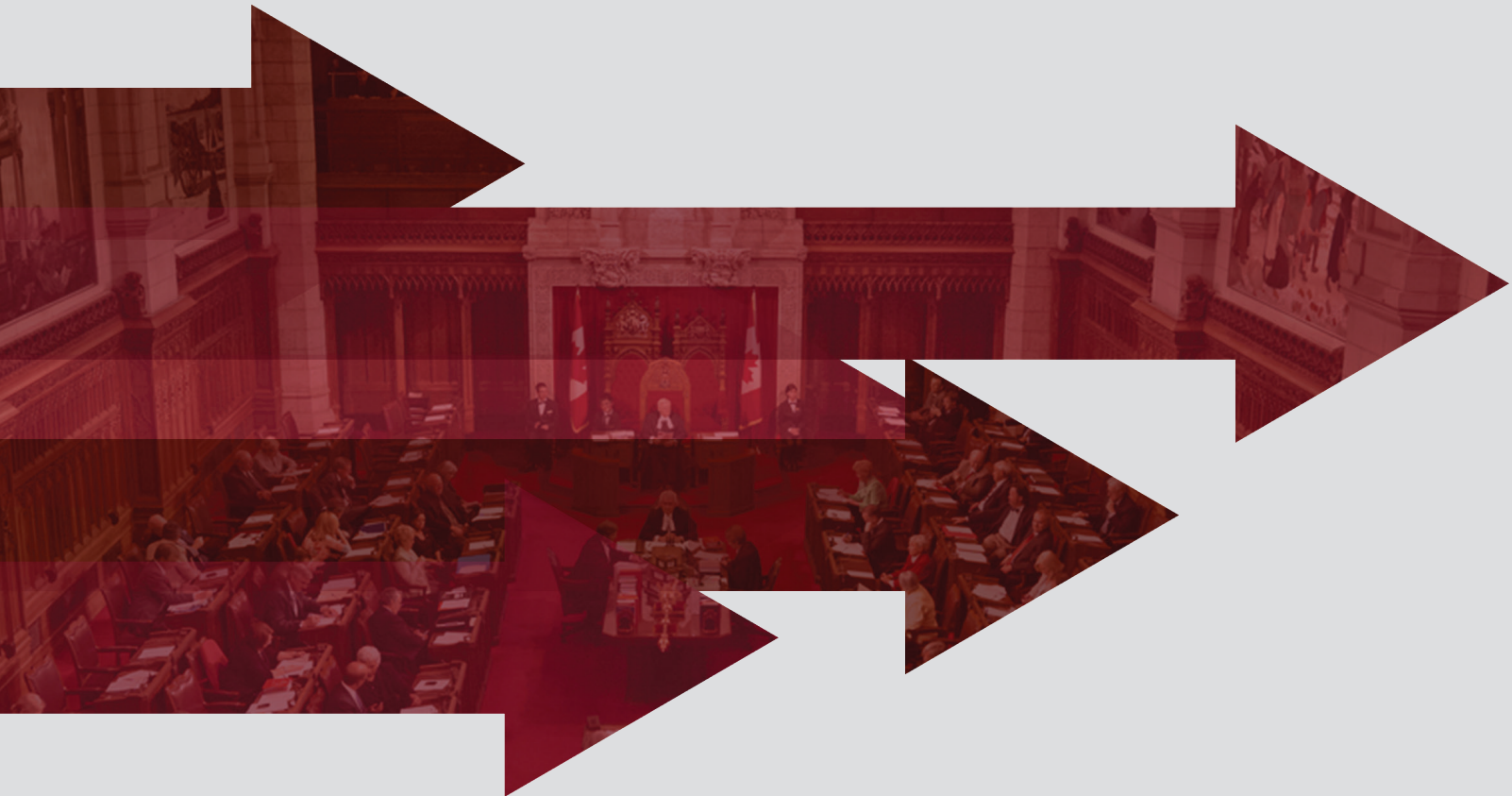


SENATE MODERNIZATION: MOVING FORWARD

OCTOBER 2016



Report of the Special Senate Committee on Senate Modernization – Part 1

The Honourable Thomas Johnson McInnis, Chair
The Honourable Serge Joyal, P.C., Deputy Chair
The Honourable Elaine McCoy

The Honourable Anne Cools
The Honourable Art Eggleton, P.C.
The Honourable Linda Frum
The Honourable Stephen Greene
The Honourable Janis Johnson
The Honourable Paul J. Massicotte

The Honourable Paul E. McIntyre
The Honourable Carolyn Stewart Olsen
The Honourable Scott Tannas
The Honourable Claudette Tardif
The Honourable David Tkachuk
The Honourable David M. Wells

The Honourable Senators Peter Harder P.C. (or Diane Bellemare) - Ex-officio
The Honourable Senators Claude Carignan P.C. (or Yonah Martin) - Ex-officio



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CANADA

For more information:

The Special Senate Committee on Senate Modernization
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4
MDRN@sen.parl.gc.ca

Ce rapport est également offert en français

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EXECUTIVE SUMMARY

Senate Modernization: Moving Forward Part I

The Senate is evolving but its core responsibilities remain unchanged.

Legislative oversight, independent thought, protecting individual rights and freedoms, and giving voice to Canadians at home and abroad — as well as those underrepresented in Parliament — remain essential features of the Senate. As complex public policy issues divide the country's elected leaders, Canadians more than ever need senators' capacity for sober second thought and evidence-based policy analysis.

To help the Senate fulfil these constitutionally-defined roles and to adapt to new realities, members of the Special Senate Committee on Senate Modernization have spent months studying how the Senate works and how it could improve.

In this first of what will be a series of reports, the committee has identified actions the Senate may take that can be implemented quickly to make the Senate more open, more inclusive and more effective.

These actions include:

- Televising Senate debates so Canadians can more easily see how senators bring value to Parliament,
- Updating committee membership rules so that senators who do not belong to a particular political party can more fully participate, and
- Establishing rules to divide identified omnibus bills so that they can be properly reviewed by committees.

This report shows how the Senate can act as an exemplary legislature in the 21st century.

KEY RECOMMENDATIONS

The Senate should not work in the shadows — senators must be visible to Canadians so they can see the Senate's value.

To accommodate renovations to Centre Block, the Senate will move to the Government Conference Centre in 2018. **The committee recommends that the new Senate chamber be outfitted with the necessary equipment to broadcast or webcast Senate proceedings.**

The number of independent senators who are not affiliated with a political party is increasing but control over which senators are appointed to committees rests largely in the hands of senators who belong to recognized political parties.

To promote equality between senators, **the committee recommends adding a definition of “caucus” to Senate rules. A caucus would be a group of nine or more senators formed for a parliamentary or political purpose, or who are members of a political party.**

Caucuses would maximize their members’ participation in the work of the Senate, particularly in light of **the committee’s recommendation that each caucus have at least one representative on the Committee of Selection, the body that determines the makeup of Senate committees.**

The Speaker of the Senate has determining influence over proceedings in the Senate. Members of the committee believe senators are best placed to put forward the names of colleagues who are particularly diligent and respected.

While constitutional considerations restrict the Senate from changing the current process — in which the Governor General appoints a Speaker on the advice of the Prime Minister — **the committee recommends the Senate nominate up to five senators for consideration by the Prime Minister to recommend to the Governor General for appointment at the appropriate time.**

Legislative oversight and sober second thought are among the most valuable contributions senators make to Canadian governance.

Omnibus legislation obstructs this work. Bills jam-packed with disparate clauses cannot easily be referred to specialized committees where experienced senators provide necessary scrutiny.

Omnibus bills are opaque and undemocratic; they prevent the government from being held to account.

To defend the values of transparency and accountability, **the committee recommends the Senate develop a process to determine how omnibus bills ought to be divided into separate bills.**

NEXT STEPS

The committee will continue to seek out ways for the Senate to modernize so it can better deliver the critical oversight and analysis that is expected of it.

A modern, independent-thinking and energetic Senate is essential to the proper functioning of Parliament. The recommendations contained in this report will guide the Senate towards achieving its potential in the 21st century.

DEDICATION



In memory of

The Honourable Pierre Claude Nolin

1950 – 2015

Speaker (2014 – 2015)

Senator (1993 – 2015)

Just two weeks after the Supreme Court of Canada rendered its 2014 opinion, *Reference re Senate Reform*, the Honourable Senator Pierre Claude Nolin responded by saying “It may be status quo in terms of the Constitution, but the Senate’s institutional transformation must move forward.” He immediately proposed a Special Committee on Senate Modernization and reached out to others to join with him. This act was typical of Senator Nolin. Indeed, he devoted all the last years of his life to working collaboratively with other senators, sometimes challenging us, sometimes cajoling us, but always urging us forward. Sadly, Senator Nolin died before he could see his vision come to fruition. Nevertheless, we continue to be inspired by his passion for parliamentary excellence and his belief that we can renew the Senate for the 21st century. We therefore respectfully dedicate our report in memory of the Honourable Pierre Claude Nolin and his vision of the future.

LETTER FROM THE CHAIR AND THE DEPUTY CHAIR

"A journey of a thousand miles begins with a single step."

Lao Tzo (Chinese philosopher)

Dear colleagues,

The Senate of Canada is undergoing a transformation.

The Special Senate Committee on Senate Modernization was given the task of providing guidance on transforming a 19th century parliamentary institution into one that would be equipped to meet the challenges of the 21st century. The desire of the Senate in constituting your committee was to initiate the process of change from within. Honourable colleagues on this committee have enthusiastically embraced this challenge and have worked together to bring forward a preliminary set of changes to the rules and practices of the Senate to start the process of modernizing the Senate. This report represents a first set of proposals which we are bringing forward to our colleagues for review and debate. Over the coming months, the committee members will continue its work and delve more deeply into some of the fundamental questions relating to how the Senate of Canada should improve its working to better serve Canadians.

For the members of the committee, the recommendations in this report are a call to action to all senators to begin a journey that Canadians expect of us in this period of transition. We look forward to debating, along with all our colleagues, these early steps on a long road ahead.

On behalf of the committee members, we would like to thank the committee's staff for their work. In particular, we would like to thank Sebastian Spano, the committee's analyst from the Library of Parliament and Daniel Charbonneau, the clerk of the committee. We also extend our thanks to the staff of the Subcommittee on Agenda and Procedure, Sandy Melo, Sebastien Payet, Gwendolyn Jarabek and Jeff Jarabek. Finally, we would like to express our appreciation to Lyne Héroux, Diane McMartin, Brigitte Martineau and all the staff in the Senate Administration for their ongoing support to the committee.

The Honourable Thomas Johnson McInnis
Chair

The Honourable Serge Joyal, P.C.
Deputy Chair

MEMBERS OF THE COMMITTEE:



The Honourable Thomas Johnson McInnis, Chair*



The Honourable Serge Joyal, P.C., Deputy Chair*

The Honourable Senators:



Anne Cools



Art Eggleton, P.C



Linda Frum



Stephen Greene



Janis Johnson



Paul J. Massicotte



Elaine McCoy*



Paul E. McIntyre



Carolyn Stewart Olsen



Scott Tannas



Claudette Tardif



David Tkachuk



David M. Wells

*Members of the Subcommittee on Agenda and Procedure

Ex officio members of the Committee:

The Honourable Senators



Peter Harder, P.C. (or Diane Bellemare)



Claude Carignan, P.C. (or Yonah Martin)



Other senators who have participated from time to time in this study:

The Honourable Senators Beyak, Cowen, Fraser, Gagné, Lankin, Oh, Omidvar, Pratte, Seidman and Sinclair

Staff Members:

Sebastian Spano, Analyst from the Parliamentary Information and Research Service of the Library of Parliament;
Daniel Charbonneau, Committee Clerk

ORDER OF REFERENCE

Extract from the *Journals of the Senate*, Friday, December 11, 2015:

“The Senate resumed debate on the motion of the Honourable Senator Cowan, seconded by the Honourable Senator Fraser:

That a Special Committee on Senate Modernization be appointed to consider methods to make the Senate more effective within the current constitutional framework;

That the committee be composed of fifteen members, to be nominated by the Committee of Selection, and that five members constitute a quorum;

That the committee have the power to send for persons, papers and records; to examine witnesses; and to publish such papers and evidence from day to day as may be ordered by the committee;

That the committee be authorized to hire outside experts;

That, notwithstanding rule 12-18(2)(b)(i), the committee have the power to sit from Monday to Friday, even though the Senate may then be adjourned for a period exceeding one week; and

That the committee be empowered to report from time to time and to submit its final report no later than June 1, 2016.

After debate,

The question being put on the motion, it was adopted. ”

ATTEST

Charles Robert
Clerk of the Senate

ORDER OF REFERENCE

Extract from the *Journals of the Senate*, Tuesday, May 17, 2016:

“The Honourable Senator McInnis moved, seconded by the Honourable Senator Andreychuk:

That, notwithstanding the order of the Senate adopted on Friday, December 11, 2015, the date for the final report of the Special Senate Committee on Senate Modernization in relation to its study of methods to make the Senate more effective within the current constitutional framework be extended from June 1, 2016 to December 15, 2016.

After debate,

The question being put on the motion, it was adopted.”

ATTEST

Charles Robert
Clerk of the Senate

LIST OF RECOMMENDATIONS

MANDATE

The committee recommends:

Recommendation 1

That the Senate develop a mission and purpose statement modeled on the following:

The Senate is the appointed Upper House in Canada's bicameral Parliament. It plays an important complementary role to the elected House of Commons by:

- i. Providing independent "sober second thought" to legislation, with particular respect to Canada's national interests, aboriginal peoples, regions, minorities and under-represented segments of Canada's populations;
- ii. Undertaking policy studies, reports and inquiries on public policy issues relevant to Canadians; and
- iii. Understanding, sharing and representing the views and concerns of different groups, based on a senator's unique perspective.

Recommendation 2

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament and the Committee on Internal Economy, Budgets and Administration to review the totality of its administrative rules as embodied in the *Senate Administrative Rules*, its procedural rules as embodied in the *Rules of the Senate*, as well as the Senate administrative processes, and revise them such that they incorporate the multiple roles of the modern Senate.

Recommendation 3

That the Senate direct the Senate administration to develop appropriate guide books and manuals that reinforce and support senators in discharging their multiple roles.

THE SPEAKER

The committee recommends:

Recommendation 4

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to develop a process within the *Rules of the Senate* by which senators may express their preference for a Speaker by nominating up to five senators as nominees for

consideration by the Prime Minister to recommend to the Governor General for appointment, and

That this process takes place at the beginning of each Parliament.

Recommendation 5

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to recommend changes to the *Rules of the Senate* to permit the Speaker *pro tempore* to be elected by senators by secret ballot.

Recommendation 6

That the Speaker *pro tempore* be selected from a caucus or group that differs from that of the Speaker.

RULES, PROCEDURES AND PRACTICES

The committee recommends:

Recommendation 7

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament and the Committee on Internal Economy, Budgets and Administration to draft amendments to the *Rules of the Senate* and the *Senate Administrative Rules* by 30 November 2016 respecting the following:

- Include a definition of "caucus" as follows:

A group of nine (9) or more senators, formed for parliamentary and/or political purposes, and where each senator has membership in not more than one such funded caucus at any one time; or

A group of nine (9) or more senators who are members of a political party registered under the *Canada Elections Act*.

