



Office of the  
Senate Ethics Officer  
Bureau du  
conseiller sénatorial  
en éthique

# Inquiry Report concerning Senator Michael L. MacDonald

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July 18, 2023

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## REQUEST FOR AN INQUIRY

I received nine separate written requests from senators under paragraph 47(2)(b) of the *Ethics and Conflict of Interest Code for Senators* (“the Code”) that I conduct an inquiry in order to determine whether Senator Michael MacDonald (“Senator MacDonald” or “the Senator”) had not complied with his obligations under sections 7.1 and 7.2 of the Code. The allegations of non-compliance are based on certain comments he allegedly made on February 16, 2022 to a protester or, as is discussed below, someone who sympathized with the then-ongoing protest in downtown Ottawa. The protest was ostensibly against COVID-19 vaccine mandates and restrictions. Senator MacDonald’s comments were captured in a video, which was widely disseminated on social media and by the national media.

These requests are from the following senators on the dates set out below:

1. Senator Jane Cordy, dated February 21, 2022;
2. Senator Lucie Moncion, dated February 23, 2022;
3. Senator Karen Sorensen dated February 24, 2022;
4. Senator Éric Forest dated February 23, 2022;
5. Senator Julie Miville-Dechéne dated February 24, 2022;
6. Senator Nancy Hartling dated February 23, 2022;
7. Senator Rosa Galvez dated March 1, 2022;
8. Senator Margaret Dawn Anderson dated March 8, 2022; and
9. Senator Brian Francis dated March 22, 2022, received by my office on March 24, 2022.

Collectively, Senators Cordy, Moncion, Sorensen, Forest, Miville-Dechéne, Hartling, Galvez, Anderson and Francis are referred to below as the “complaining senators” or the “complainants”.

## PROCESS

The progress of this inquiry was affected by several factors, which I describe below. At all times, I proceeded with this matter as expeditiously as possible, while ensuring that I respected my obligations, Senator MacDonald’s rights under the Code, and the scope of the provisions at issue in this case.

As I received the requests for an inquiry, I forwarded them, with any attachments, to Senator MacDonald by letters dated February 24, 2022, February 28, 2022, March 2, 2022, March 8, 2022 and March 25, 2022, in accordance with paragraph 47(4)(b) of the Code, and advised him that, pursuant to paragraph 47(2)(b), I would be conducting a preliminary review of this matter in order to determine whether an inquiry was warranted.



I also provided Senator MacDonald 15 days within which to respond to the allegations in the first five requests for an inquiry in accordance with subsection 47(7) of the Code, and an additional 15 days for each of the subsequent requests for inquiry. As such, he was given multiple opportunities (five) to make submissions and address the allegations in this matter.

Senator MacDonald provided his submissions for these requests by letter dated March 3, 2022, sent by email that same day. By emails dated March 9, 2022 and March 26, 2022, he informed me that his submissions of March 3, 2022 were also to be applied to the new complaints received thereafter since all the complaints raised largely similar, if not identical, issues.

Given that the nine above-mentioned requests for an inquiry raised substantially similar issues, I advised Senator MacDonald that I had decided to deal with them together. As such, this inquiry addresses all nine of these requests.

Having carefully considered this matter and all the information that I had before me, I was of the view that there were sufficient reasonable grounds for concern that Senator MacDonald may have breached his obligations under the Code and that, therefore, this case properly fell within paragraph 47(11)(c) of the Code. As such, I was required to move to the inquiry stage in order to determine whether there was, in fact, any such breach, unless I found that the matter fell under one or more of the circumstances described in subsection 47(12).

In a letter dated April 12, 2022, I advised Senator MacDonald that, in the context of a preliminary review, if I deem that it is appropriate in a particular case, paragraph 47(12)(d) authorizes me to consider remedial measures that would be to my satisfaction and raise those measures with him in order to determine whether he would undertake to carry them out. I determined that this case was indeed an appropriate case in which to consider remedial measures, particularly given that, in his submissions of March 3, 2022, Senator MacDonald had recognized that “[his] comments and behaviour did not uphold the highest standards of conduct and proper behaviour inherent to the position of a Senator” and that his behaviour “reflected poorly on [his] colleagues and the institution [he is] so privileged to serve.” Moreover, he apologized unreservedly for his behaviour and he wrote that he welcomed my guidance to ensure that the incident was remedied to my satisfaction. To this end, I outlined three remedial measures and informed him that, if all three measures were carried out, the situation would be remedied to my satisfaction, thereby ending the matter at the preliminary review stage.



These three measures were as follows:

- (1) The first was that Senator MacDonald make a sincere apology in the Senate in a form acceptable to me, given that I, like a number of the complainants, had concerns that the apology he made in the Senate on February 21, 2022 did not express sincere remorse and contrition. This was due to the fact that his apology attempted to excuse his conduct by referencing certain matters; for example, the fact that he had been drinking, that he had asked the protester, or someone who sympathized with the then-ongoing protest, not to videotape his comments, and the impact of the pandemic on his state of mind. These comments left doubt as to the sincerity of his apology and sense of remorse.
- (2) The second was that the apology include a recognition that Senate censure would be an appropriate and fair remedy in these circumstances. This was important in order to signal to the Senate and to Canadians at large that he understood the seriousness of his conduct and how it reflected on the office of senator and on the institution of the Senate.
- (3) The third was that, once the apology was made in the Senate, Senator MacDonald would be required to post it on his Senate and personal websites, as well as on all his Senate and personal social media accounts.

Senator MacDonald was asked to respond by April 22, 2022.

In an email dated April 16, 2022, Senator MacDonald requested an extension of time to consider these remedial measures. He was granted the extension until April 29, 2022.

In Senator MacDonald's response of April 29, 2022, he rejected all three measures I had submitted to him. However, he left the door open to reconsider his position with what appeared to be an expectation that we would meet to discuss these measures. I agreed to meet with him but only in order to provide him with a clear understanding of the process in this respect, of the remedial measures that I had proposed, and of the fact that they were not matters to be negotiated. This meeting took place by videoconference on May 16, 2022. At that time, Senator MacDonald asked for the opportunity to consult with counsel in this matter before making a final decision. I acceded to his request and asked him to provide a final response to me by May 20, 2022.



On May 18, 2022, Senator MacDonald sent an email requesting further clarifications and additional time to provide a final reply to my letter of April 12, 2022 concerning remedial measures. My office replied on May 19, 2022, granting a further extension until June 1, 2022.

On June 1, 2022, the Senator sent me his final reply in which he accepted two of the three remedial measures (i.e., the apology in the Senate as well as the posting of this apology on his Senate and personal websites and social media accounts) but rejected one of them (i.e., the recognition in his apology that Senate censure would be an appropriate and fair remedy in these circumstances). Senator MacDonald argued that he could not accept the latter measure since he was of the view that “there was nothing significant about ‘[his] conduct’”. He wrote that he did not break any laws, nor did he act aggressively or encourage violence. Moreover, Senator MacDonald stated that he did not use his office to personally benefit himself. He wrote: “This is definitely not an ethical issue.” He also argued that it should be up to him to decide what to say in his apology and that, otherwise, it would be “compelled speech” since he would be forced to say something he thought was false.

This constituted a rejection of the remedial measures that would have satisfied me in order to avoid an inquiry in this matter and, consequently, the matter could not be disposed of under paragraph 47(12)(d). Furthermore, none of the other circumstances described in subsection 47(12) applied in this case. As such, I was required to move to the inquiry stage in order to determine whether Senator MacDonald did in fact breach his obligations under the Code.

In a letter dated June 21, 2022, I advised Senator MacDonald of my decision in the preliminary review; namely, that an inquiry into this matter was indeed warranted given that there were sufficient reasonable grounds for concern that he might have breached his obligations under sections 7.1 and 7.2 of the Code. The inquiry in this matter was therefore triggered on June 21, 2022.

On June 29, 2022, my office wrote to Senator MacDonald to inform him that I had decided to conduct his interview in writing rather than have an in-person interview under oath and that I expected a response to my questions by way of sworn affidavit. My interview questions were attached to this letter and the Senator was advised that I expected his affidavit by July 22, 2022.

