SUBMISSION TO SPECIAL SENATE COMMITTEE ON SENATE MODERNIZATION

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JOHN D. WHYTE*

I Introductory Note

Both the political commitment to liberal democracy and the core elements of liberal democracy are growing – at least at a conceptual level, if not in the practices of some nations. In Canada, this has meant that a governmentally appointed legislative chamber represents a legitimacy challenge – a challenge based on current ideas about the elements of democratic government. However, there are compelling justifications for having an appointed chamber, and reason to doubt that democracy is well served through two majoritarian, party-directed legislative bodies. This submission makes two points:

1. The Confederation theory behind an appointed Senate should be recovered; it offers a reason why an appointed legislative chamber a sound legislative structure. We should explore that history and consider its implications for Senate functions and organization. Senate modernization should be considered in light of these implications.
2. The Senate's legislative role should be explored beyond the consideration of bills. The Senate has the potential to open up policy development in Canada in terms both of the breadth of policy exploration and public participation in policy formation.

II The Senate's distinctive legislative role

State formation is purposive. It is directed to making effective the attainment of the essential virtues of a liberal democratic state. These are stability and justice. It is the pursuit of these goals that guides the design of the institutions of government, assigns their jurisdictions, and establishes their composition. Whether these bodies remain valuable depends on their continuing ability to contribute to meeting these purposes. The Senate, like other governmental bodies, was created based on specific ideas about how it could contribute to national well-being. Ironically, we should start to look at Senate modernization by looking back to its origin and asking how well it is now meeting the purposes that it was designed to pursue.

The most generally understood purpose of a legislatures is, first, to satisfy the ideas of democratic justice for citizens and, second, achieve decisional efficacy (ensure that

* Professor Emeritus, Faculty of Law, Queen's University; Policy Fellow Emeritus Johnson-Shoyama Graduate School of Public Policy, University of Regina and University of Saskatchewan.

legislative decisions do, after due consideration and debate, actually get made). They are also designed with stability in mind – the stability that comes from a law-making process that does not ignore minority or vulnerable interests and creates political space for diverse communities, diverse regions and diverse interests.

Bicameral legislatures reflect a more complicated set of statecraft purposes. One could well wonder why there should be two legislative chambers with the requirement that both agree on a legislative measure before it can become law. The purpose behind this could be to add to the burden of making new laws by requiring legislative decisions to be made twice over, but this seems an unlikely purpose when each legislative chamber is already required to repeat its approval of new laws.

Bicameralism only makes sense when the law-making power that is conferred on two legislative chambers brings to the legislative process two distinct or different representation purposes, intelligences, mandates or bases of legitimacy. The two legislative bodies should represent different sets of interests, for example, the interests of the population as reflected in biennial elections and the interests of the population as reflected in staggered six year terms; or the interests of the population as reflected through representatives chosen through majority popular support and the interests of the population as reflected by representatives of the nation's internal states; or the interests that are reflected through representatives chosen by all and the interests of an elite segment defined by their land-holdings or baronial status; or the interests of the people determined by their elected representatives and the interests of the people as they are judged by unelected experts, or persons of sound judgment.

In Canada, it is not altogether evident what distinct types of interests it was intended that the Upper House represent. They could have been landowner interests or wealth interests (although $4000. in 1867 represents only a fairly modest $70,000. today), or the interests of diverse regions through the 1867 the regional distribution of Senate seats, or interests that are detached from party influences through the granting of life tenure – until 1965 and thereafter until age 75, or the advantage of greater political restraint through providing the counterbalance of the continuing influence of former governments' appointees, or the interests of detachment from active political connections through allowing the considered views of persons who have not made appeals for public favour and are not accountable to an electorate.

In fact, the statecraft purposes behind the Canadian Senate are not be as much a mystery as we might think. Canada's founders were not markedly less thoughtful, or less steeped in political theory than were, for example, the authors of *The Federalist,* the book of essays that described the statecraft ideas that lay behind the United States Constitution developed

in 1787. Canadian founders, or some of them, were familiar with the works of John Locke and, with respect to the question of a second legislative chamber in particular, with the thoughts of John Stuart Mill and his 1861 work, *Considerations on Representative Government*.[†] It is reasonable to believe that Mill's ideas about an Upper House's benefits motivated the thinking of Canada's founders.

While Mill was not persuaded that a second legislative chamber was essential to obtaining sound legislation, he was convinced that, if there were to be a second chamber, it would only make sense if its members were appointed. This was not based on any sense of the legislative value of social class, office or title. He believed that the chamber of appointed members would make decisions based on intellectual influences stemming from merit in relation to, and experience with, public affairs and public thought. For him, the second chamber was not a chamber of second thought, but a chamber of *different* thought – thought influenced by different intellectual constraints and different experiences.

Mill opposed a second legislative chamber if its decisions were shaped by the same social influences, the identical will of the people and the same party structures and partisanship interests that influenced the members of the House of Commons. He saw no virtue in repetitive politics, only in a different type of consideration. For him, one advantage of the second chamber was the independence of its members as opposed to the dependence of the members of the Commons brought about through party efforts and informally through tight and established alliances. The predictable influences on Commons votes created a type of despotism and eradicated critical thought and consideration.

