Court File No.: 35203

IN THE SUPREME COURT OF CANADA

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

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

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

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PART I – FACTS

I. Development of Federal Responsibility for the Administration of Peace, Order and Good Government in the Northwest Territories

1. At Confederation, the areas then known as Rupert's Land and the North-Western Territory covered over two million square miles and included what is now the Yukon, the Northwest Territories, parts of Nunavut, including the southwest portion of Baffin Island, Alberta, Saskatchewan, most of Manitoba, and the northern parts of Quebec and Ontario.

2. On March 29, 1867, s. 146 of the *British North America Act, 1867* now referred to as the *Constitution Act, 1867* [1], made provision for the admission of Rupert's Land and the North-Western Territory into the Union. As provided by section 146:

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

3. The Dominion of Canada made a formal Address to Her Majesty the Queen from the Senate and House of Commons on 16 & 17 December 1867 with respect to the North-Western Territory and Rupert's Land. [2] The 1867 Address set out the undertakings the Parliament of Canada was willing to assume as a condition of the transfer of the North-Western Territory and Rupert's Land to Canada. In particular, the 1867 Address provided that Parliament would assume the

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[1] *British North America Act, 1867* now referred to as the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 5, Attorney General of Canada ("AGC") Authorities, Tab 33.
[2] Appended as Schedule A to *Rupert's Land and North-Western Territory Order* (U.K.), 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9, Attorney General of NWT ("AGNWT") Authorities, Tab 30.

obligations and duties of government and legislation for the North-Western Territory and Rupert's Land, as set out below.

To the Queen's Most Excellent Majesty

Most Gracious Sovereign,

We, your Majesty's most dutiful and loyal subjects, the Senate and Commons of the Dominion of Canada, in Parliament assembled, humbly approach your Majesty for the purpose of representing:--

That it would promote the prosperity of the Canadian people, and conduce to the advantage of the whole Empire, if the Dominion of Canada constituted under the provisions of the British North America Act of 1867 were extended westward to the shores of the Pacific Ocean.

That the colonization of the fertile lands of the Saskatchewan, the Assiniboine, and the Red River districts; the development of the mineral wealth which abounds in the regions of The North-West; and the extension of commercial intercourse through the British possessions in America from the Atlantic to the Pacific, are alike dependent upon the establishment of a stable Government for the maintenance of law and order in the North-Western Territories.

That the welfare of a sparse and widely-scattered population of British subjects of European origin, already inhabiting these remote and unorganized territories, would be materially enhanced by the formation therein of political institutions bearing analogy, as far as circumstances will admit, to those which exist in the several provinces of this Dominion.

That the 146th section of the *British North America Act* of 1867 provides for the admission of Rupert' s Land and the North-Western Territory, or either of them, into union with Canada, upon the terms and conditions to be expressed in addresses from the Houses of Parliament of this Dominion to your Majesty, and which shall be approved of by your Majesty in Council.

That we do therefore most humbly pray that your Majesty will be graciously pleased, by and with the advice of your Most Honourable Privy Council, to unite Rupert's Land and the North-Western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government; and we most humbly beg to express to your Majesty that we are willing to assume the duties and obligations of government and legislation as regards those territories.

> That in the event of your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company, or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction.
>
> And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.
>
> The Senate, Tuesday, December 17, 1867.
>
> House of Commons, Monday, December 16, 1867. [emphasis added]

4. *Rupert's Land Act, 1868* [3] authorized the Hudson's Bay Company to make, and the Her Majesty to accept the surrender of Rupert's Land back to the Crown for the purpose of admitting Rupert's Land into the Dominion of Canada. The surrender was executed on November 19, 1869 and accepted by the Crown on June 22, 1870. Section 5 provides:

> It shall be competent to Her Majesty by any such Order or Orders in Council as aforesaid, on Address from the Houses of the Parliament of Canada, to declare that Rupert's Land shall, from a Date to be therein mentioned, be admitted into and become Part of the Dominion of Canada; and thereupon it shall be lawful for the Parliament of Canada from the Date aforesaid to make, ordain, and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions, and Ordinances, and to constitute such Courts and Officers as may be necessary for the Peace, Order and good Government of Her Majesty's Subjects and others therein; Provided that, until otherwise enacted by the said Parliament of Canada, all the Powers, Authorities, and Jurisdiction of the several Courts of Justice now established in Rupert's Land, and of the several Officers thereof, and of all Magistrates and Justices now acting within the said Limits, shall continue in full force and effect therein. [emphasis added]

5. On June 22, 1869, in anticipation of the admission of the North-Western Territory and

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[3] *Rupert's Land Act, 1868*, 31-32 Victoria, c. 105 (U.K.), reprinted in R.S.C. 1985, App. II, No. 6, AGNWT Authorities, Tab 29.

Rupert's Land into the Union, the *Temporary Government of Rupert's Land Act, 1869* [4] made temporary provision for the government of these lands until more permanent arrangements could be made by the Parliament of Canada. The territories when admitted were to be known as "The North-West Territories". The *Act* provided:

> **2.** It shall be lawful for the Governor, by any Order or Orders, to be by him from time to time made, with the advice of the Privy Council, (and subject to such conditions and restrictions as to him shall seem meet) to authorize and empower such Officer as he may from time to time appoint as Lieutenant-Governor of the North-West Territories to make provision for the administration of Justice therein, and generally to make, ordain, and establish all such Laws, Institutions and Ordinances as may be Necessary for the Peace, Order and good Government of Her Majesty's subjects and others herein; provided that all such Orders in Council, and all Laws and Ordinances, so to be made aforesaid, shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively.
>
> **3.** The Lieutenant-Governor shall administer the Government under instructions from time to time given him by Order in Council. [emphasis added]

6. As provided for by section 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868*, on July 15, 1870 Rupert's Land and the North-Western Territory were transferred to Canada by the *Rupert's Land and North-Western Territory Order* (U.K.), 23 June 1870 (*1870 Order*) [5]. The *1870 Order* is a constitutional document under section 52 of the *Constitution Act, 1982*. The *1870 Order* provided as follows:

> It is hereby ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, that from and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and Authority to legislate for the future welfare and good government of the said Territory. And it is further ordered that, without prejudice to any obligations arising from the aforesaid approved Report, Rupert's Land shall from and after the said date be admitted into and become part of the Dominion of Canada upon the following

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[4] *Temporary Government of Rupert's Land Act, 1869*, 32-33 Victoria, c. 3, reprinted in R.S.C. 1985, App. II, No. 7, AGNWT Authorities, Tab 31.

[5] *Rupert's Land and North-Western Territory Order* (U.K.), 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9, AGNWT Authorities, Tab 30.

> terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second Address of the Parliament of Canada, and approved of by Her Majesty as aforesaid: ...
>
> > 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.

7. The Address to Her Majesty the Queen by the House of Commons and the Senate on December 16 and 17, 1867 was appended as Schedule A to the *1870 Order*. The Address to Her Majesty the Queen by the House of Commons and the Senate on May 29 and 31, 1869 which set out, out among other things, details of the Agreement between the Government of Canada and the Hudson's Bay Company, was appended as Schedule B to the *1870 Order*.

8. While not included as a term of the *1870 Order*, the following resolution was made in the Address by the House of Commons and the Senate on May 29 and 31, 1869:

> That upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of Indian tribes whose interests and wellbeing are involved in the transfer, and we authorize and empower the Government in Council to arrange any details that may be necessary to carry out the terms and conditions of the above agreement.

9. While the effect of the omission of this resolution from the *1870 Order* has been debated, at the least, it is considered to have created a moral if not a legal obligation for Parliament to take responsibility for the Aboriginal population of the territory. [6]

10. On June 29, 1871, *The British North America Act, 1871* since renamed the *Constitution Act, 1871* [7], confirmed the authority and responsibility of the Parliament of Canada to provide for

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[6] Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982) p. 11-12, AGNWT Authorities, Tab 24.

the administration, peace, order and good government of any territory which was not a province, as set out in section 4.

> 4. The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any Province. [emphasis added]

11. On April 8, 1875, the *North-West Territories Act*, 1875 [8] provided a constitution for the North-West Territories.

> 2. For the North-West Territories there shall be an officer styled the Lieutenant – Governor, appointed by the Governor General In Council, by instrument under the great seal of Canada, who shall hold office during the pleasure of the Governor General; and the Lieutenant-Governor shall administer the government under instructions from time to time given him by Order in Council, or by the Secretary of State for Canada.
>
> 8. The Governor in Council may, by proclamation, from time to time, direct that any Act of the Parliament of Canada, or any part or parts thereof, or any one or more of the sections of any one or more of any such Acts shall be in force in the North-West Territories generally, or in any part or parts thereof to be mentioned in the said proclamation for such purpose. [emphasis added]

12. Provision was made for a Council of five appointed members "to aid the Lieutenant Governor in the administration of the North-West Territories, with such powers, not inconsistent, with the Act, as may be, from time to time, conferred upon them by the Governor General in Council." [s.4]

II. Development of Responsible Government in the Northwest Territories

13. The development of responsible government in the Northwest Territories has been reviewed by John Havelock Parker in a 1993 affidavit [9] originally filed in the 1996 Federal Court

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[7] *The British North America Act, 1871*, 34-35 Victoria, c. 28, reprinted in R.S.C. 1985, App. II, No. 11, since renamed the *Constitution Act, 1871*, AGNWT Authorities, Tab 20.
[8] *North-West Territories Act*, 1875, 38 Victoria, c. 49, AGNWT Authorities, Tab 25.
[9] Affidavit of John Havelock Parker sworn August 17, 1993, without exhibits.