In a letter dated July 21, 2022, Senator MacDonald reiterated that he was prepared to comply with two of the remedial measures I had recommended but that he would not accept the recommendation that, as part of his apology, there would be an acknowledgement that Senate censure would be an appropriate remedy. In this letter, he also raised concerns about the letter my office had sent, dated June 29, 2022, with the interview questions attached. Senator MacDonald took issue with the fact that I had asked my office to send the interview questions on my behalf. He asserted that the questions were too



detailed and were not relevant since he had already apologized for his behaviour voluntarily. He also argued that the questions were a matter of “partisan debate” and raised “highly controversial public policy matters”. Senator MacDonald also stated that he would refer the matter of the remedial measures to the Standing Senate Committee on Ethics and Conflict of Interest for Senators (the “CONF”) for a determination and he also added that he was inclined to refer the letter with the attached interview questions to the CONF as well.

In summary, Senator MacDonald’s letter of July 21 was repetitive of his letter of June 1 in many respects. Specifically with regard to remedial measures, it did not show any change of mind but rather a refusal to address my interview questions. And even if it had indicated a change of mind on remedial measures, this letter came after the preliminary determination letter had already been issued. As such, it would have been too late; the inquiry had already been triggered and it had to be completed at this point.

I responded by letter dated July 26, 2022. In my letter, I reiterated what I had already explained to Senator MacDonald in our videoconference of May 16, 2022, namely, that his acceptance of all three remedial measures was necessary in order to resolve the matter under paragraph 47(12)(d) of the Code. I also reiterated that if one or more of these remedial measures were not acceptable to him, then I would be required to move to an inquiry under paragraph 47(11)(c) of the Code. I reminded Senator MacDonald that after this videoconference, he had asked for an extension of time in which to seek counsel and to reconsider the matter of the remedial measures in light of our meeting. I further reminded Senator MacDonald that I had acceded to his request and provided him with a further week in which to do so. I also reminded the Senator that, by letter dated June 1, 2022, he advised me that, having consulted with counsel and considered the matter further, he could not accept the outstanding remedial measure, after which time, I made my final decision in the preliminary review to move to an inquiry and advised the Senator of this in my letter to him of June 21, 2022.

In my letter of July 26, 2022, I again explained the purpose of the questions that I had sent to him and that they formed the substance of the interview in the inquiry and did not comprise “partisan debate”, nor did they pertain to “controversial public policy matters”. I explained further that the questions being asked of him concerned his conduct on February 16, 2022 and that, with respect to his contention that the questions were irrelevant, it is for the Senate Ethics Officer to decide matters of relevance in an inquiry. I also reminded the Senator of his obligation under subsection 48(7) of the Code to cooperate without delay with the Senate Ethics Officer in respect of an inquiry.

I further noted that the interview stage of the inquiry process is a manifestation of the procedural fairness that is accorded to a senator who is the subject of an inquiry and, as such, was for his benefit.





With respect to the Senator's decision to refer the matter of the remedial measures and the letter with my interview questions to the CONF, I advised him that, in doing so, he would not be in compliance with the procedures mandated by the Code where the Senate Ethics Officer is in the process of conducting an inquiry. I explained that under subsection 48(6), the Senate Ethics Officer is required to conduct an inquiry and the process in this regard is confidential. I also explained that the CONF does not have jurisdiction under the Code to conduct an inquiry in place of the Senate Ethics Officer. It is only involved at the end of the process when, under subsection 48(17), the Senate Ethics Officer provides his inquiry report to it, on a confidential basis. Under subsection 49(1), the CONF is then mandated to consider the inquiry report of the Senate Ethics Officer, at which time Senator MacDonald would be given the opportunity to be heard by the Committee, pursuant to subsection 49(2) of the Code. I further explained that these provisions are important in order to ensure that the work of the Senate Ethics Officer is independent and free from interference by the CONF and the Senate.

Finally, I advised the Senator that the Senate Ethics Officer may always consider issues of lack of cooperation and/or breaches of confidentiality in the context of an inquiry.

I then extended the deadline for the Senator's responses to the interview questions to August 3, 2022, in light of the fact that, based on the Senator's correspondence of July 21, 2022, he did not appear to understand the process under the Code.

The Senator replied to my letter of July 26, 2022 by letter dated August 12, 2022. He not only failed to reply within the deadline of August 3, 2022, but he also stated that, while he recognized my responsibility to conduct inquiries under the Code, he was of the view that, ultimately, these "investigations are sent to the Senate Committee for their determination". Senator MacDonald asserted that, since he and I were "at an impasse", "it is only appropriate that the issue be referred to the Senate Ethics Committee". He seemed to continue to be under the mistaken impression that it is ultimately the CONF to decide the outcome of the inquiry, notwithstanding that I had clearly explained the process under the Code to him in my letter of July 26, 2022: that the Senate Ethics Officer decides the outcome of the inquiry and sends the inquiry report to the CONF for its recommendations to the Senate on sanctions and penalties where the Senate Ethics Officer determines that the senator in question has breached a provision or several provisions of the Code.

In his letter of August 12, 2022, Senator MacDonald went on to say that he would not respond to the questions I had posed in the interview portion of the inquiry until the issue of the third remedial measure was decided by the CONF as well as the appropriateness of the questions I had asked the Senator as part of his interview. He particularly took issue with the fact that one of the questions



asked with whom he had had dinner on the evening in question. His letter expressed consternation that any parliamentarian who meets with a senator who later becomes the subject of a complaint will then become part of an inquiry under the Code, irrespective of whether that parliamentarian had anything to do with the subject matter of the complaint. He stated that asking for the identity of these individuals was “extremely intrusive”.

It is, of course, necessary in any inquiry to establish whether there were any witnesses to the conduct that is at issue in order to corroborate the evidence of the subject of the inquiry or to corroborate the evidence of other individuals who are also testifying in the proceedings. In other words, any witnesses to the events could become witnesses in an inquiry. As in any other inquiry, the identification of the individuals who may have witnessed the events on the evening of February 16, 2022 was necessary. Moreover, their evidence as witnesses in this matter was also relevant to the determination as to whether Senator MacDonald was, at that time, acting in his parliamentary duties and functions or whether he was on his own personal time. If he was having a working dinner, for example, this might suggest that he was still acting in the course of his parliamentary duties and functions at that time. And this, of course, was critical to the determination as to whether section 7.2 of the Code was engaged in this matter, as had been argued by some of the complainants.

While purporting to recognize that it was not his place to tell me how to conduct the inquiry, Senator MacDonald nonetheless took the position in his letter that it would be much more efficient if he put these questions to the CONF in a preliminary way. He stated that this would “save everyone involved, you, me and the Senate Ethics Committee a lot of time and ... be an efficient and fair way of resolving the few outstanding issues between your office and me”.

I note that in correspondence from his counsel later on, received on April 24, 2023 (more fully referenced below), Senator MacDonald continued to take issue with the interview questions. His position was that my questions unduly intruded into personal matters or were “related to facts already established in evidence”. With respect, again, and as already noted earlier, that neither takes into account the need to establish whether the Senator was engaged in parliamentary duties at the relevant time, nor does it amount to recognition that it is my role to determine how to conduct the inquiry.

I should point out that this is the first time a senator has not only refused to respect and comply with the inquiry process under the Code but has also argued for and attempted to follow a process that he himself has designed for his own inquiry, preferring a resolution of the matters by his own Senate colleagues rather than a resolution by an independent and impartial decision-maker, as was contemplated under the *Parliament of Canada Act* and the Code.



I responded to the Senator's letter of August 12, 2022 with a short letter, dated August 16, 2022, acknowledging receipt and informing him that I would be proceeding with the inquiry as required under paragraph 48(2)(a) of the Code and would report my findings in due course.

Notwithstanding that Senator MacDonald refused to participate in the inquiry process, in a letter dated February 9, 2023, I provided him with the opportunity to review certain portions of a draft of this inquiry report, namely those under the headings "Requests for An Inquiry", "Process", "Complainants' Assertion of Reasonable Grounds", "Senator MacDonald's Position", and "Findings of Fact".

