

**SUBMISSION TO THE HOUSE OF COMMONS  
STANDING COMMITTEE ON PROC  
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**MANDATE FOR THE PROC STUDY**

The House of Commons of Canada's Standing Committee on Procedure and House Affairs would like to invite you to appear before the Committee in view of its study of Parliamentary Duties and the COVID-19 Pandemic. The House of Commons has instructed the committee to study ways in which members can fulfill their parliamentary duties while the House stands adjourned on account of public health concerns caused by the COVID-19 pandemic, including the temporary modification of certain procedures, sittings in alternate locations and technological solutions including a virtual Parliament

Le Comité permanent de la procédure et des affaires de la Chambre des communes du Canada souhaite vous inviter à comparaître dans le cadre de son étude sur les fonctions parlementaires et la pandémie de la COVID-19. La Chambre des communes a donné instruction au comité d'entreprendre une étude sur la façon dont les députés peuvent exercer leurs fonctions parlementaires alors que la Chambre est ajournée pour des raisons de santé publique reliées à la pandémie de la COVID-19, y compris des modifications temporaires à certaines procédures, des séances en différents lieux et des solutions technologiques, dont l'idée d'un parlement virtuel.

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| The following text was prepared by its author alone. No member of the Government of Canada or of the House of Commons of Canada was consulted. |
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**OUTLINE OF THE SUBMISSION**

1. Ottawa as National Capital
2. Functions of Members of Parliament
3. Sittings in Alternate Locations
4. Parliamentary Privilege
5. Temporary Modifications of Certain Procedures
6. Official Languages
7. Technological Solutions, Including a Virtual Parliament
8. The Problem of Undue Delay
9. International Comparisons

**APPENDIX**

# **1. Ottawa as National Capital**

-The placing of the capital of Canada in Ottawa owes its origin to Resolution 52 of the Québec Resolutions of 1864:

*52. The Seat of Government of the Federated Provinces shall be Ottawa, subject to the Royal Prerogative.*

In the context of that time, we should understand "Government" as everything relating to statecraft, not in the same limited sense as was used in the *Constitution Act, 1982*, namely the executive branch.

-Resolution 52 became enshrined as s. 16 of the *Constitution Act, 1867*:

*16. Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.*

-The requirement that Ottawa explicitly be the capital city and the implicit consequence that Parliament function there has continued to be written only into various subsequent constitutional drafts, whether enacted or not. One major example is that of Bill C-60 of 1978, the *Constitutional Amendment Act, 1978*:

*55. The seat of government of Canada shall be Ottawa.*

-The more recent definition was contained in the draft *Constitution of Canada, 2017*, prepared by law students in a joint class at the faculties of law of McGill University and the Université de Montréal:

*5.(5) The capital of Canada is Ottawa.*

-The *Interpretation Act* offers no definition of "capital" or "capital city".

-The *National Capital Act* comes closest, in its s. 2, to setting out in law the consequences of Ottawa being the capital city:

*"National Capital Region" means the seat of the Government of Canada and its surrounding area, more particularly described in the schedule; (région de la capitale nationale)*

-The meaning to be given to the term "seat of government" must be examined. The general understanding of the expression "government" is inclusive of all state functions, extending to legislative, executive and judicial ones. Nevertheless, the *Canadian Charter of Rights and Freedoms*, in the provision dealing with its own application, distinguishes between legislative and executive functions:

*32. (1) This Charter applies*

*(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament.....*

A reasonable argument can be made to the effect that in the context of analyzing the meaning of "seat of government" in association with "capital" as these expressions are used in statutes, the word "government" be understood to include the legislative branch. A contrary choice would entail that there is a constitutional requirement that the executive branch operate in Ottawa but no such requirement in respect of the legislative branch.

-The *Parliament of Canada Act* is silent on the issue of where the Parliament or either of its Houses is to meet.