Trial Division case *Northwest Territories* v. *P.S.A.C*[10]. Mr. Parker had been the Deputy Commissioner of the NWT between 1967 and 1979, and the Commissioner between 1979 and 1989. Madame Justice Simpson noted that his credentials for the task of tracing the history of the Government of the Northwest Territories were impeccable, and as all parties accepted his evidence, she quoted relevant passages in her judgment. [11]

14. As summarized by Mr. Parker, between 1870 and the turn of the 20th century, the region developed from a quasi-colonial system under virtual federal control to a system of responsible, representative government approximating the model of government existing in the provinces.

15. In 1888, an elected Legislative Assembly replaced the existing Council. An Executive Council was established in 1897 with powers approximating those of the provinces subject to certain controls by the federal government. However, in 1905, following the creation of Saskatchewan and Alberta from portions of the North-West Territories, and the transfer of additional land to Quebec and Ontario, elected representation disappeared from the North-West Territories and the administration of government reverted to the status of a colony run from Ottawa, as it had been in the early 1870s. The remaining land that comprised the North-West Territories, as well as the Arctic Islands which were transferred from Britain to Canada on July 3, 1880 [12], became known as the "Northwest Territories" with the passage of the *Northwest Territories Act*, 1906. [13]

16. The *North-west Territories Amendment Act, 1905* [14] established the office of "Commissioner" as the new federal appointee with administrative responsibility for the affairs of the territory. The Commissioner possessed extensive executive and legislative authority. This legislation stipulated the creation of a council of four appointed members, however no appointments were made until 1921. The seat of the territorial government was moved to Ottawa

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[10] *Northwest Territories* v *P.S.A.C.*, 1996 CarswellNat 780, [1996] 3 F.C. 182, 112 F.T.R. 167, AGNWT Authorities, Tab 9.
[11] *Northwest Territories* v *P.S.A.C.*, 1996 CarswellNat 780, [1996] 3 F.C. 182, 112 F.T.R. 167, at paras. 3-7, AGNWT Authorities, Tab 9.
[12] *Adjacent Territories Order (1880)*, reprinted in R.S.C. 1985, App. II, No. 14, AGNWT Authorities, Tab 17.
[13] *Northwest Territories Act*, R.S.C., 1906, c. 62, AGNWT Authorities, Tab 26.
[14] *North-west Territories Amendment Act, 1905*, S.C. 1905, c. 27, s.8, AGNWT Authorities, Tab 28 .

where it remained until 1967 when it was transferred to Yellowknife. The size of the council increased periodically between 1921 and 1951. Members of council were senior officials of various federal departments involved in northern administration.

17. During the 1950s, amendments to the *Northwest Territories Act* permitted the election of Council members, increased legislative and financial powers were given to the Council including permission to enact territorial ordinances concerning local matters, a Territorial Court was created, and the Commissioner was permitted to control some public land and to borrow money and make expenditures for territorial purposes subject to federal approval.

18. During the 1960s, the federal government continued to exercise a considerable degree of legal and practical control over the government of the Northwest Territories. The Commissioner administered the government on instructions from the Governor-in-Council or the federal Minister of Indian Affairs and Northern Development who had the responsibility of coordinating all federal activities within the Northwest Territories and had the responsibility for most territorial services.

19. In 1965, the Advisory Commission on the Development of Government in the Northwest Territories (the "Carrothers Commission") of which John Parker was a member, was established by the federal government in response to growing demands for greater autonomy from within the Northwest Territories, the desire for democratic institutions and the transfer of decision making powers to those affected by the decisions. The Report issued in 1966 [15] concluded that the Northwest Territories required "the means of growth to province-hood". Its major recommendations included that the territory not be divided, that the seat of government be relocated to Yellowknife, that territorial administration for government be implemented including decentralization of government operations and the transfer of administrative functions from federal authorities to the territory, and that increased political and fiscal responsibility be given to the territorial government.

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[15] Report of the Advisory Commission on the Development of Government in the Northwest Territories, 1966, Ottawa, Canada (Summary and Table of Contents).

20. The Carrothers Commission set a 10 year horizon for implementation of its objectives, most of which were completed within that time frame. By 1970 the major provincial-type programs which had previously been administered federally, including education, welfare, economic development, labour relations and municipal affairs, were transferred to the Government of the Northwest Territories ("GNWT"). In 1971, the GNWT assumed the responsibility for the public service and justice departments.

21. In 1975, the first fully elected council of the Northwest Territories since 1897 was created with 15 sitting members. Two members of the Legislative Assembly were chosen to sit on the Executive Committee which until that time had consisted exclusively of the Commissioner, Deputy Commissioners and Assistant Commissioners, all of whom were appointed by the federal government. By 1984, the Commissioner was the only remaining federal appointee on the Executive Committee. On January 30, 1988, the Commissioner turned over the chair of the Executive Council to the Government Leader. With this symbolic act, the Northwest Territories in practical terms effectively achieved responsible government, as elected ministers had full responsibility for the conduct of government.

22. By the 1980s the territorial public service was responsible for providing and administering most of the programs and services provided by a provincial government and permitted regional accountability to the users of the services. Transfer of human resources, forestry, health, power commission from federal to territorial jurisdiction was completed. In 1985 a special office on devolution reporting to the Government Leader was established to support and co-ordinate territorial government devolution activities in the Northwest Territories. A new financial relationship was introduced which approximated the financial arrangements between the federal government and the provinces.

23. As summarized by Mr. Parker:

> The cumulative effect of the many changes which have taken place in the government of the NWT, particularly since the release of the Carrothers Commission Report in 1966, has been to create a representative, responsible, resident territorial government which has the same powers and responsibilities to those it governs as a provincial government. Those differences which do remain

> between the NWT and the provinces have little to do with the manner of government or the relative levels of local government autonomy, which they share in common. The remaining differences have much more to do with the nature of land ownership and control of resources; the issues raised by the presence of a native majority in the NWT; and the nature and magnitude of the financial arrangements between the federal and territorial governments. [para. 34]

24. In 1993, Parliament created another new territory, Nunavut, from portions of the land that formerly comprised the Northwest Territories.

25. In 1994, the Legislative Assembly of the Northwest Territories passed a motion to adopt the designation "Premier" to refer to the Government Leader and chair of the Executive Council of the Northwest Territories.

26. On June 25, 2013, leaders in the Northwest Territories signed a final devolution agreement with the federal government to transfer authority over land, water resources, mineral resources and oil and gas management to the territory effective April 1, 2014, thereby transferring the last set of responsibilities from the Government of Canada to the GNWT.

III. Present status of the Government of the Northwest Territories

27. The present status of the GNWT has been summarized Mr. Justice Vertes of the Supreme Court of the Northwest Territories in the case of *Morin* v. *Crawford* (1999): [16]

> Through the instrument of the *Northwest Territories Act*, the Parliament of Canada delegated extensive powers of self-government to the Northwest Territories. The Commissioner in Council is given jurisdiction to legislate in a broad range of subjects similar to the jurisdictional powers of a province. There is *dicta* upholding the validity of this delegation: see *Grey, Re* (1918), 57 S.C.R. 150 (S.C.C.) (at pages 170-171). There is jurisprudence from this court that has held that, while the Commissioner in Council legislates under the authority of an act of the federal Parliament, the laws enacted are laws of the Territories passed by a legislature constituted for the Territories: *Pfeiffer v. Northwest Territories (Commissioner)* (1977), 75 D.L.R. (3d) 407 (N.W.T. S.C.). The *Northwest*

[16] *Morin* v *Crawford*, 14 Admin. L.R. (3d) 287, [1999] 29 C.P.C. (4th) 362, AGNWT Authorities, Tab 8.

