204; *Supreme Court Act Reference*, at paras. 98-100. They also consecrate the principle of “the constitutional equality of provinces as equal partners in Confederation”: *Constitutional Accord: Canadian Patriation Plan*, General Comment in Part A, at p. 1. In principle, no province stands above the others with respect to constitutional amendments, and all provinces are given the same rights in the process of amendment. The result is an amending formula designed to foster dialogue between the federal government and the provinces on matters of constitutional change, and to protect Canada’s constitutional *status quo* until such time as reforms are agreed upon.

(2) The Amending Procedures

1. Part V contains four categories of amending procedures. The first is the general amending procedure (s. 38, complemented by s. 42), which requires a substantial degree of consensus between Parliament and the provincial legislatures. The second is the unanimous consent procedure (s. 41), which applies to certain changes deemed fundamental by the framers of the *Constitution Act, 1982*. The third is the special arrangements procedure (s. 43), which applies to amendments in relation to provisions of the Constitution that apply to some, but not all, of the provinces. The fourth is made up of the unilateral federal and provincial procedures, which allow unilateral amendment of aspects of government institutions that engage purely federal or provincial interests (ss. 44 and 45).

(a) *The General Amending Procedure*

1. Section 38 of the *Constitution Act, 1982* provides:

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

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

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

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

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

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

1. The process set out in s. 38 is the general rule for amendments to the Constitution of Canada. It reflects the principle that substantial provincial consent must be obtained for constitutional change that engages provincial interests. Section 38 codifies what is colloquially referred to as the “7/50” procedure — amendments to the Constitution of Canada must be authorized by resolutions of the Senate, the House of Commons, and legislative assemblies of at least seven provinces whose population represents, in the aggregate, at least half of the current population of all the provinces*.* Additionally, it grants to the provinces the right to “opt out” of constitutional amendments that derogate from “the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province”.
2. By requiring significant provincial consensus while stopping short of unanimity, s. 38 “achieves a compromise between the demands of legitimacy and flexibility”: J. Cameron, “To Amend the Process of Amendment”, in G.-A. Beaudoin et al., *Federalism for the Future: Essential Reforms* (1998), 315, at p. 324. Its “underlying purpose . . . is to protect the provinces from having their rights or privileges negatively affected without their consent”: Monahan and Shaw, at p. 192.
3. The s. 38 procedure represents the balance deemed appropriate by the framers of the *Constitution Act, 1982* for most constitutional amendments, apart from those contemplated in one of the other provisions in Part V. Section 38 is thus the procedure of general application for amendments to the Constitution of Canada. As a result, the other procedures in Part V should be construed as exceptions to the general rule.
4. Section 42 complements s. 38 by expressly identifying certain categories of amendments to which the 7/50 procedure in s. 38(1) applies:

**42.** (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

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

1. This provision serves two purposes. First, the express inclusion of certain matters in s. 42 provided the framers of the *Constitution Act, 1982* with greater certainty that the 7/50 procedure would apply to amendments in relation to those matters: J. D. Whyte, “Senate Reform: What Does the Constitution Say?”, in J. Smith, ed., *The Democratic Dilemma: Reforming the Canadian Senate* (2009),97, at p. 102. Second, the provincial right to “opt out” from certain amendments contemplated in s. 38(2) to (4) does not apply to the categories of amendments in s. 42. This ensures that amendments made under s. 42 will apply consistently to all the provinces and allows the changes contemplated in the provision to be implemented in a coherent manner throughout Canada.
2. Section 42(1)(*b*) of the *Constitution Act, 1982* expressly makes the general amendment procedure applicable to amendments in relation to “the powers of the Senate and the method of selecting Senators”. We discuss below the meaning of this statutory language and its bearing on the questions before us.

(b) *The Unanimous Consent Procedure*

1. Section 41 of the *Constitution Act, 1982* sets out an amending procedure requiring unanimous consent in relation to certain matters:

**41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

1. Section 41 requires the unanimous consent of the Senate, the House of Commons, and all the provincial legislative assemblies for the categories of amendments enumerated in the provision. It “accords the highest level of constitutional protection and entrenchment” to the enumerated matters: W. J. Newman, “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada” (2007), 37 *S.C.L.R.* (2d)383, at p. 388. It is an exception to the general amending procedure. It creates an exacting amending procedure that is designed to apply to certain fundamental changes to the Constitution of Canada. Professor Pelletier aptly describes the rationale for requiring unanimity for the enumerated categories of amendments:

[translation] . . . the unanimity rule provided for in section 41 of the 1982 Act is justified by the need . . . to give each of the partners of Canada’s federal compromise a veto on those topics that are considered the most essential to the survival of the state.

(B. Pelletier, *La modification constitutionnelle au Canada* (1996), at p. 208)

(c) The Special Arrangements Procedure

1. Section 43 of the *Constitution Act, 1982* provides:

**43.** An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(*a*) any alteration to boundaries between provinces, and

(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

1. Section 43 applies to amendments in relation to provisions of the Constitution of Canada that apply to some, but not all, of the provinces. The determination of its scope and of the effects of its interaction with other provisions of Part V presents significant conceptual difficulties, leading Professor Scott to term it the “Rubik’s Cube” of Part V: S. A. Scott, “Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes” (1982), 20 *U.W.O. L. Rev.* 247, at pp. 292-98. We will limit our remarks on s. 43 to what is necessary to answer the Reference questions before us.
2. At the very least, s. 43 is triggered when a constitutional amendment relates to a provision of the Constitution of Canada that contains a “special arrangement” applicable only to one or several, but not all, of the provinces. In such cases, the use of the 7/50 procedure would overshoot the mark, by making adoption of the amendment contingent upon the consent of provinces to which the provision does not apply. Section 43 also serves to ensure that those provisions cannot be amended without the consent of the provinces for which the arrangement was devised: Monahan and Shaw, at p. 210.