- Replace the term "leader of a recognized party" with the term "leader or facilitator of a caucus or of a recognized party" wherever it appears in the *Rules of the Senate* and the *Senate Administrative Rules*.
- Each group of senators seeking recognition in the Senate have a leader or facilitator, or some other such individual who is charged with coordinating, directing or facilitating, as the case may be, the functioning of that group.

Recommendation 8

That the Senate direct the Committee on Internal Economy, Budgets and Administration to prepare amendments to the *Senate Administrative Rules* to provide all groups (caucuses) of senators with funding for a secretariat and research projects, regardless of whether the caucuses are organized with or without political affiliations.

OMNIBUS BILLS

The committee recommends:

Recommendation 9

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to develop a process in the *Rules of the Senate* by which omnibus bills are referred to an appropriate committee to determine whether and how an omnibus bill ought to be divided into several bills.

Recommendation 10

That when the Senate refers an omnibus bill to a committee for such a determination, the Government and the House of Commons be informed of such referral and of any determination by a committee to sever an omnibus bill.

REGIONAL REPRESENTATION

The committee recommends:

Recommendation 11

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to consider and recommend amendments to the *Rules of the Senate* to require standing committees to consider regional impacts in their reports on legislation by way of observations or in the report of subject-matter studies, where significant and prejudicial.

Recommendation 12

That the Senate direct the Committee on Internal Economy, Budgets and Administration to make available sufficient funds for committees to travel to all regions of the country when studying bills with potential regional impacts or when considering issues with potential regional impacts where significant or important.

BROADCASTING

The committee recommends:

Recommendation 13

That the Senate direct the Committee on Internal Economy, Budgets and Administration to ensure that the Government Conference Centre be equipped with cameras, facilities and resources to enable the broadcasting or webcasting of Senate proceedings.

Recommendation 14

That the Senate direct the Committee on Rules, Procedure and Rights of Parliament to examine and propose to the Senate any amendments to the *Rules of the Senate* to allow and facilitate broadcasting of its proceedings.

Recommendation 15

That the Senate direct the Senate administration to negotiate with the Canadian Public Affairs Channel to provide for more broadcast exposure of Senate proceedings, whether committee or Chamber.

ORDER PAPER

The committee recommends:

Recommendation 16

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to develop and propose to the Senate amendments to the *Rules of the Senate* to change the *Order Paper* process, particularly the process for so-called “stood” items, in line with the six elements set out on pages 34 and 35 of the report.

Recommendation 17

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to recommend amendments to the *Rules of the Senate* to restructure the *Order Paper* in a coherent and predictable manner such that:

- Bills are listed in numerical order, with Senate bills listed before House of Commons bills;
- Motions and inquiries are listed in numerical order; and
- Other items are listed in the order in which they were added to the *Order Paper*.

QUESTION PERIOD

The committee recommends:

Recommendation 18

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to amend the *Rules of the Senate* to formalize the current practice of inviting Government ministers to appear in the Chamber during question period to answer questions from senators, and regularly invite such ministers.

Recommendation 19

That the Senate also periodically invite Officers of Parliament to answer questions during question period using the same method as that used for Government ministers.

Recommendation 20

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to amend the *Rules of the Senate* such that question period should be limited to two days per week with one day being devoted to questions for a Government minister and one day devoted to questions for the Government Representative in the Senate or committee chairs.

COMMITTEES

The committee recommends:

Recommendation 21

That the Senate direct the Standing Senate Committee on Rules, Procedures and the Rights of Parliament to amend the *Rules of the Senate* to change the process for determining the composition of the Committee on Selection and the composition of each standing committee, using the process set out below as the basis for such changes. The committee members leave it to the procedural experts to craft appropriate language to give effect to the objectives of the committee and the principles underlying the objectives.

STEP 1:

1. The Committee of Selection shall be composed of 8 to 12 members.
2. The leaders, facilitators or conveners, as the case may be, of all recognized political parties, caucuses or groups shall meet and agree on the size and proportional composition of the Committee of Selection.

3. The size and proportional composition of the Committee of Selection shall be determined within five sitting days of the commencement of a new Parliament or session of Parliament.
4. The composition of the Committee of Selection must adhere to the following principles or requirements:
 - All caucuses or groups must have a minimum of one representative;
 - As closely as possible, membership on the Committee of Selection shall be in proportion to each caucus's or group's standing in the Senate;
 - The leaders, convenors or facilitators, as the case may be, of each political party, caucus or group in the Senate shall be non-voting *ex officio* members of the Committee of Selection.

STEP 2:

Each caucus or group shall select according to a process of its choosing the senator or senators from among its caucus or group who will occupy a seat or seats, as the case may be, on the Committee of Selection.

STEP 3:

The leaders, facilitators or convenors of the two largest caucuses or groups in the Senate shall present a motion in the Senate setting out the size and the composition of the Committee of Selection based on the individual selections made by each caucus or group.

STEP 4:

1. The Committee of Selection shall determine the number of seats on each standing committee of the Senate to be allocated to the members of each caucus or group in proportion to that group's or caucus's standing in the Senate.
2. Each caucus or group shall select its nominee or nominees for membership to each committee by a process of its choosing.

STEP 5:

The Committee of Selection shall allocate the positions of chair, vice chair and third member of the steering committee for each standing committee, to members of each caucus or group in proportion to that group's or caucus's standing in the Senate (though not to any individual senator in that group or caucus). In any allocation, the chair and vice chair positions shall not be occupied by senators who are members of the same caucus or group.

It should be noted that the historic practice has been that certain chairs of committees, such as the Committee on National Finance, have been allocated to senators who are not members of the party in government.

STEP 6:

The Committee of Selection after having completed the membership of each committee, and having allocated chair, vice chair and third member positions of a steering committee to each group or caucus (though not the individual senators who will occupy those positions), in accordance with the choices made by each caucus or group, shall present a report on the full membership of each committee to the Senate.

STEP 7:

Each standing committee shall meet to elect its chair, vice chair and third member of its steering committee in accordance with the report of the Committee of Selection on the allocation of such seats, by secret ballot if contested.

STEP 8:

If the foregoing selection/election process results in opposition or government caucuses not being represented on the Subcommittee on Agenda and Procedure of a committee, the leader(s) or designate of the unrepresented caucus(es) will become ex officio members(s) of that subcommittee when they are considering government legislation.

ONGOING

The Committee of Selection will continue to meet as necessary during the session to recommend to the Senate any changes in the committee framework or membership after consultations with each caucus or group.

INTRODUCTION

The Special Senate Committee on Senate Modernization is pleased to present Part I of an ongoing study of the rules, procedures and practices that guide how the Senate conducts parliamentary business and how senators perform their parliamentary functions. In this initial document, the committee provides a detailed examination of how the current rules, procedures and practices operate and then considers ways in which they may be modernized to strengthen what the Senate and senators do best: provide independent sober second thought as a complementary legislative chamber; provide an effective forum for regional concerns; reflect the diversity of Canada and Canadians in Senate studies, debates and inquiries; and protect individual rights and freedoms.

Subsequent reports will deal with additional elements of the modernization project, some of which flow from the concerns and proposals set out in this document. Presenting the issues and the modernization proposals in several phases will allow the committee to better focus its efforts. There was a strong desire on the part of senators generally to initiate the process of modernization, which understandably generated numerous proposals that are worthy of study. Senators were also keen to move forward without undue delay. Given the significant number of potential reforms, and the short timeline for reporting, the committee has chosen to present the first package of modernization proposals in this first phase.

It is noteworthy that the kind of reform contemplated in the order of reference constituting this committee has been characterized as “modernization.” This was a conscious choice of phrasing and it is significant in a number of respects. Firstly, the term acknowledges the reality that fundamental constitutional reforms will be difficult to achieve without some provincial involvement. Secondly, it reflects a strong desire on the part of the Canadian public as well as senators themselves to move forward quickly to initiate changes that are within the Senate’s power to implement. Thirdly, the term implies a recognition that traditional notions of how the Senate operates in discharging its parliamentary functions are being challenged and may no longer be suitable to meet the needs of a modern Senate.

In undertaking this study and in making the recommendations that flow from the study, the committee began by adopting what it considered to be the key principles that should guide a modernization effort. These principles serve to ensure that any recommendations for modernizing the Senate are not made in a vacuum and can provide the Senate with a coherent approach to modernizing the Senate. These principles reflect the constitutional foundations of the Senate, or the Senate’s place in the structure of the Constitution of Canada, and the purposes for which it was established. They also reflect the modern purposes of the Senate as the Senate has evolved to meet modern realities and challenges. The principles that the committee has adopted are:

- Sober second thought;
- Bicameralism;
- Independence;

- Democracy;
- Preservation of the rights and privileges of Parliament and Parliamentarians;
- Equality;
- Regional representation; and
- Minority representation.

Before proceeding to review the substantive areas for modernization, the committee reviews and clarifies the various roles played by the Senate and senators in Canada's constitutional democracy. The committee goes on to address a number of key areas the committee identified as requiring modernization. This report is structured as follows:

- Part I sets out the mandate of the committee and the general approach the committee has taken in its study;
- Part II explains the Senate's place and function in Canada's parliamentary democracy;
- Part III outlines the roles that senators perform in discharging their constitutional responsibilities;
- Part IV considers the need for modernization in relation to, and makes recommendations affecting, the office of the Speaker of the Senate as well as the Deputy Speaker;
- Part V addresses the reality of the growing number of senators who are not affiliated with a political party caucus in the Senate and proposes recommendations on how to accommodate them, including how independent senators may organize themselves into groups that have no connection to political parties;
- Part VI discusses approaches the Senate may consider in dealing with omnibus bills;
- Part VII makes recommendations on how the Senate may better fulfill its constitutional role of regional representation;
- Part VIII proposes ways to expand the broadcasting or webcasting of Senate proceedings;
- Part IX reviews some of the concerns senators have expressed on how chamber business is organized and conducted, and recommendations are made to modernize the process under the daily *Order Paper*;
- Part X proposes changes in relation to Question Period; and
- Part XI summarizes the rules around membership on committees, one of the key responsibilities for senators, and how these rules have the effect of excluding or limiting participation by independent senators on Senate committees. Recommendations are made in this part on revising the procedural and administrative rules in order that committee assignments may be distributed proportionately between non-affiliated senators and those affiliated with political party caucuses.

I. OVERVIEW AND MANDATE OF THE COMMITTEE

The Order of Reference establishing this Special Senate Committee on Senate Modernization makes clear that the committee has a very broad mandate to consider all possible measures to modernize the Senate, short of changes that would require amendments under the general amending formula in the *Constitution Act, 1982*.¹ The committee's Order of Reference states:

That a Special Committee on Senate Modernization be appointed to consider methods to make the Senate more effective within the current constitutional framework;

The task that the committee has set for itself is to propose measures that are attainable within the Senate's own rules, practices, procedures and administrative processes. This mandate is broad enough to encompass a considerable number of areas for modernization. Nevertheless, the committee has carefully avoided delving into areas that are being addressed in other parts of the Senate and in other committees. This was done to avoid duplication and to enable other committees that are better equipped to deal with particular aspects of the modernization project currently underway in the Senate to perform their mandate. In particular, the modernization of the financial practices in the Senate is being spearheaded in the committee on Internal Economy, Budgets and Administration. This committee has been constituted, and has the mandate under the *Parliament of Canada Act*, to oversee the financial administration of the Senate. The Auditor General of Canada has made a series of recommendations to strengthen the financial administration practices in the Senate.² This committee, while acknowledging the need for the Senate to review and strengthen its financial controls, considers that the Committee on Internal Economy, Budgets and Administration is best placed to deal with matters of financial administration given its mandate and its in-depth knowledge in these matters.

The committee notes that the Committee on Conflict of Interest for Senators, which administers the *Ethics and Conflict of Interest Code for Senators*, is charged with making recommendations in relation to ethics and conflict of interest. The work of this committee is highly specialized, and it works closely with the Senate Ethics Officer. The Special Committee on Senate Modernization has determined that any substantial ethics or conflict of interest issues are best left for the Committee on Conflict of Interest for Senators, again to avoid duplication and to enable the committee that is best placed to deal with these issues to exercise its mandate.

In addition, the Senate's administration continues to identify practices and procedures that can be improved upon or strengthened.³

¹ *Constitution Act, 1982*, section 38. This provision requires the concurrence of Parliament and at least seven provinces representing at least 50% of all the provinces, in order to amend the Constitution of Canada.

² Auditor General of Canada, [Report of the Auditor General of Canada to the Senate of Canada: Senator's Expenses](#), June 2015.

³ Senate of Canada, News Release, [Report of former Justice Binnie: Senators' Expenses](#), 21 March 2016.

In its study, the committee had the benefit of several important sources from which to draw inspiration and from which to develop the proposals for modernization which follow.

The first source is the Supreme Court of Canada's opinion in *Reference Re Senate Reform*, which has provided the committee with a modern interpretation of the functions and purposes of the Senate within Canada's constitutional "architecture," as the Court describes it.⁴

The committee was privileged to have the results of proposals generated by several conferences – proposals for modernization emanating from senators themselves. The first is the symposium organized by our colleague, the Honourable Senator Serge Joyal, P.C., held in January 2015 (Joyal Symposium).⁵ The other is the series of working sessions organized by the Honourable Senators Stephen Greene and Paul Massicotte (Greene and Massicotte Working Sessions) held in October 2015.⁶

The committee also heard from a number of distinguished experts in the fields of democratic reform and constitutional law, reform of upper chambers, parliamentary practice, as well as a representative from the United Kingdom House of Lords who spoke on the unique grouping of independent peers, known as Crossbenchers.

Since Confederation, the Senate of Canada has functioned within the Westminster model that includes government and opposition representative roles. Nothing in this report assumes or advocates the elimination of this dynamic. Rather, the committee espouses solutions that allow all Senators – including unaffiliated, and those affiliated with political party caucuses and groups – to exercise independence in the discharge of their duties as parliamentarians.

The desire for change and modernization of the Senate is strong among senators, as demonstrated by the work of our colleagues who organized the Joyal Symposium and the Greene and Massicotte Working Sessions. There is also a strong appetite for change among Canadians in general. According to a survey conducted by Nik Nanos, nearly seven out of ten Canadians say that Senate reform is an urgent priority or a somewhat urgent priority. Voters not affiliated with a political party were most likely to say Senate reform was an urgent or somewhat urgent priority (77%) compared with partisan voters who were less likely to say so (66%), while swing voters fell in between these two groups (69%).⁷ The survey results are provided in Appendix B.

⁴ *Reference Re Senate Reform*, 2014 SCC 32 (*Reference Re Senate Reform*).

⁵ *Working Together: Improving Canada's Appointed Senate*, December 2015 (Joyal Symposium).

⁶ *Working Sessions on Senate Modernization Report*, December 2015.

⁷ Nik Nanos, *Strong Majority want Independent Senators – Appetite for Free Votes on the Rise: Survey Summary*, April 2016.

II. THE SENATE'S PLACE IN CANADA'S PARLIAMENTARY DEMOCRACY

THE SUPREME COURT OF CANADA'S ANALYSIS OF THE NATURE AND PURPOSES OF THE SENATE

The Supreme Court of Canada on two occasions has had the opportunity to consider the nature, purposes and origins of the Senate and its place within Canada's constitutional democracy. The first occasion was in 1980 when the Court rendered its opinion in *Re: Authority of Parliament in Relation to the Upper House*. In its decision, the Court expressed the view that Parliament cannot unilaterally make alterations to the Senate that 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" or that would affect its function as a house of sober second thought.⁸ The importance of the Senate's purpose in regional and provincial representation within a federal state, underscored in the most recent Court opinion on Senate reform, is discussed below.

