How Not to Reform a Senate

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How Not to Reform a Senate

Senate reform, a perpetual issue in Canadian politics, was an important plank in the platform of the Conservative Party when it formed Government in 2006. After several failed attempts at reform during the years of minority government from 2006-2010 Mr. Harper obtained a majority in the 2011election. But instead of proceeding with Senate reform he asked for an opinion from the Supreme Court on certain constitutional issues. The case was heard in October 2013 and while waiting for a decision some financial scandals involving Senators have turned public opinion toward abolition. Meanwhile the new Leader of the Liberal Party, Justin Trudeau came up with a novel approach to reform by expelling all Liberal Senators from the National Liberal Caucus and asking them to sit as independents. While it is difficult to predict the direction of reform until the Supreme Court renders its judgment, this paper will outline some obstacles for both proponents of reform and abolition. It will argue that the logical path to reform of the Senate requires Canadians to take a closer look at the House of Lords and move away from the recent obsession with an elected Senate.

The Conservatives and Senate Reform

The Conservative Party, since its creation in a 2003 merger between the western based Reform Party (renamed Canadian Alliance) and the old Progressive Conservative Party has advocated Senate reform and in particular a democratically elected Senate. The modern Conservative Party like its populist predecessor believes an appointed Senate is undemocratic and lacks political legitimacy.

In May 2006 shortly after he became Prime Minister Stephen Harper introduced a bill in the Senate to limit the term of newly appointed senators to eight years. The Liberals controlled the Senate and the Bill was delayed for several months. The opposition claimed it was only part of a larger, more ambitious plan for Senate reform and they wanted to see the rest of the package before deciding on term limits.

This proved to be an accurate assessment and in December 2006, another bill (C-43) for "the consultation of the electors... in relation to the appointment of senators", was tabled in the House of Commons. It provided for direct elections for senators in each province to be held at the same times as either provincial or federal general elections. The winning candidates would then be recommended by the prime minister for appointment by the governor general. [1]

Both bills died at the end of the first session of the 39th parliament, but were reintroduced in the second session (C-19 and Bill C-20, respectively). They disappeared with dissolution. Similar

[1] Alberta has had Senatorial elections since the late 1980s and Prime Minister Mulroney actually appointed one “elected” Senator in 1989 but Liberal Prime Ministers refused to recognize the consultative elections and no further appointments were made until Mr. Harper became Prime Minister. In 2007 Mr. Harper appointed one of the elected Alberta Senators, Bert Brown, to the Senate. He subsequently appointed other “elected” Alberta Senators and Saskatchewan introduced legislation to hold similar elections although none were ever held. In part because of a lack of agreement over who would pay for the election.

legislation was introduced again after the 2008 election which produced another minority and once again did not survive dissolution.

Both bills raised certain constitutional questions. The issue concerning term limits was whether Parliament could act without provincial consent in making such an amendment. In 1980, the Supreme Court of Canada gave an opinion concerning Parliament's powers to reform the Senate through constitutional amendments. While the Court could not provide a definitive opinion on whether Parliament could act alone to limit a senator's term of office, it did comment that, at some point, a reduction in the term of office might impair the functioning of the Senate as a chamber of sober second thought.

Academic opinion on the subject was divided. Some maintained that the Supreme Court's opinion is of little relevance today, since it was based on an amendment process that was significantly changed when the *Constitution Act, 1982* came into force. Others maintained that the principle according to which the essential characteristics of the Senate cannot be altered by Parliament alone continues to be relevant.

The federal Senatorial elections act also raised constitutional questions. The authority to appoint members of the Senate rests with the Governor General, acting on the advice of the prime minister. In practice, the prime minister selects individuals to recommend to the Governor General for appointment. If the new process would alter the method of selection of senators, such an alteration would require a constitutional amendment using the "7/50 formula." Once again experts had different views on whether or not it modified the method of selection of senators. The government's position was that neither term limits nor consultative elections would affect the selection process so the changes could be made by Parliament alone.