> *Territories Act* does provide, in section 21(2), that the federal cabinet may disallow any statute passed by the territorial legislature within one year of its passage. In its practical effect, however, this is no different than the federal power of disallowance of provincial legislation, found in s. 90 of the *Constitution Act, 1867*, a power that by constitutional convention is not used and is now regarded as obsolete: see P.W. Hogg, *Constitutional Law of Canada* (1997), section 5.3(e). [para. 52]
>
> The Legislative Assembly of the Northwest Territories has also achieved some limited constitutional recognition. Section 3 of the *Charter of Rights and Freedoms* guarantees: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." The right to vote has been described as the very embodiment of democracy, the right of citizens to elect their government: *Harvey* v. *New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 (S.C.C.) (per La Forest J. at page 901). The rights protected by section 3 are "preferred" rights in that they are not subject to the notwithstanding clause found in s. 33 of the *Charter*. Section 30 of the *Charter* states that "a reference ... to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be." This recognition reinforces my opinion that in no way can this Legislative Assembly be considered as merely an emanation or organ of the federal government. It is a separate and distinct legislative entity. [para. 54] [emphasis added]
>
> It may be technically correct to say, as Laskin C.J.C. did in *Yellowknife (City)* v. *Canada (Labour Relations Board)* (1977), 76 D.L.R. (3d) 85 (S.C.C.), that the Parliament of Canada has an "all-encompassing" legislative authority in the Northwest Territories (at page 86). But, considering the history, the legal powers, and the constitutional position of the Legislative Assembly of the Northwest Territories as an institution, I conclude that it is an independent legislative institution as fully effective within its sphere of jurisdiction as any other legislature. [para. 55]

28. The current version of the *Northwest Territories Act* [17] which was last amended on March 28, 2013, provides as follows:

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[17] *Northwest Territories Act*, R.S.C., 1985, c. N-27, AGNWT Authorities, Tab 27.

> 3. The Governor in Council may appoint for the Territories a chief executive officer called the Commissioner of the Northwest Territories.
>
> 5. The Commissioner shall administer the government of the Territories under instructions from time to time given by the Governor in Council or the Minister.

Section 2 provides that in this Act, "Minister" means the Minister of Indian Affairs and Northern Development.

29. As set out in section 16 of the *Northwest Territories Act, 1985*, the legislative powers of the Government of the Northwest Territories are similar to those exercised by the provinces and include matters of a local nature.

30. In the letter of appointment from the Hon. John Duncan, Minister of Indian Affairs and Northern Development to the present Commissioner, the Hon. George Tuccaro, dated October 6, 2010, [18] the Minister advised the Commissioner that in addition to his appointment as chief executive officer for the Territories by the Governor in Council, the Commissioner is required to "administer the Territories in accordance with any written instruction from the Governor in Council or the Minister."

> Consistent with Canadian constitutional conventions, you will act by and with the advice of your Premier, Executive Council and Legislative Assembly in all those matters relating to territorial policy, legislation and administrative decisions that fall within the competence of your office. There are only a few instances where your Premier alone has the capacity to provide direction. More particularly, with respect to the making of appointments and regulations, the advice of the Legislative Assembly, Executive Council or the responsible Minister or other person or entity authorize to make the recommendation to you, must be followed.
>
> It is appropriate that the Commissioner's role continue to evolve in a manner consistent with, and supportive of, responsible government in the Northwest Territories. As a general guide, and having due regard to the constitutional differences between provinces and territories, you will carry out your role as Commissioner in a manner similar in practice to that of a provincial Lieutenant Governor. Overall, as Commissioner, you hold an important trust as the keeper of constitutional tradition, the embodiment of security for the people and institutions

[18] Letter of Appointment from the Hon. John Duncan to the Hon. George Tuccaro, dated October 6, 2010.

> of the Northwest Territories within the Canadian federation, and the symbol of good government."

31. As described by John Parker, [19] the role of the Commissioner has changed from the plenary authority mandated by the *North-west Territories Amendment Act, 1905* to the modern-day reality in which the Commissioner is a titular figure exercising no greater practical authority than a Lieutenant-Governor in a province. While there is no provision in the *Northwest Territories Act* requiring that the Commissioner consult with advisors, or an advisory body, when carrying out his executive function, in reality, the Executive function has now evolved to a point where the Commissioner acts with the advice of the Executive Council.

32. The Legislative Assembly functions on the principle of consensus, rather than on the party system. It is composed of nineteen Members who are elected as independents in their constituencies. The Speaker of the Legislative Assembly, the Premier, and six Members of the Executive Council (or Cabinet) are elected by the Members of the Legislative Assembly. The eleven Regular Members who have not been elected to the Executive Council become the unofficial opposition.[20]

33. The status of the GNWT has been fully reviewed in the 2001 Federal Court of Appeal case *Fédération Franco-Ténoise* v. *R.* [21] The Court stated as follows:

> In *Northwest Territories v. P.S.A.C.* (1999), 180 F.T.R. 20 (Fed. T.D.), Dubé J. seems to me to have accurately described the status of the Territories when he stated:
>
> [31] I cannot accept the argument of the GNWT that there was an evolution to a separate Crown in the NWT and that this evolution towards responsible government would give rise to a separate entity placing the NWT on the same footing as the ten Canadian provinces…
>
> [32] Undoubtedly, the powers and authority of the GNWT have increased over the years, but the source of its increased powers and authority remains the Federal Crown. The English Crown has divested itself of its power and authority over Canada in favour of Parliament and the Legislatures of the provinces but not in

[19] Affidavit of John Havelock Parker sworn August 17, 1993, without exhibits.
[20] www.assembly.gov.nt.ca
[21] *Fédération Franco-Ténoise* v *R.*, 2001 FCA 220, 203 D.L.R. (4th) 556, AGNWT Authorities, Tab 4.

favour of the territories until they have achieved full provincial status. The *Northwest Territories Act* is purely a federal statute providing for a local government headed by a federal appointee. The NWT has not become a province by evolution but it is still a territory under simple delegation of power…[para 21]

34. The Court of Appeal held that the following conclusions can be drawn:

(a) Constitutionally

Constitutionally, the Territories do not have the same status as provinces. They remain a creature of the federal government, subject in principle to the good will of the Government of Canada. Her Majesty the Queen, in the Territories, is Her Majesty the Queen in right of Canada. Although some legislative and political arrangements may have the appearance of agreements between the Government of Canada and the Government of the Territories, these arrangements cannot convert the Territories into a province: indeed, the Territories cannot gain provincial status without an amendment to that effect to the Canadian Constitution, in accordance with the method provided by the Constitution.

(b) Legislatively

Legislatively, the Parliament of Canada has invested the Territories with the attributes of a genuine responsible government and given this government the plenary executive, legislative and judicial powers that the country's Constitution allowed Parliament to delegate, stopping just short of the plenary powers associated with a sovereign responsible government, those powers being limited by the Constitution to the government of Canada and the provincial governments.

However, Parliament has reserved to the Governor in Council the ultimate control over the exercise by the Government of the Territories of its legislative power. And Parliament went to some pains to note in its legislation that federal laws applied to the institutions of the Territories failing provision to the contrary.

Although any comparison between territories and municipalities is unfair to the Territories since their status is closer to that of a province than it is to a municipality, it can be said that the Territories are no more the agents of their respective creators than are the municipalities when they administer the territory they have been empowered to manage.

(c) Politically

Politically, the Government of Canada deals with the Territories as if it were dealing with provinces, inasmuch, it seems to me, as this is allowed by the Constitution. The

> political reality can clarify the juridical issue; however, it cannot falsify it: whatever the political appearances may be, there is not, in law, a "territorial" Crown, or a "territorial" province, or Her Majesty the Queen "in right of the Territories". [para. 38-43]

35. To summarize, the GNWT has province-like powers within its sphere of jurisdiction and for the purposes of the Charter, it is treated as a province. However, Parliament and the federal government remain responsible for the governance of the territory.

IV. Senate Representation for the Northwest Territories

36. The *British North America Act, 1886* [22] provided as follows:

> 1. The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

37. *An Act respecting the representation of the North-West Territories in the Senate of Canada* enacted in 1887 [23] provided the North-West Territories with its initial representation in the Senate in the form of two Members.

38. *An Act to increase the representation of the North-west Territories in the Senate* enacted in 1903 [24] repealed the 1887 *Act* and increased representation of the North-West Territories in the Senate to four Members.

39. With the creation of Alberta and Saskatchewan in 1905, the North-West Territories lost its representation in the Senate.

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[22] *British North America Act, 1886*, 49-50 Victoria, c. 35 (U.K.), reprinted in R.S.C. 1985, App. II, No. 15, AGNWT Authorities, Tab 21.
[23] *An Act respecting the representation of the North-West Territories in the Senate of Canada*, S.C. 1887, c. 3, s. 1, AGNWT Authorities, Tab 18.
[24] *An Act to increase the representation of the North-west Territories in the Senate*, S.C. *1903*, c. 42, s.1, AGNWT Authorities, Tab 19.