More recently, in *Reference Re Senate Reform*, the Court rendered opinions on the following reference questions from the Government of Canada:

- reducing the length of senators' terms of office;
- establishing an "advisory" election process for selecting nominees from a province for consideration for appointment to the Senate;
- abolishing the property ownership requirement for senators; and
- abolishing the Senate.⁹

The Court was asked for opinions on the process for amending the Constitution to achieve those potential reforms to the Senate. The overriding question was the degree of provincial consent required in the process of amendment.

The degree of consent generally depends upon the nature and significance of a proposed amendment and may include unanimity, two thirds of the provinces, one or some provinces, or none of the provinces (unilateral action by Parliament).

The Court's opinion was that, with the exception of abolishing the property requirement for senators (except for senators representing Quebec), Parliament required some provincial consent to amend the Constitution and unanimous consent to abolish the Senate.¹⁰

⁸ *Re: Authority of Parliament in Relation to the Upper House*, [1980] S.C.R. 54.

⁹ *Reference re Senate Reform*, 2014 SCC 32 (*Reference Re Senate Reform*).

¹⁰ For a useful summary of the Court's opinion, see J. Hunter, *Renovating Canada's Constitutional Architecture: An Examination of the Government's Democratic Reform Initiatives*, Paper Presented at the symposium, The State of Canada's Constitutional Democracy, organized by the David Asper Centre for Constitutional Rights, 26-27 February 2016.

A number of important elements of the judgment - those not involving the constitutional amending procedures - merit discussion because they have considerable relevance for the task of this committee. The Court affirmed a number of important principles that this committee has used for guidance in making the recommendations set out in this report.

The Court developed the foundational principle of the “architecture” of the Constitution. The basic elements of that architecture are: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.¹¹ Within that architecture, the Court identified a number of important Senate roles or purposes, as an essential part of that architecture, including: as a complementary legislative body of sober second thought (paragraph 54); and, as a thoroughly independent body that could “canvass dispassionately the measures of the House of Commons” (paragraph 57).” Other roles developed over time: notably, representing the various regions of Canada as more provinces entered confederation and ceded legislative powers to the federal Parliament (paragraph 15). In addition, the Court observed that over time, the Senate came to represent groups that were under-represented in the House of Commons including ethnic, gender, religious and linguistic minorities and Aboriginal groups (paragraph 16).

Significantly, the Court in *Reference Re Senate Reform* draws from the 1980 judgment in *Reference Re Authority of Parliament in Relation to the Upper House* in articulating the so-called federal principle, or the purpose of the Senate within the federal structure of Canada’s democracy. In its conclusions on the constitutionality of legislation to change the method of selection of senators through so-called “consultative elections” and on changing the tenure of senators, the Court emphasized that changing the fundamental nature of the Senate would engage the interests of the provinces, and thus require substantial provincial consent under the general amending procedure in section 38 of the *Constitution Act, 1982*.¹² The Court more fully articulates the federal principle in *Reference Re Senate Reform*, extending it more broadly to the process of constitutional amendment. The Court made clear that any changes to the federal structure of the Constitution of Canada would require substantial provincial consent:

Changes that engage the interests of the provinces in the *Senate as an institution forming an integral part of the federal system* can only be achieved under the general amending procedure. Section 44 [the unilateral amendment procedure], as an exception to the general procedure, encompasses measures that maintain or change the Senate without altering its fundamental nature and role.¹³ [emphasis added]

¹¹ For an elaboration of some of these principles, see, D. Smith, *Coming to Terms: An Analysis of the Supreme Court Ruling on the Senate*, 2014, (December 2015). The paper was presented to the Committee in conjunction with Professor Smith’s appearance before the Committee on 9 March 2016. See the transcript of the evidence: Proceedings of the Special Committee on Senate Modernization, Issue 1, No. 1, [Evidence](#), 9 March 2016.

¹² For examples of the Court’s concern for provincial interests see paragraphs 47, 63, 75, and 78 in *Reference Re Senate Reform*.

¹³ *Reference Re Senate Reform*, para. 75.

PRINCIPLES ADOPTED BY THE COMMITTEE IN GUIDING ITS STUDY

One of the important lessons that the committee draws from *Reference Re Senate Reform* is that any process of modernization through constitutional negotiation will pose significant challenges at the present time. Nonetheless, as senators have recognized, there is much that can be accomplished through the Senate itself taking the initiative to modernize its practices, rules and procedures and strengthen its essential features and its constitutionally-recognized roles and purposes.

The Court's opinion thus provides this committee with guidance in crafting its recommendations. The recommendations that follow are developed with a view to strengthening or furthering the purposes for which the Senate was created and the Senate's place within the Constitutional architecture, as articulated by the Supreme Court of Canada. The principles that this committee adopts in guiding its work are as follows:

Sober second thought

Sober second thought is one of the purposes of the Senate identified by the Supreme Court of Canada and an essential characteristic of the Senate. It refers to the widely-recognized contribution that senators and the Senate bring to the review of legislation and generally to the broad range of subject-matter studies in which the Senate regularly engages. As the Court acknowledged, senators are expected to "canvass dispassionately the measures of the House of Commons," free from popular or electoral pressures.¹⁴ Their ability to do so is also a function of their independence, being free of the constraints of having to seek re-election.

Bicameralism

The Senate is a complementary chamber, not a rival to the House of Commons in the legislative process, and not a co-equal chamber.¹⁵ As a complementary body, it is understood that the Senate should be respectful of the will of the elected members of the House of Commons who act on a popular mandate, and work in a spirit of collaboration in pursuing the national interest. This does not mean that the Senate should always defer to the House of Commons. It simply means that in discharging their parliamentary functions, senators do so with a view to improving legislation passed by the House of Commons, not obstructing it.

Independence

Related to the principle of bicameralism and complementarity is the independence of the Senate. Independence has two aspects: independence of individual senators and independence of the Senate as an institution. It is through the constitutionally-protected independence of the Senate and senators that the Senate discharges its functions as a complementary legislative chamber.

¹⁴ *Reference Re Senate Reform*, para.57.

¹⁵ See the Court's analysis in *Reference Re Senate Reform* in which it articulates the principle of bicameralism, particularly at paragraph 58.

Democracy

Democracy is one of the underlying foundational principles of the Constitution of Canada, as recognized by Canada's highest court. The Senate's role as a strong and effective chamber is essential in maintaining a vibrant democracy in Canada where individual rights and freedoms are maintained.

Preservation of the rights and privileges of Parliament and Parliamentarians

Though not mentioned in *Reference Re Senate Reform*, parliamentary privilege is another foundational constitutionally-entrenched principle that is an essential component of parliamentary democracy. As expressed by the Subcommittee on Parliamentary Privilege of the Standing Committee on Rules, Procedures and the Rights of Parliament, in its comprehensive study of parliamentary privilege in Canada, parliamentary privilege "enables Parliament to function effectively and efficiently without undue impediment."¹⁶ The Supreme Court of Canada for its part affirms the role of privilege as a means of preserving "the fundamental constitutional separation of powers" between the executive, the courts and Parliament.¹⁷ Parliamentary privilege thus is a central element in preserving an independent Parliament.

Equality

By equality, what the committee is intending to convey is the principle that each senator is equal: equal with respect to his or her rights and privileges as a parliamentarian. This principle should be reflected broadly in the Senate's rules and practices.

The rule of law

The rule of law is one of the underlying unwritten principles of the Constitution of Canada, as articulated by the Supreme Court of Canada in *Reference Re Senate Reform* and other judgments. The rule of law is expressed in a number of ways, but what this committee takes from the principle is that the law is supreme over government: it seeks to prevent the exercise of arbitrary power by government officials. The rule of law also serves to protect individuals and individual rights when government exercises its powers.

Regional representation

Regional representation is one of the purposes for which the Senate was created. The Senate was intended to act as a counter-balance to proportionate representation of the provinces in the House of Commons. Since proportionate representation favours more populous provinces, the Senate is an important institution to enable smaller provinces to advance their interests and concerns. Regional representation is a key component of the federal principle to which reference was made earlier in this report.

¹⁶ Senate of Canada, Standing Committee on Rules, Procedures and the Rights of Parliament, [A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century](#), June 2015.

¹⁷ See *Canada (House of Commons) v. Vaid*, 2005 SCC 30, para. 21.

Minority representation

One of the modern roles that the Senate has developed is to act as a forum for protecting minority interests, particularly aboriginal, gender, linguistic and ethnic minorities who have traditionally been under-represented in the House of Commons.

III. WHAT SENATORS DO – THE NATURE OF A SENATOR’S CONSTITUTIONAL ROLE

THE SENATE AS THE EMBODIMENT OF THE FEDERAL PRINCIPLE

The nature of a senator’s role is founded in the purpose of the Senate’s creation. The Senate was intended to embody the federal principle, to which the committee has referred elsewhere in this report (see page 6). The federal principle reflects a key component of the negotiations that led to the confederating agreement. It was this agreement among the pre-Confederation provinces which made Confederation a possibility and a reality. The Senate was constituted to provide equal representation among the regions, irrespective of population and size. The Senate was a counter-balance to the elected House of Commons which was constituted by representation by population, known as ‘rep by pop’. The Senate’s purpose was to provide a “distinct form of representation for the regions that had joined Confederation,” and, to protect cultural and religious minorities in the province of Quebec through specific provisions of the *Constitution Act*.¹⁸ It is this distinct form of representation that gives the Senate its unique character as a House of Parliament which draws upon the perspectives of senators from Canada’s distinct regions, thereby reflecting those regions and the concerns of minorities, as against the majority in the elected House of Commons.

The Supreme Court of Canada’s opinion in *Reference Re Senate Reform* underscored the enlargement of that role over time, be it in the composition of the Senate, now more reflective of the diversity and pluralism of Canada, and a broader concern for minority rights. All of this actuates the sensitivity, concern and respect Canadians feel for their rights and freedoms.

The Senate was thus constituted as an upper house in a federal state to reflect regional and minority interests. It was a unique institution at the time of Confederation, since there were no models upon which to draw. The House of Lords, the closest upper chamber model available at the time, was not constituted to represent regional interests, while the British House of Commons was established to serve a unitary state.

PARLIAMENTARY FUNCTIONS BROADLY DEFINED

The work of senators in discharging their constitutional functions generally falls within the rubric, “parliamentary functions.” Former Supreme Court Justice Ian Binnie, in his report to the Senate titled *Report of the Special Arbitrator*, is instructive in defining a senator’s parliamentary functions.¹⁹ He takes a broad perspective, informed by the Supreme Court of Canada’s analysis, and by his thorough understanding of the Senate’s procedural, administrative and ethical rules. Justice Binnie’s analysis in support of a broad definition of a senator’s parliamentary functions is buttressed by a review of the quality, depth and diversity of the work of the Senate, particularly the “excellent reports” produced by Senate committees. For example,

¹⁸ *Reference Re Senate Reform*, para. 15.

¹⁹ Justice Ian Binnie, [Report of the Special Arbitrator on the Expense Claims Identified by the Auditor General in his Report Dated June 4, 2015](#) (undated, released 21 March, 2016) (Report of the Special Arbitrator). The report is available through the Senate portal.

specific mention is made of reports by the Social Affairs Committee (the so-called Kirby Report on health care and other reports on pharmaceuticals and mental health), the Banking Committee and the Human Rights Committee.²⁰ Justice Binnie also had the benefit of direct interviews with senators as well as written submissions, including submissions that Senator Serge Joyal, P.C. had made to the Auditor General of Canada, copies of which are included as an Appendix to this report. The broad perspective, reflecting the “richness and diversity of the Senate’s work” is expressed in the following passage:

Democracy would be ill-served by curtailing the good faith pursuit of what Parliamentarians consider to be the public interest even if a particular pursuit is regarded in some quarters (even within the Senate) as unimportant. Senators are expected to be independent, and it is that independence that gives the Senate’s work the richness and diversity that best serves its “Parliamentary function.”²¹

THE MODERN PARLIAMENTARY ROLES OF SENATORS

What are the modern parliamentary functions of a Senator? Senator Pierre-Claude Nolin, who served in the Senate, including as Speaker, until his untimely death in 2015, elaborated in a series of inquiries he initiated in the Senate what he termed the multiple roles of a modern Senate. These roles are:

- Legislative;
- Investigative;
- Representing regions;
- Protecting minorities;
- Parliamentary diplomacy; and
- Promoting and defending public causes.

Commenting on the legislative role, Senator Nolin noted in his speech on 4 February 2014:

“The Senate calmly and independently proceeds to considering legislative proposals by using its effective and credible process for passing laws that are respectful of the ‘deliberate and understood wishes of the people’ on the one hand, and the constitutional law – and the rule of law that it underpins – on the other hand.”

In articulating the investigative role, Senator Nolin and other senators emphasized the complementary role the Senate plays in relation to the House of Commons. In a speech delivered in the Chamber on 1 April 2014, he stated the following:

“Far from competing with the lower chamber, the upper chamber complements the lower chamber’s work in many important ways, such as by conducting special studies.”

“Both when it is studying legislative measures and when it is conducting investigations, the Senate deliberates, sheds light on legislative arguments through debate, listens to

²⁰ *Ibid*, Part 4, para. 47.

²¹ *Ibid*, Part 1, para. 15.

testimony and gathers a vast range of opinion from Canadians in all areas of activity and from every region of the country.”

Because of the independence that has been conferred on senators, the Senate can dispassionately and freely conduct its legislative function.

With respect to representing the regions, as the Supreme Court of Canada observed, there would not have been a union of provinces resulting in the creation of Canada as a nation were it not for the establishment of an upper chamber to provide a “distinct form of representation for the regions that had ceded a significant portion of their powers to a new federal Parliament.” In the modern context, the Senate draws together exceptional individuals from every region of the country providing it with diverse perspectives.

One of the principal ways the Senate protects minorities is through the vigorous application of the *Canadian Charter of Rights and Freedoms* to legislation and other government measures. The work of committees such as the Committee on Legal and Constitutional Affairs, the Committee on Human Rights and the Committee on Official Languages is widely recognized for the thorough analysis and in-depth review in the areas of civil liberties and human rights that is invariably found in their reports and studies.

Parliamentary diplomacy is an area where senators make important contributions on the international scene, effectively supplementing the Government’s international relations efforts. Senators promote Canadian values abroad, especially Canadian values in democracy, human rights and the rule of law, areas in which Canadian traditions are highly valued and recognized. In pursuing their diplomatic roles, senators also develop an extensive knowledge of the global context in which Canada and Canadians operate, and apply that expertise in their legislative and investigative roles.

Finally, because the Senate is independent from the Executive and from the House of Commons, senators are freer to raise sensitive issues of national importance and worthy public causes that may be somewhat controversial or ahead of public opinion. The Senate routinely takes a long-term, in-depth point of view on topics that ultimately provide a positive contribution to Canadian civil society.