Senator MacDonald responded to this letter by email dated February 14, 2023. In his email, he again referred to the remedial measures that I had proposed in the context of the preliminary review and the concerns he had with an acknowledgement in an apology to the Senate that Senate censure would be an appropriate and fair remedy. He contended that this would be compelled speech and that I did not have the authority to force any parliamentarian to make a statement that they believe to be false. He also again referred to the notion that this matter should be resolved by the CONF and that he would abide by its decision. He argued that I had yet to respond to these matters.

He also took issue with my interpretation of the confidentiality provisions in the Code related to inquiries, namely subsections 48(6), (7) and (8) of the Code and argued that these direct the Senate Ethics Officer's conduct and not that of senators.

He disputed my reference to his refusal to participate in the inquiry process and argued that it was I that was refusing to participate in it by not addressing the issue of compelled speech.

In that same email dated February 14, 2023, he indicated that he would, "out of courtesy to me", be available for a meeting to review certain portions of the draft inquiry report on either February 22 or February 23, 2023, though he was not sure what was left to discuss.

I replied to this email by letter dated February 15, 2023. In this letter, I referred to the fact that the Senator had repeatedly taken issue with the interview questions in the inquiry and had repeatedly argued that it would be more efficient to send the interview questions and the issue related to the remedial measures to the CONF. I referenced the fact that I had already advised him in previous correspondence that the CONF did not have standing at this stage of the inquiry process and that I had explained the inquiry process to him but that, notwithstanding these clarifications, he continued to refuse to respond to the interview questions.



With respect to the reference in my letter of February 9, 2023 that he had refused to participate in the inquiry process, I explained that this statement referred to the fact that he had refused and continued to refuse to answer my questions in the interview and that he continued to insist that he would refer the matters which he disputed to the CONF rather than follow the inquiry process provided for under the Code and by me.

I explained that paragraph 47(12)(d) of the Code concerning remedial measures was duly adopted by the Senate in April 2014 and that, under this provision, I am provided with the discretionary authority to propose any remedial measures that I believe would, if accepted, remedy the situation to my satisfaction. I explained that I do not, however, have the authority to impose any such measures on a senator. A senator has the option to accept or reject the measures I propose. I wrote that I cannot compel a senator to accept them and, as such, there is no issue of compelled speech in this respect.

With regard to his concerns regarding my application of the confidentiality provisions, I advised him that I disagreed with his interpretation.

I then referred to his availability to review certain portions of the draft inquiry report and advised him that I would be available on one of the dates he had proposed.

On February 19, 2023, the Senator replied by email to my letter of February 15, 2023. He informed me that he could no longer meet on either of the dates he had proposed for this meeting because his counsel was not available. He told me that his counsel would contact me to advise as to when the meeting could take place.

I replied to this email on February 27, 2023 and provided him until March 17, 2023 to work with counsel, who I understood had only recently been retained for this matter.

On March 8, 2023, Senator MacDonald's counsel, Michael Spratt, contacted my office and a meeting was scheduled for March 31, 2023. On that date, I provided Senator MacDonald and his counsel with the opportunity to review the above-mentioned portions of the draft inquiry report and allowed them, at counsel's request, until the week of April 24, 2023 to provide comments in relation to them. Mr. Spratt provided those comments by letter received April 24, 2023 (and erroneously dated April 24, 2022).

Unfortunately, however, this was the only participation from Senator MacDonald in this inquiry in light of the circumstances described above.



## COMPLAINANTS' ASSERTION OF REASONABLE GROUNDS

The complaining senators pointed out that sections 7.1 and 7.2 set out a higher standard of conduct for senators in order to protect the reputation of the office of senator and of the Senate. This standard of conduct, they argued, is higher than that expected of other citizens.

They expressed the view that Senator MacDonald's comments made in front of the Centre Block on February 16, 2022 and captured in a video resulted in a breach of section 7.1 because they do not reflect the highest standards of dignity inherent to the position of senator and that his statements undermine public confidence in senators individually and in the Senate as a whole, contrary to section 7.1 of the Code.

Some also argued that Senator MacDonald breached section 7.2 because the comments captured by the video do not reflect a senator acting with dignity, honour and integrity in performing their parliamentary duties and functions. The complaining senators who took the position that he had contravened section 7.2 argued that this provision is engaged because Senator MacDonald was having a conversation with a member of the public in front of the Parliament buildings, in a public place, on matters of public policy. As such, they argued that he was acting in the course of his parliamentary functions when he was having this exchange. Furthermore, they submitted that this position is bolstered by the fact that these statements were disseminated widely when the video capturing the Senator's remarks was published on social media. They also argued that the Senator was acting in his official functions because he had at least one interview with the media in which he commented on the video, and he also made a statement in the Senate to explain his conduct to senators.

The complainants cited a number of examples to support the notion that Senator MacDonald's comments did not reflect the highest standards of dignity inherent to the position of senator and that such conduct was a failure to act with dignity, honour and integrity in the performance of his parliamentary duties and functions. These include:

- (1) mocking the residents of Ottawa;
- (2) insinuating certain stereotypes about the Ottawa residents and their salaries;
- (3) using profanity and foul language to describe Canada's political leadership and democratic institutions; and



- (4) expressing his desire that the protest -- characterized as “an occupation” by the complaining senators -- continue, implicitly encouraging the continuation of illegal activities on the part of some protesters. They say this is particularly egregious given the national state of emergency declared by the federal government and the efforts of law enforcement and the various levels of government to clearly communicate to the protesters that they needed to evacuate the zone immediately.

The complaining senators argued that Senator MacDonald’s conduct on the evening in question damaged the reputation of senators individually and of the Senate as an institution and they point to a number of factors to support this position. *First*, they argue that he indirectly disparaged the work of senators and the Senate by certain statements he made, such as “We haven’t worked a full week in two years”, and by referring to Ottawa residents and their hours of work and salaries, reinforcing the negative impression that some Canadians have about the Senate. *Second*, the complaining senators pointed to the overwhelming negative response from other users of social media directed towards him but also directed towards the Senate and in particular those senators who represent Nova Scotia and/or Atlantic Canada. They point to emails and telephone calls received from concerned Nova Scotians, embarrassed by the behaviour of their Senate representative. *Third*, the comments were made in a public space and were later released by video to a wide audience on social media and to mainstream media.

## **SENATOR MACDONALD’S POSITION**

In Senator MacDonald’s submissions, dated March 3, 2022, he unequivocally apologized for his comments and behaviour in respect of this incident. The Senator stated that he took full responsibility for his conduct. He also stated that he recognized that his actions reflected poorly on the institution and the public trust.

Senator MacDonald admitted as follows: “My comments and behaviour did not uphold the highest standards of conduct and proper behaviour inherent to the position of a Senator, and I acknowledge that my remarks were inappropriate.” He went further and stated that his behaviour was “undignified, unacceptable and reflected poorly on [his] colleagues and the institution [he is] so privileged to serve.” In his submissions, he apologized “unreservedly” for this.

The Senator stated that, for this reason, he felt obliged to apologize in the Senate Chamber at the earliest opportunity, i.e., February 21, 2022, which was the first sitting of the Senate following the incident.



Senator MacDonald also posted the expression of apology he made on February 21, 2022 in the Senate on his official Twitter page (@SenMacDonald) that same day.

The Senator noted that, when contacted by CTV News, he expressed how “mortified” he was by the way he had expressed himself.

Senator MacDonald explained that, over the course of the week, he had received correspondence from Ottawa residents who were “rightly” offended by his remarks. He stated that he had read them and taken them to heart.

The Senator indicated that he had open conversations about the protests with his own staff, who are also Ottawa residents and who had had a very difficult experience with the protesters occupying the downtown core.

Senator MacDonald also noted that, having had more time to reflect, he wished he had conveyed his regret more effectively in his Senate remarks on February 21, 2022. He stated that he wished he had spent less time trying to provide context and more time focused on the harm his comments had caused. The Senator told me that he had since posted an additional note on his Twitter page reiterating his remorse in case there were any who felt his initial apology could have been more thorough.