-Notwithstanding the silence of the *Parliament of Canada Act* as to the location where the House of Commons is to meet, there is an instrument of a constitutional / legal nature that is applicable to this matter. The *Proclamation* issued for the purpose of convening the 43<sup>rd</sup> House of Commons, following the general election of October 21, 2019, indicated that it was to meet at Ottawa:

*WHEREAS We are desirous to meet Our People of Canada as soon as may be and to have their advice in Parliament; WE DO HEREBY, by and with the advice of Our Prime Minister of Canada, pursuant to section 38 of the Constitution Act, 1867, summon and call together the House of Commons, to meet at Our City of Ottawa, on Monday, the eighteenth day of November, 2019, then and there to have conference and treaty with the Senate. SI/2019-100, 12 September 2019; Canada Gazette, Part II, Vol 153, Extra No 1.*

-In this constitutional and legal context, it becomes appropriate to question the consequence of there being a "capital city". *De facto*, Ottawa has functioned as the national capital of Canada since 1867. In respect of the House of Commons needing to conduct its work in Ottawa alone, Canada is operating on a traditional political assumption to the effect that every state institution must function in the capital city. In Canada, this political assumption may have achieved the status of a constitutional convention.

-The foregoing recital may be deemed to support the conclusion that the House of Commons as an institution must function in Ottawa. At a minimum, the House must be based in Ottawa. In the absence of either constitutional or legal prohibition, it may be examined whether, in a national emergency, the House of Commons, or some components of it could, if it so decided, simultaneously also function in other parts of the country.

-There is one more layer of analysis that is necessary in this context. The foregoing constitutional and legal elements relate to the House of Commons as an institution. Considering the judicial determination of the House as an institution, it may be possible to reason that the House is separate from each of its Members. In *Re House of Commons and Canada Labour Relations Board*, originally (1986) 27 D.L.R. (4<sup>th</sup>) 481 and now 1986 CanLII 4052 (FCA), the Federal Court of Appeal held that:

26. .... *the House is an assembly of persons, albeit, no doubt, the most important one in the country. Nothing in the [Constitution Act, 1867](#), nor in the law, custom and convention of the Constitution as I understand it, gives to the House corporate status or personality. Indeed everything points the other way. It is of the essence of a corporation that it shall be perpetual. But the House of Commons is by its nature an ephemeral thing, having by constitutional prescription a maximum life span of five years. When the House is dissolved it ceases to exist.*

.....

[36] *While, in a sense, the House of Commons may be said to be a creature of the [Constitution Act, 1867](#), such a qualification, in my view, belittles both the House and the Constitution. The House is far more than a creature of the Constitution: it is central to it and the single most important institution of our free and democratic system of government. ....*

The consequence of the foregoing citations is that, however one qualifies the House of Commons as an ephemeral institution textually created by the *Constitution Act, 1867*, it is separate and distinct from each of its Members, who are vested with the powers, duties and functions they have by means of their election. Based on the distinct constitutional provenance of the House as an institution from the existence of each of the MPs, we must conclude that while the House is anchored in Ottawa, its Members can continue to fulfill their constitutional and legal responsibilities even when they are distant from that harbour.

## **2. Functions of Members of Parliament**

-We must clarify what is the work of the House of Commons, or more precisely of the MPs who comprise it.

-In *Vaid v. Canada (House of Commons)*, 2005 SCC 30, the Supreme Court of Canada defined the work of the House of Commons in several instances as being *legislation, deliberation and holding the government to account*. In an alternate fashion, it also referred to the House as *the grand inquest of the nation*.

-The *Constitution Act, 1867*, s. 48 (and s. 46), imposes a condition precedent on the validity of the work of the House of Commons. That condition precedent is the "quorum".

-There is no definition of the word quorum in the *Constitution Acts* nor in the *Parliament of Canada Act*. The *Interpretation Act*, at s. 22(2), deals with the concept of quorum only in relation to boards, courts, commissions and associations. The substantive constitutional standard is that in order for there to be a valid meeting of the House of Commons and for it to be able to exercise its powers, at least twenty Members, including the Speaker, must be "present".

-Consequently, if fewer than twenty Members are present for the purpose of conducting the work of the House of Commons, that work cannot proceed and by inference the Members are unable to fulfill their functions.

-The constitutional standard is also set out in the Standing Orders of the House of Commons:

**29. (1)** *The presence of at least 20 members of the House, including the Speaker, shall be necessary to constitute a meeting of the House for the exercise of its powers.*

-The requirement for a quorum of 20 MPs is reiterated and further explained in *House of Commons Procedure and Practice*, 3<sup>rd</sup> ed. The same fundamental assumptions underlie the text of *Ersine May*, based on U.K. parliamentary experience.