Mr. Justice Ian Binnie came to a similar conclusion in his *Report of the Special Arbitrator*. At page 22, he said:

In summary, the Parliamentary functions of a Senator include:

- attending Senate sessions;
- sitting in committees and sub-committees;
- representing the people of the Provinces, regions or territories for which they were appointed;
- partisan politics;
- inquiring into, publicizing or promoting matters of public interest in their “Grand Inquest of the Nation” role;

- belonging to relevant parliamentary associations and interparliamentary groups; and
- pursuing other issues of public interest linked to their role as senators.²²

The Senate's effectiveness in its various roles is demonstrated by the strong tradition of free debate, which the parliamentary privilege of freedom of speech grants to senators. The ability to debate freely is also a manifestation of the principle of independence. The quality of debate in the Senate is widely acknowledged, and an important reason why the Senate is so effective as a legislative chamber.

Recommendation 1

That the Senate develop a mission and purpose statement modeled on the following:

The Senate is the appointed Upper House in Canada's bicameral Parliament. It plays an important complementary role to the elected House of Commons by:

- i. **Providing independent "sober second thought" to legislation, with particular respect to Canada's national interests, aboriginal peoples, regions, minorities and under-represented segments of Canada's populations;**
- ii. **Undertaking policy studies, reports and inquiries on public policy issues relevant to Canadians; and**
- iii. **Understanding, sharing and representing the views and concerns of different groups, based on a senator's unique perspective.**

Recommendation 2

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament and the Committee on Internal Economy, Budgets and Administration to review the totality of its administrative rules as embodied in the *Senate Administrative Rules*, its procedural rules as embodied in the *Rules of the Senate*, as well as the Senate administrative processes, and revise them such that they incorporate the multiple roles of the modern Senate.

Recommendation 3

That the Senate direct the Senate administration to develop appropriate guide books and manuals that reinforce and support senators in discharging their multiple roles.

²² Report of the Special Arbitrator, p. 22.

IV. THE SPEAKER OF THE SENATE

BACKGROUND

The Speaker of the Senate is the presiding officer of Senate debates and presides over proceedings of the chamber, ruling on points of order and *prima facie* questions of privilege, as well as preserving order and decorum.²³ The Speaker ranks fourth in the Canadian Order of Precedence, after the Governor General, the Prime Minister and the Chief Justice of the Supreme Court of Canada.²⁴

The Speaker performs various ceremonial and protocol functions, but he or she plays a minimal role in the administration of the Senate. With the exception of a brief period during the 41st Parliament, the Speaker has not recently presided over the Standing Senate Committee on Internal Economy, Budgets and Administration, the body responsible for the management and administration of the Senate. This is in strong contrast to the Speaker of the House of Commons, who presides over the Board of Internal Economy and who effectively presides over the management of the House.²⁵

The Speaker is appointed, and may only be removed, by the Governor General pursuant to section 34 of the *Constitution Act, 1867*, which states:

34. The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead.

It must be highlighted that the Speaker is appointed under Royal Command. This fact is of more than symbolic importance. As the formal document setting out the Commission makes clear, the Commission confers trust and confidence in the individual who holds the office of Speaker and requires that person to act with loyalty, integrity and ability.²⁶

By constitutional convention, the Governor General acts on the advice of the Prime Minister, whose advice is rarely, if ever, declined, making the Speaker a *de facto* appointee of the Prime Minister.

MODERNIZING THE PROCESS OF SELECTION OF THE SPEAKER

The committee considers it important to provide some historical context to the issue of modernizing the process of selection of the Speaker to illustrate how the position has evolved over the years and to emphasize the difficulty in changing that process.

The role of the Speaker has evolved considerably over the years. The Speaker's role was patterned on the role of the Lord Chancellor in the House of Lords prior to reforms in 2005. The

²³ The Senate of Canada, *Senate Procedure in Practice*, December 2015, p. 25 (*Senate Procedure in Practice*).

²⁴ *Ibid*, p. 26.

²⁵ A. Barnes, et al, [Reforming the Senate of Canada: Frequently Asked Questions](#), Library of Parliament, Background Paper No. 2011-83, (Revised 12 September 2011), p. 31 (*Reforming the Senate of Canada*).

²⁶ *Senate Procedure in Practice*, Chapter 2, Appendix D, p. 37.

Lord Chancellor occupied several positions for the Crown including as a member of the Cabinet. Indeed, in the post-Confederation period, the Speaker was a minister without portfolio. During this period, the Speaker lacked the powers to enforce the *Rules of the Senate* (Rules), unless a matter of order was raised by a senator.²⁷

A revision of the Rules in 1906 gave the Speaker some additional powers similar to those of the Speaker in the House of Commons. In 1991, the Senate gave the Speaker the power to act on his or her own initiative to preserve order and decorum and to enforce the Rules.²⁸

The Speaker's current powers are codified in the Rules, particularly subrule 2-1, which provides:

2-1 (1) The Speaker shall:

- (a) preside over the proceedings of the Senate;
- (b) rule on points of order, the *prima facie* merits of questions of privilege and requests for emergency debates; and
- (c) preserve order and decorum.

The modern role of the Speaker is such that he or she has considerable influence over the conduct of proceedings in the Senate. In addition to the changes to the procedural rules noted above, the Speaker also has a deliberative vote, allowing the Speaker to vote at the same time as other senators. The speaker's rulings on procedural points, however, may be over-ruled by the Senate.²⁹ This is in sharp contrast to the Speaker of the House of Commons, who has only a tie-breaking vote, but whose rulings on procedural points cannot be over-ruled.

The trend has been towards an increasingly impartial and proactive Speaker, with senators relying on the Speaker to act fairly and judiciously in procedural matters.

The gradual progression of the Speaker from, in effect, an instrument of the Executive to an integral part of a modern legislative chamber, where the Speaker has considerable authority over the way business is conducted in the Senate, has led many to reflect on the role senators themselves have, or should have, in the process of selection of the Speaker.

In 2006, the Special Senate Committee on Senate Reform, in its First Report of October 2006 on the subject-matter of Bill S-4, identified other issues of Senate reform that needed to be addressed in the near future. The possible election of a Senate Speaker was one of them.³⁰

There have also been a number of Senate public bills proposing a different selection process. In this Parliament, Bill S-213, An Act to amend the Constitution Act, 1867 and the Parliament of Canada Act (Speakership of the Senate) was introduced in the Senate by Senator Mercer on 9 December 2015.

²⁷ *Ibid*, p. 25.

²⁸ *Ibid*, p. 25. That authority is now found in Subrule 2-6(1).

²⁹ *Ibid*, p. 10.

³⁰ Senate, *Report on the subject-matter of Bill S-4* (October 2006).

More recently, senators who participated in the Greene and Massicotte Working Sessions were overwhelmingly supportive of the idea of having senators themselves become involved in the selection of the Speaker.

Developments elsewhere among Westminster parliaments lend further support for the idea of modernizing the process by which the Speaker is selected. In the House of Lords, the Lord Speaker has been elected by members of the House of Lords since 2006. Prior to 2006, the role of Speaker was performed by the Lord Chancellor, a prime ministerial appointee who occupied several other positions: senior judge, head of the judiciary in England, Wales and Northern Ireland, member of the Cabinet, as well as presiding officer in the House of Lords. The *Constitutional Reform Act, 2005* split these various roles – with the judicial elements being assigned to the Lord Chief Justice - and created the position of Lord Speaker.³¹

A number of arguments may be advanced in support of modernizing the method of selection of the Speaker:

- The Speaker is there to assist and support the Senate in performing its constitutional roles. The Speaker is not appointed as an agent of the executive branch of government, notwithstanding his or her appointment by the executive.
- By initiating the selection process for the Speaker, the Senate is expressing its independence.
- Mechanisms could be devised to enable the Senate to identify candidates for possible appointment as the Speaker without requiring a formal constitutional change. The Senate could advise the Prime Minister of its preferred candidate or candidates.³²

Changing the method of selection of the Speaker such that the Governor General would no longer appoint a Speaker and the Prime Minister would no longer exercise a prerogative to recommend a senator for appointment, would require an amendment to the *Constitution Act, 1867*. The *Constitution Act, 1982*, which sets out the procedures for amending the Constitution of Canada, however, is silent as to which procedure is required to modify the method of selection of the Speaker. Consequently, there are competing views as to which formula ought to apply. According to some scholars, there are doubts as to whether Parliament has the capacity to amend section 34 of the *Constitution Act, 1867* unilaterally. They suggest that the concurrence of seven provinces representing at least 50% of the population of all the provinces would be required. Still others suggest that the unanimity procedure would be necessary.

For the purposes of this report, however, the committee need not engage in a detailed discussion of the constitutional considerations and competing viewpoints on this issue, since this committee is proposing an approach that would not involve a constitutional amendment.

³¹ Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived*, Oxford University Press, 2013, p. 35.

³² *Reforming the Senate of Canada*, pp. 31-32.

The approach that the committee recommends involves the Senate initiating the process of selection. The committee proposes that the Senate adopt rules to enable the Senate to select a nominee or several nominees and to put forward their names to the Prime Minister. In this initial phase, the committee makes no specific recommendation on the mechanics of that process. The committee debated the merits of two processes: a process by which senators collectively select one or more candidates to become nominees of the Senate for consideration by the Prime Minister; and, a process by which each of the various groups in the Senate (political groups or groups of independents, concepts that are discussed in Part V of this report) put forth one or several candidates for nomination. Under either process the Senate as a whole would vote by secret ballot to select several nominees to recommend to the Prime Minister.

In the end, the committee decided that the precise mechanics of the process the Senate could develop to select its nominee or nominees for the Prime Minister's consideration would be left for a subsequent report. The committee was also cognizant of the fact that any process that the Senate would ultimately adopt would not likely be put into use immediately, but rather made available in the next Parliament.

The strength of the approach being proposed by this committee is that it would enable the Senate itself to express its views on who among its members has sufficient competence and the respect of senators to elicit their confidence. It is also a means for the Senate collectively and individually to exercise a degree of independence, reinforcing what the Supreme Court of Canada expressed as one of the fundamental characteristics of the Senate.

At the same time, the approach the committee proposes avoids the need for potentially complex and drawn out debates about which amending process is required to effect this change.

Finally, what the committee recommends closely parallels the process the Government has adopted for the Prime Minister to select senatorial nominees for recommendation to the Governor General to appoint to the Senate.

The Speaker *Pro Tempore*

The position of Speaker *pro tempore* (or deputy speaker) is not provided for in the Constitution of Canada, nor is it created by statute. Instead the Senate selects the deputy speaker in accordance with the Rules.³³ The Rules provide that the Committee of Selection shall prepare a report to the Senate within the first five sitting days of each session on its nomination of the Speaker *pro tempore*.³⁴ There was general consensus that the process for selecting the Speaker *pro tempore* be made more democratic. The committee discussed a proposal generated during the Greene and Massicotte Working sessions calling for a vote by secret ballot, which the committee endorsed.

³³ However, it is mentioned in the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, paragraph 62.1(1) (b), for purposes of establishing the salary for the position.

³⁴ *Rules of the Senate*, Sub-Rule 12-2(1) (a).

Recommendation 4

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to develop a process within the *Rules of the Senate* by which senators may express their preference for a Speaker by nominating up to five senators as nominees for consideration by the Prime Minister to recommend to the Governor General for appointment, and

That this process takes place at the beginning of each Parliament.

Recommendation 5

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to recommend changes to the *Rules of the Senate* to permit the Speaker *pro tempore* to be elected by senators by secret ballot.

Recommendation 6

That the Speaker *pro tempore* be selected from a caucus or group that differs from that of the Speaker.

V. INDEPENDENT SENATORS

CONTEXT

According to a recent Nanos poll completed in April 2016, a “strong majority of Canadians (three in four) believe Senators should be less partisan and say they should be independent and vote independently of any party caucus.”³⁵

The Senate is confronted with a new reality: an increasing number of senators are choosing not to affiliate themselves with or join a political party caucus in the Senate. This development is occurring alongside the Government’s new process for selecting senators to recommend to the Governor General for appointment to the Senate. The new process envisages that new appointees to the Senate will function in a less partisan manner in discharging their constitutional roles.

Already, the Governor General has appointed seven new senators recommended by the Prime Minister under the newly-implemented process, to serve in the Senate. As of the writing of this report there are 23 senators who consider themselves independent. A further 21 vacancies currently exist, and several more are anticipated over the coming year as senators reach the mandatory retirement age of 75. As a result, it is conceivable that as many as 40 senators will not be members of a political party caucus by the end of 2016, and over 50 will likely be in that position two years later.

Therein lies a challenge. The procedures and practices of the Senate as embodied in the *Rules of the Senate* (Rules) and *Senate Administrative Rules* (SARs) are effectively structured around the existence of two main political party caucuses. Many of the procedural responsibilities therefore fall within the influence of leaders of a political party caucus.

If the Senate is truly to take up the task of modernizing itself to account for contemporary realities, it is of crucial importance that it change its rules so that senators who are not affiliated with a political party caucus are given equal consideration in the Senate’s procedural and administrative rules and practices.

THE SENATE’S RULES, PROCEDURES AND PRACTICES

Recognized Parties and Caucuses

As currently framed, the Rules and SARs focus primarily on the concept of recognized political parties. The Rules, for example, do not define “caucus” but do define “recognized party”, as follows:

A caucus consisting of at least five Senators who are members of the same political party. The party must have initially been registered under the *Canada Elections Act* to qualify for this status and have

³⁵ Nik Nanos, *Strong Majority want Independent Senators – Appetite for Free Votes on the Rise: Survey Summary*, April 2016.

never fallen subsequently below five Senators. Each recognized party has a leader in the Senate.³⁶

The SARs, on the other hand, define "caucus" in part by reference to a leader of a recognized party, and in part by reference to political purposes, as follows:

"Caucus" means a group of members of Parliament, formed for political purposes, composed exclusively of or including Senators, and recognized as a caucus by a leader of a recognized party in the Senate.³⁷

Chapter 5:04 of the SARs deals entirely with caucuses, again closely tied to the concept of a recognized party. Section 1 states:

- (1) The leader of a recognized party in the Senate may recognize as a caucus a group of members of Parliament formed for political purposes that include Senators or is composed exclusively of Senators.
- (2) Only groups recognized as caucuses under subsection (1) are caucuses for the purposes of the *Senate Administrative Rules*.

Leaders and Whips of Recognized Parties and Caucuses

Another area that requires modernization is with respect to the leader of the recognized parties in the Senate, particularly the Leader of the Government and the Leader of the Opposition. These positions are recognized in the Rules. There is also a statutory basis for the existence of these positions: the *Parliament of Canada Act* recognizes the positions for the purpose of setting additional salaries,³⁸ and authorizes the two leaders to change the membership of the Committee on Internal Economy, Budgets and Administration in accordance with the Rules, including during periods of prorogation or dissolution.³⁹

The individuals who occupy these positions are accorded important rights in the Senate's procedural rules. For example, both leaders are members *ex officio* of the Committee of Selection as well as all standing and special committees, except the Committee on Ethics and Conflict of Interest for Senators and joint committees. They are also generally allowed longer speaking times than other senators, often unlimited speaking time.

The term "Leader of the Government in the Senate" is defined in the Rules, in Appendix I: "The Senator who acts as the head of the senators belonging to the Government Party." The Government Party is also a recognized party for purposes of the Rules. Similarly, "Leader of the

³⁶ *Rules of the Senate*, Appendix I, Terminology.

³⁷ *Senate Administrative Rules*, Chapter 6:01.

³⁸ *Parliament of Canada Act*, R.S.C. 1985, c. P-1, section 62.3

³⁹ *Ibid*, subsection 19.1(3).

Opposition in the Senate” is listed in the Appendix to the Rules as the “Senator recognized as the head of the party, other than the Government party, with the most Senators.”

