PRESENTATION OF
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BEFORE THE MODERNIZATION COMMITTEE OF THE SENATE

ON BILL S-213, *An Act to amend the Constitution Act, 1867 and the Parliament of Canada Act (Speakership of the Senate*)

1. Proposed changes to the *Parliament of Canada Act* are constitutional.

2. Proposed changes to s. 36 of the *Constitution Act, 1867* could be made under s. 44 of the *Constitution Act, 1982* (s. 44 says that, subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the Senate).

3. Proposed changes to s. 34 of the *Constitution Act, 1867* with regards to the election of the Deputy Speaker of the Senate could be made under s. 44 of the *Constitution Act, 1982*, since they are <u>not</u> covered by section 41 nor by section 42 of the latter act. That means that the Speaker *pro tempore* may be elected by senators by secret ballot without the need for a complex constitutional amendment.

4. Proposed changes to s. 34 of the *Constitution Act, 1867* with regards to the election of the Speaker of the Senate would <u>not</u> alter the fundamental nature and role of the Senate nor the essential features of the Senate. As such, they would <u>not</u> fall under the 7-50 formula provided for by s. 38 of the *Constitution Act, 1982* (*Reference re Senate Reform*, [2014] 1 S.C.R. 704).

   However, it is possible that such changes fall under the unanimity procedure of s. 41*a*) of the *Constitution Act, 1982*, as they would alter "the office" of the Governor General, i.e. the powers, the status and the constitutional role of the latter (*Motard* c. *Canada (Procureure générale)*, 2016 QCCS 588 (CanLII).

   If s. 41*a*) of the *Constitution At, 1982* really applies, then there is a risk that decisions made by the Senate under a speakership that contravenes that provision be unconstitutional.

   The reason why we are not 100% sure that s. 41*a*) of the *Constitution Act, 1867* applies is because Quebec was able to unilaterally abolish its Legislative Council in 1968 (see the *Act respecting the Legislative Council of Quebec*, S.Q. 1968, c.9). S. 77 of the *Constitution Act, 1867* has therefore been completely spent. That section provided as follows: "The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be speaker thereof, and may remove him and appoint another in his Stead".

What the unilateral abolition of Quebec's Legislative Council indicates is that s. 77 has been considered as being related to the constitution of Quebec and not as requiring an amendment made by the Parliament of the United Kingdom. In other words, s. 77 has been rendered ineffective without a complex constitutional amendment. If such were the case, then why should Parliament not be able to unilaterally amend s. 34 of the *Constitution Act, 1867*, that provision being the equivalent —at the federal level — of s. 77 of the same act ?

5. In its October 2016 report entitled *Senate modernization: Moving forward*, the Modernization Committee suggested (recommendation number 4) that there be a process at the beginning of each Parliament for the nomination of up to five senators as nominees for consideration by the Prime Minister to recommend to the Governor General for appointment as Speaker of the Senate. Such an idea could be realized without any constitutional amendment.

   Of note, in the context described above, the five nominees could even be elected by secret ballot without the need for a formal constitutional amendment.

6. The current constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada. The idea that the Senate makes recommendations directly to the Governor General for appointments as Speaker of the Senate would go against the established constitutional convention and might put the Governor General in the difficult situation where he or she would have to choose between recommendations made by the Senate and other recommendations made by the Prime Minister.

7. Proposed changes to s. 34 of the *Constitution Act, 1867* with regards to the election of the Speaker of the Senate would affect the prerogatives of the Governor General and, therefore, would require that Royal assent be given before there is a vote at third reading on the bill under examination. My view is that such a consent must be signified by a minister of the Crown.

Ottawa, February 15, 2017