### **3. Sittings in Alternate Locations**

-For the purposes of the present meeting of the PROC Committee, it is necessary to interpret the concept of "alternate locations". I believe this expression should not be understood as meaning a single alternative location to Ottawa, such as for example contemplating that the House of Commons hold a meeting in Montreal instead of meeting in Ottawa. Given the context and circumstances of the present PROC study, it is more likely the intention of the drafters of the terms of reference was to address the question of whether some Members of the House could be in Ottawa while others could, simultaneously, be in their respective electoral districts, scattered across the country.

-The answer to this question lies in the modern-day interpretation of "quorum".

-The original definition of "quorum" could be based only on the **simultaneous physical presence** of the participating Members in one location, namely Ottawa, and more specifically inside the House of Commons. In the period 1864-1867 when the original *Constitution Act* was drafted, presence in the sense of constituting quorum could only mean a group of parliamentarians in the same location and at the same time. This idea was in tune with that time. In 1867, no physical recording mechanism and no information transmission mechanism existed, that could have enabled participation in the absence of physical presence.

-In the more modern context of 2020, it may be appropriate to question whether the Members of the House participating in *legislation, deliberation and holding the government to account* all need to be simultaneously in the same location, namely in the capital city and more specifically facing each other within the House of Commons. This questioning is rendered appropriate both

- the attitude of the courts interpreting concepts such as "quorum", and
- by technological advances since 1867.

-Based on these two criteria, it may be reasonable to argue that today, quorum can relate not exclusively to **simultaneous physical presence** but rather to **participation**.

-As far as the undersigned has been able to uncover, there exists no Canadian jurisprudence on the modern notion of parliamentary quorum, as the issue has never been questioned in litigation and has never been the subject of a reference. Nevertheless, two trends in the cases decided by the Supreme Court of Canada should be taken into account.

-The first line of judicial reasoning that is relevant here is the **purposive interpretation** that has become prevalent in the Supreme Court's recent decisions. In other words, we must look to see how the Supreme Court would be likely to interpret the notion of quorum today, if a case or a reference submitted to it turned on this notion?

-A reasonable argument can be made that if the highest court were asked today to interpret the notion of parliamentary "quorum", it would look at:

- **Participation** of the requisite number of Members, rather than their **simultaneous physical presence** in the same location. Thus, if one is to interpret the meaning of quorum in an **purposive** fashion, in modern times, quorum should be seen as enabling some Members to be within the House in Ottawa, while other Members were elsewhere at the same time, assisted by, perhaps even as being reliant on, the latest audio-visual and related transmission technologies.

- A **meeting of the minds of the participants**, wherever they happen to be, rather than the mere **simultaneous presence** of a number of bodies in a single location.

-In other words, based on the Supreme Court of Canada's tendency of relying on **purposive interpretation**, the Court should be taken as likely to accept the idea that the words in the constitutional text should acquire meaning adapted to fit the context of today, rather than being limited by the social and physical capabilities that existed at the time they were drafted, in the 1860's.

-A second aspect of judicial decision-making that is relevant in the current circumstances is the **national emergency branch of the POGG doctrine**. This assumption is based on the *Re: Anti-Inflation Act*, originally [1976] 2 S.C.R. 373 and now 1976 CanLII 16 (SCC). In the middle of the 1970s, there was a severe national crisis of an economic nature. For our purposes, the essence of this ruling was that where Parliament had a "rational basis" for regarding a set of circumstances as a national emergency, it was justified in having resort to emergency powers. Today, the national crisis is no less severe, although, for now, it is one founded on considerations of public health. Moreover, it is entirely possible to envisage that the current public health crisis may in due course also lead us into an economic crisis. However that turns out, there is now indeed a circumstance of **crisis** and it is national in scope. It requires an urgent response on the part of public authorities, such as the House of Commons, in adapting their *modus operandi* in such a way as to minimize risk.

-Based on the foregoing considerations, there is a rational basis to make the following reasonable argument. **The notion of "quorum" can be applied to a number of not less than 20 Members in alternate locations, provided that they were enabled to engage in a meeting of minds.** This enabling would necessarily consist of:

- the ability to communicate with each other by modern audio-visual methods, and
- adequate safeguards to ensure the identity of participants.