The Rules also recognize the leaders of other parties in the Senate for various purposes, including: allocating speaking time (up to 45 minutes for debate);⁴⁰ and, agreements to allocate time for one or more stages of consideration of a government bill or other item of Government Business.⁴¹ Finally, Appendix 1 sets out a definition of “Leader of any other recognized party in the Senate” as the “Senator heading any party in the Senate” other than the party supporting the Government or the largest party in Opposition.

Whips are also explicitly mentioned in Appendix 1 to the Rules, where the specific roles of whips are articulated. Whips are defined as the senators responsible for “the presence of an adequate number of senators” of the Government or Opposition, for purposes “such as quorum and the taking of votes.” Interestingly, only Government and Opposition whips are defined in the Rules, even though other recognized parties with their own whips may exist, as is currently the case.

These definitions are crucial to the way the business of the chamber and committee business are organized. Notably, speaking times for debates are apportioned such that the leaders of the Government and Opposition are allowed unlimited speaking time, while the leader of any other recognized party (or critic) is granted up to 45 minutes.⁴² The process of reaching an agreement on allocating time for debate on government bills involves the representatives of the recognized parties.⁴³ The process of changing the membership of a committee requires a notice signed by either the Leader of the Government (or designate) or the Leader of the Opposition (or designate), or the leader of any other recognized party.⁴⁴ The rules around Question Period in the Senate provide that any Senator may ask a question of the Leader of the Government in the Senate.⁴⁵ And, government business is to be called in the order as determined by the Leader or Deputy Leader of the Government.⁴⁶

More fundamentally, the practices in the Senate, as reflected in the procedural document, *Senate Procedure in Practice*, have developed so that much of the business of the Chamber, as well as committee business, is arranged by agreement of the leaders of the recognized parties in the Senate (or their designates), often referred to as “the usual channels.” The usual channels in Canada have generally excluded all but the leaders, deputy leaders and whips of the Government and Opposition.

THE NATURE OF AN INDEPENDENT GROUPING

The House of Lords includes a large number of peers who are not affiliated with any political party. Some (approximately 23) are referred to as “non-affiliated.” A large number of other

⁴⁰ Rules of the Senate, Subrule 6-3(1)(a).

⁴¹ *Ibid*, Sub-Rule 7-1(1).

⁴² *Ibid*, Sub-Rule 6-3(1)(a).

⁴³ *Ibid*, Sub-Rule 7-1(1).

⁴⁴ *Ibid*, Sub-Rule 12-5(c).

⁴⁵ *Ibid*, Sub-Rule 4-8(1).

⁴⁶ *Ibid*, Sub-Rule 4-13(3).

peers (currently, 173), however, have organized themselves as a non-political grouping known as the Crossbench peers, or the Crossbenchers. The Crossbenchers have evolved as an organized grouping over a period of more than 50 years.⁴⁷ As such, they can offer some inspiration to the Senate of Canada, although the Senate will not have the benefit of 50 years to respond to its new reality. Within a short period of just three years, the Senate will likely be transformed into a chamber where a majority of its members will not be affiliated with any political party caucus.

As Professors M. Russell and M. Sciara note, Crossbenchers have “an identity associated with independence, although ... the boundaries of this are often far from clear.”⁴⁸ They are described as a grouping within the House of Lords. Although they have party-like features, they lack many of the attributes of a political party, particularly a whip and party discipline. The Crossbenchers have no unified point of view or common position on legislation. They serve in their individual capacities: they do not take official group positions on substantive public matters before the Lords.

Crossbenchers elect one Convenor. Lord Hope of Craighead, the current Convenor, was elected in September 2015. In his evidence before the committee, he explained his roles and responsibilities. His primary role is to act as a conduit of information between the Crossbenchers and the leaders or whips of the political parties. He meets with these individuals to discuss the arrangement of the business of the House and other matters of relevance to the Crossbenchers. Although not formally a member of the usual channels, the Convenor is consulted by the leaders of political parties and other groups on issues where the Crossbenchers' views are sought or where Crossbenchers need to be represented. The Convenor is also an *ex officio* member of a number of key Lords committees including the Procedure Committee, the Privileges and Conduct Committee, and the Administration and Works Committee. On these committees, by convention, one or two other Crossbenchers are also assigned seats.

Another important role of the Convenor is to ensure that Crossbenchers are represented in proportion to their numbers on Lords committees, and to ensure they have a proportionate opportunity to ask questions and participate in debates.

A third key role for the Convenor is to select individual Crossbenchers for membership to committees. As Lord Hope explained, he will invite Crossbenchers to express a preference for committee assignments. He will consult with a small group of three Crossbenchers, who act as his advisors. Together they select Crossbenchers to sit on various committees based on a number of criteria, including: the relevant experience of the Crossbencher; whether a

⁴⁷ Its origins, however, go back much further in time. By the late 19th century, a sizeable number of peers who chose not to be affiliated with a political party chose to sit as independents in what is known as the crossbench area of the Lords chamber, hence the term “Crossbencher.” See Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived*, Oxford University Press, 2013, p. 32.

⁴⁸ M. Russell and M. Sciara, “Independent Parliamentarians En Masse: The Changing Nature and Role of the ‘Crossbenchers’ in the House of Lords,” *Parliamentary Affairs*, Vol. 62, No. 1, 2009, p. 34 (Russell and Sciara).

Crossbencher has sat on a particular committee before; and whether a new member of the Crossbencher group ought to be given an opportunity to sit on a committee to gain experience. Another factor he may consider is past attendance at committee meetings by a Crossbencher seeking an appointment to a committee.⁴⁹

Although the Convenor exercises no authority over Crossbenchers in a way that party leaders might exercise authority over a parliamentary caucus, he does play a leadership role, particularly with respect to preserving the essential features, or the integrity, of the Crossbenchers – i.e. that they remain unaffiliated with any political party. In particular, the Convenor ensures that Crossbenchers remain truly independent, in the sense that they do not belong to a political party or caucus or are active in partisan politics. In addition, he plays a gatekeeper role for other peers seeking to join the Crossbenchers.

HOW TO ACCOMMODATE THE GROWING NUMBER OF INDEPENDENT SENATORS

It is estimated that there are over 50 rules or sub-rules that would be affected if the terms “Leader of the Government,” and “Leader of the Opposition,” as well as the current focus on just two political parties in the Rules, were to be revised. Proposing changes to these Rules will require much detailed analysis by the procedural experts in the Senate, particularly senators who serve on the Committee on Rules, Procedures and the Rights of Parliament. The members of this committee have determined that this task should be left to those experts.

The task instead is to recommend substantive changes that would achieve some broad and principled objectives. The committee is guided in this respect by five principles:

1. Equality of senators;
2. Proportionality;
3. Fair share of the workload amongst senators;
4. Independence of voting; and
5. Democracy.

The committee observes that the business of the Senate requires a degree of predictability, certainty and clarity. More important, it depends upon the active participation of all senators. The committee is primarily concerned that unaffiliated senators have sufficient support from the Rules and SARs to perform their roles responsibly and effectively. At the same time, the Committee is cognizant of the fact that some degree of coordination is essential. There was concern expressed about the proliferation of small groups or caucuses of senators. The committee is mindful of this prospect as it has implications for funding of groups and allocation of committee assignments. The underlying concern here is the effect such a proliferation may have on the predictability, clarity and certainty with respect to the Senate’s procedural rules and practices. In addressing this issue, one option to consider is a higher threshold for establishing a caucus or a group for purposes of standing and recognition in the Senate.

The other concern is that a group should be more than a loose affiliation of senators. It should have some structure, direction and coordination. The committee does not wish to recommend a

⁴⁹ Proceedings of the Special Committee on Senate Modernization, Issue 1, No. 2, [Evidence](#), 18 April 2016

particular kind of organization for a group of senators who are not affiliated with a political party caucus. The committee would leave it to the group of senators involved how they want to organize themselves. The committee fully appreciates that we are in a period of evolution and it is to be expected that independent senators may feel uncertain as to how their group will function within the new framework of rules, and will be searching for models that will work best for their particular group. Therefore, the committee sets out an approach in the recommendations below that will allow senators ample scope to determine how best to organize themselves to maximize their participation in the work of the Senate and fully discharge their constitutional functions.

Finally, in upholding the long-standing and effective tradition of our House of Parliament, the Senate has been and is comprised of senators who propose and those who oppose; those senators who are associated with a recognized party under the *Canada Elections Act* and who have the greatest number of senators who are not government supported shall be the opposition.

Recommendation 7

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament and the Committee on Internal Economy, Budgets and Administration to draft amendments to the *Rules of the Senate* and the *Senate Administrative Rules* by 30 November 2016 respecting the following:

- **Include a definition of "caucus" as follows:**

A group of nine (9) or more senators, formed for parliamentary and/or political purposes, and where each senator has membership in not more than one such funded caucus at any one time; or

A group of nine (9) or more senators who are members of a political party registered under the *Canada Elections Act*.

- **Replace the term "leader of a recognized party" with the term "leader or facilitator of a caucus or of a recognized party" wherever it appears in the *Rules of the Senate* and the *Senate Administrative Rules*.**
- **Each group of senators seeking recognition in the Senate shall have a leader or facilitator, or some other such individual who is charged with coordinating, directing or facilitating, as the case may be, the functioning of that group.**

Recommendation 8

That the Senate direct the Committee on Internal Economy, Budgets and Administration to prepare amendments to the *Senate Administrative Rules* to provide all groups (caucuses) of senators with funding for a secretariat and research projects, regardless of whether the caucuses are organized with or without political affiliations.

VI. RESPONSIBILITY TO DIVIDE OMNIBUS BILLS

The committee engaged in a lengthy discussion of the practice of Government omnibus bills and was unanimous in the view that omnibus bills should be restricted to purely financial or budgetary measures. The crux of the concern for senators is when omnibus bills include financial or budgetary measures together with measures that are more appropriate as separate pieces of legislation. Omnibus bills of this nature are problematic in many ways: they compromise the ability of a legislative chamber to hold governments accountable; they are a challenge for parliamentarians to properly scrutinize legislation, depriving Parliament of the opportunity to identify and correct any flaws in the legislation; and they make it difficult for legislators to properly respond to inquiries from constituents and the public about the legislation.⁵⁰ A major concern expressed by members of this committee is that omnibus bills that contain financial and non-financial measures cannot be referred to specialist committees where senators with particular expertise can bring that expertise to bear at committee stage.

It is widely understood that there are few restrictions on the Senate's powers in the legislative process. One fundamental restriction is that money bills may only be introduced in the House of Commons and may not originate in the Senate.⁵¹ In addition, under section 47 of the *Constitution Act, 1982*, the Senate only has a suspensive veto, effective only for six months, over resolutions to amend the Constitution of Canada. Otherwise, the Senate is equipped with broad authority to deal appropriately with bills originating in the House of Commons. In fact, the Senate has on many occasions amended money bills.⁵² The House of Commons has on occasion accepted these amendments, while at other times it has objected. Where the Commons chooses to accept Senate amendments to money bills, it waives this financial prerogative, or privilege, but asserts that the decision to do so does not constitute a precedent. It has also been pointed out that the House of Commons has accepted Senate amendments to financial bills without asserting its privilege.⁵³

It was observed by members of this committee that the Senate has already dealt with omnibus bills that combined financial and non-financial elements in creative ways that amount to severing or dividing these bills. One technique employed by the Senate in 2001 involved simply approving the finance or budgetary elements of an omnibus bill with non-financial elements, while voting down the non-financial elements. The bill so voted was sent to the House of Commons. The House of Commons concurred in the amendments, while the Government resurrected the parts of the bill that were voted down and re-introduced them in a new bill.

⁵⁰ A. Dodek, *Omnibus Bills, Constitutional Constraints and Legislative Liberations*, Paper presented to the Symposium on the State of Canada's Constitutional Democracy, David Asper Centre for Constitutional Rights, University of Toronto, Faculty of Law, February 2016, p. 7 (Dodek). See also M. Bédard, *Omnibus Bills: Frequently Asked Questions*, Library of Parliament, Publication No. 2012-79, 1 October 2012, pp. 5-6.

⁵¹ *Constitution Act, 1867*, section 53.

⁵² Dodek, p. 19.

⁵³ A. O'Brien and M. Bosc, *House of Commons Procedure and Practice*, 2nd Ed. (Ottawa/Montreal: House of Commons/Éditions Yvon Blais, 2009), p. 111,

Before doing so, the Senate sent a message to the Commons of its intention to vote down parts of the bill while approving the financial portions.

Another, more direct, example is the experience with Bill C-10, An Act to amend the Criminal Code (cruelty to animals and firearms) and the Firearms Act, in the second session of the 37th Parliament. In that case, the Senate sent two orders of reference to the Standing Senate Committee on Legal and Constitutional Affairs: one referring the bill to the committee, the other to divide the bill into two bills. The committee divided the bill into Bill C-10A, An Act to amend the Criminal Code (firearms) and the Firearms Act, and Bill C-10B, An Act to amend the Criminal Code (cruelty to animals).⁵⁴ It is noted that the Government supported the procedure.

The committee further notes that several Westminster parliaments, notably Australia and New Zealand, have amended their procedural rules to limit the use of omnibus bills.⁵⁵

The committee expresses its strong desire to see the Senate be more assertive in using its powers to more effectively scrutinize omnibus bills. To this end, it proposes that a process be formalized under which omnibus bills be referred to an appropriate subject-matter committee (Standing Senate Committee on Finance, in the case of omnibus bills containing financial measures) to determine whether and how to sever a bill that requires separate study for several committees.

Recommendation 9

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to develop a process in the *Rules of the Senate* by which omnibus bills are referred to an appropriate committee to determine whether and how an omnibus bill ought to be divided into several bills.

Recommendation 10

That when the Senate refers an omnibus bill to a committee for such a determination, the Government and the House of Commons be informed of such referral and of any determination by a committee to sever an omnibus bill.

⁵⁴ Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, [Second Report](#), 28 November 2001.

⁵⁵ J. Hunter, *Renovating Canada's Constitutional Architecture: An Examination of the Government's Democratic Reform Initiatives*, Paper Presented at the symposium, The State of Canada's Constitutional Democracy, organized by the David Asper Centre for Constitutional Rights, 26-27 February 2016.

VII. REGIONAL REPRESENTATION

Regional representation is one of the modern purposes of the Senate, recognized by the Supreme Court of Canada.

The committee had the benefit of a number of sources including the Greene and Massicotte Working Sessions Report, the Joyal Symposium Report and the evidence of some of the experts appearing before the committee, in setting out recommendations in this area.

First the committee notes that in the Greene and Massicotte Working Sessions, there was broad-based consensus for informal "regional caucuses" to meet from time to time. The Joyal Symposium highlighted the importance of the Senate as a body providing parliamentary representation for the regions as well as minorities.

The committee also heard from one of its expert witnesses – Professor Paul G. Thomas – who suggested that one way to give effect to the principle of regional representation was to establish a committee on regional affairs with four subcommittees.

The committee recognizes the importance of the principle of regional representation, a principle that is often acknowledged in the abstract, but less often in practice. It is the committee's desire to see this principle incorporated throughout the Senate's practices and procedures. This may be accomplished in a variety of ways, without the need to formally create a committee on regional affairs. Committee members provided various examples of how regional interests could be represented and the regions could be given a greater voice in the work of the Senate.