(d) The Unilateral Federal and Provincial Procedures

1. Sections 44 and 45 of the *Constitution Act, 1982* provide for unilateral federal and provincial procedures of amendment:

**44.** Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

**45.** Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

1. These sections fulfill the same basic function as ss. 91(1)[[4]](#footnote-4) and 92(1)[[5]](#footnote-5) of the *Constitution Act, 1867*, which were repealed when the *Constitution Act, 1982* was enacted: *Constitutional Accord: Canadian Patriation Plan*, Explanatory Notes 7 and 8; P. W. Hogg, *Constitutional Law of Canada* (loose-leaf), at pp. 4-31 to 4-34; Pelletier, “Réponses suggérées”, at pp. 462-63; G. Tremblay, “La portée élargie de la procédure bilatérale de modification de la Constitution du Canada” (2011), 41 *R.G.D.* 417, at p. 428; W. J. Newman, “Defining the ‘Constitution of Canada’ Since 1982: The Scope of the Legislative Powers of Constitutional Amendment under Sections 44 and 45 of the *Constitution Act, 1982*” (2003), 22 *S.C.L.R.* (2d) 423, at p. 494; Pelletier, *La modification constitutionnelle au Canada*, at pp. 117 and 181; see also R. I. Cheffins, “The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications” (1982), 4 *S.C.L.R.* 43, at pp. 52-53.
2. Sections 91(1) and 92(1) of the *Constitution Act, 1867* granted the federal and provincial governments the power to amend their respective constitutions, provided that the amendments did not engage the interests of the other level of government. Section 91(1) was worded broadly, allowing Parliament to amend the “Constitution of Canada”, subject to certain restrictions. In 1980, the federal government asked this Court whether Parliament could unilaterally implement sweeping reforms to the Senate under s. 91(1). This Court concluded that s. 91(1) allowed Parliament to amend “the constitution of the federal government in matters of interest only to that government”: *Upper House Reference*, at p. 71. It followed that s. 91(1) did not give Parliament the power to unilaterally make constitutional changes such as the abolition of the Senate or the modification of the Senate’s essential features, since these changes engaged the interests of the provinces as well as those of the federal government: *ibid.*, at pp. 74-75 *et* *seq.* Likewise, s. 92(1) allowed the provincial legislatures to enact amendments only in relation to “the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union”: *OPSEU*, at p. 40, *per* Beetz J.
3. As the successors to those provisions, ss. 44 and 45 give the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government. This limited ability to make changes unilaterally reflects the principle that Parliament and the provinces are equal stakeholders in the Canadian constitutional design. Neither level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution. This said, those institutions can be maintained and even changed to some extent under ss. 44 and 45, provided that their fundamental nature and role remain intact.
4. How Can The Senate Changes Contemplated in the Reference Be Achieved?
5. The Reference questions ask whether Parliament, acting alone, can reform the Senate by creating consultative elections to select senatorial nominees endorsed by the populations of the various provinces and territories, by limiting senatorial tenure to fixed terms, and by removing the personal wealth and real property requirements for Senators. We will address each of these issues in turn.
   1. Consultative Elections
6. The text of the *Constitution Act, 1867* provides for the formal appointment of Senators by the Governor General:

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

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

In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada when filling Senate vacancies.

1. The Attorney General of Canada (supported by the attorneys general of Saskatchewan and Alberta as well as one of the *amici curiae*)submits that implementing consultative elections for Senators does not constitute an amendment to the Constitution of Canada. He argues that this reform would not change the text of the *Constitution Act, 1867*, nor themeans of selecting Senators. He points out that the formal mechanism for appointing Senators — summons by the Governor General acting on the advice of the Prime Minister — would remain untouched. Alternatively, he submits that if introducing consultative elections constitutes an amendment to the Constitution, then it can be achieved unilaterally by Parliament under s. 44 of the *Constitution Act, 1982*.
2. In our view, the argument that introducing consultative elections does not constitute an amendment to the Constitution privileges form over substance. It reduces the notion of constitutional amendment to a matter of whether or not the letter of the constitutional text is modified. This narrow approach is inconsistent with the broad and purposive manner in which the Constitution is understood and interpreted, as discussed above. While the provisions regarding the appointment of Senators would remain textually untouched, the Senate’s fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered.
3. We conclude that each of the proposed consultative elections would constitute an amendment to the Constitution of Canada and require substantial provincial consent under the general amending procedure, without the provincial right to “opt out” of the amendment (s. 42). We reach this conclusion for three reasons: (1) the proposed consultative elections would fundamentally alter the architecture of the Constitution; (2) the text of Part V expressly makes the general amending procedure applicable to a change of this nature; and (3) the proposed change is beyond the scope of the unilateral federal amending procedure (s. 44).