After the 2011 general election the Conservative government had a majority of seats in both the Senate and the House of Commons. They once again introduced similar legislative provisions to reform the Senate but for reasons which have never been completely clear decided not proceed with passage but opted to refer several questions to the Supreme Court in a reference which was heard in October 2013.

Five questions were asked:

Can the Parliament of Canada alone:

- make amendments for a term limits for Senators
- enact legislation providing for a means of consultative elections in order to determine the preferences of each province and territory as to potential nominees for appointment to the Senate
- Can it establish a framework setting out a basis for provincial and territorial legislatures to enact legislation to consult their populations?
- Repeal subsections of the *Constitution Act, 1867* regarding property qualifications for Senators?

- Can abolition of the Senate be achieved by using the general amending formula (7/50)

We are currently waiting for a decision from the Court but three other recent events have impacted the whole issue of Senate reform.

The first event, probably the least significant from a constitutional perspective, has had tremendous political consequences. Three Senators, two Conservative and one Liberal, were found to have been submitting housing claims while actually living in the National Capital. All were ordered to pay back the funds. The Liberal member paid it back and resigned. He is currently being investigated by police.

One Conservative Senator refused to pay it back and had his wages garnished by the Senate. A second Conservative, former journalist Mike Duffy claimed to have paid back the money but it was discovered that the Prime Minister's Chief of Staff, a successful Bay Street lawyer, actually wrote a personal check for $90,000 to Duffy to cover his disputed housing expenses. Both Duffy and former Chief of Staff, Nigel Wright, are being investigated by the RCMP.

Meanwhile a third Conservative Senator, Pamela Wallin, was found in a separate audit to have overspent her travel allowance by several hundred thousand dollars. She is also being investigated by the RCMP. As the police investigations were being carried out the three Senators who remained in office, all Conservatives, were expelled without pay from the Senate for the remainder of this Parliament which will end in 2015. It was a nasty, controversial and unprecedented process with several Senators opposing or abstaining due to the absence of due process. During the debate it came to light that the Prime Minister's office had attempted to interfere with some of the audits and also with the reports being drafted by the Senate committee charged with investigating the matter.

The net result of this scandal was a surge in support for abolition, mostly in the form of outraged editorials but also from some provincial premiers. The province of Saskatchewan, led by a Conservative Government, introduced a motion calling for abolition of the Senate. It passed unanimously.[2] Before passing the motion the legislature also repealed its Senatorial Election Act which was designed to implement the Harper preference for consultative provincial elections to choose Senators. This left Alberta as the only province with such legislation and, pending the Supreme Court decision, was a symbolic nail in the coffin of the Harper approach to Senate reform -- constitutional reform by non-constitutional means.

In January 2014 Liberal Leader Justin Trudeau shocked Canadians including his own Senators by announcing he was expelling all Liberal Senators from the National Liberal Caucus.[3] His idea generated considerable interest even from unlikely sources such as the Canada West Foundation, Preston Manning, Conrad Black, and the Sun Newspapers. It was also ridiculed by populists on the right who only will accept an elected Senate and ones on the left who will only accept abolition. But as we come to the end of the Harper approach to Senate reform , what are

[2] See Hon. Brad Wall, Time to Consider Abolition of the Senate, Canadian Parliamentary Review, vol 36, no 4, winter 2013-2014, pp.6-8

[3] See Gary Levy, What is not to like about the Justin Trudeau's Senate Reform, Hill Times, February 4, 2014

we to make of Trudeau proposal. Is it going to lead us down the same unsuccessful path or does it signal a new approach to this difficult issue?

What is to like about the Trudeau Proposal

The first thing to admire is that, unlike the populists, he seems to understand the essential logic of Westminster style government.

Canada shares with the United Kingdom a theory of government based on the classical view of the benefits of a mixed constitution. It combines elements of monarchy, aristocracy and democracy (in modern terms constitutional monarchy, appointed meritocracy, a House of Commons elected by universal suffrage).