Having apologized and conveyed his regret as set out above, Senator MacDonald also noted certain points, not, he contended, to excuse his comments but rather to provide me with what he considered to be relevant information. He pointed out that, on the night of the incident in question, during his conversation with the unknown individual about the protest in Ottawa, he explicitly told him that he did not want to be recorded when he noticed that the individual had a recording device. The individual replied “okay”. Senator MacDonald told me that he subsequently discovered that the conversation had been livestreamed. He stated that he thought the comments he had made were in the context of a private conversation and were not intended for public consumption. The Senator noted, however, that this did not excuse his comments, but he wanted to ensure that it is understood that these comments were never meant to be a public statement. He noted that he was “self-aware”, which is why he had asked that the conversation not be recorded. The Senator pointed out that his intent that the conversation not be recorded is clear from the original, unedited version of the video clip, rather than the edited/abbreviated social media version.

Senator MacDonald added that his comments were made under the influence of alcohol. He stated that, while this is not an excuse and that his actions are his responsibility alone, he would never have expressed himself in the manner that he did, had he not been under the influence of alcohol.



The Senator also noted that he has been a senator for over 13 years and has never, during this time, been involved in any public incident before this matter. He stated that this was an isolated incident in his time working as a senator and that it does not reflect his views or standards of conduct. He provided assurances that this behaviour will not occur again.

Finally, Senator MacDonald told me that he was “prepared to participate openly and honestly at every opportunity during the preliminary review”. He noted that he welcomed my guidance to ensure this incident is remedied to my satisfaction. However, and as already mentioned above, he later refused to agree to one of the three remedial measures with which I had provided him that would have satisfied me in this matter and decided to refer the issue of remedial measures and the interview questions in the inquiry to the CONF.

Senator MacDonald’s position is also discerned from his counsel’s submissions of April 24, 2023, already referred to above, especially in relation to the “Senator MacDonald’s Position”, and “Findings of Fact” portions of the draft inquiry report. For example, Senator MacDonald’s counsel took the position that the Senator’s comments on February 16, 2022 were protected by parliamentary privilege. He also submitted that the Senator did not approach the person who recorded their conversation on February 16, 2022, but that this person had approached Senator MacDonald. I address these and other points raised in counsel’s letter below.

## **FINDINGS OF FACT**

On February 16, 2022, Senator MacDonald was walking along Wellington Street in front of the Parliament buildings, on his way back to his hotel after dinner with friends. Senator MacDonald later informed me (in a letter he sent on August 12, 2022) his dinner companions were parliamentarians. Although Senator MacDonald has asserted that he was approached by a member of the public, someone whom he did not know to be a protester, the context and content of the ensuing conversation, based on the video clip, indicate that Senator MacDonald knew or would soon know that the person who approached him was either one of the protesters or someone who sympathized with the protest. In the video, the Senator can be heard telling the individual towards the end of the conversation: “Thanks for having the courage and decency to come here. You’re not alone.”

The protest was ostensibly against COVID-19 vaccine mandates and restrictions.

On the view I take of what followed, whether Senator MacDonald approached this individual or was approached by him is irrelevant. What matters is what Senator MacDonald said and the way he said it.





Senator MacDonald asked the person with whom he was speaking not to record the conversation, but this person did so notwithstanding. Senator MacDonald's request not to be recorded implied that he intended to speak both privately and candidly.

The Senator's comments were published by the national media and on social media and the video in which he made them was widely distributed and viewed by Canadians at large.

Based on the video transcript, Senator MacDonald stated the following:

- "...we have had enough of the bullshit and duplicity and the lies and...and its social management, and the bullying and the control freaks, and everything else, right? And you know where everything's a lie right now."
- "This country is full of Karens. My wife's a Karen...scared to...'oh, I just wish they'd leave'. I said....I don't care if they leave Windsor or in the other places where they're shutting down transportation....But in Ottawa..? (whispers) ...I don't want them to leave."
- "...and people say, 'oh...' – I hear this all the time – 'they're in our city.' It's everybody's fucking city."
- "Just because you have a six-figure salary, and you work 20 hours a week – where you haven't worked a full week in two years....You know? It's sickening."
- "And I'm so sick of the entitlement in this country and this fucking city. Everybody around this city, with their six-figure salary to their 20-hour weeks, and their bullshit nonsense..."

Based on the transcript of the video, the Senator used profanity and made disparaging remarks about Canadians. He also encouraged the prolongation of activities that both the federal and Ontario governments had declared were illegal. I cannot accept that Senator MacDonald did not intend to encourage the prolongation of those activities, a position he took through counsel's submissions received on April 24, 2023. One is deemed to intend the natural consequences of one's actions, and saying about the protesters then in Ottawa, "I don't want them to leave" was unambiguous in its meaning.

After the video was made publicly available, Senator MacDonald apologized in the Senate, at the next sitting date, i.e., February 21, 2022.



Following this, Senator MacDonald posted an additional note on his Twitter page reiterating his remorse in case the public felt that his initial apology could have been more thorough. He did this out of concern that he should have conveyed his regret more effectively by spending less time trying to provide context and focusing more on the harm his comments had caused.

Over the course of the week following February 16, 2022, Senator MacDonald received thoughtful correspondence from Ottawa residents that were offended by his remarks.

The Senator had open conversations with his own staff, who are Ottawa residents, about the protests and who told him they had had a very difficult experience with the protestors who occupied the downtown core.

Senator MacDonald was under the influence of alcohol when he made the comments at issue in this case.

## ISSUES

This inquiry raises the following issues:

### A. Conduct on February 16, 2022

#### (1) Section 7.1

Did Senator MacDonald's conduct on February 16, 2022 result in a failure:

- a. to uphold the highest standards of dignity inherent to the position of senator, contrary to subsection 7.1(1) of the Code?
- b. to refrain from acting in a way that could reflect adversely on the position of senator or the institution of the Senate, contrary to subsection 7.1(2) of the Code?

#### (2) Section 7.2

- a. Was Senator MacDonald acting in the performance of his parliamentary duties and functions on February 16, 2022 when he spoke with a protester or someone who sympathized with the protest in downtown Ottawa?
- b. If the answer to question (2)a. is "yes", did Senator MacDonald's conduct in this regard result in a failure on his part to perform his parliamentary duties and functions with dignity, honour and integrity?



## **B. Failure to Cooperate in inquiry**

### (1) Subsection 48(7)

- a. Did the fact that Senator MacDonald chose not to participate in the inquiry process outlined in the Code, but instead decided to raise certain issues in this regard with the CONF, result in a failure to cooperate with the Senate Ethics Officer, contrary to subsection 48(7) of the Code?

### (2) Sections 7.1 and 7.2

- a. If the answer to question (1)a. is “yes”, is Senator MacDonald’s failure to cooperate with the Senate Ethics Officer in this inquiry also a failure to uphold the highest standards of dignity inherent to the position of senator, contrary to subsection 7.1(1) of the Code?
- b. If the answer to question (1)a. is “yes”, is Senator MacDonald’s failure to cooperate with the Senate Ethics Officer in this inquiry also a failure on his part to refrain from acting in a way that could reflect adversely on the position of senator or the institution of the Senate, contrary to subsection 7.1(2) of the Code?
- c. If the answer to question (1)a. is “yes”, is Senator MacDonald’s failure to cooperate with the Senate Ethics Officer in this inquiry also a failure to perform his parliamentary duties and functions with dignity, honour and integrity, contrary to section 7.2 of the Code?

## **ANALYSIS**

### **A. Preliminary Comments**

I preface my analysis with the following preliminary comments.

*First*, notwithstanding that Senator MacDonald refused to follow the inquiry process that is outlined under the Code and by me, and attempted to follow his own alternate process, I determined that I had sufficient evidence on a balance of probabilities to conclude on the issues that this inquiry raises.<sup>1</sup> Had I not been in a position to conclude on the issues due to a lack of evidence, subsection 48(4) of the Code confers on the Senate Ethics Officer the power to send for persons, papers, and records. These powers may be enforced by the

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<sup>1</sup> Subsection 48(11) of the Code refers to the standard of proof to be applied in the finding of a breach of the Code. It reads: “The determination that a Senator has breached his or her obligations under the Code shall be made on the balance of probabilities.”