(1) Consultative Elections Would Fundamentally Alter the Architecture of the Constitution

1. The implementation of consultative elections would amend the Constitution of Canada by fundamentally altering its architecture. It would modify the Senate’s role within our constitutional structure as a complementary legislative body of sober second thought.
2. The *Constitution Act, 1867* contemplates a specific structure for the federal Parliament, “similar in Principle to that of the United Kingdom”: preamble. The Act creates both a lower *elected* and an upper *appointed* legislative chamber: s. 17. It expressly provides that the members of the lower chamber — the House of Commons — “shall be elected” by the population of the various provinces: s. 37. By contrast, it provides that Senators shall be “summoned” (i.e.appointed) by the Governor General: ss. 24 and 32.
3. The contrast between election for members of the House of Commons and executive appointment for Senators is not an accident of history. The framers of the *Constitution Act, 1867* deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of “sober second thought”.
4. As this Court wrote in the *Upper House Reference*, “[i]n 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”: p. 77 (emphasis added). The framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives.
5. Correlatively, the choice of executive appointment for Senators was also intended to ensure that the Senate would be a *complementary* legislative body, rather than a perennial rival of the House of Commons in the legislative process. Appointed Senators would not have a popular mandate — they would not have the expectations and legitimacy that stem from popular election. This would ensure that they would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons. As John A. Macdonald put it during the Parliamentary debates regarding Confederation, “[t]here is . . . a greater danger of an irreconcilable difference of opinion between the two branches of the legislature, if the upper be elective, than if it holds its commission from the Crown”: *1865 Debates*,February 6, 1865, at p. 37. An appointed Senate would be a body “calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people”: *ibid.*, at p. 36 (emphasis added).
6. The appointed status of Senators, with its attendant assumption that appointment would prevent Senators from overstepping their role as a complementary legislative body, shapes the architecture of the *Constitution Act, 1867*. It explains why the framers did not deem it necessary to textually specify how the powers of the Senate relate to those of the House of Commons or how to resolve a deadlock between the two chambers. Indeed, on its face the *Constitution Act, 1867* grants as much legislative power to the Senate as to the House of Commons, with the exception that the House of Commons has the exclusive power to originate appropriation and tax bills (s. 53). As Professor Smith aptly summarizes:

[The framers’] original answer to the clash that would inevitably occur between elected chambers was to make the Senate appointed. This assured that a government enjoying the confidence of the House of Commons would normally be able to have its legislation adopted by Parliament, but gave the Senate the ability to act as a check in those rare instances when it was absolutely necessary.

(D. E. Smith, *The Canadian Senate in Bicameral Perspective* (2003), at p. 169; see also A. Heard, “Constitutional Doubts about Bill C-20 and Senatorial Elections”, in Smith, *The Democratic Dilemma,* 81, at p. 95.)

1. The proposed consultative elections would fundamentally modify the constitutional architecture we have just described and, by extension, would constitute an amendment to the Constitution. They would weaken the Senate’s role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design.
2. Federal legislation providing for the consultative election of Senators would have the practical effect of subjecting Senators to the political pressures of the electoral process and of endowing them with a popular mandate. Senators selected from among the listed nominees would become popular representatives. They would have won a “true electoral contest” (*Quebec Senate Reference*, at para. 71), during which they would presumably have laid out a campaign platform and made electoral promises: Pelletier, “Réponses suggérées”, at pp. 470-71. They would join the Senate after acquiring the mandate and legitimacy that flow from popular election.
3. The Attorney General of Canada counters that this broad structural change would not occur because the Prime Minister would retain the ability to ignore the results of the consultative elections and to name whomever he or she wishes to the Senate. We cannot accept this argument. Bills C-20 and C-7 are designed to result in the appointment to the Senate of nominees selected by the population of the provinces and territories. Bill C-7 is the more explicit of the two bills, as it provides that the Prime Minister “must” consider the names on the lists of elected candidates. It is true that, in theory, prime ministers could ignore the election results and rarely, or indeed never, recommend to the Governor General the winners of the consultative elections. However, the purpose of the bills is clear: to bring about a Senate with a popular mandate. We cannot assume that future prime ministers will defeat this purpose by ignoring the results of costly and hard-fought consultative elections: see for example the discussion in M. D. Walters, “The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7” (2013), 7 *J. P.P.L.* 37, at pp. 47-48. A legal analysis of the constitutional nature and effects of proposed legislation cannot be premised on the assumption that the legislation will fail to bring about the changes it seeks to achieve.
4. In summary, the consultative election proposals set out in the Reference questions would amend the Constitution of Canada by changing the Senate’s role within our constitutional structure from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy.