Mill also subscribed to the value of seeking negotiated resolution of policy differences. He saw in the Upper House's refusal to approve a bill from the House of Commons a valuable opportunity for reconsideration of a measure that has been approved by the Commons. Policies that the Commons had come to see as settled orthodoxy could be usefully challenged through the Upper House's reservations. Certainty closes the mind to improvements and to alternatives; it is the questioning voice of the second chamber that can lead the legislative process away from certainty toward conciliation.

It would be mistaken to suggest that Mill did not have misgivings about the democratic deficit of an elected legislative chamber, but he clearly saw the benefit of bringing into the legislative process, as a counterbalance to popular enthusiasms, the experience and wisdom of persons of public service and practical political engagement. This preference for

[†] See Michael K. MacKenzie, "House of Competence: John Stuart Mill and the Canadian Senate" a paper delivered to the Canadian Political Science Association Annual Meeting, Victoria, B.C., June, 2013. See, also, Janet Ajzenstat, *The Canadian Founding : John Locke and Parliament* (Montreal and Kingston: McGill-Queen's University Press, 2007).

experience and familiarity with the principles of good and just government does, of course, represent a challenge to the basic tenet of democratic government that state power is only tolerable when a majority has granted consent to be governed by decisions of persons that they have chosen as legislators. Perhaps the idea of an appointed legislative chamber represents a profound deviation from current liberal democratic sensibility and is only intelligible from the perspective of the 19th century and that age's tolerance for *noblesse*.

The reason for reviewing Mill's case for an appointed legislative chamber is, however, not to insist that an indispensable source for legislative judgment is an appointed Upper House, nor that such a body represents superior wisdom, but only to suggest that in considering the structure that we have inherited we should get past seeing only objections to this arrangement and recognize the decisional virtues that members an appointed chamber could bring – the advantages of experience, lived wisdom, impartial thought and independence in decision-making. It is not likely the founders of Canada fully thought the Senate could ever claim higher legitimacy, supremacy or superior authority in Canada's legislative process, but it seems likely that they hoped that it would be improved through the independence and experience of its members to act both progressively and cautiously and to offer a salutary check on the zeal of democratically elected majorities.

The fundamental question is: what elements of virtue, intelligence, representativeness and legitimacy should the Senate bring to Canada's legislative process (as well as to the process of holding governmental administration accountable)? The answer to this is neither the strengthening of political party loyalties nor providing a process for elite accommodation. Its best service must surely be, as it was in its inception, to bring differently tempered judgments – judgments rooted in public experience and social knowledge – to Parliament's role of enacting laws. This standard, though, must not be reduced to choosing only persons who enjoy public esteem since esteem flows along set channels –wealth, occupation, class and education. Bringing into the legislative process persons with demonstrated wisdom and experience would become institutionally corrupting if the appointing power adopted a conception of relevant experience that was familiar, narrow and elitist.

This risk demonstrates a general truth – that when membership of a governmental institution or agency is comprised of persons selected by single power, then that institution's prestige and value depend heavily on the way the appointing power is exercised - mich more than on the actual performance and work of the institution. For this reason there is something inherently vulnerable in appointed bodies in which the appointing process is in the hands of a few. Modernized structures and processes, together with the consistent hard work and good judgment in appointments, can help overcome this risk, but the margin of tolerance for poor appointing judgment, nevertheless, remains

narrow and can be bridged by the slightest exercise of poor jufgment. The best answers to the question of the modern legitimacy of the Upper House are, first, making appointments that reflect the capacity for dispassionate concern for the rationality and effectiveness of public government, perhaps following the ideas of public wisdom suggested by John Stuart Mill, and, second, having the Senate and its members perform public policy tasks that are of unique value to the nation. It is that aspect of modernization that I turn to next.

III Proposals for Senate action

The Senate can both undertake tasks and reforms that it is able to achieve on its own and initiatives that it has no power to see to conclusion but the initiation of which could lead to reforms of national benefit.

In the first category of proposals the most pressing reform idea is to reduce partisanship. Canada does not need a second legislative chamber the members of which are guided by party and partisan interests. This does not mean that Senators should not be ideological. Legislative chambers need debate between those who see the social benefits of the broad socialization of human needs and problems, who see the benefit of the wise use of state capital, or who subscribe to trade protectionism. It needs the voice of those who think the state's highest good is to leave people free as reasonable to pursue their own ends and, to the extent possible, make their own way. It needs to have defenders of the high value of private investment. It needs voices promoting social solidarity and voices that recognize the legitimate autonomy needs of minority communities. And so forth. But the least useful role for any Senator is to serve as a stalking horse for one of the national political parties; when the Senate becomes a place to score substantively insignificant points against the government party or against opposition parties, Canadians are quick to doubt that the Senate has value.

Along the same line, the senate loses its place as a valued institution when it simply bulldozes away the arguments and positions of those who oppose the views of the Senate majority. That conduct directly undercuts the deliberative role that Canadians, I believe, intuitively accept as the Senate's best role. The Senate also risks its credibility when it insists social values of spent significance in order to act as a voice for an older order of things. This socially conservative view does, of course, deserve a voice and it would be wrong to censor its voice in any chamber but the Senate's reputation risks being harmed whenever its members are moved to provide it.

