A Meritocracy? Lessons from the British House of Lords

Tom Flanagan

Whither the Senate?
Reform, Abolish or Status Quo?
Conference Sponsored by
The Manning Foundation for Democratic Education

October 31, 2013

In 1999, Tony Blair's Labour government brought in legislation to discontinue automatic membership of hereditary peers in the House of Lords. In the wake of these reforms, the House of Lords is now composed of the following groups of members, each chosen in a different way.[1] I leave out some minor details and conventions in order to emphasize the big picture:

- 26 "Lords Spiritual," including all archbishops and some bishops of the Church of England. Legally, these are appointed by the monarch on the advice of the prime minister, but in practice are chosen by internal processes of the Church.
- 92 hereditary peers, originally elected after the 1999 reforms by all the hereditary peers, who up to that time had been automatic members of the House of Lords. Now, when a hereditary peer dies, there is a by-election procedure in which a replacement is chosen by the remaining hereditary peers of the departed member's party.
- Crossbench, i.e., non-party, members chosen by the House of Lords Appointment Commission. The Prime Minister sets the number of appointments, usually three or four

[1] Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford: Oxford University Press, 2013), pp. 68-71.

a year, but is not otherwise involved in the selection, except to transmit the nominations to the Queen. But by informal agreement the Prime Minister is also allowed to nominate a few Crossbenchers during each Parliament. The Commission consists of three party members—one from each of the main parties—plus four non-party members appointed "through open competition following guidelines set down by the Commissioner for Public Appointments" (website).

- Party members, chosen by each party using whatever internal process it wishes. The Prime Minister sets the number of appointments to be made by each party each year but does not otherwise involve himself in the selection process except in his own party. Since 1999, prime ministers have used their power to set numbers to ensure that no single party has a majority in the Lords and that the distribution among parties roughly resembles the results of recent election. Also, all party appointments have to be reviewed for "propriety" by the House of Lords Appointment Commission. This is not just a rubber stamp, as shown in 2006 when the Commission rejected some of Prime Minister Blair's appointees on grounds that their very large donations to the Labour Party looked like the purchase of peerages.

This set of procedures is complicated because they are interim compromises. All major parties now claim to want a House of Lords that is completely or mainly elected, but they have never been able to agree on electoral procedures, so it seems that current procedures may continue in force for some time, subject to minor amendments which happen frequently both through legislation and convention.

For several reasons, these specific nomination procedures would not work in Canada:

- Hereditary and ecclesiastical peers would not be appropriate in Canada.
- The House of Lords lacks the function of regional and provincial representation that is an essential part of Canadian constitutional design. The provinces would almost certainly have to be part of any nomination procedure in Canada.
- The House of Lords, unlike the Senate, does not have a fixed size, which makes it easier for prime ministers to resolve issues of balance by appointing additional members. That would not be so easy in our Senate, whose size of 105 members is prescribed by the constitution.
- The House of Lords has only a suspensory veto, whereas the Senate of Canada has full legal equality with the House of Commons, except that money bills cannot originate in the Senate.
- Current British arrangements are heavily dependent on unwritten understandings about balance and independence. It is questionable whether such an approach would work in contemporary Canada, given the high state of animosity and polarization among political parties.

But even if the specifics are not transferable, there are some lessons from the British experience of trying to reform the House of Lords that seem applicable to the Canadian project of Senate reform:

- Even if there is constitutional stalemate over introducing the election of members, it is possible to make progress through less dramatic reforms to the appointment procedure.

- Reforms don't have to be logically consistent and symmetrical. Compromise can produce new arrangements that, while untidy, are functional.
- Reforms to the appointment procedure can reduce partisanship, increase expertise, and enhance legitimacy of an upper house, thereby making it a more effective chamber of legislative revision.[2]

These lessons are applicable to Canada because we are stuck in at least a temporary constitutional impasse. When they had a minority government from 2006 to 2011, the Conservatives could not get support from opposition parties in order to pass reform legislation in Parliament. With a majority after the 2011 election, the Conservatives could have passed their legislation, but Quebec and other provinces served notice they would challenge the constitutionality in court. Finally, the government referred its legislation to the Supreme Court of Canada for a verdict on the constitutionality of enacting various types of change to the Senate, including abolition through legislation without explicit constitutional amendment. My guess is that the Court will hold that both abolition and election require constitutional amendment to enact, though I'm not sure whether they will say that the general procedure or the unanimous procedure is necessary. In either event, a requirement for explicit constitutional amendment, coupled with the difficulties of the legislated regional amending formula, means that nothing is likely to happen soon.