40. It was not until 1975 with the enactment of the *Constitution Act (No. 2)* [25] that the Northwest Territories was provided with one Member in the Senate. In the House of Commons debates regarding this Bill, it was noted that the Executive Council of the Northwest Territories had unanimously endorsed the Bill [26] and was on record as supporting the provision of territorial representation in the Senate when delegates had appeared before the Standing Committee on Indian Affairs and Northern Development one year previously, despite the fact that the current Member of the House of Commons for the Northwest Territories was opposed. The Hon. Judd Buchanan commented that the provision of the Senate seats to Yukon and Northwest Territories were expected to provide additional opportunities for the expression of northern viewpoints in Parliament and to improve communication between Ottawa and the territories at the Parliamentary level. [27]

41. The Hon. Walter Baker, also supportive of the Bill, reflected upon the principle that all people of Canada whether they reside in the provinces or in the territories have a right to be represented in all of the federal representative bodies in Parliament. The Senate was established for the purpose of ensuring representation in a different way to minority area groups which find themselves in the minority in terms of number in relation to other groups in Canada. [28]

V. The Role of the Senate

42. The creation and role of the Senate was reviewed by the Supreme Court of Canada in *Reference re Legislative Authority of Parliament of Canada.* [29] The Court noted that the Senate has a vital role as an institution forming part of the federal system created by the *British North America Act, 1867* as reflected in the following recital in the *Act*:

> Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the

[25] *Constitution Act (No. 2), 1975,* S.C. 1974-75-76, c. 53, s. 1, reprinted in R.S.C. 1985, App. II, No. 42, AGNWT Authorities, Tab 22.
[26] Legislative Assembly of the Northwest Territories Debates, 7th Council, 52nd Session, March 27, 1974 p. 10-12.
[27] House of Commons Debates, April 18, 1975, p. 4998 – 5013 at p. 5004.
[28] House of Commons Debates, May 30, 1975, p. 6295 – 6299 at p. 6296.
[29] *Reference re Legislative Authority of Parliament of Canada*, [1980] 1 SCR 54 (sub nom. *Reference re Legislative Authority of Parliament to Alter or Replace Senate*), 102 D.L.R. (3d) 1 (sub nom. *British North America Act and Federal Senate, Re*), AGNWT Authorities, Tab 12.

> United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom... [para. 13] [emphasis added]

43. Representation in the Senate was designed to protect the interests of minorities, as described by Sir John A. Macdonald in the *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, Quebec, 1865*, pages 35 and 38, and cited by the Court:

> In order to protect local interests and to prevent sectional jealousies, it was found requisite that the three great divisions into which British North America is separated, should be represented in the Upper House on the principle of equality. There are three great sections, having different interests, in this proposed Confederation.... To the Upper House is to be confided the protection of sectional interests: therefore is it that the three great divisions are there equally represented for the purpose of defending such interests against the combinations of majorities in the Assembly. [para. 15]

44. Representation in the Senate was also a requirement for the consent of certain colonies to enter into the Union, as described by the Honourable George Brown in *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, Quebec, 1865,* page 88, and cited by the Court:

> But the very essence of our compact is that the union shall be federal and not legislative. Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step; and, for my part, I am quite willing they should have it. In maintaining the existing sectional boundaries and handing over the control of local matters to local bodies, we recognize, to a certain extent, a diversity of interests; and it is quite natural that the protection for those interests, by equality in the Upper Chamber, should be demanded by the less numerous provinces. [para. 15]

45. The Court stated:

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

> *1867*], as originally enacted, provided, in s. 22, that in relation to the constitution of the Senate, Canada should be deemed to consist of Three Divisions, to be equally represented, *i.e.* Ontario, Quebec and the Maritime Provinces (Nova Scotia and New Brunswick)… [para. 16]
>
> Bearing in mind the historical background in which the creation of the Senate as a part of the federal legislative process was conceived, the words of Lord Sankey L.C. in re *The Regulation and Control of Aeronautics in Canada* [1932] A.C. 54. at p. 70, although they were written in relation to the Act as originally enacted, are apt:
>
> > Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies. [para 30] [emphasis added]

46. At the Special Joint Committee of the Senate and the House of Commons on Senate Reform in 1983[30], the Hon. George Braden, Leader of the Elected Executive, GNWT, noted that during the Quebec talks of 1864, a great deal of time and effort was devoted to the question of representation in the Parliament of Canada. Mr. Braden indicated that the compromise arrived at and the reasons for it have been clearly set out by Dean George Stanley in his book *A Short History of the Canadian Constitution* wherein he stated in reference to the Senate: "Since they could hope to gain nothing in the House of Commons, the Maritimers and French Canadians concentrated on the composition of the Senate. The Maritimers saw in a strong representation in the upper chamber the one safeguard that the smaller provinces could possess." As stated by Stanley, "the role of the Canadian Senate was to be more than one of restraint and revision; it was to be one of guarding minority and regional rights. That the Senate has never played this role in our history does not deny the intentions of the framers of the Constitution; it merely

[30] Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform, September 21, 1983, pg. 18:3 – 18:26.

reveals the failure of subsequent generations to live up to the hopes of the founders of confederation." [p. 18:5-18:6]

47. Mr. Braden recognized that the purpose of the Special Joint Committee was to recapture and revive the original reason for the creation of the Senate – namely to provide for equitable regional representation in Parliament. It was the view of the Executive Council that whether appointed or elected, a Senator ought to represent a particular region of the country to provide for regional balance. "Senators should be made aware of their special responsibility to bring forth a regional point of view and should be ever vigilant of the impact that proposed legislation may have on a particular region." [p. 18:6-18:7]

48. "The position of the Government of the Northwest Territories in respect of [the powers of the Senate] is that the Senate should exercise its powers, keeping in view its two fundamental purposes – namely, to present a regional point of view and to provide for sober second thought." [p. 18:7]

> [T]he Senate was the vehicle designed by the fathers of Confederation to provide for regional representation. It was a means to provide a balance to the obvious control which areas with larger populations would enjoy in the House of Commons. Looking at the present distribution of seats, it is clear that the balance no longer exists...It is no wonder...that the Senate has lost its role as a body to protect regional interests. This imbalance must be redressed so that the areas with less populations can still have an effective voice in the Senate. [p. 18:9]

VI. Participation by Northwest Territories in Discussions on Constitutional Amendment and Senate Reform

49. The Legislative Assembly of the Northwest Territories considered the following postulate of the Carrothers Commission to be an irrefutable statement of the rights of Territorial residents:

> Every citizen of Canada has a claim to participate in the institutions of responsible government under the Canadian Constitution; it is a goal of political development of the NWT that the optimum number of Canadian citizens resident in the

> Territories should, at optimum speed, participate in government as fully as Canadian citizens resident in the Provinces.[31] [32]

50. Accompanying its development of responsible government, the Northwest Territories has been able to increase its participation in, and contribution to issues of national importance, including constitutional amendment and Senate reform.

1. First Ministers' Meetings

51. Government Leaders of the Northwest Territories were initially invited by the federal government to attend the First Ministers' conferences as independent observers. GNWT delegates attended the 1974 Federal-Provincial Conferences of First Ministers on Energy and the 1985 Annual Conference of First Ministers and the First Ministers' Conference on the Economy on this basis. [33]

52. The Hon. George Braden and a delegation from the Northwest Territories were full participants for the first time at the Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters in 1983.[34] The Conference was convened pursuant to section 37 of the *Constitution Act, 1982* which specified its agenda to include an item respecting constitutional matters that directly affect the aboriginal peoples of Canada and that elected representatives of the governments of the Yukon Territory and the Northwest Territories should also be invited to participate in the discussions on any item on the conference agenda that in the opinion of the Prime Minister directly affects the Yukon Territory and the Northwest Territories. The Northwest Territories was an attendee at the subsequent First Ministers' Conferences on Aboriginal Constitutional Matters which were held in 1984, 1985 and 1987.[35]

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[31] Report of the Advisory Commission on the Development of Government in the Northwest Territories, 1966, Ottawa, Canada, Summary at p. 3.
[32] Report of the Standing Committee on Constitutional Development in the Northwest Territories, March 28, 1979 at p. 11.
[33] First Ministers' Conferences 1906 – 2004, Canadian Intergovernmental Conference Secretariat, www.scics.gc.ca, at p. 58, 71, 72, 80.
[34] First Ministers' Conferences 1906 – 2004, Canadian Intergovernmental Conference Secretariat, www.scics.gc.ca, at p. 76, 77.
[35] First Ministers' Conferences 1906 – 2004, Canadian Intergovernmental Conference Secretariat, www.scics.gc.ca, at p. 78, 79, 81, 82, 85, 86 .