What links Canada to Britain and separates it from Australia and other potential models is the appointed upper house and the underlying theory that good governance derives from institutions which bring together actors from these three different perspectives. The mixed constitution also serves to differentiate Canada from the United States who have put all their eggs in the democracy basket.

It is always easier to fix something if you understand how it is supposed to work in the first place.

The second thing to like is that Trudeau has correctly diagnosed the problem. The issue is not that the Senate is unelected. Appointments are not, by definition, illegitimate. The problem is length of appointments, (can be up to 40 years) the quality of appointments and the source of the appointments (all by the same person and of the same party).

A related but serious issue is the extent to which the Senate has evolved into a base for party-fundraisers and an extension of the Prime Minister's Office. At best this is unseemly and at worse it is an abomination of our form of government.

So to some extent Trudeau's solution to expel the Liberal Senators from National Caucus, to undertake to keep them out of fundraising for election campaigns and to create a non-partisan appointment process to select highly qualified people is a breath of fresh air.

What is not to like

First, we should not like the fact that he keeps talking about change by non constitutional means. (Meaning that none of his proposed changes would require a constitutional amendment) That was the Harper line and it will soon be completely discredited by the Supreme Court. Mr. Trudeau has nothing to gain by embracing it. It is very possible that the kind of change he seems to envisage including term limits and a new appointment process will require a constitutional amendment under the general amending formula (seven provinces with 50% of the population). He should be preparing the population for this instead of following the crowd of politicians who keep telling us constitutional amendment is impossible.

Second we should worry about the way he confuses non-partisanship and independence. Political bodies are going to be partisan and there is nothing wrong with that. It is not good enough to have come up with a bunch of Senators who may be independent of the Liberal National Caucus. He needs to reflect on the more important question of how to get truly independent minded people into the Senate. Similarly he needs to recognize that we want a mixture of political and independent people in the Senate. And that the political people should not all be from one party.

Thirdly he has yet to recognize we have omitted a key step on the path toward a reformed Senate. A hundred years ago the British started by reforming the powers of the Lords. That should be our first step. That debate would also force us to think about the purposes we want fulfilled by the Chamber.

With these points in mind let us take a closer look at the British House of Lords and what lessons there might be for Canada.

Reform of the House of Lords

Before drawing analogies with the United Kingdom we must acknowledge several differences between House of Lords and the Senate. One relates to powers. The power of the Lords was curbed by the *Parliament Act*, *1911*. The *Parliament Act* as subsequently amended in 1949 now limits the ability of the Lords to delay a bill passed by the Commons for one year.[4]

Related to this is the Salisbury-Addington Convention which deals with the possibility of obstruction by the Upper House. In 1945 the post war Labour Government found itself with virtually no members in the House of Lords so it negotiated an agreement which provides that the Lords will not obstruct bills that seek to implement policies clearly outlined in an election manifesto. This does not affect the Lords ability to amend legislation. The convention still governs relations between the chambers to some extent[5] although the advent of coalition government in 2010 makes it rather more complicated since the Coalition Agreement is a mixture of the manifestos of two different parties.[6]

Another key difference is the absence of any upper limit on the membership. For centuries it was a small body with 50 or so members but as its powers declined membership grew to well over 1000 before the removal of most hereditary peers in 1999. [7] As of October 2013 there were over 800. In terms of party there are 219 Labour, 217 Conservatives 95 Liberal Democrats, and 183 Crossbenchers.

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[4] For a full discussion of the *Parliament Act 1911* see Philip Norton, Parliament Act 1911 in its Historical Context', in David Feldman, ed. *Law in Politics, Politics in Law*, Hart Publishing, 2013.

[5] By 2000 the party standings in the Lords were more equal and the convention was questioned by some and considered by a Joint Committee on Conventions which reported in 2006. The Committee concluded that the convention should still apply and the rejection of Bills at second reading on a regular basis would be inconsistent with the role of the Lords as a revising chamber.

[6] Meg Russell, *The Contemporary House of Lords*, Oxford University Press, Oxford, 2013, p.84.