(2) The Wording of Part V Indicates That the Proposal for Consultative Elections Attracts the General Amending Procedure

1. Our view that the consultative election proposals would amend the Constitution of Canada is supported by the language of Part V. The words employed in Part V are guides to identifying the aspects of our system of government that form part of the protected content of the Constitution. Section 42(1)(*b*) of the *Constitution Act, 1982* provides that the general amending procedure (s. 38(1)) applies to constitutional amendments in relation to “the method of selecting Senators” (“*le mode de sélection des sénateurs*”). This broad wording covers the implementation of consultative elections, indicating that a constitutional amendment is required and making that amendment subject to the general procedure: H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 343; Whyte, at p. 106; see also C.-E. Côté, “L’inconstitutionnalité du projet d’élections fédérales sénatoriales” (2010), 3 *R.Q.D.C.* 81, at p. 83, cited in the *Quebec Senate Reference*, at para. 50; Walters, “The Constitutional Form and Reform of the Senate”, at p. 52.
2. The words “the method of selecting Senators” include more than the formal appointment of Senators by the Governor General. “[S]ection 42(*b*) refers to the method of *selecting* persons for appointment, not the means of appointment”: Whyte, at p. 106 (emphasis in original). By employing this language, the framers of the *Constitution Act, 1982* extended the constitutional protection provided by the general amending procedure to the entire process by which Senators are “selected”. The proposed consultative elections would produce lists of candidates, from which prime ministers would be expected to choose when making appointments to the Senate. The compilation of these lists through national or provincial and territorial elections and the Prime Minister’s consideration of them prior to making recommendations to the Governor General would form part of the “method of selecting Senators”. Consequently, the implementation of consultative elections falls within the scope of s. 42(1)(*b*) and is subject to the general amending procedure, without the provincial right to “opt out”.
3. In like vein, the Attorney General of Canada argues that consultative elections are not “in pith and substance” amendments in relation to the “method of selecting Senators”. He draws upon the doctrine of pith and substance, which is employed by courts in division of powers cases to decide whether legislation was validly enacted by a level of government: see Hogg, at pp. 15-7 to 15-10. The courts look to whether legislation, in its purpose and effects, falls within one of the classes of subjects over which the Constitution gives power to the enacting body: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 63-66. The Attorney General’s position is that legislation implementing consultative elections would not, in its purpose and effects, constitute an amendment in relation to the “method of selecting Senators”. He confines the meaning of this expression to the formal mechanism of appointment of Senators by the Governor General.
4. As discussed, the plain meaning of the words “the method of selecting Senators” goes beyond the formal mechanism of appointment. Borrowing a doctrine from the division of powers jurisprudence does not avoid this textual difficulty. Even if the doctrine of pith and substance were relevant to the analysis, its application cannot justify a narrow reading of the relevant constitutional amending provisions. It bears repeating that ss. 38 and 42 of the *Constitution Act, 1982* are intended to ensure that substantial provincial consent will be obtained for constitutional changes that engage provincial interests. The 7/50 procedure is the general rule for amendments to the Constitution of Canada. The Attorney General’s invocation of the language of “pith and substance” does not alter this principle.

(3) The Implementation of Consultative Elections Falls Outside the Scope of the Unilateral Federal Amending Procedure

1. The Attorney General of Canada argues in the alternative that, if the implementation of consultative elections requires a constitutional amendment, then it can be achieved under the unilateral federal amending procedure (s. 44). More specifically, he argues that the creation of consultative elections would be an amendment “in relation to . . . the Senate”, within the meaning of s. 44.
2. We must reject this argument. As we have seen, s. 42(1)(*b*) makes the general amending procedure applicable to changes to “the method of selecting Senators”. Section 44 is expressly made “[s]ubject to” s. 42 — the categories of amendment captured by s. 42 are removed from the scope of s. 44. It follows that the 7/50 procedure, as opposed to the unilateral federal procedure, applies to the introduction of consultative elections. Moreover, the scope of s. 44 is limited — it does not encompass consultative elections, which would change the Senate’s fundamental nature and role by endowing it with a popular mandate.

(4) Conclusion on How Consultative Elections Can Be Achieved

1. We conclude that introducing a process of consultative elections for the nomination of Senators would change our Constitution’s architecture, by endowing Senators with a popular mandate which is inconsistent with the Senate’s role as a complementary legislative chamber of sober second thought. This would constitute an amendment to the Constitution of Canada in relation to the method of selecting Senators. It thus attracts the general amending procedure, without the provincial right to “opt out”: s. 42(1)(*b*), *Constitution Act, 1982*.
   1. Senatorial Tenure
2. It is not disputed that a change in the duration of senatorial terms would amend the Constitution of Canada, by requiring a modification to the text of s. 29 of the *Constitution Act, 1867*. Section 29(2) provides:

(2) A Senator who is summoned to the Senate . . . shall . . . hold his place in the Senate until he attains the age of seventy-five years.

The question before us is which Part V procedure applies to amend this provision.