Because there are only six vacant seats in the Senate at the present time, the prime minister could simply refrain from making new appointments. That can go on for a while, but not forever. By the end of 2017, about four years from today, retirements will bring the minority Liberal Senate caucus from 33 members down to 24. That, in turn, would threaten the efficiency

[2] Ibid., pp. 294-295.

of Senate operations because it would be hard for the opposition to fill its positions on committees. So before too long, a prime minister would probably have to resume nominating members to the Senate, even though major reform such as election or abolition had not taken place. Given that such major reforms may not take place for a long time, it would be good to have a Plan B in mind to modernize the appointment of Canada's senators.

In the past, the prime minister's unfettered discretion to nominate senators for appointment by the Governor General was a prized piece of patronage, allowing the reward of personal aides and party stalwarts while also bringing in a certain number of distinguished but less overtly political Canadians. But the recent controversies over senators' expenses and residences have turned this prized power into a poisoned chalice, which the prime minister might be happy to pass on to someone else.

Without raising constitutional issues, the PM could announce that from now he would seek advice on all senatorial appointments. The first step would be to say that he would follow the advice of the voters in Alberta or any other province that might hold senatorial elections. Prime Ministers Mulroney and Harper have already done this, so it wouldn't be a big deal. Experience has shown that we can live with some asymmetry of Senate appointments.

For seats from provinces that don't want to hold senatorial elections, the PM could rely on an advisory committee. For structuring the committee, he might take inspiration from the committees that are now used to recommend appointments to the superior courts as well as the Supreme Court of Canada. For the superior courts, each province has its own committee (Ontario has three and Quebec two), composed of members from the federal and provincial governments, plus the provincial law society, Canadian Bar Association, provincial courts,

police, and general public.[3] For the Supreme Court of Canada, the composition has varied somewhat since Prime Minister Paul Martin appointed the first committee in 2005. The most recent Selection Panel consists of five MPs, three from the governing Conservatives, one Liberal, and one New Democrat. The Panel reviewed a long list of candidates compiled by the Department of Justice and, after consultation with various legal authorities, submited an unranked short list of three to the Prime Minister, who made the decision in consultation with the Minister of Justice.[4]

Senators represent provinces, so there would have to be provincial representation on any advisory selection committee. At the same time, the Senate is a national institution, so it would not seem appropriate to have separate committees for each province, working in isolation from each other. To square this circle, the prime minister might create a Senatorial Appointments Commission with, say, four, federal members deliberating on all appointments and four members from each province deliberating only on appointments from their own province. The federal members might consist of one member from each official party in the House of Commons, plus a public member if, as is now the case, there are only three recognized parties. The provincial members might be appointed by the provincial premier and allocated in a similar way.

This is not a hard-and-fast proposal; it is merely an example of how a committee could be put together. There could be almost infinite variation in the details. But whatever its precise composition, the committee should observe certain principles if the Senate's legitimacy is to be restored and even enhanced:

---

[3] http://en.wikipedia.org/wiki/Judicial_appointments_in_Canada.
[4] http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32908.html.

- Senators should be appointed from all parties in rough proportion to those parties' success in federal or provincial elections.
- Some appointments should be willing to sit as independents, or crossbenchers in the British and Australian vernacular.
- Some appointments, as now happens in a somewhat sporadic way, should be from professions other than politics, so that the Senate will hear voices from major areas of Canadian life—business, unions, sport, the arts and sciences, medicine, law, and so on.

The overall goal of such changes would be to make the Senate less overtly partisan, thereby enhancing its expertise and legitimacy in the technical amendment of legislation, which is the main role it has come to play.