Senate acting on the recommendation of the CONF following a request from the Senate Ethics Officer. However, it was not necessary, in this case, for me to rely on this provision.

*Second*, this inquiry was not about the constitutional freedom of peaceful assembly, freedom of association or freedom of thought, belief, opinion and expression. It was in no way related to the issue of whether Senator MacDonald, or any other senator, supported the protest that was ongoing on February 16, 2022 in downtown Ottawa. Nor was this inquiry about freedom of speech in the context of parliamentary privilege. As Senator MacDonald himself argues (in relation to section 7.2 of the Code), he was not engaged in the execution of his parliamentary duties when he made his comments on February 16, 2022. Rather, the only matters that were at issue in this inquiry were whether Senator MacDonald breached sections 7.1 and/or 7.2 of the Code when he made certain comments on February 16, 2022 to one of the protesters or someone who sympathized with the protest, as well as whether he failed to cooperate with the Senate Ethics Officer in this inquiry contrary to subsection 48(7) and whether that failure resulted in further breaches of sections 7.1 and 7.2 of the Code. The subject-matter of the protest and the protest itself was not at issue in this inquiry.

*Third*, in assessing Senator MacDonald's credibility in this matter, I noted certain inconsistencies in a number of his statements, which led me to question the reliability of some aspects of the information he has provided, as well as his sincerity in some respects. Inexplicably, the Senator went from being unreservedly apologetic and fully cooperative (on March 3, 2022) to being uncooperative and completely denying that his behaviour raised ethical issues (on June 1, 2022).

One example of this was the Senator's statement in his letter of April 29, 2022 in response to mine of April 12, 2022 concerning remedial measures. He took exception with my concern that his apology in the Senate on February 21, 2022 left doubt as to the sincerity of his remorse and contrition due to the fact that he had attempted to excuse his behaviour throughout his apology. The complainants in this matter also raised this concern. Yet, in his earlier submissions (and in particular, in a letter dated March 3, 2022), Senator MacDonald expressed regret that, in his initial apology in the Senate, he did not "convey [his] regret more effectively" and that he wished he had spent less time providing context and more focus on the harm that his comments had caused. Because he recognized the inadequacy of this apology, he posted a further apology on his Twitter page "in case there are any who feel my initial apology could have been more thorough." In other words, he seemed to recognize that his apology in the Senate was lacking in certain respects and yet, in his later correspondence, seemed to deny this.



A further example of this inconsistency concerned Senator MacDonald's assertion in his earlier submissions (March 3, 2022) that his "comments and behaviour did not uphold the highest standards of conduct and proper behaviour inherent to the position of a Senator". He went further and stated that his behaviour was "undignified, unacceptable and reflected poorly on [his] colleagues and the institution [he is] so privileged to serve." The Senator apologized "unreservedly" for this. Yet later in the process, in a letter dated June 1, 2022, concerning the remedial measures I had proposed in the preliminary review, he stated that there was nothing "significant" about his conduct on the evening in question. Surprisingly, he also asserted that: "[t]his is definitely not an ethical issue."

Yet another example concerned his statement in his letter of March 3, 2022 that he welcomed my guidance to ensure this incident would be remedied to my satisfaction. Yet, the Senator later refused to accept one of the three remedial measures I had proposed – a position that he has reiterated recently through counsel – and then once the inquiry had been triggered, he refused to accept and participate in the process, preferring to turn to the CONF instead. And there were other such inconsistencies throughout the entire preliminary review process, all of which I took into consideration in drawing my conclusions.

## **B. Conduct on February 16, 2022 – Sections 7.1 and 7.2**

As I have discussed in previous reports, sections 7.1 and 7.2 do not invite a free-standing analysis of whether certain conduct merits moral condemnation. Rather, they require an evaluation of whether alleged conduct:

- a. undermines the standards of dignity inherent to the position of senator, such that, for example, it impacts a senator's professional reputation, integrity or trustworthiness (subsection 7.1(1));
- b. may have an adverse impact on the reputation of the office of senator or the Senate as an institution (subsection 7.1(2)); or
- c. fails to uphold the standard required of a senator to perform their parliamentary duties and functions with dignity, honour and integrity (section 7.2).



The position of senator is a position of public trust that involves certain functions and responsibilities towards individuals and society at large. The minimum standard of conduct tolerated in the community is not the same standard of behaviour a senator must adhere to under the Code. In adopting sections 7.1 and 7.2, senators have set a high standard of conduct for themselves in order to protect the reputation of the office of senator and of the Senate as a whole. A loss of confidence or respect in the office of senator or the Senate will have an adverse effect on the Senate's credibility, which in turn will have an impact on the ability of all senators to carry out their functions effectively, particularly their representative function given that senators represent the provinces and regions of Canada.

It is the public responsibilities inherent to the role of senator that give rise to a standard of conduct beyond that expected of an ordinary citizen. As such, conduct that does not rise to the standard of behaviour expected of senators may be a breach of sections 7.1 and/or 7.2 notwithstanding that it may not be illegal and may even be acceptable conduct by other members of the community. This is not unusual; higher standards of conduct are regularly imposed on members of various professions in light of their public responsibilities and the leadership role they play in society.<sup>2</sup>

It is important to note that the scope of section 7.1 includes but extends beyond the duties and functions of the office of a senator and encompasses all conduct of a senator. It establishes, not just a high standard, but the "highest standards" of dignity inherent in the position of senator. This was, in fact, the intent of the Senate in adopting section 7.1, as is clear from a directive of the CONF, dated July 27, 2015, and made pursuant to what was then subsection 38(2), but is now subsection 37(2) of the Code, which instructs the Senate Ethics Officer to interpret, apply and administer the Code in accordance with the directive.<sup>3</sup> The directive states:

These rules of general conduct are applicable to all conduct of a Senator, whether directly related to parliamentary duties and functions or not, which would be contrary to the highest standards of dignity inherent to the position of Senator and/or would reflect adversely on the position of Senator or the institution of the Senate.

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<sup>2</sup> See for example, *Shewan v. Abbotsford School District No. 34* (1987), 1987 CanLII 159 (BCCA) in which the BCCA made the distinction between the behaviour expected of a teacher versus the behaviour expected of an ordinary member of society. The Court found that paragraph 122(1)(a) of the *Schools Act* imposed a higher standard of conduct for teachers in light of their public responsibilities and the leadership role they play in society.

<sup>3</sup> Directive 2015-02, Standing Senate Committee on Ethics and Conflict of Interest for Senators, issued July 27, 2015.



Section 7.1 establishes a broad obligation for senators to act with dignity, and to avoid conduct that could reflect adversely on the position of senator or the Senate. It puts senators on notice that they will be held to account for their conduct – whether in the performance of their parliamentary duties and functions or otherwise – that (a) undermines the standards of dignity inherent to the position of senator, such that, for example it impacts a senator’s professional reputation, integrity or trustworthiness, or (b) may have an adverse impact on the reputation of the office of senator or the Senate as an institution.<sup>4</sup> It is precisely because section 7.1 applies regardless of whether a senator is engaged in parliamentary duties that the submissions made on Senator MacDonald’s behalf most recently (on April 24, 2023) miss the point. Those submissions focused on whether Senator MacDonald mentioned or invoked his office, communicated an official position, referred to any other senators, or made promises about government policy or action or legislation.

In contrast, section 7.2 imposes a higher standard of conduct on senators when engaged in the course of their official duties and functions. In other words, unlike section 7.1 which is broader in scope, section 7.2 is limited to conduct that arises out of acts performed in a professional capacity or in connection with a senator’s status as a senator. It provides that, in the performance of their parliamentary duties and functions, senators must act with dignity, honour and integrity.

It is important to bear the above principles in mind when considering whether these provisions have been breached in this case.