[7] Peers are disqualified from sitting and voting in the House of Lords while serving as a member of the European Parliament, or serving as a Judge,

The existence of many independent Lords, the so called crossbenchers, is another difference. In 1958 the *Life Peerages* Act provided for appointments for life rather than the traditional hereditary appointments that were handed down from father to first born son. This completely changed the composition and atmosphere of the Upper House. Aside from allowing women to sit, a number of life peers chose to sit as independents without any party affiliation. They became known as Crossbenchers and their numbers have increased over the years. Only a few, such as former Speakers of the House, come from a political background. Others tend to be drawn from the professions including professors, doctors, scientists, businessmen and members of the voluntary sector and the performing arts. Most are still actively involved in their professions. They do not have a party Leader but many of those functions are performed by a Convener.[8]

The British approach to appointment is also slightly different in practice, if not in theory. An informal custom has developed of alternating party appointments among the party leaders so that all parties have significant representation in the Upper House. (The Prime Minister still decides how many appointments the opposition parties shall receive)

The Coalition Agreement sets a goal that political representation should roughly reflect the percentage of votes cast for each party in the most recent election. Labour is still over represented according to this formula but without a membership limit a Prime Minister could appoint more Lords to attain his share of the vote after an election.

One final difference is that unlike Canada Members of the House of Lords do not receive any salary.[9]

The British Reform Movement 1997-2013

In the 1997 election the Labour Party put forth an ambitious constitutional and political agenda which included a "more democratic and representative" second chamber.

Between 1999 and 2012 there have been six White Papers, a Royal Commission, dozens Committee Reports and many Bills both government and private dealing with the issue of Lords Reform.

The first concrete change was The *House of Lords Act, 1999* which originally proposed to expel all hereditary peers from the Upper House. However the Government accepted an amendment to retain 92 hereditary peers who were chosen by their colleagues in a special election.

There have been 5 important consequences of the *House of Lords Act*.

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[8] For a discussion of the role of the crossbenchers see Meg Russell and Maria Sciara, Independent Parliamentarians en Masse: The Changing Nature and Role of the Crossbenchers in the House of Lords, *Parliamentary Affairs*, vol 62, no 1, 2009.

[9] Members of the House of Lords can claim a daily allowance of £300 for each qualifying day or attendance and travel expenses. Only Ministers and certain office holders receive a salary under the Ministerial and other Salaries Act (1975). The House of Lords Draft Reform Bill of 2011 proposed that members of the reformed Lords receive a taxable salary and pensions in line with provisions of the Independent *Parliamentary Standards Authority established in 2009 for the House of Commons*.

First, the most active and committed peers were generally the ones who survived, the less committed and absentee Lords were eliminated.

Second overall membership dropped from1330 to 669.

Third, the Lords became more balanced with no party having an overall majority. The balance of power rests with the Liberal Democrats and the Crossbench independents.

Fourth the Lords became more assertive and self-confident and less concerned about challenges to their legitimacy. [10]

As Meg Russell demonstrates in her recent book on the House of Lords, one manifestation of the new assertiveness was an increase in the number of defeats of government measures. During the Blair years there were 450 such defeats with 88 in 2002 alone. A database showing the number of defeats is maintained by the Constitutional Unit of University College. Defeats range from minor technical issues to major policy issues particularly in the areas of finance, security and criminal law. [11]

A second reform was creation of an Appointments Commission in April 2000 as advocated in a Royal Commission chaired by Lord Wakeham. The Appointments Commission is an independent, advisory body consisting of seven members, including the Chair[12]. The Conservatives, Labour and Liberal Democratic each have one member of the House of Lords on the Commission, nominated by the respective party leader for a term of three years. The other three members and the Chair are non-political and independent of Government. The current Chair of the Commission is the crossbench Lord, a Professor and Surgeon at University College in London.

