

Submission to the House of Commons Standing Committee on Procedure and House Affairs

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Constitutional/legal considerations

1. The ability of Parliament to hold government to account is the lynchpin of our system. This core principle extends beyond the narrow constitutional convention of responsible government, which requires that the government of the day maintains the confidence of a majority of the members of the House of Commons. For Parliament to properly fulfill its role, *all* members must be able to actively engage in their legislative and oversight activities to the fullest extent possible. This includes scrutiny of legislation, engaging in deliberation and debate, the ability to pose questions to the government and to each other, *and* to vote on bills and motions.
2. In a context where a full in person meeting of Parliament is not possible, supplementing a skeletal Parliament with virtual processes – on an emergency, temporary basis – is vital. Ours is a system of elected representation by riding. While political parties are a central feature of this system in practice, it is each individual MP that enjoys the right of participation in the legislative process. Whether an MP is a member of a party or is an Independent, their ability to take part in the full legislative process is important.
3. The ‘federal principle’ also necessitates ensuring wider participation among MPs beyond a skeletal Parliament. While the Senate is properly regarded as the chamber of regional representation, and in this sense regional/provincial representation within the House is not necessarily a *formal* legal/constitutional requirement for any given sitting (i.e. there’s no legal or constitutional violation if a skeletal Parliament overrepresented particular regions), ensuring members from across Canada can participate is consistent with the broader principle of federalism from a political and legitimacy perspective. Maximizing what can be done virtually is the best way to facilitate that.
4. Although much virtual activity may be facilitated by changes to the Standing Orders, permitting electronic/distance voting likely requires a formal amendment to the Constitution Act, 1867, by virtue of the language of sections 48 and 49. Section 48 refers to “[t]he presence” of members “necessary to constitute a Meeting of the House for the Exercise of its Powers”, and the language of s. 49 certainly implies a physical presence in the House for voting purposes. However, Parliament has clear authority to amend these provisions unilaterally under the amending formula (section 44 of Part V of the Constitution Act, 1982). As a result, the necessary amendments to facilitate online voting by MPs can be brought into effect via an Act of Parliament.

5. It has been suggested by some commentators that meeting virtually clouds the application of parliamentary privilege and the protections it provides to individual members (particularly as it regards legal immunity in the context of speech). It is true that courts have been reluctant to expand the scope of parliamentary privilege beyond parliamentary activities. In determining the scope of privilege, however, courts have consistently framed their analysis in terms of the 'sphere of activity' or content of the parliamentary function, not the venue or process by which that activity is pursued. While I am not an expert on parliamentary privilege specifically, it is difficult to see how privilege would not extend to core parliamentary duties of individual members if conducted in the virtual context. The concept is inextricably tied to duties pertaining to the legislative process – as noted, Parliament has the authority to amend how that process works. Nonetheless, formalizing virtual processes through changes to the Standing Orders or even the Parliament of Canada Act may help to buttress such activities as core to the formal legislative process.

6. Any changes to the Standing Orders, statutes like the Parliament of Canada Act, or even the Constitution Act, 1867 that aim to facilitate virtual voting and participation in the context of the pandemic should be framed explicitly as emergency measures. It may be useful to keep any new provisions 'on the books' for future contingency, but I am not proposing that these processes become the 'new normal' for the Canadian parliamentary process. Technological challenges, asymmetries in access, and the imperfect nature of virtual options mean they cannot replace the general value and superiority of an in-person Parliament. Provisions for virtual participation should be regarded as a temporary stop-gap measure to ensure Parliament can continue to play its fundamental role to the best degree possible.