The idea that the committee considers most fruitful and most likely amenable to quick implementation is to require all committee studies and reports to consider the regional impacts of bills and government measures, where appropriate and relevant.

Committees should have sufficient funding to travel to all regions of Canada in studying legislation with regional impacts or doing subject-matter studies on issues with regional concerns, where these issues are significant or important. This proposal would serve a second purpose: providing the Senate with the opportunity to be more visible to Canadians, giving Canadians a greater appreciation of the work senators do.

Recommendation 11

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to consider and recommend amendments to the *Rules of the Senate* to require standing committees to consider regional impacts in their reports on legislation by way of observations or in the report of subject-matter studies, where significant and prejudicial.

Recommendation 12

That the Senate direct the Committee on Internal Economy, Budgets and Administration to make available sufficient funds for committees to travel to all regions of the country

when studying bills with potential regional impacts or when considering issues with potential regional impacts where significant or important.

VIII. BROADCASTING

There was unanimous agreement that the Senate should be more visible to Canadians if it is to be seen as relevant to the lives of Canadians. Modernization, accountability and accessibility would be hollow principles if the Senate continued to do its good work in the shadows. It is crucial that Canadians have every opportunity to observe senators in their roles as legislators and representatives of the regions and of minorities. The Canadian public needs to see the Senate in action not only to benefit from the quality work and the sober second thought that senators are known for, but also to be able to scrutinize the Senate collectively and individually.

Expanding the Senate's capabilities to communicate with the public through broadcasting and webcasting, and other means of communication has been an ongoing concern of senators for many years. Various obstacles have been raised which have prevented the Senate from moving forward to expand the broadcasting of Senate proceedings. The biggest obstacle has been funding to equip the Chamber with television cameras, and an arrangement with broadcasters to carry Chamber proceedings.⁵⁶

This committee is of the view that the obstacles that have existed to making the Senate more visible and accountable by expanding the reach of the Senate to Canadians should be removed. An opportunity presents itself at the moment. The Centre Block on Parliament Hill will be part of a multi-year restoration of buildings on Parliament Hill. During this period, the Senate must move its Chamber to the Government Conference Centre (GCC). The committee recommends that the Senate's temporary Chamber in the GCC be equipped with broadcasting equipment to enable the broadcasting of Chamber proceedings. This will occur in 2017.

In coming to this recommendation, the committee weighed the costs and the benefits of equipping the existing Chamber for the remainder of the period that the Senate is occupying its current Chamber. The committee considers that it would not be a good use of public funds to equip the current chamber only to have to remove the equipment when the Chamber is relocated. The committee heard evidence from Senate officials who explained that these costs, in the neighbourhood of \$1 million, would be effectively thrown away. The committee also considered the relatively short time remaining before the move to the GCC, amounting to 11 sitting months.

Recommendation 13

That the Senate direct the Committee on Internal Economy, Budgets and Administration to ensure that the Government Conference Centre be equipped with cameras, facilities and resources to enable the broadcasting or webcasting of Senate proceedings.

⁵⁶ Currently, the Senate has in place an arrangement with Canadian Public Affairs Channel to broadcast a small number of committee proceedings as determined by the Canadian Public Affairs Channel itself.

Recommendation 14

That the Senate direct the Committee on Rules, Procedure and Rights of Parliament to examine and propose to the Senate any amendments to the *Rules of the Senate* to allow and facilitate broadcasting of its proceedings.

Recommendation 15

That the Senate direct the Senate administration to negotiate with the Canadian Public Affairs Channel to provide for more broadcast exposure of Senate proceedings, whether committee or Chamber.

IX. ORDER PAPER PROCEDURES AND ORGANIZATION OF THE BUSINESS OF THE CHAMBER

Senators have raised concerns for a number of years about the manner in which the daily business in the Senate Chamber is conducted, particularly through the *Order Paper*. Some decry the lack of clarity and predictability with respect to the agenda of business, while others would like to see the process of debate be streamlined and efficient. There is a clear desire on the part of senators to see the processes of debate in the Chamber reformed.

The committee considered a number of options, with assistance in evaluating these options provided by Dr. Heather Lank, Principal Clerk, Chamber Operations and Procedure Office (COPO). Dr. Lank and her colleague, Charles Walker, Procedural Clerk in the COPO, were extremely helpful to the committee in explaining how the business of the Senate is structured and why, and in outlining the available options for modernization.⁵⁷

The committee identified four objectives for modernization of the way chamber business is organized and conducted through the *Order Paper*:

- To increase the sharing of information through what is known as the daily scroll notes;
- To reduce the number of items on the *Order Paper* that are stood each sitting day;
- To ensure senators are aware of upcoming debates; and
- To reduce confusion with respect to the organization of the *Order Paper*.

Three areas for modernization have been identified to achieve each of these objectives.

DAILY SCROLL NOTES

There are two versions of the daily scroll as described by Dr. Lank: a reformatted version of the *Order Paper and Notice Paper* including the various headings; and a version with annotations indicating which senators are expected to speak to a particular item on a given day. The latter is compiled from information received from the deputy leaders. Work on the scroll begins the day before a sitting as information is received as to which senators will likely speak to what items. The scroll is updated frequently as the information is received. Changes to the scroll can, however, occur even minutes before the Senate sits. An initial version of the scroll is shared a few hours before a sitting with the deputy leaders. The final version is used by the Speaker during the sitting. In addition, a summary of anticipated business is circulated by email prior to each sitting.

The annotated scroll is a potentially useful tool to give senators a better idea of what items will be debated and which senators will participate in debates. It provides some predictability, while reducing confusion as to the items of business on a given day. Unfortunately, the annotated scroll is not made available to all senators, particularly independent senators. This concern was raised by senators in the course of Dr. Lank's appearance. As a result of the committee's review

⁵⁷ Proceedings of the Special Committee on Senate Modernization, Issue 3, [Evidence](#), 4 May 2016.

of the issue, Dr. Lank reported that arrangements had been made to make the daily summary email available to all senators, but with a disclaimer that the information is subject to change and is not binding.

The committee is pleased that its intervention has already resulted in changes to the way Chamber proceedings are conducted and contributed to increasing the transparency relating to the Senate's proceedings.

STOOD ITEMS

The agenda of business in the Chamber is structured through the preparation of the *Order Paper and Notice Paper*. As explained by Dr. Lank, in her evidence before the committee, the document sets out every item of business before the Senate. Under the current system, every item on the *Order Paper* is called at each sitting for possible debate in the order in which it is listed. (Notable exceptions to this are items of Government Business, which are called in the order determined by the Government as prescribed in rule 4-13.) The *Order Paper* procedures are set out generally in rules 4-12 to 4-16. The most relevant of these rules, for purposes of this discussion on stood items are rules 4-14 and 4-15.

This process of calling each item for debate allows virtually any item to be debated at any sitting by any Senator, once notice periods have expired, whether or not the Senator has given notice of an intention to speak to an item. Items that are not proceeded with, because no Senator wishes to speak to the items, are "stood" until the next sitting day. This means that there is a request to postpone the item to the next sitting and no senator objects.

Many senators, however, have expressed frustration at the manner in which the Senate conducts its daily Chamber business, particularly the practice of standing items over to the next sitting day. Most senators recognize that on the one hand, this process gives senators maximum flexibility and maximum opportunities to debate items on the *Order Paper*. On the other hand, when a significant number of items are stood and no senator speaks to the items, and these items are passed over to the next sitting day, sitting time is wasted. Another concern is that this process often creates the mistaken impression that the Chamber does not conduct its business efficiently.

The committee considers that a new process is required, one that promotes the principles of accountability and modernization and that ensures that valuable Chamber time is used efficiently and effectively and gives the Canadian public a clearer picture of the important modern roles of the Senate.

One option that the committee found to have considerable appeal would involve changes to the calling of items on the *Order Paper*. The elements of this option are as follows:

1. Senators wishing to speak to any item on the *Order Paper* would provide notice to their respective caucus leadership, group convenor, or group facilitator, or alternatively to the Chamber Operations and Procedure Office.
2. Items on which notice has been given would be compiled into a single list and added to the daily scroll. This information would be shared among all senators. The possibility

- that this information may be posted on the Senate website so that the public can know what items of business will be debated in the Chamber could be explored in the future.
3. Instead of the Reading Clerk calling all items on the *Order Paper*, the Clerk would only call items on which a Senator had given notice of his or her intention to speak.
 4. After the called items have been debated, senators would, at the end of each category of business, be invited by the Speaker to speak to items that were not called because no senators had submitted an intention to speak to the items.
 5. Items not called would be deemed to have been stood and would be put over to the next sitting, where the proposed process would be repeated.
 6. Once the process has been completed for the *Order Paper*, it would be repeated for the *Notice Paper*.

The committee considers that the process outlined here promotes the principles of accountability and modernization. It ensures that valuable Chamber time is used efficiently and effectively and gives the Canadian public a clearer picture of the important modern roles of the Senate. At the same time, it ensures that any senator who wishes to speak to any item is not deprived of the opportunity to do so.

Senate staff brought the following concerns related to this proposal to our attention:

- if multiple senators signalled an intention to speak to called items, in what order would they be listed?;
- would each senators' name be shared or just the fact that an item of business is expected to be debated?;
- how much information would be contained in the document?;
- if a Senator indicates his or her intention to speak, but in the end does not do so, or does not attend the sitting at that moment, how would the Senate deal with such situations?;
- for non-called items, how would the Speaker deal with the possibility that multiple senators might wish to speak to non-called items? What systems would be needed in order for the Speaker to keep track of items spoken to and not spoken to?

The committee is grateful for the input from staff in the COPO. These issues, of course, will need to be addressed at the implementation stage, after the Committee on Rules, Procedures and the Rights of Parliament considers how the process may be incorporated in the Rules. At this stage, however, the objective is to identify options to deal with deficiencies in the current process.

Finally, Dr. Lank suggested an interim approach, specifically with respect to adjourning items for debate that would only require a change in practice, without any associated changes to the Rules. Most items are adjourned for the next sitting day. However, the Rules allow any item of Other Business to be adjourned to the next sitting day or to a future date specified in an adjournment motion. The exception to this rule is with respect to Government Business: the Rules require that Government Business can only be adjourned to the next sitting.

Dr. Lank suggested that a senator could select a future date for continuing a debate, which has the effect of giving notice to senators that a debate is expected to occur on a fixed date. Dr. Lank also noted that a further effect would be to allow debate to be focused on particular topics or themes by grouping items of business. These items would also not be called at every sitting, but only on the announced date. These changes could give senators more time to prepare and may increase participation rates. They would also reduce the number of items that are stood on a particular day.

The committee considers this suggestion to be worthy of serious consideration and urge the Senate and senators individually to work with COPO on how this suggestion might be put into practice.

STRUCTURING OF THE ORDER PAPER

The Rules generally require that items be called in the order most recently proceeded with. This approach may make it difficult to understand and follow the *Order Paper*. It was suggested that the committee may wish to consider recommending a different approach under which items could be listed in an intuitive order within each section of the *Order Paper*. For example, bills could be listed in numerical order within each category, with Senate bills listed before House of Commons bills. The same could be done with motions, inquiries and reports: in numerical order. Other items could be listed in the chronological order that they are added to the *Order Paper*.

Recommendation 16

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to develop and propose to the Senate amendments to the *Rules of the Senate* to change the *Order Paper* process, particularly the process for so-called “stood” items, in line with the six elements set out on pages 34 and 35 of the report.

Recommendation 17

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to recommend amendments to the *Rules of the Senate* to restructure the *Order Paper* in a coherent and predictable manner such that:

- **Bills are listed in numerical order, with Senate bills listed before House of Commons bills;**
- **Motions and inquiries are listed in numerical order; and**
- **Other items are listed in the order in which they were added to the *Order Paper*.**

X. QUESTION PERIOD

An essential characteristic of the Westminster parliamentary system is the presence within a legislative chamber of a government and an opposition. Although the Senate is not a confidence chamber like the House of Commons, it has established its own practice of accountability where senators may question senators who also represent the government in the Senate.

Question period is governed by the Rules. Rules 4-7 and 4-8 provide that there shall be a daily question period lasting no more than 30 minutes. During question period a senator may ask without notice a question of: the Leader of the Government on a matter relating to public affairs; a senator who is a Government minister on matters relating to that senator's responsibilities as minister; or, a committee chair on a matter relating to the committee's activities.⁵⁸

The committee considered a range of options for modernizing question period, some of which originated from the Greene and Massicotte Working Sessions and others proposed by individual senators. On the basis of these proposals, the committee makes the recommendations which follow.

Recommendation 18

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to amend the *Rules of the Senate* to formalize the current practice of inviting Government ministers to appear in the Chamber during question period to answer questions from senators, and regularly invite such ministers.

Recommendation 19

That the Senate also periodically invite Officers of Parliament to answer questions during question period using the same method as that used for Government ministers.

Recommendation 20

That the Senate direct the Committee on Rules, Procedures and the Rights of Parliament to amend the *Rules of the Senate* such that question period should be limited to two days per week with one day being devoted to questions for a Government minister and one day devoted to questions for the Government Representative in the Senate or committee chairs.

⁵⁸ *Rules of the Senate*, Rule 4-7 and Sub-Rule 4-8(1).

XI. COMMITTEES

COMMITTEE MEMBERSHIP – THE CURRENT RULES AND PRACTICES

Membership on committees of the Senate is initially determined by the Senate as a whole, which adopts a report from the Committee of Selection. Through consultation between the leaders, deputy leaders and whips of each party, selections are made for each standing and joint committee, with the number of seats assigned to senators of each party being in rough proportion to the party standings in the Senate. In practice, senators express their committee preferences to the leaders of their political parties who then allocate committee seats among members of their own party. For unaffiliated senators, the leaders of the recognized parties in the Senate agree on the allocation of a limited number of seats on various committees. However, this is not a practice that is formalized and it depends too much on the good will of the leadership of the recognized parties in the Senate.

The selection process for membership to the Committee on Ethics and Conflict of Interest for Senators differs significantly. The Leader of the Government in the Senate has a prescribed role under the *Ethics and Conflict of Interest Code for Senators* (Code). He or she must present a motion to the Senate, seconded by the Leader of the Opposition, on the full membership of the Committee on Ethics and Conflict of Interest for Senators.⁵⁹ The Code also requires that two committee members are to be elected by secret ballot from the caucus of Government senators. This is also found in the Rules along with the requirement that a similar motion shall be moved for any substitutions in the membership of the committee.⁶⁰

The Committee of Selection is itself appointed by the Senate as a whole.⁶¹ In practice, the membership of the Committee of Selection is determined by agreement of the leadership of the two recognized parties in the Senate. The Rules, and the practices that have developed over time, have had the result of effectively excluding senators who are not members of a recognized party in the Senate from membership on the Committee of Selection.

The Rules mandate the Committee of Selection to nominate senators to serve on standing and joint committees of the Senate. The Committee of Selection presents its report to the Senate on the nomination of senators to serve on standing and joint committees.⁶² Once the Senate adopts the Committee of Selection's report, the nominated senators serve on those committees for the duration of the session.⁶³ The Committee of Selection also has the power to propose to the Senate changes to the membership of a committee.⁶⁴

It is clear that the Rules and practices in the Senate do not adequately address the needs of independent senators and do not provide for a fair and proportionate distribution of committee

⁵⁹ *Ethics and Conflict of Interest Code for Senators*, s. 35(5).

⁶⁰ *Rules of the Senate*, Sub-Rule 12-27(1).