The Commission has two main functions to recommend individuals for appointment as crossbench peers and to vet nominations for life peers, including those nominated by the political parties. Since establishment it has recommended more than sixty people for appointment following a process which is not unlike an application for a job in the public service, a university or a corporation. There have been about five thousand applications since 2000 but with no deadlines a regular and continuous assessment process is carried on by the Commission[13].

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[10] See Meg Russell and M. Sciara, The House of Lords in 2005: A more representative and assertive chamber?" in Michael Rush and M. Giddings (eds) *The Palgrave Review of British Politics*, Palgrave, Basingstoke, 2006. Also Meg Russell and M. Sciara, Why Does the government get defeated in the House of Lords? *British Politics*, vol 2, no. 3, 2007, pp. 299-322.

[11] See http://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords/lords-defeats

[12] See testimony of Lord Jay of Ewelme to the House of Commons Committee on Political and Constitutional Reform, House of Lords Reform: What Next? June 27, 2013.

[13] The cost of the Commission is about £118,997. The major element of expenditure was staff costs, at £76,065. Commission members' fees - £8,000 for the Chairman and £3,000 for other members. The remainder of the expenditure was for administrative costs including travel and subsistence, staff training, publications and stationery. As a public body, the House of Lords Appointments Commission is subject to the provisions of the Freedom of Information Act 2000.

The selection criteria and the assessment process are published in full on the Commission website.[14] The Commission recommends individuals for the crossbenches based on merit and their ability to make a significant contribution to the work of the House. The Commission considers nominees who would broaden the expertise and experience of the House and reflect the diversity of the United Kingdom. It is mandated to ensure that the individuals it recommends are independent have integrity and are committed to the highest standards of public life.

The Commission will usually interview 6 or 7 people for before making a recommendation.[15] The Prime Minister decides the actual number of appointments the Commission may make in a year and after averaging about six a year since inception, Prime Minister Cameron asked in 2012 that the Commission make no more than two recommendations a year for the time being. All Prime Ministers since Tony Blair have stated they will only decline to pass on a Commission recommendation to the Queen in exceptional circumstances.

In 2010 a study from University College London examined the appointments by the Commission since its inception. It found that of the 63 appointments 23 were women and 13 were from a minority ethnic background, which equates to 37% and 22% of the Commission's appointments, respectively. This compares well against the current composition of the Lords, where just over 20% of Members are women and 5% are from minority ethnic backgrounds. The report also identified the range of expertise in the House and concluded that there were one or two areas, such as science, which were not as well represented as they should be.[16]

The Commission also has a role in vetting individuals nominated to the House of Lords by the Prime Minister and political parties. It is not asked to comment on the suitability of those so nominated but simply to advise the PM on the propriety of individual nominees.

The Commission takes the view that in this context, propriety means:

i) the individual should be in good standing in the community in general and with the public regulatory authorities in particular; and
ii) The past conduct of the nominee would not reasonably be regarded as bringing the House of Lords into disrepute. [17].

Its advice to the PM is confidential and it does not disclose or comment on either the identity or number of nominees it may have advised against. However in the summer of 2005, a list of 28 nominees for appointment was submitted by the Prime Minister to the Commission in the usual way. Publication of the list was delayed and stories began to appear in the press stating that the

[14] See http://lordsappointments.independent.gov.uk/news.aspx

[15] The Select Committee on the Constitution, Meeting with Lord Jay of Ewelme, Chairman of the House of Lords Appointments Commission, Evidence Session No. 1. January 25, 2012.

[16] See Report of Constitutional Unit

[17] http://lordsappointments.independent.gov.uk/vetting-for-propriety.aspx

Commission had concerns about some of those nominated because they had made large loans and donations to the Labour Party (the so-called Cash for Honours scandal).

A police investigation was launched and although no one was ultimately convicted the questioning of the Prime Minister by police and the arrest and subsequent release on bail of one member of the Lords contributed to the declining support for the Labour Party. Contrary to the fears of some that the involvement of the Appointments Commission in the leaks might have eroded its reputation for independence and political neutrality[18] in fact this does not seem to have been the case and it does serve as a deterrent to unseemly appointments

The Parliamentary Votes

The British dealt directly with the difficult issue of election versus appointment over the course of three brutal debates and votes during three Parliaments.