### Sections 7.1 and 7.2

As noted in previous inquiry reports, the Code does not set out any definitions for the terms that are used in sections 7.1 and 7.2. The term “dignity”, referred to in both sections 7.1 and 7.2, is undefined. Similarly, there are no definitions for the terms “honour” and “integrity”, both of which are referred to in section 7.2. In the absence of any such definitions in the Code, it is useful to consider other sources in order to provide some guidance as to how to interpret these provisions.

It is noteworthy that the *Oxford Dictionary* refers to “dignity” as “[t]he state or quality of being worthy of honour or respect.”

Words like “dignity”, “honour”, and “integrity” are often used in setting standards of professional conduct, for example for judges, lawyers, and doctors, though their precise meaning is the subject of less consideration.

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<sup>4</sup> Office of the Senate Ethics Officer, “Inquiry Report under the *Ethics and Conflict of Interest Code for Senators* Concerning Senator Don Meredith,” March 9, 2017, p. 7.



In the Beyak report,<sup>5</sup> I referred to the use of the words “dignity, honour and integrity” under Quebec’s Judicial Code of Ethics.<sup>6</sup> As such, I considered what the Conseil de la magistrature du Québec (the “Conseil”) has said of them in its conduct decisions.<sup>7</sup>

This comparison is particularly useful given that the public trust is engaged in the execution of both a judge’s duties and a senator’s duties. In this respect, the position of judges can be analogized to that of senators.

Having said that, it is also important to note here that one of the main functions of senators is to deliberate and debate important public policy issues. By contrast, judges are required to refrain from publicly speaking out on such issues. This dissimilarity must also be borne in mind as well as the unique role that senators play in the parliamentary process.

When considering the role of senators, it is also noteworthy that the phrase “sober second thought” is often used to describe the Senate and how it differs from the House of Commons. For example, in the Supreme Court of Canada’s decision in *Reference re Senate Reform*, the Court noted that: “As in the United Kingdom, it [the Upper Chamber] was intended to provide ‘sober second thought’ on the legislation adopted by the popular representatives in the House of Commons...”.<sup>8</sup> This phrase implies that the members of the Senate are expected to avoid hasty, intemperate and unrestrained reactions and decisions when performing their parliamentary duties and functions.

Turning now to the Conseil’s comments on “dignity”, which are particularly relevant here, it has referred to a dictionary definition from *Le Petit Robert*: “the word ‘dignity’ is synonymous with ‘reserve and restraint’ and is the opposite of ‘disgracefulness, casualness and vulgarity’.”<sup>9</sup>

Judges have been found to breach this standard while carrying out their judicial duties by insinuating, without justification, that a defendant’s lawyer was getting his witness to perjure himself;<sup>10</sup> and altering a judgment following a conversation with one of the parties after the judge’s decision had been delivered.<sup>11</sup>

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<sup>5</sup> Office of the Senate Ethics Officer, “Inquiry Report under the *Ethics and Conflict of Interest Code for Senators* Concerning Senator Lynn Beyak”, March 19, 2019, p.40.

<sup>6</sup> Quebec, *Judicial Code of Ethics*, CQLR, c. T-16, r. 1, s. 2: “The judge should perform the duties of his office with integrity, dignity and honour.”

<sup>7</sup> For a thorough review of the Conseil’s decisions and commentary on these standards, see Pierre Noreau & Emmanuelle Bernheim, *Applied Judicial Ethics – Third Edition* (Montreal: Wilson & Lafleur Ltée, 2013).

<sup>8</sup> *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704, para. 15.

<sup>9</sup> Quebec, Conseil de la magistrature, *Rapport d’enquête*, 2007 CMQC 22, April 30, 2008.

<sup>10</sup> Quebec, Conseil de la magistrature, *Rapport d’enquête*, CM-8-61, October 29, 1985.

<sup>11</sup> Quebec, Conseil de la magistrature, *Décision du comité d’enquête*, CM-8-88-32, February 21, 1990.





In light of the above and turning to the first issue, did Senator MacDonald fail to uphold the highest standards of dignity inherent to the position of senator, contrary to subsection 7.1(1) of the Code, by making the comments he did on February 16, 2022, to a protester or someone who sympathized with the then ongoing protest in downtown Ottawa?

First, it is important to bear in mind that, in the case at hand, the issue does not concern Senator MacDonald expressing himself on public policy matters, a role which he is expected to play as a senator. Rather, the issue concerns certain comments he made and the language he used to make them.

There is an underlying expectation that when a senator comments on issues of public policy, whether in the context of their parliamentary duties and functions (in which they are expected to be a Chamber of sober second thought), or in a personal/private capacity, they will consider the impact of their statements. Likewise, the requirement to exercise dignified restraint involves the obligation to refrain from certain types of expression – such as, in this case, using profanity, denigrating, maligning and mocking a group of Canadians, and encouraging the prolongation of activities that both the federal and Ontario governments had declared were illegal – in favour of maintaining the honour and dignity expected of the office of senator and of the Senate as a whole.

Senator MacDonald’s comments on February 16, 2022 to someone who was either a protester or someone who sympathized with the protesters were clearly incompatible with upholding the highest standards of dignity inherent in the position of senator. Senators are expected to represent Canadians, not denigrate, mock and demean them, while encouraging illegal activities at a time when a state of emergency had been declared by the federal government concerning the ongoing protest. By Senator MacDonald’s own admission, he did not consider the impact of his statements on the evening in question and did not exercise dignified restraint in his language, in his choice of words, and in the comments he made.

Directly related to subsection 7.1(1), Senator MacDonald admitted in his submissions in the preliminary review that his behaviour was “undignified, unacceptable ...” He stated: “My comments and behaviour did not uphold the highest standards of conduct and proper behaviour inherent to the position of a Senator ...”. It is interesting to note here that Senator MacDonald asked the person with whom he was speaking on February 16, 2022 not to record his remarks. As noted earlier in this report, this suggests that the Senator intended to speak candidly with him and this, in turn, implies that he knew that his remarks were going to be offensive and insulting to Canadians. Yet notwithstanding this knowledge, the Senator made the remarks anyway. This demonstrates an intentional failure to exercise dignified reserve and restraint.



Senator MacDonald also raised other issues that he stated were not meant to excuse his behaviour but only to provide context. One of these was that he was under the influence of alcohol when he made his remarks. He stated that he would never have expressed himself in the manner that he did, had he not been under the influence. However, and as the Senator himself stated, this does not excuse his behaviour.

He also noted that he has been a senator for over 13 years and has never, during this time, been involved in any public incident before this matter. He stated that this was an isolated incident in his time working as a senator and that it does not reflect his views or standards of conduct. He provided assurances that this behaviour will not occur again. While the fact that the Senator has never in his years as a sitting senator been involved in any public incident prior to this one could be considered a mitigating factor, this is vitiated by his later correspondence in which he minimized his conduct and even denied that it was an ethics issue.

In addition, through his counsel, Senator MacDonald took the position that his apologies were unprompted and delivered at the earliest opportunity. While this is a potential mitigating factor, it does not absolve Senator MacDonald for breaching the Code, especially given his later claim that his comments did not create an ethical issue.

Finally, through submissions of his counsel, received on April 24, 2023, the Senator also raised the issue that his comments on February 16, 2022 were protected by parliamentary privilege. However, in his various expressions of apology, he did not make this claim, nor could he. This privilege only protects senators when they are engaged in legitimate activities in carrying on the business of Parliament.<sup>12</sup> If Senator MacDonald genuinely believed the comments he made on February 16, 2022 were protected by parliamentary privilege, one would have expected that he would have taken that position at the earliest opportunity -- when he spoke in the Senate about this matter on February 21, 2022 -- and not on April 24, 2023 through his counsel. Moreover, this position directly contradicts that which he took with respect to section 7.2 of the Code that he was not engaged in the execution of his parliamentary duties when he made his comments on February 16, 2022.

