

Presentation to the Senate Special Committee on Modernisation, March 1, 2017

Thank you Mr. Chairman

It is an honour to have been invited to appear. I will comment on a few issues that seem central to your discussions.

It is common practice for Canadians to proclaim ourselves adherents to the Westminster Model but there is little agreement as to what this means. Senator Harder has argued that the Westminster system is flexible. I agree but it is not infinitely flexible.

Some scholars limit the Westminster model to the 16 members of the Commonwealth who recognize the Queen as Head of State. Others argue that for practical comparative purposes the model is limited to the UK and three of the four original Dominions: Canada, Australia and New Zealand.

Some identify responsible government and the confidence convention as defining features. Others think it is the existence of an impartial presiding officer. Professor Philip Norton, perhaps the greatest living authority on this subject and also a member of the House of Lords has written that the distinctive feature of the Westminster Model is the concept of Her Majesty's Loyal Opposition.

My former boss at the Library of Parliament, Philip Laundy, also an expert on Westminster, used to say that Parliament is above all a vehicle for Opposition.

It may be argued that this logic only applies to the Opposition in the House of Commons. In the Upper House opposition can take many forms including the view expressed by some of your witnesses that all 105 members can be independent and in opposition.

I understand the argument but I do not think that a Parliament with a completely non partisan upper house is still following the Westminster model.

On this point of what is a Westminster system I recall a conversation with an Australia political scientist. I asked him how Australia, with all the unique innovations, can continue to refer to itself as following the Westminster model. He said we don't. We call it the Australian Model.

We are heading toward a "Canadian model" and the question you are wrestling with, without much help from our government, is whether this new Canadian

model will be better suited to the modern political context than what we have traditionally called the Westminster model.

Senator Harder has argued that “we have little to learn from the House of Lords” Professor Smith used more academic language to say essentially the same thing.

There are many, many differences between the Lords and the Senate and between Great Britain and Canada. But institutionally we are still closest to the United Kingdom Parliament and we should take at least two things from their experience.

First is the appointment process. Before the last election, I wrote a paper recommending an independent appointment process. But I never envisaged a commission appointing all Senators or ending up with a 100% non-partisan Senate. I proposed the British approach whereby some members are appointed by an independent commission but most are still appointed by the Prime Minister.

There are many countries where the Opposition party Leader has input into Upper House appointments either formally as in the Trinidad and Tobago constitution or informally as in the UK and in my view Canada would be well served by following this practice to a much greater extent.

Another thing we can learn from the United Kingdom concerns the relationship between the Houses. As you know by law the Lords are limited to a one year suspensive veto over legislation. But that has been invoked only four or five times since 1911. More important are the conventions governing the relationship between the Houses.

Many Senators have stated that we have a convention in Canada whereby the Senate ultimately defers to the House in case of disputes.

We certainly have that practice but it is hardly a constitutional convention. There have been two cases where the Upper House has forced an election – in 1911 over the Naval Bill and in 1988 over the Free Trade Agreement. A third example was avoided in 1990 only by invoking section 26 of the constitution and appointing extra Senators.

In 2008 a frustrated Minister of Justice told the Senate Legal and Constitutional Affairs committee that it had taken long enough to consider an amendment to the criminal code and if it did not pass the bill by February 28 he said “I do not believe I would have any choice except to advise the Prime Minister that I believe this is a confidence measure and I will put the matter in his hands.”

The fear of defeat or obstruction has been the main reason successive governments have worried about the partisan composition of the Upper House and preferred to fill it with persons who could be counted upon to support it.

One way to mitigate partisanship would be a British style suspensive veto since it removes the incentive to partisan opposition.

We also need to look at a less well known British device the Salisbury convention. It provides that the Lords will not obstruct bills that seek to implement policies contained in an election manifesto.

It was established in 1945 when the new Labour Government found itself with virtually no members in the House of Lords. The Convention does not affect the Lords ability to amend legislation.