The first such vote took place on February 4, 2003 simultaneously in both Houses. The vote was on the report of a Joint Committee which had been tasked with looking at a government white paper and coming up with specific proposal. The Joint Committee decided to submit several different options to Parliament ranging from a fully appointed Upper House to a fully elected one with various combinations in between. [19]

Prime Minister Tony Blair argued against the creation of a hybrid House and expressed his support for the House of Lords as a revising chamber not a rival chamber. He also pointed out that it was a free vote but as a vote of constitutional importance the government would require a consensus rather than a simple majority before taking any action.

The House rejected all eight options for reform while the House of Lords voted by a 3:1 margin for a fully appointed House. The option which MPs defeated by the fewest number was for an 80 per cent elected chamber.

The result was a paradox. "By defeating eight resolutions to amend the *status quo* the Commons was left with the status quo – but a *status quo* barely distinguishable from one of the eight defeated outcomes, and the most decisively defeated at that[20]."

According to the chief architect of the 2003 debacle, House Leader Robin Cook.

> Tony Blair's intervention brilliantly positioned a democratic second chamber as a threat to the Commons rather than a challenge to the Executive by warning that it might become a rival. He therefore conscripted enough, though not most, Labour MPs to voting for a

[18] See Robert Hazell, *Constitutional Futures Revisited,* Palgrave McMillan, London, 2008, p. 293.

[19] See House of Lords, *Debates,* January 21, 2003 cols 575-688; January 22, 2003, cols 720-838 and House of Commons, Debates, January 2, 2003, cols 187-272.

[20] See P. Dorey and A. Kelso, House of Lords Reform Since 1911: Must the Lords Go? Palgrave, Basingstroke, 2011. Also I McLean, A Spirling and M. Russell, None of the Above: The UK House of Commons Votes on Reforming the House of Lords, *The Political Quarterly*, vol 74 no. 3, pp.298-310.

> wholly appointed Chamber. Such a Chamber will not demand any scrutiny that will trouble the Executive and will therefore not offer any hope of restoring public respect for parliamentary democracy[21]

This theory is substantiated by Blair's own memoires where he suggests that appointment, assuming a reformed appointment process, is the best way to get people with "a different and deeper experience or expertise."[22]

After another election won by Labour and another White Paper the House again voted on the issue of House of Lords Reform in March 2007[23] amazingly they did not seem to learn much from the previous experience and once more put forth several options in a free vote. One slight difference is that the votes were not held simultaneously.

This time four of the options were defeated but a majority of MPs voted in favour of both an 80% elected chamber and a wholly elected chamber. They also supported a motion for the removal of the remaining 92 hereditary peers and for the continuance of a bicameral parliament. The new Leader of the Government, Jack Straw, expressed his satisfaction with the result and announced that cross party discussions would continue on the issue[24].

A week later he was somewhat less sanguine as the House of Lords defeated all options for an elected chamber and solidly supported the concept of an all appointed Upper House. Asked if he would rely upon the *Parliament Act 1911* to proceed without the Lords Mr. Straw said the House of Commons could, proceed that way if they wished but "they we are not at that position yet."[25]

A few months later Gordon Brown replaced Tony Blair as Prime Minister and it was decided to bring out yet another White Paper on Lords Reform. Fatigue and in fighting among Labour over leadership issues had taken considerable steam out of the reform movement.