53. The Northwest Territories has attended all First Minister's Meetings as a full participant since 1992. The Northwest Territories has attended First Ministers' Meetings on the Economy in 1992 and 1993, Trade in 1994, and First Ministers' Meetings in 1996, 1997, 1999, 2000, 2003, 2004, 2008, 2009, 2013. Meetings have been regularly held between various levels of federal, provincial and territorial governments. [36]

2. Special Meetings on Constitutional Amendment and Senate Reform

54. The Hon. George Braden, Leader of the elected members of the Executive Committee, in a presentation given on behalf of the Legislative Assembly and the GNWT to the Joint Committee of the House of Commons and the Senate on the Constitution of Canada on November 25, 1980 [37] stated:

> ...[T]he Northwest Territories have made substantial progress in constitutional development and, as a natural flow of this progress, whether we remain as one territory or two, we will look forward to the attainment of provincehood within Canada within the foreseeable future. It is therefore of vital interest to us to participate in the shaping of the Constitution of Canada, to be given an opportunity to speak for the residents of our vast region and to bring to the attention of this Committee the concerns of the people of the Northwest Territories." [pg. 2]

55. Mr. Braden described why participation of the Northwest Territories in the constitutional process and in discussion on Senate reform were important to the jurisdiction:

> If the Legislature of the Northwest Territories is to be bound by the constraints laid down in the *Charter of Rights and Freedoms*, then it must also have the right to actively participate in other areas of the constitution and must be recognized as the legitimate law-making body for the residents of the Northwest Territories. The Northwest Territories may be sparsely populated but it consists of a vast area of land covering nearly a third of Canada [prior to the creation of Nunavut]; an area which is rich in minerals and badly needed hydrocarbons. I suggest to you

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[36] First Ministers' Conferences 1906 – 2004, Canadian Intergovernmental Conference Secretariat, www.scics.gc.ca.
[37] A Presentation by the Government of the Northwest Territories to the Joint Committee of the House of Commons and the Senate on the Constitution of Canada, November 25, 1980.

> that the interests of the Northwest Territories ought not to be ignored or treated lightly…[pg.5]

56. According to George Braden and Nellie Cournoyea in the First Report Special Constitutional Committee on the Constitution of Canada presented to the Legislative Assembly in 1981,[38] when the proposed Constitution arrived in Ottawa, federal members of Parliament were not aware that paragraphs (e) and (f) of paragraph 42(1) had been included. These sections which dealt with the extension of existing provinces into the territories; and the establishment of new provinces subject to the amendment procedure in section 38, had been included without consultation with the territories. "[The federal members of Parliament] did not recognize that the inclusion of these clauses constitutes an abdication of responsibility of the federal government for the territories, and a violation of trust assumed by the federal government for territorial peoples under the provision of the Rupert's Land Act…" [pg. 5] [emphasis added]

57. Regarding issues discussed and decisions made at federal-provincial conferences and the lack of representation by the Northwest Territories, George Braden stated to the Special Joint Committee of the Senate and the House of Commons on Senate Reform in 1983 [39] : "I suspect that on this particular issue [Senate reform] and others that we do have the opportunity through forums such as this to put forth our ideas. We expect and hope that the federal government would represent out interests in these matters." [P. 18:20] [emphasis added]

58. Further to the issue of the failure of the federal government to represent territorial interests and the need for territorial participation in constitutional matters, Mr. Braden added:

> I would say generally, though in my experience, I find northern residents are becoming very aware that the Government of Canada and various institutions such as the Senate are in fact debating or considering issues of relevance to the Northwest Territories. Sometimes the provinces do it as well. You know, we lost one a few years ago in the Constitution of Canada, where the provinces got together and formulated a clause which would give them the opportunity to veto provincial status. I suppose, if they wanted to, in the Northwest Territories or in

[38] First Report Special Committee on the Constitution of Canada, November 27, 1981.
[39] Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform, September 21, 1983, pg. 18:3 – 18:26.

> the Yukon. I never thought for one instant that the Government of Canada would ever accept that particular provision, but there it is. It is in the Constitution of Canada, and we learned that we have to participate in these particular forums that are established from time to time; if we do not, some major decisions could be made which would affect our future or some particular issue in the Northwest Territories. [p. 18.11] [emphasis added]
>
> As part of the discussions on effective representation, I want to make special mention of representation of our aboriginal people in Parliament. Canada adheres to the principle of one man, one vote. This is a good principle and is well recognized as such in the various democracies of the world. However, Mr. Chairman, this principle also works grave hardship and denies to the original inhabitants of this country any say in the running of their country. As you are no doubt aware, our Constitution specifically recognizes aboriginal rights and several first ministers' conferences are scheduled over the next few years to further define and enunciate those rights. The Government of the Northwest Territories is on record as supporting effective participation of aboriginal people in the Canadian Parliament. The Senate in particular could, and should provide for a certain number of seats to be filled by aboriginal people. We are of the view that this concept should be further explored and any decision on the matter should be made in consultation with the national aboriginal leaders during the ongoing process set in motion by the first ministers. [p. 18:9 – 18:10] [emphasis added]

59. With reference to the exclusion of the Northwest Territories from constitutional discussions in 1981 and again in 1987 while vital interests of the Territories were being discussed pertaining to s. 42(e) and (f) of the *Constitution Act, 1982*, Michael Ballantyne, Chairman of the Special Committee of the Legislative Assembly of the Northwest Territories on Constitutional Reform in 1990 reiterated, "I cannot over emphasize how important it is in all discussions on Constitutional Reform to have a fair process for hearing, and acting on, the concerns of all governments and all citizens of Canada." [40]

60. Mr. Ballantyne emphasized the interest of the citizens of the Northwest Territories in fully participating in the constitutional reform process:

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[40] A Presentation by the Legislative Assembly of the Northwest Territories Special Committee on Constitutional Reform to the House of Commons Special Committee to Study a Proposed Companion Resolution to the Meech Lake Accord, April 18, 1990, at p. 20.

> The Northwest Territories is a vibrant and enthusiastic part of Canada. We believe we can make a significant contribution to the process of constitutional reform as the only jurisdiction in which aboriginal peoples constitute a majority of the population. It is commendable that you have taken the time to come to the Northwest Territories to hear the views of Canadians who, like Quebecers, are eager to become full partners in the Constitutional councils of this nation. [41]

61. With respect to the issue of Senate reform, Chairman Ballantyne stated that "[t]he Northwest Territories is currently guaranteed representation in the Senate by the *Constitution Act, 1975* and, therefore, the Northwest Territories should be involved in any conferences or meetings on Senate reform." [42]

62. The Northwest Territories was not invited to attend the First Ministers' Conference on the Constitution in 1990. At this Conference issues which were discussed included the role of the Territories with respect to further constitutional amendments. The creation of new provinces in the Territories was identified as an issue for future constitutional discussions. [43]

63. In a Presentation by the Legislative Assembly of the Northwest Territories Special Committee on Constitutional Reform to the Senate and House of Commons Special Joint Committee on the Process for Amending the Constitution of Canada on March 19, 1991 [44]in Yellowknife, it was stated:

> The Special Committee does not wish to take too much of your time today. You have kindly agreed to allow us to make a longer, more technical presentation at your hearings in Ottawa in later April or early May…Today I would like to leave you with two simple messages: first, the people, government and Legislative Assembly of the Northwest Territories must be admitted to the Constitutional Councils of Canada, including all discussions on the amending formula.

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[41] A Presentation by the Legislative Assembly of the Northwest Territories Special Committee on Constitutional Reform to the House of Commons Special Committee to Study a Proposed Companion Resolution to the Meech Lake Accord, April 18, 1990, p. 1-2.

[42] A Presentation by the Legislative Assembly of the Northwest Territories Special Committee on Constitution Reform to the House of Commons Special Committee to Study a Proposed Companion Resolution to the Meech Lake Accord, April 18, 1990, p. 5-6.

[43] First Ministers' Conferences 1906 – 2004, Canadian Intergovernmental Conference Secretariat, www.scics.gc.ca, at p. 92-93.

[44] Legislative Assembly of the Northwest Territories Presentation to Senate and House of Commons Special Joint Committee on the Process for Amending the Constitution of Canada, March 19, 1991.

Constitutional processes such as intergovernmental meetings of officials and ministers, first ministers' meetings and conferences, and all public forums that may operate to include Canadians in Constitutional reform are not complete unless the two territories are represented at the table by northerners. Second, Aboriginal peoples must also have access to governmental and executive decision making on all matters that relate to the interests of Aboriginal peoples. A national forum that brings together First Ministers and Aboriginal leaders is necessary, now more than ever, to continue the dialogue on identifying and defining constitutionally protected rights of Aboriginal peoples. [p. 1-2]

We want to stress at the outset, however, that the need for change to the Constitutional text setting out the amending formula must be clear and unequivocal before the existing provisions are tampered with. In our view, there are some provisions in the present formula that must be attended to if the Northwest Territories and the Yukon are to be treated fairly and are to play a role in the Canada of the 21st Century. But there are also several unwritten aspects of the amending process that must be carefully examined. We believe a clear distinction must be drawn between these written and unwritten elements of the process.