1. The Attorney General of Canada argues that changes to senatorial tenure fall residually within the unilateral federal power of amendment in s. 44, since they are not expressly captured by the language of s. 42. He also contends that the imposition of the fixed terms contemplated in the Reference[[6]](#footnote-6) would constitute a minor change that does not engage the interests of the provinces, because those terms are equivalent in duration to the average length of the terms historically served by Senators.
2. In essence, the Attorney General of Canada proposes a narrow textual approach to this issue. Section 44 of the *Constitution Act, 1982* provides: “Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to . . . the Senate . . .”. Neither s. 41 nor s. 42 expressly applies to amendments in relation to senatorial tenure.[[7]](#footnote-7) It follows, in his view, that the proposed changes to senatorial tenure are captured by the otherwise unlimited power in s. 44 to make amendments in relation to the Senate.
3. We agree that the language of s. 42 does not encompass changes to the duration of senatorial terms. However, it does not follow that all changes to the Senate that fall outside of s. 42 come within the scope of the unilateral federal amending procedure in s. 44: see Whyte, at pp. 102-3.
4. We are unable to agree with the Attorney General of Canada’s interpretation of the scope of s. 44. As discussed, the unilateral federal amendment procedure is limited. It is not a broad procedure that encompasses all constitutional changes to the Senate which are not expressly included within another procedure in Part V. The history, language, and structure of Part V indicate that s. 38, rather than s. 44, is the general procedure for constitutional amendment. Changes that engage the interests of the provinces in the Senate as an institution forming an integral part of the federal system can only be achieved under the general amending procedure. Section 44, as an exception to the general procedure, encompasses measures that maintain or change the Senate without altering its fundamental nature and role.
5. When discussing the scope of the unilateral federal procedure in the federal government’s 1980 proposal for an amending formula, the then-Minister of Justice Jean Chrétien made statements to the effect that it would allow Parliament to make constitutional amendments for the Senate’s continued maintenance and proper functioning, such as for example a modification of the Senate’s quorum requirement at s. 35 of the *Constitution Act, 1867*: *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 53, February 4, 1981, at p. 50. He made clear, however, that significant Senate reform which engages the interests of the provinces could only be achieved with their consent: *ibid.*, at pp. 67-68.
6. In our view, this understanding of the unilateral federal procedure applies to Part V. The Senate is a core component of the Canadian federal structure of government. As such, changes that affect its fundamental nature and role engage the interests of the stakeholders in our constitutional design — i.e.the federal government and the provinces — and cannot be achieved by Parliament acting alone.
7. The question is thus whether the imposition of fixed terms for Senators engages the interests of the provinces by changing the fundamental nature or role of the Senate. If so, the imposition of fixed terms can only be achieved under the general amending procedure. In our view, this question must be answered in the affirmative.
8. As discussed above, the Senate’s fundamental nature and role is that of a complementary legislative body of sober second thought. The current duration of senatorial terms is directly linked to this conception of the Senate. Senators are appointed roughly for the duration of their active professional lives.[[8]](#footnote-8) This security of tenure is intended to allow Senators to function with independence in conducting legislative review. This Court stated in the *Upper House Reference* 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’”: p. 76. A significant change to senatorial tenure would thus affect the Senate’s fundamental nature and role. It could only be achieved under the general amending procedure and falls outside the scope of the unilateral federal amending procedure.
9. The imposition of fixed senatorial terms is a significant change to senatorial tenure. We are not persuaded by the argument that the fixed terms contemplated in the Reference are a minor change because they are equivalent in duration to the average term historically served by Senators. Rather, we agree with the submission of the *amici curiae* that there is an important “qualitative difference” between tenure for the rough duration of a Senator’s active professional life and tenure for a fixed term: factum, at para. 88. Fixed terms provide a weaker security of tenure. They imply a finite time in office and necessarily offer a lesser degree of protection from the potential consequences of freely speaking one’s mind on the legislative proposals of the House of Commons.
10. It may be possible, as the Attorney General of Canada suggests, to devise a fixed term so lengthy that it provides a security of tenure which is functionally equivalent to that provided by life tenure. However, it is difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure. As Professor Desserud writes:

A one-year term would certainly not provide sufficient opportunity for the Senate to fulfill its duty to be a chamber of sober second thought. . . . The question becomes one of degree. If not one year, what about two? What about three? And so on. . . . Drawing an absolute line between when a term limit is too short and acceptably short is impossible.

(D. Desserud, “Whither 91.1? The Constitutionality of Bill C-19: An Act to Limit Senate Tenure”, in J. Smith, ed., *The Democratic Dilemma*,63, at p. 78)

1. The difficulty in determining how long senatorial terms should be in order to safeguard the Senate’s role as a body of sober second thought suggests that this is at heart a matter of policy. The very process of subjectively identifying a term long enough to leave intact the Senate’s independence engages the interests of the provinces and requires their input. The imposition of fixed terms, even lengthy ones, constitutes a change that engages the interests of the provinces as stakeholders in Canada’s constitutional design and falls within the rule of general application for constitutional change — the 7/50 procedure in s. 38.
2. We note that although s. 42 does not apply to the imposition of fixed terms, no province would be able to exercise a right to “opt out” of a reform of tenure that garnered the requisite level of provincial consent. Such a change would constitute an institutional reform that affects the independence of the Senate and the senatorial office. It does not affect the legislative powers, property rights, or any other rights or privileges of the legislature or government of a province. Consequently, it does not trigger the right to “opt out” provided in s. 38(2) of the *Constitution Act, 1982*.
   1. Property Qualifications
3. The fourth Reference question contemplates the repeal of the provisions setting out the property qualifications for Senators. Sections 23(3) to 23(6) of the *Constitution Act, 1867* provide:

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

. . .

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

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

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

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

1. The *Constitution Act, 1867* established two property qualifications for Senators: a real property qualification requiring them to own land worth at least $4,000 in the province for which they are appointed (s. 23(3)), and a requirement that they have a personal net worth of at least $4,000 (s. 23(4)). The Attorney General of Canada argues that Parliament can repeal the provisions setting out these requirements through the unilateral federal amendment procedure. The Attorney General of Quebec contends that the repeal of the real property qualification in s. 23(3) would affect the operation of s. 23(6), which allows Quebec Senators to either reside in the electoral division for which they are appointed *or* to fulfill their real property qualification in that division. It follows, in his view, that Quebec’s consent is required to repeal the provision.
2. We conclude that the net worth requirement (s. 23(4)) can be repealed by Parliament under the unilateral federal amending procedure. However, a full repeal of the real property requirement (s. 23(3)) requires the consent of Quebec’s legislative assembly, under the special arrangements procedure. Indeed, a full repeal of that provision would also constitute an amendment in relation to s. 23(6), which contains a special arrangement applicable only to the province of Quebec.