A survey conducted by the Constitution Unit at University College found that election of members of the House of Lords was fifth out of seven factors considered important by the general public when it came to reform of the Lords. Careful consideration of legislation was first, followed by a trustworthy appointments process. In addition more of the public felt the Lords were doing an acceptable job carrying out their duties than member of the House of Commons.[26]

The House of Lords Reform Bill

The 2011 election produced a Conservative-Liberal Democratic Coalition with a written agreement that favoured an elected Upper House. With the largest opposition party also in

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[21] See Robin Cook, The Point of Departure, Simon and Schuster, London, 2003, p. 280.
[22] Tony Blair, *Tony Blair: A Journey*, Alfred Knopf, New York, 2010, p. 640.
[23] House of Commons, *Debates*, March 6, 2007, cols 1389-1488 and cols 1524-1638
[24] House of Commons, *Debates*, March 7, 2007, col. 1636.
[25] Downing Street, Afternoon press briefing, March 15, 2007. Since 1949 only 4 bills have passed against the will of the Lords.
[26] See House of Lords, Library Note, *House of Lords Reform*, June 28, 2010, LLN 2010/15.

favour it appeared that reform along those lines was inevitable. Yet the entire reform process came to a halt as the result of yet another vote on July 9, 2012.

This time the government proceeded differently. There were no options presented and there was no free vote. It was a whipped vote on the *House of Lords Reform Bill*. It proposed reducing membership in the Lords to 300 members. Most Lords (240) would be elected with the remaining 20% appointed. There would also be 12 Bishops sitting as ex-officio members.

The bill did not propose changing the constitutional powers and privileges of the House once it is reformed, nor would the relationship with the House of Commons change.

The most controversial proposals involve how Peers would be elected and the terms they would serve. Each elected Lord would serve a single, non-renewal term of "three normal election cycles 15 years. The elections would be held at the same time as General Elections for the House of Commons, but would be staggered, so that one-third of the seats would be contested in each election.

Appointed members would be nominated by a statutory Appointments Commission and recommended by the Prime Minister for appointment by the Queen. These appointed Lords, like their elected counterparts, would be staggered, with 20 appointments made each election. Appointed Lords would serve the same term as elected members.

The draft bill had been sent to a Joint Committee. A majority (14) endorsed the approach outlined in the Draft House of Lords Reform Bill but 12 members signed an alternative report. The dissidents questioned whether election necessarily adds legitimacy to the Chamber. If members were elected to a single non-renewable term of 15 years as proposed in the bill they would never have to face the electorate again and could hardly be considered any more accountable or legitimate than appointees.

Another concern was that a largely elected Upper House would challenge the primacy of the Commons. The question would arise as to which elected House had more credibility. Conversely if the Lords was to remain in its current subordinate position vis a vis the House it made little sense to elect members to a chamber which had limited powers.

Another problem was the future of the crossbenchers. It was hard to imagine most of the crossbench peers who are independent and considered extremely competent standing for popular election. The same is true of many of the party elders who contribute their experience to the present Upper House. A PR election system could end up with a membership dominated by political party influence. The resulting Upper House would become more partisan when in its unreformed state it often has more objective and insightful debates than the Commons.

Finally, but perhaps crucially, a few members were not prepared to move forward with the reform proposal without the benefit of a referendum.[27] Labour members, in particular, had committed in the 2010 Manifesto to a referendum on reform of the Lords.

After a spirited debate the Bill came to a vote. The House adopted the bill at second reading but 91 Conservatives voted against it despite a three line whip and 19 others abstained. When many Labour members said they would oppose a programming motion (time allocation) needed to get it considered in committee, the Deputy Prime Minister, Nick Clegg, announced that the whole package of Lords Reform was being abandoned. He claimed the Conservatives had "broken the coalition contract." Prime Minister Cameron disputed this, saying that the agreement contained no specific promise to enact reform of the House of Lords.

The process left the proponents of radical reform (meaning election) proclaiming that the whole exercise has been a failure and vowing to return to the attack after the next election. Be that as it may I do believe there is much that Canadians could learn from past and recent experience in the United Kingdom.

Four Lessons for Canada

Incrementalism

British experience shows that reform takes a long time and that limited, piecemeal reforms have a much greater chance of succeeding than do grand schemes. Life peerages were proposed in the 19th century, but not introduced until 1958. In the 1940s there were vigorous debates about cutting the number of hereditary peers, but this was only achieved in 1999. Making the Lords' membership proportional to general election vote shares was discussed in the 1920s. The recent, unsuccessful idea of a smaller chamber of 300 and 12 year terms, was proposed in the 1930s. The Harper approach was perhaps too radical particularly when it was attempted with a minimum of discussion and consultation.