Changes to the amending formula must not be made simply to address current political problems. Any changes must be squarely grounded in widely-shared principles and must be durable.

I can briefly illustrate what I mean by a principles approach to amending the Constitution using the example of section 38 which is the general amending formula. Section 38 requires an amendment to be approved by Parliament and the Legislative Assemblies of two thirds of the provinces that have in the aggregate according to the latest census at least 50% of the population of all the provinces. The territories are not provinces so their population is not counted. When a Canadian living in the Northwest Territories or in the Yukon sees a formula like this it leaves the impression that the Constitution belongs to governments not to the people of Canada. No matter what the population of the two territories, Canadians living here are not counted for purposes of this general amending formula. Does the Constitution belong to Canadians or to governments in Canada.

A second example arises for the amending formula governing the extension of existing provinces into the territories and the creation of new provinces. Again, these provisions appear to ignore Canadians who will be directly affected if these provisions are ever used. There is no requirement to consult with or receive the approval of the residents of the territories or their elected representatives prior to an annexation of the territories, or even prior to the creation of a new province in the Northwest Territories or Yukon. In fact, if the unanimity formula in the Meech Lake Accord had gone through, the only legislatures which would not be consulted under the Constitution would have been those in the two territories. [p. 3-5]

64. At the subsequent meeting held on May 1, 1991 [45] Chairman Ballantyne summarized the situation as follows:

> ...before any Constitutional Reform proceeds, the process of reform must be legitimized in the eyes of Canadians. In particular, our Special Committee wants to make it very clear that Territorial residents, particularly aboriginal peoples, and elected representatives from the Northwest Territories, must be involved in any process designed to seek Constitutional reform. We are not satisfied with being consulted after agreements have been reached and ratified by other governments and legislative assemblies. We are determined to be at the table whenever Constitutional issues of national importance are being discussed. [p. 2-3]
>
> We stress the development of any reform package dealing with process or substantive issues must include aboriginal representatives, and representatives of the two territorial governments. As most of you know, we have been ignored, or worse, rejected, when Constitutional reforms were proposed that directly affected our vital interests. We know that a constituent assembly has been discussed extensively before your Committee. If representation on such an assembly were to be based on equality of the provinces, the two northern territories should be treated equally with the provinces for this purpose. Aboriginal peoples should be similarly integral participants. If representation is based on the regions of Canada, then the North should be given equal status as one of the five regions..."[p. 7-8]
>
> ...as the amending formula currently stands, there is no mention whatsoever of the two Territories in relation to any type of amendment. I must remind members of your Committee that the Legislative Assembly of the Northwest Territories is recognized in other provisions of the Constitution. For example, section 3 of the *Charter* which guarantees the right to vote in elections of a legislative assembly must be read to include the Legislative Assemblies of the Northwest Territories and Yukon by virtue of section 30 of the *Charter* which defines the word "Province" and "Legislature" in the *Charter* to include the Northwest Territories and Yukon. [p. 17]
>
> In addition, certain provisions in relation to the Senate define the word "Province" to include the Northwest Territories and Yukon. I am referring to the provisions of the *Constitution Act (No. 2), 1975*. Furthermore, during the Constitutional Conferences on aboriginal affairs from 1982 to 1987 there was a recognition in the Constitution that the elected representatives of the Territorial governments had a direct interest in those talks and were to be invited to participate by the Prime Minister. [p. 18] [emphasis added]

65. The Hon. Richard Nerysoo stated:

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[45] A Presentation by the Legislative Assembly of the Northwest Territories Special Committee on Constitutional Reform to the Senate and House of Commons Special Committee on the Process for Amending the Constitution of Canada, May 1, 1991.

> The preamble to the *Northwest Territories Official Languages Act* "recognizes that the existence of aboriginal peoples, centred in the Territories from time immemorial, is a fundamental characteristic of Canada, and that the existence of aboriginal peoples, speaking aboriginal languages, constitutes the Territories as a distinct society within Canada." [p. 12-13]
>
> We are the first jurisdiction in Canada to treat aboriginal peoples as a founding people in the process of developing new constitutions for two new territories. We are attempting a marriage of aboriginal self-government and Parliamentary government. This experience and perspective should be a very strong reason by itself to ensure that aboriginal peoples and territorial governments are included in Canada's Constitutional Councils. [p. 13]

66. In his concluding remarks to the Special Joint Committee of the Senate and House of Commons on a Renewed Canada on January 23, 1992,[46] the Hon. Stephen Kakfwi stated:

> Within the last few years we have seen signs of change. Our participation in national constitutional, economic and political affairs is not only tolerated but also increasingly sought after. The Prime Minister and the federal Minister of Finance have recently invited the participation of Territorial leaders and finance ministers in First Ministers and Finance Ministers' meetings...We look forward to and expect to be treated with the same dignity and respect that all Canadians and all provinces and regions in Canada should expect. A third of Canada is governed by territorial governments. Surely it does not stretch the imagination to have the Constitution reflect some principles to account for this... [p.16] [emphasis added]

67. The Northwest Territories attended the First Ministers' Meeting on the Constitution as a full participant beginning in 1992, as well as at all of the Multilateral Meetings on the Constitution process held in the spring and summer of 1992. [47]

68. Residents of the Northwest Territories, including those in remote communities, participated in the 1992 Referendum. Extensive public education campaign was conducted to explain to territorial residents the content and meaning of the Charlottetown Accord which included the

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[46] A Presentation by the Legislative Assembly of the Northwest Territories Special Committee on Constitutional Reform to the Special Joint Committee of the Senate and House of Commons on a Renewed Canada, January 23, 1992.

[47] Report of the Special Committee on Constitutional Reform on the Multilateral Meetings on the Constitution and First Ministers – Aboriginal Leaders Conference on the Constitution, September, 1992, at p. 1-2.

personal appearance of members of the Special Committee in many communities as well as publications which were widely circulated throughout the print media. Residents returned a "Yes" vote in the referendum. The percentage of residents participating in the referendum in the Northwest Territories (72. %) was similar to and in some cases exceeded participation in the provinces. This is particularly significant considering the remoteness of many of the communities. [48]

VII. Abolition of the Senate

69. The federal government's ability to unilaterally abolish the Senate has previously been considered by the Supreme Court of Canada in *Reference re Legislative Authority of Parliament of Canada* (1979) (the "*Senate Reference*"). [49]

70. The Court held that elimination of the Senate, one of the two Houses of Parliament, would alter the structure of the federal Parliament to which the federal power to legislate is entrusted under s. 91 of the *British North America Act, 1867.*

> ...[I]t is our opinion that while s. 91(1) would permit some changes to be made by Parliament in respect of the Senate as now constituted, it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three provinces in order to meet the requirement of the proposed federal system. It was that Senate, created by the Act, to which a legislative role was given by s. 91. In our opinion, its fundamental character cannot be altered by unilateral action by the Parliament of Canada and s. 91(1) does not give that power. [para. 49] [emphasis added]

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[48] Final Report of the Special Committee on Constitutional Reform on the Charlottetown Accord and the October 26, 1992 National Referendum on Constitutional Reform, November, 1992.

[49] *Reference re Legislative Authority of Parliament of Canada*, [1980] 1 SCR 54 (sub nom. *Reference re Legislative Authority of Parliament to Alter or Replace Senate*), 102 D.L.R. (3d) 1 (sub nom. *British North America Act and Federal Senate, Re*), AGNWT Authorities, Tab 12.

PART II – QUESTIONS IN ISSUE

71. The Questions to be answered by the Court were set out in the Order in Council dated February 1, 2013 and are reproduced in Appendix "A".

72. The Attorney General of the Northwest Territories takes no position with respect to the first four Questions.

73. With respect to Question 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?

74. And with respect to Question 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?

75. The Attorney General of the Northwest Territories respectfully submits that general amending procedure set out in section 38 of the *Constitution Act, 1982* and the unanimous consent procedure set out in section 41 of the *Constitution Act, 1982* are both insufficient to abolish the Senate without the federal government first being obligated to consult, consider and represent the interests of the citizens of the Northwest Territories with respect to this issue.

PART III – ARGUMENT

1. The Federal Government cannot abolish the Senate without consulting, considering and representing the best interests of the Northwest Territories

1.1 Parliament undertook to legislate for the future welfare, peace, order and good government of the North-Western Territory and Rupert's Land and their Aboriginal populations

76. The Government of Canada, in exchange for the admission of the North-West Territory and Rupert's Land into the Union undertook to legislate for the future welfare and good government of these lands, and to take into consideration the best interests of their citizens when making any decisions affecting their interests.