(1) The Net Worth Requirement

1. As discussed above, the unilateral federal procedure to amend the Constitution is limited in scope. It does not permit amendments that engage the interests of the provinces by modifying the Senate’s fundamental nature or role. The question is thus whether the removal of the net worth requirement would modify the Senate’s fundamental nature or role.
2. There is nothing in the material before us to suggest that removing the net worth requirement would affect the independence of Senators or otherwise affect the Senate’s role as a complementary legislative chamber of sober second thought. This change is qualitatively different than implementing consultative elections for Senators or changing their security of tenure, which affect the fundamental nature and role of the Senate.
3. Therefore, removing the net worth requirement does not engage the interests of the provinces. This is supported by the fact that none of the intervening provinces opposed the repeal of the requirement or argued that their interests were engaged by the amendment.
4. We conclude that the repeal of s. 23(4) is precisely the type of amendment that the framers of the *Constitution Act, 1982* intended to capture under s. 44. It updates the constitutional framework relating to the Senate without affecting the institution’s fundamental nature and role.

(2) The Real Property Requirement

1. Similarly, the removal of the real property requirement (s. 23(3), *Constitution Act, 1867*) would not alter the fundamental nature and role of the Senate. However, the removal of the real property requirement for Quebec’s Senators would constitute an amendment in relation to a special arrangement. It would thus attract the special arrangements procedure and require the consent of Quebec’s National Assembly (s. 43, *Constitution Act, 1982*).
2. Section 22 of the *Constitution Act, 1867* provides that each Senator from Quebec is appointed to represent one of the province’s 24 electoral divisions. Historically, this was intended to ensure that Quebec’s Anglophone minorities would be represented in the Senate, by making it mandatory to appoint Senators specifically for divisions in which the majority of the population was Anglophone: J. Woehrling, “Le recours à la procédure de modification de l’article 43 de la Loi constitutionnelle de 1982 pour satisfaire certaines revendications constitutionnelles du Québec”, in P. Thibault, B. Pelletier and L. Perret, eds., *Essays in Honour of Gérald-A. Beaudoin*: *The Challenges of Constitutionalism* (2002), 449, at pp. 489-90. Section 23(6) is linked to the implementation of this special arrangement: it provides a degree of flexibility to Senators from Quebec by allowing them to either reside in the electoral division for which they are appointed *or* to simply fulfill their real property qualification in that division.
3. A full repeal of s. 23(3) would render inoperative the option in s. 23(6) for Quebec Senators to fulfill their real property qualification in their respective electoral divisions, effectively making it mandatory for them to reside in the electoral divisions for which they are appointed. It would constitute an amendment in relation to s. 23(6), which contains a special arrangement applicable to a single province, and consequently would fall within the scope of the special arrangement procedure. The consent of Quebec’s National Assembly is required.
4. However, the real property qualification in s. 23(3) could be partially removed by making the provision inapplicable to Senators from all provinces except those from Quebec. This would not engage the interests of the provinces and can be achieved under the unilateral federal amending procedure.
5. Senate Abolition: How Can It Be Achieved?
6. Finally, the Reference asks which of two possible procedures applies to abolition of the Senate: the general amending procedure or the unanimous consent procedure?
7. The Attorney General of Canada argues that the general amending procedure applies because abolition of the Senate falls under matters which Part V expressly says attract that procedure — amendments in relation to “the powers of the Senate” and “the number of members by which a province is entitled to be represented in the Senate” (s. 42(1)(*b*) and (*c*)). Abolition, it is argued, is simply a matter of “powers” and “members”: it literally takes away all of the Senate’s powers and all of its members. Alternatively, the Attorney General of Canada argues that since abolition of the Senate is not expressly mentioned anywhere in Part V, it falls residually under the general amending procedure.
8. We cannot accept the Attorney General’s arguments. Abolition of the Senate is not merely a matter of “powers” or “members” under s. 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*. Rather, abolition of the Senate would fundamentally alter our constitutional architecture — by removing the bicameral form of government that gives shape to the *Constitution Act, 1867* — and would amend Part V, which requires the unanimous consent of Parliament and the provinces (s. 41(*e*), *Constitution Act, 1982*).
   1. Abolishing the Senate Does Not Fall Within Section 42(1)(b) and (c)
9. It is argued that s. 42(1)(*b*) and (*c*), which expressly make the general amending procedure applicable to changes to the “powers” of the Senate and to the “number” of Senators allotted to each province, brings abolition of the Senate within the scope of the general amending procedure.
10. We cannot accept this argument. It misunderstands the purpose of the express mention of the Senate in s. 42(1)(*b*) and (*c*). This provision captures Senate *reform*, which implies the continued existence of the Senate: Pelletier, *La modification constitutionnelle au Canada*, at pp. 221-24. Outright abolition falls beyond its scope.
11. As discussed above, the references to the Senate in s. 42 were made in anticipation of future Senate reform. The Quebec Court of Appeal aptly captured this historical context and its relevance in interpreting s. 42:

The interpretation of section 42 must also take account, in particular, that because of the inability of the federal government and the provinces to agree in 1982 on a total reform of the Constitution, including the Senate, amongst other institutions, the framers decided to postpone further discussion of the matters it contains, while specifying the applicable amending procedure to incorporate an eventual consensus in the Constitution.