⁶¹ *Ibid*, Rule 12-1.

⁶² *Ibid*, Sub-Rule 12-2(2).

⁶³ *Ibid*, Sub-Rule 12-2(3).

⁶⁴ *Ibid*, Sub-Rule 12-2(4)(b).

assignments. With this in mind, the committee turns to proposals for modernizing the process of allocating committee assignments.

PROPOSAL FOR ALLOCATING COMMITTEE ASSIGNMENTS

In the course of the committee's deliberations, the theme of equitable distribution of committee assignments for non-affiliated members regularly emerged. The expert witnesses who appeared before the committee were clear that proportional treatment was essential for a modern Senate in which independence and sober second thought are guiding principles.⁶⁵

The committee carefully considered a number of ideas generated by Committee members, most of which were inspired by a consensus recommendation in the Greene and Massicotte Working Sessions Report. The committee also heard evidence from a number of witnesses in relation to potential changes to the way committees are constituted, several of whom commented that there needed to be a more democratic element in the way committee assignments are allocated.

The committee devoted much of its deliberations to how the rules respecting committee membership could be revised in order to ensure that committee assignments are proportionally distributed enabling independent senators to fully participate in the work of the Senate and effectively discharge their constitutional roles.

Recommendation 21

That the Senate direct the Standing Senate Committee on Rules, Procedures and the Rights of Parliament to amend the *Rules of the Senate* to change the process for determining the composition of the Committee on Selection and the composition of each standing committee, using the process set out below as the basis for such changes. The committee members leave it to the procedural experts to craft appropriate language to give effect to the objectives of the committee and the principles underlying the objectives.

STEP 1:

- 1. The Committee of Selection shall be composed of 8 to 12 members.**
- 2. The leaders, facilitators or conveners, as the case may be, of all recognized political parties, caucuses or groups shall meet and agree on the size and proportional composition of the Committee of Selection.**
- 3. The size and proportional composition of the Committee of Selection shall be determined within five sitting days of the commencement of a new Parliament or session of Parliament.**
- 4. The composition of the Committee of Selection must adhere to the following principles or requirements:**
 - All caucuses or groups must have a minimum of one representative;**

⁶⁵ Proceedings of the Special Committee on Senate Modernization, Issue 2, [Evidence](#), April 13 2016 (Errol Mendes); Proceedings of the Special Committee on Senate Modernization, Issue 2, [Evidence](#), April 12, 2016 (Meg Russell).

- As closely as possible, membership on the Committee of Selection shall be in proportion to each caucus's or group's standing in the Senate;
- The leaders, convenors or facilitators, as the case may be, of each political party, caucus or group in the Senate shall be non-voting *ex officio* members of the Committee of Selection.

STEP 2:

Each caucus or group shall select according to a process of its choosing the senator or senators from among its caucus or group who will occupy a seat or seats, as the case may be, on the Committee of Selection.

STEP 3:

The leaders, facilitators or convenors of the two largest caucuses or groups in the Senate shall present a motion in the Senate setting out the size and the composition of the Committee of Selection based on the individual selections made by each caucus or group.

STEP 4:

1. The Committee of Selection shall determine the number of seats on each standing committee of the Senate to be allocated to the members of each caucus or group in proportion to that group's or caucus's standing in the Senate.
2. Each caucus or group shall select its nominee or nominees for membership to each committee by a process of its choosing.

STEP 5:

The Committee of Selection shall allocate the positions of chair, vice chair and third member of the steering committee for each standing committee, to members of each caucus or group in proportion to that group's or caucus's standing in the Senate (though not to any individual senator in that group or caucus). In any allocation, the chair and vice chair positions shall not be occupied by senators who are members of the same caucus or group.

It should be noted that the historic practice has been that certain chairs of committees, such as the Committee on National Finance, have been allocated to senators who are not members of the party in government.

STEP 6:

The Committee of Selection after having completed the membership of each committee, and having allocated chair, vice chair and third member positions of a steering committee to each group or caucus (though not the individual senators who will occupy those positions), in accordance with the choices made by each caucus or group, shall present a report on the full membership of each committee to the Senate.

STEP 7:

Each standing committee shall meet to elect its chair, vice chair and third member of its steering committee in accordance with the report of the Committee of Selection on the allocation of such seats, by secret ballot if contested

STEP 8:

If the foregoing selection/election process results in opposition or government caucuses not being represented on the Subcommittee on Agenda and Procedure of a committee, the leader(s) or designate of the unrepresented caucus(es) will become ex officio members(s) of that subcommittee when they are considering government legislation.

ONGOING

The Committee of Selection will continue to meet as necessary during the session to recommend to the Senate any changes in the committee framework or membership after consultations with each caucus or group.

OTHER OPTIONS

The committee favours that all Senate committees, particularly when producing reports on bills, make use of appended observations. Observations are useful for all senators. They indicate, for the benefit of all senators, including those not sitting on specific committees, the key issues that were canvassed in the course of a committee's deliberations. Appended observations included in committee reports on bills generally do not have the effect of increasing a committee's workload. These observations are useful for all senators so that they can discuss in the Chamber the issues raised by the various bills that are studied in the Senate. Observations identify and provide an assessment of the relevant evidence gathered from witnesses during a committee's legislative work. These observations could take into account the regional, social, economic, and constitutional effects of the studied bills. Observations could also provide a list of individuals or groups that met with a committee. They could also note the proposed amendments that were not adopted by the committee, providing senators with a useful source of the issues raised during committees' legislative work. This type of observation is especially useful when the Senate studies private members' bills emanating from the House of Commons or Senate public bills.

In this way, appended observations in committees reports on bills ensure that a committee's legislative work is given full account in a transparent and objective manner to all senators. Above all, appended observations on reports on bills showcase the work of Senate committees.

APPENDIX A – LETTER FROM SENATOR JOYAL TO THE AUDITOR GENERAL

[Letterhead: Senate of Canada, The Honourable Serge Joyal]

[Stamp: COPY]

Michael Ferguson
Auditor General of Canada
Office of the Auditor General of Canada
240 Sparks St.
Ottawa, ON
K1A 0G6

Wednesday, December 18, 2013

Dear Mr. Ferguson:

I have received your letter of November 12 explaining that the Senate of Canada has mandated you to conduct an audit of expenditures by the Senate and its members.

As a member of the Senate, I will provide you and the members of your team with all the documents at my disposal so that you can conduct this audit in accordance with the powers and duties granted to you as an Officer of Parliament under the *Auditor General Act*.

The members of my staff will be available to provide you with information and help you carry out your mandate. In addition, I will authorize the appropriate services at the Senate to provide you with any information they may have related to expenditures made by my office in the performance of my duties as a senator, respecting the confidentiality stipulated in the legislation and regulations.

I will, of course, maintain the confidentiality of the protected documents sent to me for review and will return them to you once the audit is completed, as requested.

Before continuing, I would like to remind you that a senator's legal status is different from that of a public servant.

The *Senate Administrative Rules* clearly state that:

DIVISION 1:00 INTERPRETATION

Chapter 1:02 Principles

[...]

3. The following principles of parliamentary life apply in the administration of the Senate:

(a) a Senator has the constitutional rights, immunities and independence applicable to that office and the carrying out of the Senator's parliamentary functions, free from interference or intimidation;

The Audit Plan Summary that I received, dated October 29, 2013, refers to the role of a senator, stating that in addition to their legislative role, senators have a role to play in public policy issues.

I believe this definition of a senator's role is restrictive and overlooks the many other responsibilities that senators assume by virtue of the fact that they sit in the Senate, one of the two Houses of Parliament, and they represent a region (or a specific senatorial district in the case of Quebec). Because of their position, senators receive numerous requests to get involved in many different issues and initiatives; in general, they must also participate in public activities organized by the political parties represented in the Senate; they are involved to varying degrees in parliamentary associations recognized and supported by the Senate; and they are expected by the public to support matters of public interest given their professional credibility, experience and specific expertise in a given field.

Restricting their role simply to legislative work or the study of public policy is far below what the public is entitled to expect of senators.

Individual senators decide how they will assume their responsibilities, and it is up to them to determine, depending on the circumstances, how they will fulfil their role as a representative, which is an essential part of legislative work and the study of public policy.

Senators have an important responsibility to represent the interests of their respective regions and of various minorities. This responsibility is recognized in the *Constitution Act, 1867*, and the *Constitution Act, 1982*, as well as in the *Conflict of Interest Code for Senators* and the *Senate Administrative Rules*. It was confirmed in two recent Supreme Court of Canada decisions (*Re: Authority of Parliament in relation to the Upper House*, [1980], and *Reference re Secession of Quebec*, [1998], paragraphs 81/83) and in a recent decision by the Quebec Court of Appeal (*Renvoi sur un projet de loi fédéral relative au Sénat*, October 24, 2013).

According to s. 23(5) of the *Constitution Act, 1867*, a senator “**shall be resident in the Province for which he is appointed**”, and s. 31.(5) states that the “**Place of a Senator shall become vacant**” if “**he ceases to be qualified in respect of ... Residence**”. There is no equivalent provision for members of the House of Commons, who are not required to reside in the riding or province that they represent.

Requiring senators to actually reside in the region they represent emphasizes the close relationship that was intended between the senator, on the one hand, and the population and the community, on the other hand. During the Confederation debates, John A. Macdonald confirmed this relationship in a speech delivered February 6, 1865.

The members of the upper house will be like those of the lower, men of the people, and from the people. The man put into the upper house is as much a man of the people the day after as the day before his elevation. Springing from the people, and one of them, he takes his seat in the council with all the sympathies and feelings of a man of the people, and when he returns home, at the end of the session, he mingles with them on equal terms and is influenced by the same feelings and associations, and events, as those which affect the mass around him.

Janet Aizenstat, Professor Emeritus of Public Law and Political Philosophy at McMaster University, addressed this statement in her book *Canada's Founding Debates* (2004, University of Toronto Press, p. 82):

Although the senators he [John A. Macdonald] describes will not be chosen directly by the people, they are, nevertheless, representatives of the people; they are not an extraordinary, permanent class of law-makers, and they must periodically 'return home,' to live under the laws they promulgate.

This role as a representative—of the interests of the population where the senator resides—is directly related to the Senate's role of protecting provincial interests and, more specifically, the rights of the people residing in the various provinces as well as the rights of minorities.

In 1914, Sir George W. Ross (Premier of Ontario, Member of the House of Commons and Leader in the Senate) wrote that this role is emphasized by the way in which Quebec senators are allocated districts so that Protestants and Catholics, and francophone and anglophone Canadians would feel fully protected in at least one of the houses of Parliament.

The matter of Quebec electoral districts is set out in ss. 23(5) and 23(6) of the *Constitution Act, 1867*:

23. The Qualification of a Senator shall be as follows:

...

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

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

It is hard to imagine how senators could voice the interests of the region in which they must reside and defend the interests of the people living there without truly performing the role of a representative. These two roles are symbiotic, as stated by constitutional law professor John McEvoy when speaking before the Standing Senate Committee on Legal and Constitutional Affairs on March 22, 2007:

A regional representative is not only to represent the views of that particular region in a single role, but in all of its roles....They are symbiotic.

David E. Smith, Professor Emeritus of Political Science at the University of Saskatchewan, clearly explained a senator's representative role in 2003, when the government withdrew a bill to redistribute seats in the House of Commons in the face of Senate opposition. In his book, *The Canadian Senate in Bicameral Perspective*, Professor Smith described the characteristics of the Senate that ensure its independence and went on to state the following:

Those qualities were necessary if the Senate was to perform its major task – that is, to afford adequate protection to minorities. In the debate, which extended over two sessions because the government withdrew the initial bill in the face of Senate opposition, the minorities mentioned included French-speakers in Canada, English-speakers in Quebec, Irish Catholics and Protestants

in Quebec, Roman Catholics elsewhere, Prince Edward Island, and small provinces generally (p. 73).

Many senators felt motivated to oppose the government's bill because of their representative role. In other words, their role as legislators was dictated by their role as representatives of minority interests and by the relationship they have forged with minorities in order to voice their opinions in the legislative process.

Describing the role of senators, Professor Smith explained that representation "**is only part of what the Senate does**" (p. 87). While representing regional and minority interests is only one of their roles, it is a significant part of the mandate that senators have been carrying out for quite some time in accordance the Constitution, as mentioned earlier.

More recently, Brian Lee Crowley of the Macdonald-Laurier Institute wrote as follows:

For national decision-making to be legitimate in a federation the virtually universal rule is that you need something more than the assent of the majority of individuals; you also need the assent of some important share of the communities that make up the country. The interests of the people who inhabit the provinces or states cannot be fully represented by representation by population ("rep-by-pop") alone. (November 2013)

Representing minority communities has long been considered an important part of a senator's role. In the 1980s and 1990s, Senator Stanley Haidasz, a former MP and former Cabinet minister, represented the interests of Canada's Polish community in Parliament. In the 1990s and the first decade of 2000, Senator Thelma Chalifoux, the first Métis senator, staunchly defended the interests of Aboriginal communities in her home province of Alberta and throughout Canada. Currently, Senator Yonah Martin is the spokesperson for the Canadian-Korean community, and senators Claudette Tardif, Maria Chaput and Marie Charette-Poulin represent francophone minority communities in Alberta, Manitoba and Ontario, respectively. These are only a few such examples.

Professor Smith highlights the national dimension of a senator's work. However, "**This last characteristic does not mean they are inured to sectional or minority concerns – on the contrary, the constitution enjoins them to protect these interests – but that they place these interests in a national context**" (p. 111).

The reality of this representative role is reflected in the Senate's internal rules. Subsection 2.(1) of the *Conflict of Interest Code for Senators* states as follows:

2. (1) Given that service in Parliament is a public trust, the Senate recognizes and declares that Senators are expected

(a) to remain members of their communities and regions and to continue their activities in those communities and regions while serving the public interest and those they represent to the best of their abilities.

Section 4 of the Code states as follows:

Assisting the public

4. Senators are encouraged to continue to assist members of the public as long as their actions are consistent with their obligations under this Code.

It is up to individual senators to decide how they will carry out this responsibility, based on their training and work experience, community involvement, and requests from the public or various communities.

The *Senate Administrative Rules* recognize senators' legitimate and essential role as representatives. The following definitions are provided in the section of the Rules entitled "Interpretation":

"public business" means all business carried on by a Senator for public purposes, whether or not authorized by the Senate or the Government of Canada, and includes official business, representative business, partisan business and related travel, but does not include attending to one's private concerns.

"parliamentary functions" means duties and activities related to the position of senator, wherever performed, and includes public and official business and partisan matters, but does not include activities related to

(a) the election of a member of the House of Commons during an election under the *Canada Elections Act*; or

(b) the private business interests of a Senator or a member of a Senator's family or household.

Section 2.1.1 of the Senators' Travel Policy also encourages senators to be involved not only in their region but elsewhere in Canada and abroad in order to represent the country's interests:

2.1.1 ... Parliamentary functions are also carried out in senators' regions and, from time-to-time, senators may be required to travel to other locations, both within Canada and internationally, in the service of the Senate.

The many examples of regulatory provisions in force in the Senate, which recognize the various facets of a senator's role, support the conclusion that an audit of a senator's parliamentary activities and related expenditures cannot be limited simply to legislative and public policy work, as this would ignore the much broader public reality in which senators carry out their role, a role that each senator is called on to play in an independent, individual and responsible manner.