77. The Government of Canada's duty to legislate for the benefit of the Northwest Territories and its people arises from the Address to Her Majesty the Queen from the Senate and the House of Commons of the Dominion of Canada on December 16 and 17, 1867, appended as Schedule A to the *1870 Order*. [50] In the Address, which is now part of the Constitution of Canada [51], the Government of Canada specifically asked the Queen to unite the North-Western Territory and Rupert's Land with the Dominion and "to grant to the Parliament of Canada authority to legislate for their future welfare and good government; and we most humbly beg to express to your Majesty that we are willing to assume the duties and obligations of government and legislation as regards these territories."

78. The Government of Canada submitted that the admission of these lands to the Union were for the benefit of the Dominion and that colonization of the west depended upon the establishment of a stable government for the maintenance of law and order in the North-Western Territory. Parliament promised to provide for the welfare of the sparse population of British subjects and to establish a government similar to those in the provinces. Parliament also undertook to settle aboriginal claims in conformity with equitable principles and to recognize its "duty to make adequate provision for the protection of Indian tribes whose interests and wellbeing are involved

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[50] *Rupert's Land and North-Western Territory Order* (U.K.), 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9, AGNWT Authorities, Tab 30.

[51] The *1870 Order* forms part of the Constitution under s. 52 of the *Constitution Act, 1982.*

in the transfer" of Rupert's Land into the Union.

79. Parliament was subsequently authorized pursuant to the terms of the *Rupert's Land Act, 1868* and the *Temporary Government of Rupert's Land Act, 1869* to make, ordain, and establish all such laws, institutions and ordinances as may be necessary for the peace, order and good government of Rupert's Land and the North-Western Territory prior to their admission to the Union. [52]

80. Through the *1870 Order*, the North-Western Territory was admitted to the Union on the terms and conditions set forth in the Address by the House of Commons and the Senate. Since then, Parliament has had the full power, and responsibility, "to legislate for the future welfare and good government of said Territory."

81. In 1871, pursuant to the terms of the *Constitution Act, 1871*, [53] Parliament was granted the authority and responsibility to provide for the administration of peace, order and good government of any territory which is not a province. More than a century later, pursuant to the *Northwest Territories Act, 1985*, [54] the Governor in Council and his delegated federal Minister continue to maintain ultimate control over the exercise of legislative power by the GNWT.

82. In conclusion, the Government of Canada undertook to enact legislation and make decisions for the benefit of the Northwest Territories and for the well-being of its citizens. It has done so by passing the *Northwest Territories Act* allowing the GNWT to govern the territory but the amending formula has not been changed. Moreover, because the Northwest Territories does not have the status of a province, the GNWT cannot participate directly in constitutional reform, including matters such as abolition of the Senate, under the terms of the amending formula. Nevertheless and until the GNWT has the right to participate in the amendment of the Constitution in its own right, the Attorney General of the Northwest Territories respectfully

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[52] *Rupert's Land Act, 1868*, 31-32 Victoria, c. 105 (U.K.), reprinted in R.S.C. 1985, App. II, No. 6, s. 5, AGNWT Authorities, Tab 29 and *Temporary Government of Rupert's Land Act, 1869*, 32-33 Victoria, c. 3, reprinted in R.S.C. 1985, App. II, No. 7, s. 2 and 3, AGNWT Authorities, Tab 31.

[53] *The British North America Act, 1871*, 34-35 Victoria, c. 28, reprinted in R.S.C. 1985, App. II, No. 11, since renamed the *Constitution Act, 1871*, AGNWT Authorities, Tab 20.

[54] *Northwest Territories Act*, R.S.C., 1985, c. N-27, AGNWT Authorities, Tab 27.

submits that the constitutional obligations and responsibilities of the Government of Canada provide that Parliament cannot legislate and amend the Canadian Constitution without first considering the best interest of the Northwest Territories, without consulting the Northwest Territories and its citizens, and without being satisfied that the proposed constitutional proposal is for the "welfare and good government" of the Northwest Territories. The Government of Canada has the constitutional obligation and responsibility to ensure that the needs and requirements of the Northwest Territories are adequately and appropriately represented in all constitutional amendments.

1.2 The Northwest Territories is currently represented by a Senator

83. In 1975, the Northwest Territories was again provided with Senate representation. [55] The Attorney General of the Northwest Territories respectfully submits that the Government of Canada cannot abolish the Senate without first considering the interests of the Northwest Territories on the basis that it has a Senator and the statue which appointed the Senator is part of the Constitution of Canada.

1.3 The Senate is central to the federal system and it was a requirement for creation of the union that the Constitution be similar in principle to that of the United Kingdom

84. The colonies which formed the Dominion of Canada expressed the desire to be federally united with a Constitution similar in principle to that of the United Kingdom. A central component to the British Parliamentary system, and subsequently the Canadian Parliamentary system, is the Upper House or Senate. Lower Canada and the Maritimes sought strong representation in the Senate as a condition of joining the federation.

2. The unwritten principles of the Constitution provide that the Canadian Constitution cannot be amended without adequate consultation and consideration of the Northwest Territories and its citizens

85. The Supreme Court of Canada has ruled on numerous occasions that the *Charter* and its

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[55] *Constitution Act (No. 2), 1975,* S.C. 1974-75-76, c. 53, s. 1, reprinted in R.S.C. 1985, App. II, No. 42, AGNWT Authorities, Tab 22.

values could be used as interpretative tools.[56] This Court has also affirmed that unwritten principles of the Constitution form the very foundation of the Constitution of Canada and may be used in constitutional adjudication.[57] In *Re Secession of Quebec* (1998) [58], this Court held that the unwritten principles were vital unstated assumptions that inform and sustain the constitutional text. The principles function in symbiosis; they cannot be defined in isolation from the others, and no one principle trumps or excludes the operation of any other. Therefore, the Constitution has an internal architecture and structure, and the unwritten principles are linked to the other individual elements of the Constitution and must be considered in the proper interpretation of the Constitution as a whole. The unwritten principles breathe life into the Constitution. Properly construed, the principles assist in "the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions".[59]

2.1 The unwritten principle of democracy: the Northwest Territories has developed a responsible, representative government similar to provincial governments and its interests are deserving of equal consideration

86. The unwritten principle of democracy informs the design of our constitutional structure and is an essential interpretative tool in the determination of any constitutional issue.[60] The principle of democracy relates to the process of government, the promotion of self-government, the accommodation of cultural and group identities.[61] The principle of democracy provides that the powers of government must be exercised after consultation of the public and the wishes of the electorate. [62] In *Re Secession of Quebec*, the Supreme Court of Canada held that:

> The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. ...the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected

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[56] See for example, *Charlebois* v *Saint John (City)*, 2005 SCC 74, [2005] 3 S.C.R. 563 at para. 23, AGNWT Authorities, Tab 3; *Bell ExpressVu Limited Partnership* v *Rex*, 2002 SCC 74, [2002] 2 S.C.R. 559 at para. 62, AGNWT Authorities, Tab 2 .

[57] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 88 DLR (4th) 385 at pg 752, AGNWT Authorities, Tab 13.

[58] *Reference re Secession of Quebec*, [1998] 2 SCR 217, AGC Authorities, Volume II, Tab 21.

[59] *Reference re Secession of Quebec*, [1998] 2 SCR 217, AGC Authorities, Volume II, Tab 21.

[60] *Reference re Secession of Quebec*, [1998] 2 SCR 217, AGC Authorities, Volume II, Tab 21.

[61] *Reference re Secession of Quebec*, [1998] 2 SCR 217, AGC Authorities, Volume II, Tab 21.

[62] *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 880, AGC Authorities, Volume I, Tab 20.

> representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the *Provincial Judges Reference, supra*, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed. [63]

87. The Attorney General of the Northwest Territories respectfully submits that, consistent with the unwritten principle of democracy, any amendment to the Canadian Constitution must comply with basic democratic consultations, including with all provincial/territorial governments. In the case of the Northwest Territories, it is submitted that the legislative powers of the GNWT are similar to those exercised by the provinces. With the completion of the devolution of lands and resources on April 1, 2014, the GNWT will have assumed virtually all of the responsibilities of a provincial government. The GNWT is also subject to the provisions of the *Charter of Rights and Freedoms*.

88. Consequently, while citizens residing in the Northwest Territories do not possess the same explicit participation rights as citizens in other provinces, and do not have a specific participation right under s. 38 of the *Constitution Act, 1982*, the unwritten principle of democracy provides that Northwest Territories, as well as its citizens, must be consulted by the federal government before any constitutional amendment is proposed, and adopted. Any other interpretation of the Amendment formula would be in inconsistent with the principle of democracy and would cause fundamental unfairness for the citizens of the Northwest Territories. It is submitted that if these citizens of the Northwest Territories have a right to vote, they must be afforded an opportunity to participate in such fundamental changes as is the Constitution of Canada.