-The undersigned accepts the argument that speculation as to the outcome of any hypothetical Supreme Court decision is not guaranteed to be correct. Nevertheless, based on the combination of the trend of judicial decisions made in recent years, together with the indisputable presence of crisis circumstances, the forgoing lines of reasoning can be recommended and they can serve as a best guess as to the outcome of a case before the Court.

-Using this logic, the House of Commons could validly interpret the concept of "quorum" as enabling sittings that would take place simultaneously in Ottawa and alternate locations within Canada, for the purpose of *legislating, deliberating or holding the government to account*.

## **4. Parliamentary Privilege**

-The arguments set out above, marshalled above in favour of enabling sittings of the House of Commons in alternate locations, or eventually in favour of a more complete virtual Parliament, need to be analyzed in the light of parliamentary privilege, the particular legal regime applicable to the House of Commons.

-In the view of the undersigned, the justifications set out above are aligned with considerations of parliamentary privilege.

-The determination of what constitutes "quorum", how the Members constituting "quorum" are organized and put in touch with each other, as well as the other considerations pertinent to this question are matters pertaining to the internal organization by the House of Commons of its own affairs, its meetings and its procedure.

- The classic definition of privilege is that it is *the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, "without which they could not discharge their functions"*. The internal organization of the House of Commons is a matter of parliamentary privilege. In relation to this topic, the House of Commons does not fall under the supervision of the courts. This assertion is based on various rulings of the Supreme Court of Canada.

-Notwithstanding the fact that the *Constitution of Canada* declares Ottawa to be the capital and that customarily, the national Parliament of a state is seated in the capital city, the Parliament of Canada, or in this case more precisely the House of Commons of Canada, has the parliamentary privilege to arrange its own internal conduct of business. The privilege extends to determining that **participation** rather than **simultaneous physical presence** should be the determining factor in assessing the validity of any quorum of parliamentarians.

-The proposal for Members to **participate** from alternate locations as parliamentarians, or to form part of a more elaborate virtual Parliament, requires consideration of parliamentary privilege in a larger perspective. Should Members so conducting their work be deemed to be in the Chamber and protected by geographical extension of parliamentary privilege in the following respects:

- since time immemorial, the parliamentary privilege of freedom of speech has applied only within the Chamber; on the basis that MPs in alternative locations are performing parliamentary functions, should this privilege be extended to include them?
- similarly, should privilege be deemed to protect MPs from hindrance in their access to, or egress from, alternative locations?
- should the other privileges be deemed to apply to Members working in alternative locations?

-Under this rubric, there is a problem of semantics to be resolved. The exact wording of the study the House mandated the PROC Committee to undertake requires clarification in one respect. The mandate reads:

*The House of Commons has instructed the committee to study **ways in which members can fulfill their parliamentary duties while the House stands adjourned** on account of public health concerns caused by the COVID-19 pandemic, including the temporary modification of certain*

procedures, sittings in alternate locations and technological solutions including a virtual Parliament.

As drafted, this mandate includes the fulfillment of duties during an adjournment as a general category. Within that overall category, a) the temporary modification of certain procedures, b) sittings in alternate locations and c) technological solutions including a virtual Parliament are listed as specific examples. For the sake of the clarity of the mandate of the present PROC study, it needs to be understood that while the House itself stands adjourned, Members of Parliament can fulfill only some of their parliamentary duties, whether there is a national emergency or not. They can certainly fulfill their representational role on behalf of constituents and they can act as ombudspersons for their constituents. Members of Parliament can also act in their capacities as Members of committees. Despite the existence of a national emergency, while the House stands adjourned, the House of Commons cannot meet as a House, regardless of the issue of quorum. Based on the modern interpretation of the requirement of quorum, as set out above, once quorum is reached, the House is no longer adjourned – it is convened, even though Members may be in various locations.



## **5. Temporary Modification of Certain Procedures**

-The temporary modification of certain procedures should, I believe, be understood to mean the variation of Standing Orders of the House of Commons so as to enable:

- members to fulfill their parliamentary duties while the House stands adjourned,
- the holding of sittings in alternate locations,
- members to engage in sittings in alternate locations, and
- technological solutions including a virtual Parliament.