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<sup>12</sup> The source of freedom of speech under parliamentary privilege is article 9 of the English *Bill of Rights, 1689*, which provides “that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”. This provision is silent regarding events outside of Parliament, but as Joseph Maingot writes at page 101 in *Parliamentary Privilege in Canada*, 2<sup>nd</sup> ed. (House of Commons and McGill-Queen’s University Press, 1997): “Generally speaking, words spoken or things done by a Member beyond the walls of Parliament will not be protected.”



In light of the above, I am of the view that the comments Senator MacDonald made undermined the standards of dignity inherent to the position of senator. They certainly did not reflect the highest standards in this respect. As such, I conclude that Senator MacDonald failed to uphold the highest standards of dignity inherent to the position of senator, contrary to subsection 7.1(1) of the Code.

Turning to the second issue, did Senator MacDonald fail to refrain from acting in a way that could reflect adversely on the position of senator or the institution of the Senate by making the comments he made on February 16, 2022 to a protester or someone who sympathized with the protesters, contrary to subsection 7.1(2) of the Code?

There are several factors that demonstrate that Senator MacDonald's comments had an adverse impact on the reputation of the office of senator and the Senate as an institution. They impacted on his professional reputation and on his integrity as well as the reputation of the Senate as a whole.

*First*, I received nine complaints from senators in this matter.

*Second*, in his submissions to me, Senator MacDonald indicated that he had received correspondence from Ottawa residents who were “rightly” offended by his remarks.

*Third*, Senator MacDonald also indicated that his own Senate staff, who are also Ottawa residents, had a very difficult experience with the protestors occupying the downtown core and that, in the aftermath of the events of February 16<sup>th</sup> and the media attention that followed, he had had open conversations with them about this.

*Fourth*, my office received many emails from concerned Canadians about Senator MacDonald's remarks referring to how his conduct reflected poorly on his position of senator and the Senate. Many of them asked me to conduct an inquiry into the matter.<sup>13</sup>

*Fifth*, and most importantly, Senator MacDonald's comments were published by the national media and on social media and, as such, the video in which he made them was widely distributed and viewed by Canadians at large. And though, in his submissions, Senator MacDonald told me that he had asked the person with whom he was speaking not to record his comments, his intention that the remarks not be published or disseminated is not relevant to the issue

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<sup>13</sup> It should be noted that the public does not have standing under the Code to make requests for inquiries. Under subsection 47(2) of the Code, the Senate Ethics Officer must conduct a preliminary review of a matter if he receives a request to conduct an inquiry from a senator who has reasonable grounds to believe another senator has not complied with their obligations under the Code; or if the Senate Ethics Officer has reasonable grounds to believe that a senator has not complied with their obligations under the Code.



of whether his conduct reflected adversely on the position of senator and on the Senate. Indeed, his comments did reflect adversely on the position of senator and on the Senate because they were in fact widely distributed and viewed by many Canadians notwithstanding his intention in this regard.

The above factors suggest that Canadians associated Senator MacDonald's comments with his position of senator, and with the Senate itself. It follows that the disrespectful and derogatory comments he made were associated with the weight and prestige that comes with the office of senator.

Finally, it is important to also note that Senator MacDonald himself acknowledged in his submissions in the preliminary review that his behaviour "reflected poorly on [his] colleagues and the institution [he is] so privileged to serve."

In light of the above, I find that Senator MacDonald's actions on the evening of February 16, 2022 not only could have reflected adversely on his position as a senator and on the Senate itself, but did so. Applying the language in subsection 7.1(2) of the Code, I therefore conclude that he did act in a way that "could reflect adversely on the position of senator or the institution of the Senate", contrary to subsection 7.1(2).

Turning now to section 7.2, this provision raises the question of whether stopping to talk with protesters or their sympathizers in front of the Parliament Buildings while Senator MacDonald was walking back to his hotel after dinner with certain parliamentarians could be characterized as falling within the scope of his official duties and functions. Since Senator MacDonald did not participate in any interviews in this inquiry and refused to answer my questions, I was not able to ascertain with whom the Senator was having dinner and for what purpose – whether for personal or professional reasons – nor was I able to ascertain whether they were still with him when he was speaking with the person on the night in question. This would have provided some indication as to whether Senator MacDonald was, at that time, still acting in the course of his parliamentary duties and functions.

Some of the complainants argue that it is reasonable to conclude that a senator who has a conversation with a citizen that takes place in front of the Parliament of Canada on questions of public policy is engaged in the exercise of a senator's duties and functions. They argue that the fact that the comments made by Senator MacDonald were widely distributed *via* video on social media and the fact that he publicly commented on the video and also made a statement in the Senate about his comments further demonstrates that he was acting in his parliamentary duties and functions.



Having carefully considered the submissions of the complainants that addressed this issue, as well as those of Senator MacDonald, and on a balance of probabilities, I find that Senator MacDonald's conduct on February 16, 2022 does not engage section 7.2 of the Code. In my view, and based on the information I have obtained in the course of the inquiry, the Senator was not acting in his parliamentary duties and functions. None of the facts raised by the complainants to support their view that section 7.2 is engaged in this matter have convinced me that he was acting in his official functions when he made the comments in question. Holding otherwise would lead to the result that whenever a senator is speaking to anyone about public policy anywhere in the vicinity of the Parliament Buildings, they are acting in the performance of their parliamentary duties and functions. This would be too broad an interpretation of a senator's role under the Code.

### **C. Failure to Cooperate in Inquiry – Subsection 48(7), sections 7.1 and 7.2**

In my preliminary determination letter of June 21, 2022, in which I advised Senator MacDonald that I was moving to the inquiry stage in this matter, I reminded him that he was required to cooperate with my office in the inquiry process and to respect its confidential nature, pursuant to subsections 48(7) and (8) of the Code. The Senator was again reminded of his obligations in this respect in a letter dated June 29, 2022, once the inquiry process had already begun.

However, and as outlined above, Senator MacDonald chose not to participate in the inquiry process that is outlined under the Code and by me. He refused to answer the interview questions I had asked of him arguing that they were too detailed and were not relevant. The Senator also asserted that he felt the questions were a matter of “partisan debate” and raised “highly controversial public policy matters”. He took issue with the fact that my office sent him the interview questions on my behalf. He also informed me that, instead of participating in the interview process, he would refer the matter of the remedial measures and the questions I had asked him as part of the interview to the CONF for its determination on his concerns about these issues.

In a letter to the Senator dated July 26, 2022, I explained that, under subsection 48(6), the Senate Ethics Officer is responsible for conducting inquiries under the Code and that the CONF does not have jurisdiction to conduct an inquiry in place of the Senate Ethics Officer. (This means that, where the Code does not explicitly outline certain details about the process, as is the case in subsection 48(9), for example, the Senate Ethics Officer is required to decide how the process will unfold and is required to do so while applying the rules of procedural fairness throughout the various stages of the process.)



I also again reminded him that the inquiry process is confidential. In that letter, I put the Senator on notice that a lack of cooperation in the inquiry process and/or breaches of confidentiality could also be examined and considered in the context of that inquiry. In other words, he was put on notice that a finding could be made concerning his lack of cooperation and concerning any breaches of confidentiality in the context of this inquiry.

Notwithstanding these repeated cautions, in his letter of response dated August 12, 2022, the Senator insisted that it would be much more efficient if he put his concerns about the remedial measures and the interview questions to the CONF in a preliminary way. As already mentioned earlier in this report, he stated that this would “save everyone involved, you, me and the Senate Ethics Committee a lot of time and ... be an efficient and fair way of resolving the few outstanding issues between your office and me”.

This situation was essentially the Senator deciding that he did not like the inquiry process under the Code and, therefore, refusing to follow it and deciding instead that he would prefer that the CONF resolve the issues required to be resolved by the Senate Ethics Officer. His lack of cooperation was a flagrant disregard for the process outlined under the Code and that has been duly adopted by the Senate, the authority of the Senate Ethics Officer to establish the details of the process that are left to his discretion, the authority of the CONF, as well as that of the Senate itself. Moreover, his approach would fundamentally compromise the independence of the inquiry process, the independence of the Senate Ethics Officer, and the power of the Senate to adopt a code of conduct with a process and a set of rules to which senators are required to adhere.