Engagement

British experience shows that if reform is to be taken seriously there is a lot of heavy lifting to be done. In Canada when it comes to Senate reform in recent years there have been no White Papers, no green papers, no joint committees, no special committees. Even the election platforms of the parties have been vague and general on the issue. The same proposition was introduced multiple times before the government washed its hands of the matter and referred the whole issue to the Supreme Court. If one advocates fundamental reform, like an elected Senate, it is even more important to do this work. While I do not personally favour an elected Senate I do think we need a wider debate including the fundamental question. Is the traditional idea of a mixed constitution still appropriate? Or do we want to go down the garden path of democratic absolutism. I believe if this question is put and competently debated on both sides most Canadians will come around to the same conclusion as the founders.

[27] Sir Alan Haselhurst, Rethinking House of Lords Reform, *Canadian Parliamentary Review*, winter 2012, pp. 12-16.

Some people, like Senator Hugh Segal, have proposed a national referendum on this subject. Recently Reform Party founder Preston Manning proposed a multi question referendum. The former Parliamentary Budget Officer has proposed a Royal Commission on Governance generally and that could include Senate Reform.

This government does not do Royal Commissions in part because the previous Liberal Government used them too often as an excuse to do nothing. The British Royal Commission took less than nine months. We are going to get a Supreme Court decision in about that amount of time. Let us hope that it will be a starting point rather than the last word in Senate Reform.

In the absence of a referendum or a royal commission it would be useful if our elected and appointed politicians would organize a committee to produce a report on Senate reform and hold a debate and vote on the report. Were it to be a free vote after lengthy debate as in Britain I expect there would be no clear consensus but the educational value of such a debate is important. That is why we have a Parliament and it should be used to discuss the issues.

Powers

A third lesson from the British relates to the powers of the Senate. As I previously mentioned we have omitted this step.

Take away the power of the Senate with a type of suspensive veto (which we already have for constitutional matters) and you open the way for the more dispassionate, reflective, effective chamber

Independence

Finally in order to get more independents in the Senate we could, like the British, start alternating appointments among party leaders. Certain Caribbean countries have written into their constitution the alternation of appointments among the Prime Minister, the Leader of the Government and the Governor General on his own. The British are now doing this by informal agreement.

Can the next Prime Minister avoid the Harper mistake?

If, as appears possible, the Harper ship is about to flounder over its handling of the Senate issue, what can a future government do to avoid the hazard. If Mr. Trudeau becomes Prime Minister after the next election, he will find himself with 30-40 supporters lined up against 60 opposition Senators just as Mr. Harper found after his first win in 2006. If Mr. Mulcair becomes Prime Minister he will have no supporters in the Senate. How will either of them get their legislation passed? Will they, like Mr. Harper, have to go back on their promises and appoint a bunch of Senators to get their programme adopted? That is the traditional scenario but there is a better way if either of them has the courage to do it.

The first step would be to introduce a constitutional amendment to limit the Senate to a 6 or 12 month suspensive veto over legislation. The Conservative majority will oppose this but

assuming it has been part of the election program and assuming the provincial premiers are not out of touch with popular opinion it should be possible to obtain at least seven provincial premiers with 50% of the population who will go along. Within a year we will have a Senate with reduced powers.

The new Prime Minister, be it Trudeau or Mulcair, can then introduce his legislation and even without a majority of seats in the Senate things will be passed after a six month or one year delay, which is not much longer than it takes now even with a majority in the Senate.

Eventually our Senators, would realize that their role in our system is to be an independent revising chamber and to perform other functions than those presently performed by the elected Chamber. If things go well by 2016 or 2017 we could have a reformed Senate and a functional Parliament.

That is an optimistic scenario. It will take a lot of strength, co-operation, leadership and wisdom to get from where we are now to where we want to be when it comes to Senate reform.