-The time between the convening of this meeting of the PROC Committee and the date of the meeting itself was likely too short for the drafting of the temporary modification of certain procedures into the *Standing Orders of the House of Commons*. Given the justifications set out in the previous paragraphs, that work should, in the opinion of the undersigned, proceed.

-The proviso to the foregoing is that there may be some confusion resulting from the wording of the Committee's mandate, regarding the fulfillment by Members of their parliamentary duties while the House stands adjourned.

## **6. Official Languages**

-The *Constitution Act, 1867* provides for the use of the English and French languages in the Debates of the House of the Parliament of Canada. Section 16(1) of the *Constitution Act, 1982* sets out that English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament of Canada. Section 4(1) of the *Official Languages Act* affirms that *English and French are the official languages of Parliament, and everyone has the right to use either of those languages in any debates and other proceedings of Parliament.* Further provisions deal with parliamentary bilingualism with respect to simultaneous interpretation of the debates and other proceedings, as well as official reports of debates.

-The constitutional and legal standard that bilingualism is the rule in the House of Commons is well settled, no matter where or how the House functions. No adoption of a practice of virtuality should be seen as changing that.

## **7. Technological Solutions, Including a Virtual Parliament**

-The technological solutions the House of Commons may wish to envisage in order to respond to the current public health emergency are, at a minimum, the ones that could render possible a form of participation from alternate locations by Members who would constitute quorum. This solution entails the crafting of a technology-based multilateral communication system, for example to enable meetings of committees or meetings of the House itself, based on the notion of quorum proposed above.

-The development of a more comprehensive "virtual Parliament" is likely a more sophisticated communications and mutual communication system.

-In either such endeavour, the House and the House Administration are bound to treat every one of its Members equally, providing equal service to each Member in both official languages.

-Bearing in mind the ever-present failings of computer-based systems, if the House decides to function in a virtual fashion, perhaps even on a temporary basis, it should gather two fundamental and vital working groups from among the staff of the House Administration:

- a working group of legal advisors to engage in liaison with like-minded jurisdictions, especially from Commonwealth states, designed to exchange information on the best ways to ensure democracy, constitutionalism and the maintenance of parliamentary privilege, and
- a working group of technical experts, whose principal task would be to design failsafe methods for the protection of MPs' identity in their access to the system.

-In order to render a virtual functioning of the House of Commons viable, the highest grade of hardware and software should be placed at the disposal of Members. Particular care should be taken in methodologies to verify each participating Member's identity. In its preparation for the 43<sup>rd</sup> federal general election, Elections Canada worked extensively to prevent computer intrusion and fraud. That experience could be put to good use here.

## **8. The Problem of Undue Delay**

-Prudence dictates that we always consider alternative scenarios. Thus, if the "quorum" rule of s. 48 of the *Constitution Act, 1867* continues to be interpreted in such a way as to require face-to-face meetings of parliamentarians in Ottawa, yet temporary rules of public health demand physical distancing, the House of Commons be prevented from meeting. That may result in a different and perhaps even greater constitutional problem.

-No one can predict how long the current pandemic will last or how long it will require a lockdown. Pursuant to s. 5 of the *Charter*, Parliament must meet at least once a year.

-If the COVID-19 pandemic lasts another year; if the interpretation of "quorum" prevents Members of the House of Commons from meeting, thereby rendering the work of the House impossible, Canada could risk being in breach of s. 5 of the *Charter in Constitution Act, 1982*.

## **9. International Comparisons**

-The jurisdiction to which Canada most closely looks as an example in parliamentary matters is the United Kingdom. In recent days, Westminster has been taking serious steps toward the establishment of a "virtual Parliament". According to the best information available, pursuant to this plan, 50 ministers and backbenchers would meet in the Chamber of the House of Commons, while 120 others would join them through computer links.

-The U.K. plan calls for gradual introduction of virtual functioning in both Houses, starting on Tuesday, April 21. At first, virtuality would include questions and statements. Later, it could extend to debates and legislation. In a later stage, voting could be conducted through virtual means.

-The U.K. equivalent of the Board of Internal Economy, the House of Commons Commission, would have to approve the virtual Parliament plan. In Britain as well as Canada, security is perceived to be the principal consideration in the feasibility of the plan.