[*Quebec Senate Reference*, at para. 40]

1. Abolition of the Senate was not on the minds of the framers of the *Constitution Act, 1982*. Rather, they turned their minds to the main aspects of Senate reform that were discussed in the years prior to patriation: the distribution of seats in the Senate, the powers of the Senate, and the manner of selecting Senators. They expected ongoing discussion of these aspects of Senate reform and made it clear, through their choice of words in s. 42, that these reforms would require a substantial degree of federal-provincial consensus. However, they assumed that the evolution of Canada’s system of government would be characterized by a degree of continuity — that constitutional change would be incremental and that some core institutions would remain firmly anchored in our constitutional order.
2. To interpret s. 42 as embracing Senate abolition would depart from the ordinary meaning of its language and is not supported by the historical record. The mention of amendments in relation to the powers of the Senate and the number of Senators for each province presupposes the continuing existence of a Senate and makes no room for an indirect abolition of the Senate. Within the scope of s. 42, it is possible to make significant changes to the powers of the Senate and the number of Senators. But it is outside the scope of s. 42 to altogether strip the Senate of its powers and reduce the number of Senators to zero.
   1. Abolishing the Senate Would Alter the Part V Amending Formula
3. The Attorney General of Canada argues that Senate abolition can be accomplished without amending Part V and that it therefore does not fall within the scope of s. 41(*e*), which requires unanimous federal-provincial consent for amendments to Part V. He argues that the Senate can be abolished without textually modifying the provisions of Part V. The references to the Senate in Part V would simply be viewed as “spent” and as devoid of legal effect.
4. The Attorney General further submits that the Part V amending procedures would remain functional despite the presence of these “spent” provisions, since the Senate’s failure to adopt a resolution authorizing a constitutional amendment can be overridden after the expiration of a 180-day period: s. 47(1), *Constitution Act, 1982*. Moreover, he submits that the Senate’s role in the unilateral federal amending procedure (s. 44) can be eliminated under the general amending procedure, by changing the definition of Parliament in s. 17 of the *Constitution Act, 1867* so as to remove the upper house.
5. The Attorney General supplements these submissions with the argument that the effects of Senate abolition on Part V would be merely incidental and that they should not trigger the application of the unanimous consent procedure. In his view, Senate abolition would not be, “in pith and substance”, an amendment in relation to Part V.
6. We disagree with these submissions. Once more, the Attorney General privileges form over substance. Part V is replete with references to the Senate and gives the Senate a role in all of the amending procedures, except for the unilateral provincial procedure: Pelletier, *La modification constitutionnelle au Canada*, at pp. 220-21. Part V was drafted on the assumption that the federal Parliament would remain bicameral in nature, i.e.that there would continue to be both a lower legislative chamber and a complementary upper chamber. Removal of the upper chamber from our Constitution would alter the structure and functioning of Part V. Consequently, it requires the unanimous consent of Parliament and of all the provinces (s. 41(*e*)).
7. The Attorney General of Canada’s argument that the upper chamber could be removed without amending Part V fails to persuade us. As discussed, the notion of an amendment to the Constitution of Canada is not limited to textual modifications — it also embraces significant structural modifications of the Constitution. The abolition of the upper chamber would entail a significant structural modification of Part V. Amendments to the Constitution of Canada are subject to review by the Senate. The Senate can veto amendments brought under s. 44 and can delay the adoption of amendments made pursuant to ss. 38, 41, 42, and 43 by up to 180 days: s. 47, *Constitution Act, 1982*. The elimination of bicameralism would render this mechanism of review inoperative and effectively change the dynamics of the constitutional amendment process. The constitutional structure of Part V as a whole would be fundamentally altered.
8. The argument that Senate abolition would only have “incidental” or secondary effects on Part V also fails to persuade us. The effects of Senate abolition on Part V are direct and substantial. While it is true that the Senate’s role in constitutional amendment is not as central as that of the House of Commons or the provincial legislatures, its ability to delay the adoption of constitutional amendments nevertheless provides an additional mechanism to ensure that they are carefully considered. Indeed, the Senate’s refusal to authorize an amendment can give the House of Commons pause and draw public attention to amendments: Smith, at p. 152.
9. Since the effects of Senate abolition on Part V cannot be characterized as incidental, it is not necessary to decide whether there exists a doctrine — analogous to the “pith and substance” doctrine, discussed above — that justifies applying the general amending procedure to a constitutional amendment that has incidental effects on a matter coming within the unanimous consent procedure.
   1. Conclusion on Abolition of the Senate
10. The review of constitutional amendments by an upper house is an essential component of the Part V amending procedures. The Senate has a role to play in all of the Part V amending procedures, except for the unilateral provincial procedure. The process of constitutional amendment in a unicameral system would be qualitatively different from the current process. There would be one less player in the process, one less mechanism of review. It would be necessary to decide whether the amending procedure can function as currently drafted in a unicameral system, or whether it should be modified to provide for a new mechanism of review that occupies the role formerly played by the upper chamber. These issues relate to the functioning of the constitutional amendment formula and, as such, unanimous consent of Parliament and of all the provinces is required under s. 41(*e*) of the *Constitution Act, 1982*.
11. Conclusion
12. The majority of the changes to the Senate which are contemplated in the Reference can only be achieved through amendments to the Constitution, with substantial federal-provincial consensus. The implementation of consultative elections and senatorial term limits requires consent of the Senate, the House of Commons, and the legislative assemblies of at least seven provinces representing, in the aggregate, half of the population of all the provinces (s. 38 and s. 42(1)(*b*), *Constitution Act, 1982*). A full repeal of the property qualifications requires the consent of the legislative assembly of Quebec (s. 43, *Constitution Act, 1982*). As for Senate abolition, it requires the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces (s. 41(*e*), *Constitution Act, 1982*).
13. We answer the Reference questions as follows:

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

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

(*b*) a fixed term of ten years or more for Senators;

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

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

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

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

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

No.

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

No.

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

No.

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

Yes, with respect to s. 23(4). A full repeal of s. 23(3) requires a resolution of the legislative assembly of Quebec, pursuant to s. 43 of the *Constitution Act, 1982*.

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

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

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

(*c*) by abolishing the powers of the Senate and eliminating the representation of provinces pursuant to paragraphs 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*?

No.

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

Yes.

**APPENDIX**

*Constitution Act, 1982*

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

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

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

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

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

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

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

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

(2) [Idem] A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

**40.** [Compensation] Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

**41.** [Amendment by unanimous consent] An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

**42.** (1) [Amendment by general procedure] An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

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

**43.** [Amendment of provisions relating to some but not all provinces] An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(*a*) any alteration to boundaries between provinces, and

(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

**44.** [Amendments by Parliament] 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.

**45.** [Amendments by provincial legislatures] Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

**46.** (1) [Initiation of amendment procedures] The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

(2) [Revocation of authorization] A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

**47.** (1) [Amendments without Senate resolution] An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

(2) [Computation of period] Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

**48.** [Advice to issue proclamation] The Queen’s Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

**49.** [Constitutional conference] A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

*Judgment accordingly.*

Solicitor for the Attorney General of Canada:  Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.

Solicitors for the intervener the Attorney General of Quebec:  Bernard, Roy & Associés, Montréal.

Solicitor for the intervener the Attorney General of Nova Scotia:  Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick:  Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba:  Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia:  Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Attorney General of Prince Edward Island:  Stewart McKelvey, Charlottetown.

Solicitor for the intervener the Attorney General for Saskatchewan:  Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta:  Attorney General of Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador:  Attorney General of Newfoundland and Labrador, St. John’s.

Solicitor for the intervener the Attorney General of the Northwest Territories:  Attorney General of the Northwest Territories, Yellowknife.

Solicitor for the intervener the Attorney General of Nunavut:  Attorney General of Nunavut, Iqaluit.

The Honourable Serge Joyal, P.C.*, on his own behalf.*

Solicitors for the intervener the Honourable Anne C. Cools:  Stikeman Elliott, Ottawa.

Solicitors for the intervener Fédération des communautés francophones et acadienne du Canada:  University of Ottawa, Ottawa; Power Law LLP, Ottawa.

Solicitor for the intervener Société de l’Acadie du Nouveau‑Brunswick Inc.:  Université de Moncton, Moncton.

Solicitors appointed by the Court as amicus curiae:  McGill University, Montréal; Hunter Litigation Chambers, Vancouver.

1. See for example *The* *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada: Final Report* (1972) (the “Molgat-MacGuigan Report”), at p. 35; *Report on Certain Aspects of the Canadian Constitution* (1980) (the “Lamontagne Report”), at pp. 35-36; P. McCormick, E. C. Manning and G. Gibson, *Regional Representation: The Canadian Partnership* (1981), at pp. 109-10. [↑](#footnote-ref-1)
2. See for example the Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (1979) (the “Pepin-Robarts Report”), at pp. 98 and 128-29. [↑](#footnote-ref-2)
3. See for example the Molgat-MacGuigan Report, at p. 35, and the discussion in M. Lalonde, “*Constitutional Reform: House of the Federation*” (1978), at pp. 7 *et seq.* [↑](#footnote-ref-3)
4. Section 91(1) gave Parliament legislative power over:

   1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House. [↑](#footnote-ref-4)
5. Section 92(1) gave the provincial legislatures power over:

   The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor. [↑](#footnote-ref-5)
6. The first Reference question contemplates the following terms, in addition to the non-renewable nine-year term in Bill C-7: a non-renewable term of ten years or more; a non-renewable term of eight years or less; a non-renewable term for the life of two or three Parliaments; and a renewable eight-year term, as set out in Bill S-4. [↑](#footnote-ref-6)
7. Section 42 makes the following references to the Senate:

   **42.** (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

   . . .

   (*b*) the powers of the Senate and the method of selecting Senators;

   (*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators; [↑](#footnote-ref-7)
8. Under s. 29 of the *Constitution Act, 1867* as it stood when originally enacted, Senators were appointed for life (see s. 29(1)). The duration of their tenure was reduced to the attainment of 75 years of age by the *Constitution Act, 1965*, S.C. 1965, c. 4, s. 1. In the *Upper House Reference*, this Court found that “[t]he imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate”: pp. 76-77. [↑](#footnote-ref-8)