There are at least three other conventions governing relations between the Chambers and when disputes arise as to the meaning of conventions measures are taken such as the 2006 Joint Committee on Conventions and the 2015 review by Lord Strathclyde following the defeat of a statutory instrument relating to tax credits.

If we are going to have a largely or completely non-partisan Senate, it is important to have clearer conventions on relations between the Chambers.

Let me turn now to the four questions that you have asked witness to answer.

Virtually everyone including the unaffiliated Senators, have stated that **political party caucuses do have a role and a future in the Senate?** Yet the number of Senators belonging to a political party continues to decline. It is theoretically possible for any of the newly appointed independent senators to sit with a party caucus but that has not been the practice.

Perhaps the reason is found in a recent speech of Senator Harder where he claimed that only 14% of Canadians prefer that senators be members of a party caucus. That may be true but I think it is an overreaction to a particular period and particular incidents. The idea that political caucuses are somehow the root of all evil is not a good basis for reforming our institutions.

As to **whether a modern Senate needs government representation** my answer is yes. I was disappointed when Mr. Harper removed the Government Leader from cabinet in 2013. I was even more disappointed when Mr. Trudeau decided to follow this precedent in 2016 because he combined it with some sleight of hand by

creating a position of Government Representative without amending the law that creates the office of Government Leader. The result is a very odd and in my view unsustainable structure whereby three individuals (G3) are charged with the pushing the government agenda and every else is either in opposition, or on their own. One of the strengths of the Canadian system as opposed to the American one is the presumption of a leadership role for the Government.

My answer as to **whether a modern Senate needs an official opposition** or opposition groups is obvious from my opening comments

Let me conclude with some thoughts on possible changes to the rules and practices of the Senate that might work whether you have a body of 105 non-affiliated Senators or two, three, four or more parties.

The key, I think, is for the Senate to focus on roles that are not being well performed by the House of Commons.

**Public Policy.** The House of Commons is losing the capacity to do serious public policy studies. It devotes an inordinate amount of time to unearthing scandals be it the cost of a glass of orange juice or where people spend their holidays. Constituency service has been prioritized. Public consultation processes have been expanded but opportunities for debate and deliberation have been reduced.

The Senate has always done useful public policy study in its committees and I think this can be continued and expanded. However this should be co-ordinated around government priorities rather than a free for all of individual hobby horses. Hard to see how that can be effective without government input and leadership.

**Constitutional Amendment:** We have an odd situation whereby all parties reject any proposals that involve constitutional amendment due to an unsuccessful project 25 years ago. In my view we drew the wrong lessons from that experience and a *de facto* moratorium on constitutional change is not an intelligent way to run a country.

In fact it is more than an unwritten aversion to amendment. By statute no Minister of the Crown may introduce a constitutional amendment unless it has been approved by the legislatures of Ontario, Quebec, British Columbia and a two Prairie and two Atlantic provinces.

But even the slightest change to the Senate could require approval of the provinces. Senator Hays has suggested that the Senate should be proactive in seeking input from the provinces as to whether they would agree to particular constitutional amendments starting with those that affect the Senate. Such amendments can be initiated by Senators since they are not Ministers of the Crown.

**Procedural Modernisation:** The House of Commons has done little to improve its procedures despite a number of problems over the last few Parliaments. I wonder if the Senate could become a model and serve as a beacon to the lower house in certain areas. You are already moving in that direction.

The recent approach to Question period whereby one minister is invited to the Senate and questioned without a stop watch and other obstacles to effective questioning that exist in the House is an example.

Televising the Senate is under consideration and if this new approach to question period was televised I am convinced the House of Commons would come under pressure to try and offer something similar instead of its present format.

You are also looking at how to discourage omnibus bills, another area where the House of Commons has real problems. You have suggested the Senate Rules Committee develop a process by which omnibus bills are referred to an appropriate committee to determine whether and how they could be divided into several bills.

That is a step forward although I think the simpler solution is for the Speaker to make that determination. The concept of an elected and presumably more influential speakership is also something you are examining.

I will stop there and thank you once again for the invitation.