89. The Attorney General of the Northwest Territories respectfully submits that the citizens of the Northwest Territories need to be represented regarding an issue as significant as the abolition of the Senate. If the right to vote exists for each Canadian, citizens living in the Northwest Territories, like all Canadians, must have a voice in constitutional negotiations. Failure to

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[63] *Reference re Secession of Quebec*, [1998] 2 SCR 217, AGC Authorities, Volume II, Tab 21.

provide these rights to citizens living in the Northwest Territories is a breach of democratic principles.

90. Parliament cannot enact a statute amending the Constitution, including the abolition of the Senate, if it flies in the face of foundational values of the Constitution itself.

2.2 The unwritten principle of protection of the minorities: The GNWT has a specific responsibility to represent the First Nations within its territory

91. In *Re Secession of Quebec*, the Supreme Court of Canada affirmed that protection of minorities is an unwritten principle of the Constitution which reflects an important underlying constitutional value that has been part of the design of the constitutional structure since Confederation. [64] The minorities protected by the unwritten principle include those protected by sections 15 and 23 of the *Charter*, as well as aboriginal rights under section 35 of the *Constitution Act, 1982*. This Court has on numerous occasions affirmed that minority rights must be considered and protected in governmental decision-making. [65] The unwritten principles are "constitutional principles" which must be considered when determining the proper interpretation to give to the constitutional text.

92. While Aboriginal persons comprise the majority of the population of the Northwest Territories, they are a minority within Canada as a whole. It is important to note that as a condition of transference of the territorial lands to the Dominion of Canada, Parliament undertook to settle claims equitably and to protect the interests and wellbeing of Aboriginal persons. This duty is in addition to the Crown's fiduciary duty to the First Nations as well as the duty to consult and to accommodate aboriginal rights under s. 35 of the *Constitution Act, 1982*.

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[64] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras. 81-82, AGC Authorities, Volume II, Tab 21.

[65] See, for example, *Société des Acadiens du Nouveau-Brunswick Inc. v Association of Parents for Fairness in Education*, [1986] 1 SCR 549 at 564, AGNWT Authorities, Tab 15; *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 71, AGC Authorities, Voume I, Tab 18; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 SCR 1148 at 1173, AGNWT Authorities, Tab 10; *Reference re Education Act (Que.)*, [1993] 2 SCR 511 at 529-30, AGNWT Authorities, Tab 11; *Greater Montreal Protestant School Board v Quebec (Attorney General)*, [1989] 1 SCR 377 at 401-402, AGNWT Authorities, Tab 5; *Adler v Ontario*, [1996] 3 SCR 609, AGNWT Authorities, Tab 1; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 SC.R 839, AGNWT Authorities, Tab 14; *Mahe v Alberta*, [1990] 1 SCR 342, AGNWT Authorities, Tab 7; *Vriend v Alberta*, [1998] 1 SCR 493 at 577, AGNWT Authorities, Tab 16.

There has been a long-standing duty of the Crown to act honourably with Aboriginal people which arises from the Crown's assertion of sovereignty over Aboriginal people and control of land and resources formerly in their control. [66] Representatives of the Legislative Assembly have expressed the need to ensure that Aboriginal peoples are to be included in constitutional discussions. Consequently, the Attorney General of the Northwest Territories respectfully submits that before adopting any measure which could affect the Aboriginal interests in the Northwest Territories, the Government of Canada must first consult, consider and accommodate the needs and interests of the Aboriginal citizens of this region.

93. Given the sparsely populated nature of the Northwest Territories, it is respectfully submitted that representation in the Senate provides the opportunity for regional and Aboriginal interests to be represented. On this basis, the Attorney General of the Northwest Territories respectfully submits that Parliament cannot abolish Senate without first considering and accommodating the interests of the Northwest Territories and its Aboriginal residents, as failure to do so would be contrary to the foundational democratic values of the Constitution.

3. Any amendment to the Canadian Constitution without consultation of the Northwest Territories would be in breach of constitutional conventions

94. Constitutional conventions are rules of conduct in the political community that are accepted by those political actors as binding or obligatory. They are rarely acknowledged in written form, but nevertheless form part of the guiding doctrines of the Constitution. They may impose duties or bestow rights or privileges upon political actors in the Canadian government. However, while they demand compliance, they are not enforceable by the Courts. Conventions may evolve naturally from usages over time through their faithful observance.[67] A convention may also be formed through an agreement of relevant officials representing various governments. [68]

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[66] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, AGNWT Authorities, Tab 6.
[67] Guy Regimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st ed (Markham: LexisNexis Canada Inc., 2013) at s. 3.18, AGNWT Authorities, Tab 23.
[68] Guy Regimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st ed (Markham: LexisNexis Canada Inc., 2013) at s. 3.29, AGNWT Authorities, Tab 23.

95. The Supreme Court of Canada adopted and applied Jennings' test of constitutional conventions in the *Patriation Reference*: [69]

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

96. This Court held that historical evidence demonstrated that in situations where amendments affected provincial-federal relationships, the provinces had consented to those amendments. However, for the second stage of the Jennings test which requires the faith and loyalty to the convention by the relevant actors of the time, the Court held that it was satisfied by the evidence but that the obligation of unanimous consent was not made out. [70] As for the third requirement, that of a valid reason for the rule, the Court held that Canadian federalism would be undermined if the federal government was allowed to unilaterally modify provincial legislative powers.[71]

97. The Attorney General of the Northwest Territories respectfully submits that it is a constitutional convention that the GNWT must be invited to participate and voice its opinion in any constitutional negotiation.

98. The Northwest Territories has developed a responsible, representative government with powers similar to those of its provincial counterparts. With the completion of devolution of lands and resources on April 1, 2014, the GNWT will have assumed virtually all of the responsibilities of a provincial government. The GNWT is subject to the provisions of the *Charter of Rights and Freedoms*.

99. The precedents suggest that the Northwest Territories has been considered to be a full participant at all First Ministers Meetings since 1992. Delegates from the GNWT regularly attend meetings at various levels of between representatives of the federal, provincial and

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[69] *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 888, AGC Authorities, Volume I, Tab 20.
[70] *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 904, AGC Authorities, Volume I, Tab 20.
[71] *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 906, AGC Authorities, Volume I, Tab 20.

territorial governments. Beginning in the 1980s, the GNWT was a full participant in a number of Senate and House of Commons Special Joint Committees, First Ministers' Meetings and Multilateral Meetings concerning the Constitution and Senate reform.

100. The Attorney General of the Northwest Territories respectfully submits that the federal, provincial and territorial governments fully recognize their obligation to consider the opinions and interests of all participants at these meetings, including the opinion and interests of the GNWT, thereby satisfying the second part of the test.

101. The Attorney General of the Northwest Territories further submits that there is a valid reason for this constitutional convention, thereby satisfying the last element of the test. Any amendment to the Constitution, and in particular, the abolition of the Senate, will affect the interests of the citizens of the Northwest Territories, as has been set out in this factum. Failure to consult with the GNWT regarding proposed constitutional amendments has been demonstrated to result in negative consequences for the Northwest Territories as exemplified by the inclusion of s. 42 (e) and (f) in the *Constitution Act, 1982*. As previously discussed, consultation with the Northwest Territories is required pursuant to the terms of the *1870 Order* among other legislation, as well as the unwritten principles of democracy and the protection of minority and Aboriginal interests.

102. The Attorney General of the Northwest Territories respectfully submits that there is currently a constitutional convention that the GNWT must have the opportunity to take part in all discussions regarding the abolition of the Senate. Since abolition requires unanimity, it is submitted that the federal government must consult with and consider the position of the Government of the Northwest Territories concerning the issue of Senate abolition.

PART IV – COSTS

103. The Attorney General of the Northwest Territories does not seek any costs in this Reference.

PART V – ORDER SOUGHT

104. The Attorney General of the Northwest Territories respectfully submits that the Constitutional Questions should be answered in the following manner :

With respect to Questions 1 – 4:

ANSWER: NO POSITION

With respect to Question 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;

ANSWER: NO

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

ANSWER: NO

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

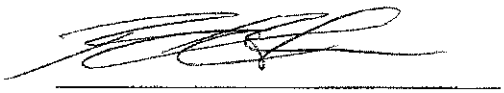
ANSWER: NO

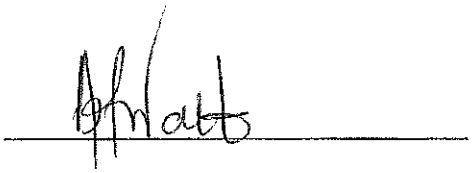
With respect to Question 6: If the general amending procedure set out in section 38 of the Constitution Act, 1982 is not sufficient to abolish the Senate, does the unanimous consent procedure set out in section 41 of the Constitution Act, 1982 apply?

ANSWER: YES, with the added condition that the federal government must consider and represent the best interests of the Northwest Territories.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 30th day of August, 2013





Bradley E. Patzer

Anne F. Walker

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PART VI – TABLE OF AUTHORITIES

Other