It is noteworthy that, in a certain number of Canadian jurisdictions, ethics/integrity commissioners are provided with broad and sweeping powers to compel the attendance of persons and records and to issue subpoenas when acting in the course of an inquiry without having to seek the approval or support of their respective legislatures. A failure to comply could result in an order of contempt by the commissioner that is enforceable and punishable or, in some cases, the commissioner may apply to a court in order to enforce it in the same manner as a contempt order.<sup>14</sup> This illustrates the seriousness of a failure to cooperate with the ethics/integrity commissioners in an inquiry in these jurisdictions and the serious consequences of failing to do so.

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<sup>14</sup> See for example, the Ontario *Members' Integrity Act*, 1994, S.O. 1994, c. 38, para. 31(2)(a). the British Columbia *Members' Conflict of Interest Act*, [RSBC 1996] Chapter 287, ss. 21 and 21.1, and the Saskatchewan *Members' Conflict of Interest Act*, CHAPTER M-11.11, subs.30(3).



I have no knowledge as to whether Senator MacDonald did in fact bring this inquiry and certain issues related thereto to the CONF requesting a resolution of these matters. What is clear is that the Senator failed to comply with his obligation to cooperate with the Senate Ethics Officer in this inquiry by refusing to follow the inquiry process that I have established pursuant to subsection 48(9) of the Code and by insisting that he would refer the matter to the CONF instead. As such, I find that he failed to comply with his obligation under subsection 48(7) of the Code.

This behaviour is not what is expected from someone holding the office of senator. A reasonable person would question Senator MacDonald's sincerity in stating in the context of the preliminary review that he welcomed my guidance to ensure this incident is remedied to my satisfaction, given his refusal to comply with the requirements that were duly adopted by the Senate for conducting inquiries and that the Senator's refusal came when the outcome of the preliminary review was known and the interview questions had been sent to him. Failing to cooperate will no doubt have an impact on the public's confidence in the integrity and trustworthiness of the inquiry process, which, in turn, will impact on the credibility of the office of senator and of the Senate as an institution. This lack of cooperation cannot be countenanced.

For these reasons, I find that Senator MacDonald's failure to comply with the inquiry process outlined in the Code resulted in a failure to uphold the highest standards of dignity inherent to the position of senator and a failure on his part to refrain from acting in a way that could reflect adversely on the position of senator and the institution of the Senate, contrary to subsections 7.1(1) and (2) of the Code.

Moreover, the inquiry process under the Code was established and adopted by the Senate to ensure the fair and impartial resolution of complaints against senators by an independent and impartial decision-maker. This process was adopted to establish clear standards and a transparent system, which in turn would serve to maintain and enhance public confidence and trust in the integrity of senators and the Senate. Adhering to these rules and this process forms part of a senator's parliamentary duties and functions. By refusing to respect this process and to cooperate with me and my office, I am of the view that Senator MacDonald failed to perform his parliamentary duties and functions with dignity, honour and integrity, contrary to section 7.2 of the Code.



## CONCLUSIONS

As set out above, I have concluded that Senator MacDonald breached subsections 7.1(1) and (2) of the Code when he made the comments described above on February 16, 2022 to a protester or someone who sympathized with the protesters. However, in making those comments, the Senator did not breach section 7.2 of the Code on that occasion because in making those comments, he was not engaged in his parliamentary duties and functions.

With respect to the allegation concerning his lack of cooperation in this inquiry, I have concluded that Senator MacDonald breached subsections 48(7) and 7.1(1) and 7.1(2), as well as section 7.2 of the Code when he failed to adhere to the inquiry process outlined under the Code, failed to answer my questions in the interview, and insisted that he would turn the matter over to the CONF instead.

In summary, I have found six breaches of the Code in this inquiry, all of which I consider to be serious.

## FINAL COMMENTS – REMEDIAL MEASURES

As already noted earlier in this report, the Senate Ethics Officer has the discretion to propose remedial measures to a senator who is the subject of a preliminary review under paragraph 47(12)(d) of the Code. If these remedial measures are accepted by the senator, the matter ends at the preliminary review stage and will not proceed to the inquiry stage. This avoids the time and expense of an inquiry. However, a senator may reject those measures and, if they are rejected, the matter must proceed to an inquiry.

In this case, I had raised remedial measures at the preliminary review stage under paragraph 47(12)(d) of the Code. As already explained above, Senator MacDonald had agreed to two of the three remedial measures I had proposed. However, and as already described earlier in this report, the Senator refused to accept the remedial measure concerning Senate censure, thereby triggering an inquiry into this matter.

I should note here that I proposed this last remedial measure because of the seriousness of a breach of section 7.1 and given the fact that there were nine complaining senators in this case, an unusually high number. Senate censure is effectively an expression of the Senate's displeasure and disapproval of something, and in this case, it would be a clear message that the Senate does not condone this conduct, particularly given the significant impact that it had on the position of senator and on the Senate as an institution. And while the Senate Ethics Officer does not have the authority to impose a Senate censure, or any other measure, a recognition by Senator MacDonald that his conduct warranted a censure was, in my view, an appropriate remedy as it would have





demonstrated Senator MacDonald's true remorse for his actions and his understanding of the seriousness of this matter. Of course, it would be up to the Senate to determine whether to impose that or any sanction. Unfortunately, Senator MacDonald's refusal to recognize that Senate censure would be an appropriate and fair outcome does not inspire confidence that he has insight into the seriousness of his actions and their consequences.

I reject Senator MacDonald's contention (made in his counsel's submissions concerning portions of the draft inquiry report) that recognizing that his conduct is worthy of this sanction amounts to an intrusion on parliamentary privilege or the independence of the Senate, and that it is "an insidiously coercive example of compelled speech". In circumstances where a senator may have breached an obligation under it, the Code calls upon the Senate Ethics Officer to consider identifying remedial measures that a senator may undertake to remedy the situation to the Senate Ethics Officer's satisfaction. That is what I have done in this case. In all of the circumstances of the present matter, it cannot be said that this was an unreasonable exercise of authority.

The issue of remedial measures is also addressed at the inquiry stage of the process under subsection 48(14) where the Senate Ethics Officer makes a finding of a breach under the Code. Subsection 48(14) of the Code requires me to indicate whether remedial measures to my satisfaction have been agreed to by the senator, whether the senator did not agree to remedial measures that would have been to my satisfaction and what those measures were, or whether remedial measures were either not necessary or not available.<sup>15</sup> As in the case of the preliminary review, the senator who is the subject of the inquiry must voluntarily agree to these remedial measures; the Senate Ethics Officer cannot impose them on the senator.

Since I had already addressed the issue of remedial measures at the preliminary review stage of the process and Senator MacDonald was given multiple opportunities to consider and reconsider them, as well as to consult with counsel before making a final decision, there was no need to raise the same three remedial measures I had proposed earlier yet again at the inquiry stage. Moreover, I determined that there were no other additional remedial measures that would have been to my satisfaction in this matter in respect of the Senator's conduct on February 16, 2022.

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<sup>15</sup> Subsection 48.(14) of the Code reads as follows:

48.(14) Where the Senate Ethics Officer makes a finding that the Senator breached his or her obligations under the Code, the Senate Ethics Officer shall also indicate whether remedial measures to the satisfaction of the Senate Ethics Officer have been agreed to by the Senator, whether the Senator did not agree to remedial measures that would have been to the satisfaction of the Senate Ethics Officer and what those measures were, or whether remedial measures were either not necessary or not available.



With regard to the Senator's lack of cooperation, I am of the view that his conduct in this respect was so egregious that there are no measures that would remedy the harm that his actions have caused to the office of senator and the institution of the Senate. As such, for the purposes of subsection 48(14), remedial measures were not available in relation to the four breaches concerning the Senator's failure to cooperate (subsections 48(7), 7.1(1) and 7.1(2) and section 7.2 of the Code). Rather, the imposition of sanctions or penalties by the Senate, on the recommendation of the CONF, would be more appropriate for these breaches.

Pierre Legault  
Senate Ethics Officer

July 18, 2023



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