Another vital change is to put aside the party affiliation of Senators but. Senatorial effectiveness, though, can be enhanced through the development of caucuses, Caucuses

allow members of a legislative body obtain what they most need to function well –the ability to form common ground and common purpose with others. They allow members to seek out those they respect, pay attention to, and are able to seek compromise with. Furthermore, caucuses of, say, at least 12 – 15 members should be funded – generously funded – so that their contributions to debate can be informed by research and analysis. The availability of funding to caucuses also provides a valuable incentive to Senators of like mind to collaborate on developing a common position. Within this search for alliances there is an inevitable process of concession and compromise which is the touchstone of effective democratic government.

Senators, on appointment, should be asked to choose (or, possibly, be assigned) a policy envelope to which they will be attached. It would be nationally valuable – and increase senatorial professionalism – if Senators were to work within a structure that demands policy specialization. The policy envelopes need to be active, ambitious, well serviced and, in significant part, conducted in public. The Senate should strive to become a highly valuable policy engine for Canada – more comprehensive, less situated in specific interests, more guided by research and the testimony of experts and, perhaps, less by the views of interest groups. In truth, governmental policy processes are commonly opaque and feel closed to public. Canada faces so many challenges for which analyses and policies are needed; the Senate could open the door to broader participation in developing policies that would lead a national response these essential issues.

The policy envelopes should match cabinet portfolios, but they should also be created to initiate and facilitate public dialogue on special and temporal issues. There would be policy envelopes on the economy, trade issues, social development, foreign affairs, justice and human rights, constitutional development and Indigenous peoples' policy. There should also be topical envelopes such as Aging, Health and Income, or Climate Change and Amelioration, or Overcoming Social Exclusion and Incapacity. Canada has a very large civic society that produces awareness on many vital issues but in many areas it also has a policy deficit. This comes about through executive government having an inordinate influence on the agenda of governmental policy development. The Senate could serve as a spur to greater policy development and policy innovation independent of governmental licence.

These policy envelopes would without doubt take considerable time and effort and require a great deal of reading and extensive briefing. There could be no more successful sign of the modernization of the Senate than a membership was seen to work at full capacity at improving governmental policy and whose efforts generated thoughtful and responsible responses to the nation's difficult and demanding problems. The Senate would come to be admired for its energy in seeking solutions.

With respect to Senate initiatives that require the participation of other bodies, the most obvious field is the area of constitutional reform. The Senate's special legitimacy with respect to constitutional reform is the reform of the provisions that relate to the Senate. Some may take the view that constitutional reform is still a toxic matter and that constitutional changes cannot be brought about other than through the adoption of a comprehensive package of reforms that meets all demands. If this is so, then there is, of course, no purpose in starting a process for constitutional reform. But this conclusion must be resisted; a sovereign nation that cannot be constitutionally self-determining – cannot manage constitutional responses to changing needs and contexts – lacks one of the central feature of liberal democracy. It is not prudent for any nation to avoid engaging in constitutional reforms.

These are reforms relating to the Senate that would remove constitutional elements that are no longer consistent with current ideas about any legislative chamber:

1. Initiate the repeal of subsections (3) and (4) of s. 23 of *Constitution Act, 1867*relating to the requirement to have real and personal property.
2. Initiate the repeal of section 26 relating to the appointment of additional Senators. This provision tends to confirm the idea that a senatorial seat is created and filled in order to serve the government's purposes and that it is legitimate to alter established constitutional arrangements for reasons of political convenience.
3. Initiate constitutional reform relating to the distribution of Senate seats. It is not the case that the Senate was created for purposes of intra-state federalism – to provide specific representation to provinces in the national Parliament. Senatorial seats were allocated in order to sustain its legitimacy as a national body in the same way that seats on the Supreme Court of Canada are presumptively allocated by region. However, the current imbalance in Senate seats allocated to provinces is producing a counter-productive effect on legitimacy. This imbalance can be corrected with about 35 additional Senators.
4. Initiate constitutional reform relating to a term limit for appointments, without possibility of re-appointment. Fresh perspectives in any legislative body are a benefit. So, possibly, is a naïve hopefulness.)The Molgat-Cosgrove committee recommended 9 year terms, but they could be slightly longer
5. Initiate consideration of a constitutional reform turning the Senate's rejection of a House of Commons bill into a suspensive veto that requires the House of Commons to again approve the bill. This would be the most controversial of the constitutional reform proposals. This reform would have three potentially beneficial effects. First, it would compel Senators to make a public case for their dissent from the Common's legislative proposal and this could, in some cases, cause the Commons to consider it prudent to

revise the bill in order to meet the Senate's concerns. In other words, public disagreement with the Commons might lead to improvements in legislation. Second, it would strengthen the influence of those who opposed the bill in the Commons and this could lead to a more serious resort to conciliation and compromise. Third, it would give attention to the controversy that the bill has created and this could increase popular engagement with the issues raised by the proposed legislation.