Auditing senators' expenditures from the limited perspective of their legislative work and their study of policy issues means that public activities would be overlooked that are essential to their legitimate role as representatives, a role that is clearly set out in the Constitution and directly supported by various Senate rules.

As a result, I believe that the legal basis for the role of a senator, as set out in the protected documents sent by your office, is incomplete and could lead to misinterpretation, making it impossible to fully realize the proposed audit of expenditures by the Senate and its members. I think it would be beneficial

to review the legal basis, taking into account the essential components of representation described previously and supported in the rules and legislation cited.

Please feel free to contact me or have any of your staff do so if I may contribute in any way to the successful conclusion of this audit.

Sincerely,

[signed]

The Hon. Serge Joyal, P.C.

cc: The Hon. Claude Carignan, P.C., Leader of the Government in the Senate
The Hon. Jim Cowan, Leader of the Opposition in the Senate
The Hon. Noël Kinsella, Chair, Senate Internal Economy Committee
The Hon. George Furey, Deputy Chair
Gary O'Brien, Clerk of the Senate

APPENDIX B – SURVEY SUMMARY

“STRONG MAJORITY WANT INDEPENDENT SENATORS – APPETITE FOR FREE VOTES ON THE RISE”

Nanos

Strong majority want independent Senators – appetite for free votes on the rise

Survey Summary

*submitted by Nanos to Senator McCoy, April, 2016
(Submission 2016-792)*





A strong majority of Canadians believe Senators should be less partisan and say they should be independent and vote independently of any party caucus

A very strong majority (three in four) of Canadians believe that the Senate should not be a partisan body. Ideally, Senators would sit as independents, not belong to any party caucus and therefore not vote along party caucus lines. When looking at partisanship levels, respondents who had high partisanship were generally less enthusiastic about an independent Senate compared to the general population, while swing voters were generally more enthusiastic about an independent Senate. Open voters were of a similar level of enthusiasm to the general population. The idea of Senators as members of a party caucus and simply voting along party lines was extremely unpopular. Senate reform is on the mind of Canadians, and seven in ten say that reform is an urgent or somewhat urgent priority. In general, a slight majority of Canadians feel that democracy would not be weakened if the influence of political parties dropped.

Canadians and Federal Politics

- **Majority of Canadians follow federal politics closely** - Just under nine in ten Canadians say that they follow federal politics either closely (42%) or somewhat closely (46%). Nine percent said they follow federal politics somewhat not closely, while three percent said they do not follow federal politics closely at all.
- **Two in three have a positive impression of an MP** – Likewise, just under two thirds of Canadians say that they have either a positive or somewhat positive view of someone who is a Member of Parliament (19% positive; 45% somewhat positive) while 21% said they had a somewhat negative impression, and eight percent said their impressions were negative. Partisan voters were more likely to have a positive or somewhat positive impression of MPs (25% positive, 45% somewhat positive) while open voters were more likely to have a more negative impression (58% positive or somewhat positive). The most cited reason for their opinions were that most MPs work hard for their ridings and for Canada (27%), followed by it depending on the MP in question (11%) and MPs being paid too much/entitled/in it for themselves (10%).

Keeping democracy strong in Canada

Participants were asked how important specific elements were to keeping democracy strong in Canada, and rated them from 1 (not at all important) to 5 (very important).

- **Representing all Canadians' issues will keep democracy strong** – According to Canadians, representing the issues of all Canadians was the most important element (90% scored it a four or above), followed by giving voice to Canada's regions (81% scored it a four or above). Having reasonable representation of women and minorities in Parliament was seen as the least important element (only 62% rated it a four or above) to keeping democracy strong.

- While representing the issues of all Canadians was not asked in the previous research wave, all the other elements (giving voice to Canada's regions, having government legislation independently reviewed, and allowing more free votes) saw an increase of 10% or more who rated them a four or above, with the exception of having reasonable representation of women and minorities in Parliament, which remained relatively unchanged since 2009. Partisan voters were less likely to rate representation of women and minority as important (57%), as were open voters (58%), when compared to swing voters (64%). Additionally, giving voice to Canada's regions was very important to open voters (88% said it was important).

Canadians' impressions of the Senate

- **The majority of Canadians are familiar with the Senate's role in Canada** – Overall, just over eight in ten Canadians would say they are either familiar (35%), or somewhat familiar (48%) with the role of the Senate of Canada in the federation, while just 11% would say they are somewhat unfamiliar, and only six percent would say they are unfamiliar. Open voters were less likely to say they were familiar or somewhat familiar with the role of the senate (26% familiar, 45% somewhat familiar).
- **Ineffective and corrupt come to mind when thinking of the Senate** – When asked what words come to mind when thinking of the Senate of Canada, 16% said ineffective/pointless, followed by corruption/hot trustworthiness (15%), being in need of reform (1.4%), and a waste of money (10%).
- **Canadians have negative impressions of Senators** – Impressions of Senators themselves were poor, with just under two thirds professing a negative (29%) or somewhat negative impression (36%), compared to 22% who had a somewhat positive impression, and just four percent who had a positive impression. The most popular reasons for Canadians' opinions included their belief that there were too many Senators involved in corruption or scandals (23%) and that they thought the Senate is too partisan, entitled, or otherwise unaccountable (16%). Partisan voters had the highest impressions of senators (30% positive or somewhat positive) as compared to swingers (21%) or open voters (19%).
- **Senators should focus on the interests of Canada first** - Respondents were asked to assign points between 1 and 100 to the importance of Senators representing the interests of the country or the region based on their personal preferences. Overall, Canadians thought that Senators should spend approximately three fifths of their time representing the interests of the country, and the remaining two fifths of their time representing the interests of their region.
- **Canadians feel the Senate should either be elected or abolished** - Making the Senate an elected body (21% agreed), outright abolishing the Senate (20% agreed), or changing the appointment criteria, the process, or instating term limits (17% agreed) were the most popular recommendations mentioned by Canadians when asked what could improve the Senate.
- **Senate reform is an urgent priority for Canadians** - When thinking about the Senate, just under seven in ten Canadians would say that it is an urgent (25%) or somewhat urgent (43%) priority to change the Senate of Canada, compared to just under a third who do not think it is a pressing issue (20% say it is somewhat not urgent; seven percent say it is not urgent). Partisan voters were less likely to say it is a priority (61% say it's urgent or somewhat urgent) compared to swingers (69% say it's urgent or somewhat urgent). Open voters were the most likely to say it was an urgent priority (77% say it's urgent or somewhat urgent).

Confidential

3



Canadians' impressions of the Senate

- **Senators should vote independently of their political parties** - When thinking about the senate, and how it could function, a strong majority of Canadians preferred that Senators were independent of political parties, and voted independently (74% preferred this arrangement), while 14 percent preferred that Senators be members of a Party Caucus and vote independently of their Party. There was little support for Senators belonging to a party caucus, and voting in line with that caucus (only four percent preferred this arrangement). Partisan voters were generally less enthusiastic about an independent Senate (65% say it should be independent) compared to the general population, while swing voters were generally more enthusiastic about an independent Senate (77% say it should be independent).

Voting behaviour during elections

- **Most Canadians make voting decision at the end of the campaign** - Just over seven in ten Canadians (71%) say that when making a decision for a federal electoral campaign they follow the campaign from start to finish, then make a decision. A little over two in ten Canadians (23%) say they know who they will be voting for from the beginning of the campaign and three percent say they focus on the campaign in the last week and then make a decision. Only 39% of partisans follow the campaign, then decide who to vote for – a majority (58%) said their mind is made up at the beginning of the campaign.
- **Canadians are split on voting strategically** - When asked about strategic voting, just under half of Canadians (48%) say they have never voted strategically, however 42% say they have done so occasionally and nine percent do so regularly. Partisan voters are far more likely to say that they have never voted strategically before (73% say they haven't).
- **Canadians periodically vote for the same party provincially and federally** - When asked about provincial versus federal elections, a majority of Canadians (68%) say that they periodically vote for the same party provincially as they do federally, compared to 19% who say they do all the time and 12% who never do so.
- **Most Canadians find two or three political parties credible** - Two thirds of Canadians think that either two federal political parties (41%) or three parties (25%) offer them a credible choice to support, though a further 19% said only one party offered them a credible choice to support. Five percent found four parties credible and five percent found no parties to be credible, while three percent found all parties to be credible.
- **Canadians willing to change their vote during an election** – Canadians are open to changing their vote during an election, with 30% agreeing and 37% somewhat agreeing that they have, on occasion, changed their vote. Nine percent somewhat disagree that they would change their vote intention during an election, while 23% disagree. Partisans were far less likely to say they agreed or somewhat agreed that they on occasion change their vote (32% said this) compared to either swingers (76% would say they've changed their vote) or open voters (73% say they've changed their vote).

Confidential

4



Voting behaviour during elections

- **Majority of Canadians vote for the same party consistently** - As well, a majority of Canadians say that generally speaking their vote in the last election is a very good predictor of how they will vote in the next federal election (31% each agree or somewhat agree). Eighteen percent somewhat disagree with this and 15% disagree. The more partisan a voter is, the more likely they say their vote is a predictor (91% of partisans agree or somewhat agree, while only 45% of open voters agree or somewhat agree).
- **Canadians say their vote is up for grabs during an election** – Twenty-six percent agree and 35% somewhat agree that they consider their vote to be up for grabs during an election, while 18% somewhat disagree and 20% disagree with this. When it comes to partisanship, swing voters' vote is up for grabs (69% agree or somewhat agree) as is open voters' vote (75% agree or somewhat agree), however far fewer partisan voters are willing to say they can be swayed (28% of partisans agree or somewhat agree their vote is up for grabs)
- **Canadians split on party loyalty during elections** - There is marginal agreement among Canadians that they feel personal loyalty to the federal party they vote in the election for (21% agree; 35% somewhat agree). Nineteen percent disagree that they feel such loyalty and 24% disagree. However, the more partisan the voter, the more loyalty they feel (80% of partisans agree or somewhat agree, while only 42% of open voters do).
- **Canadians generally feel democracy would not be weakened if party influence dropped** - Canadians were slightly negative towards the idea that if the influence of parties dropped, it would weaken our democracy. Just under half of Canadians (45%) either somewhat disagreed (25%) or disagreed (20%) with the idea, compared to 16% who agreed and 25% who somewhat agreed. Of note, 14% of Canadians were unsure.

Political engagement and partisanship

- **Just under six in ten have never attended a political event** – Canadians were also asked about their own, personal political involvement. Just under six in ten (58%) of Canadians say that they have never attended a political event, compared to 26% who had done so prior to 2015, and 14% who have done so in 2015 or 2016. Just over half of both partisan voters and swing voters have never attended an event (53% of partisan voters have not; 56% of swing voters have not) while on the other hand 76% of open voters say they have never been to a political event.
- **Two thirds of Canadians have never donated to a political party** – Two thirds (64%) say that they have never made a political donation, compared to 16% who had done so prior to 2015, and 19% who have done so in 2015 or 2016. The more partisan the voter, the more likely they have donated to a political party (41% of partisan voters say they have made a donation at some point, while 22% of open voters say the same).



Political engagement and partisanship

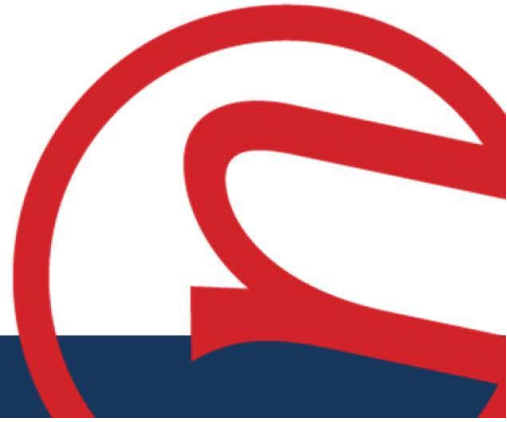
- **Majority of Canadians are not members of a political party** - Seven in ten Canadians (71%) say that they are not members of a political party, though 14% say they were members prior to 2015, and 13% say they have been members since 2015. The more partisan the voter, the more likely they have been a member of a political party (38% of partisan voters say they are or have been a member, while 14% of open voters say the same).

These observations are based on an RDD dual frame (land- and cell-lines) hybrid telephone and online random survey of 1,000 Canadians, 18 years of age or older, between March 31st and April 4th, 2016 as part of an omnibus survey. Margin of error for a random survey of 1,000 Canadians is ± 3.1 percentage points, 19 times out of 20.

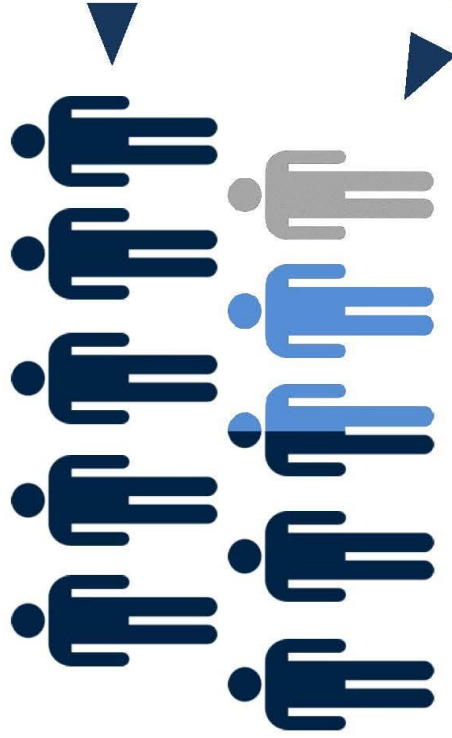
Previous wave: Nanos Research conducted an RDD dual frame (land- and cell-lines) random telephone survey of 1,003 Canadians, 18 years of age or older, between January 3rd and 7th, 2009 as part of an omnibus survey. The margin of error for a random survey of 1,003 Canadians is ± 3.1 percentage points, 19 times out of 20.

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Canadians' preferred direction for the Senate



Three quarters (74%) of Canadians want Senators to be independent of party caucuses, and want them to vote independent of party lines

Only four percent of Canadians want Senators to be members of party caucuses, and want them to vote along party lines

Fourteen percent of Canadians want Senators to be members of party caucuses, but vote independently of their party

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APPENDIX C – LIST OF WITNESSES AND BRIEFS

Name of Organization and Spokesperson	Date	Brief
As an individual David E. Smith, Distinguished Visiting Scholar. Ryerson University	2016.03.09	X
The Senate of Canada The Honourable Stephen Greene, Senator The Honourable Paul J. Massicotte, Senator	2016.03.23	X
As an individual Meg Russell, Director, Constitution Unit, Department of Political Science, University College London	2016.04.12	
As individuals Paul G. Thomas, Professor Emeritus, University of Manitoba Stéphane Beaulac, Professor, Faculty of Law, University of Montreal Errol Mendes, Professor, Faculty of Law - Common Law, University of Ottawa Donald Desserud, Professor, Department of Political Science, Faculty of Arts, University of Prince Edward Island	2016.04.13	X X
As an individual The Right Honourable the Lord Hope of Craighead, KT, Convenor of the Crossbench Peers, House of Lords of the United Kingdom	2016.04.18	
The Senate of Canada Heather Lank, Principal Clerk, Chamber Operations and Procedure Office Charles Walker, Procedural Clerk, Chamber Operations and Procedure Office	2016.05.04	
As an individual Andrew Heard		X
As an individual Henry K vanEyken		X