

# **An appointed upper house: lessons from Canada**

## **Executive Summary**

The government has announced that the House of Lords is to be reformed in two stages. First, the right of hereditary peers to sit and vote will be ended. This will result in a transitional upper chamber which is wholly appointed. The second stage of reform will follow after a Royal Commission has considered the options.

Canada has the only wholly appointed second chamber in the western world, and therefore provides some insights into how the transitional chamber in Britain might operate. Canadian parliamentary traditions are modelled on the British and many similarities remain.

Members of the Canadian second chamber are effectively appointed by the Prime Minister, nominally to represent the provinces of the country. However, appointments are actually made on a purely party-political basis. Despite general agreement on the need for change to the Canadian Senate, successive reform packages have failed over the past decades.

The key points about the Canadian Senate which will be of interest in the UK include:

Although the Senate has almost identical powers to the lower house - making it stronger than our House of Lords - it rarely uses them. This is largely because it is seen as undemocratic for an appointed house to challenge the will of an elected one.

The appointment system in Canada, where Prime Ministers are in control and rarely appoint from outside their own party, creates particular cynicism amongst Canadians about the Senate.

The appointed nature of the Canadian Senate, coupled with the use of political patronage in appointments, means that it has little respect amongst Canadians. Its work is largely ignored, and even ridiculed, by the media and political commentators.

This suggests that the UK government's commitment to review<sup>1</sup> the Senate is in jeopardy.

Reform proposals in Canada have failed because, despite dissatisfaction with the current arrangements, there is no one model for the Senate which has majority support. In particular the different provinces of the country are not in agreement and use Senate reform proposals as an opportunity to vie with each other. The government have little incentive to resolve the situation, as a reformed Senate will be more powerful and more liable to challenge their programmes.

If the UK wants a well respected upper house, it is essential that we move on to the second stage to create one which is "more democratic and representative"<sup>1</sup>. A long drawn out debate on options, allowing entrenched positions to develop, could result in the process being stalled. It is therefore important that the Royal Commission generates a wide debate, and that the government maintains momentum thereafter on the way forward.

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<sup>1</sup> Labour Party election manifesto, 1997.

## **Introduction**

The government has announced that the first stage of House of Lords reform will be the abolition of hereditary peers' rights to sit and vote. A Bill to enact this change will be announced in the Queen's Speech. In the words of the Labour Party manifesto, "this will be the first stage in a process of reform to make the House of Lords more democratic and representative".

The government has also announced that a Royal Commission will be appointed to consider the options for the second stage. The Commission will probably be asked to report in 2000, allowing parties to take positions on the second stage reform in their election manifestos. Implementation of any further reform will then not take place until after the 2001/2002 election.

Until the second stage is implemented the reformed House of Lords will be wholly appointed, comprising life peers, plus law lords and bishops. The size of this transitional chamber will be around 500. Much of the opposition to the government's stage one reform has focused on the claim that stage two may never be reached, and that the appointed second chamber could become a permanent feature of the British parliamentary system.

Canada is alone amongst modern industrialised countries in having a wholly appointed second chamber<sup>2</sup>. Its parliamentary system is closely modelled on the British and retains many similarities. The Canadian example can thus offer us some insights into how the transitional appointed chamber might operate in the UK. For many years there have been calls for reform of the Canadian Senate, and there are also lessons which can be learnt about the development of the reform debate which may be applicable to the UK.

## **History and composition of the Senate**

The Canadian constitution, which provided for the creation of the upper and lower houses, dates back to the federation of Canada in 1867. This brought together the four provinces of Ontario, Quebec, New Brunswick and Nova Scotia. The Constitution Act stated that the Canadian parliament should be based on the British system, and many of the traditions and procedures of the parliament remain remarkably similar to the UK.

The annual opening of parliament is marked by a "speech from the throne" - delivered by the

A key difference between the Canadian and British second chambers is the formal status which the Senate has in the Canadian federal state. When the federation was formed it was agreed that seats in the Senate would be allocated on a provincial basis, with equal numbers of seats given to the three main regions<sup>3</sup>. This would partly counterbalance the House of Commons where seats allocated by population gave the balance of power to the more populous provinces. This model of fixed numbers of seats per province, regardless of population, reflected that adopted in the neighbouring United States.

Seats were initially allocated to the original four provinces, with new seats added as provinces and territories joined the federation. Today's Senate has 104 members, representing the ten provinces and two territories<sup>4</sup>. Although members of the Senate must reside in the area of the country which they represent, appointments are made centrally. These appointments are effectively in the sole gift of the Prime Minister, but are formally made by the Governor General. Senators hold their seats until they reach retirement age at 75<sup>5</sup>, which combined with a fixed size for the Senate means that appointments are only made when vacancies arise through retirement, resignation or death.

The original intention was that the Senate should fulfil two of the classic functions of a second chamber - that of representation of the regions within a federal state, and that of "sober second thought"<sup>6</sup> to counter a potentially radical elected House of Commons. Its members, who are required to be aged 30 or over<sup>7</sup>, are expected to be respected citizens of stature who will bring maturity to its deliberations.

### **Formal powers of the Canadian Senate**

Constitutionally, the Canadian Senate is one of the most powerful in the world. Unlike the House of Lords it is not restricted to delaying legislation, but can block almost any government proposal. There are just two exceptions. Firstly, the Senate may not initiate Bills providing for the expenditure of public money or the imposition of taxes, although it may amend or reject such Bills which come from the lower house. Second, during consideration of constitutional amendments, the Senate only has the power to delay for a maximum

and the House of Commons each have a set of committees which mirror government departments and consider legislation in detail.

The co-equal powers of the Canadian Senate mean that there is no automatic means of resolving a dispute between the two Houses. If the Senate consistently refuses to agree a Bill which has been supported by the House of Commons, the Commons does not have the power to impose its will<sup>9</sup>. The only means the government has to try and force passage through a reluctant Senate is to appoint additional Senators. There does exist an extraordinary power which the Prime Minister can use in such circumstances, to temporarily increase the size of the Senate<sup>10</sup>. However, this power has only once been used once in Canada's history, by Brian Mulroney in 1990.

The relationship between the Senate and the government is quite similar to that of the British House of Lords. Cabinet ministers and other members of the government may be appointed from either Chamber and most Cabinet positions, including Prime Minister, have been appointed from the Senate at some time in the past. However, in modern times the majority of Cabinet appointments tend to be made from the elected House of Commons, and it is becoming increasingly common for the House Leader to be the only Senate member represented in Cabinet. Otherwise ministers from the Senate are generally appointed only if the governing party is underrepresented in a certain province<sup>11</sup>. An appointment to the Senate has also sometimes been used by the Prime Minister to bring a parliamentary outsider in as a member of the government.

Scrutiny of the government in the Senate, aside from examination of government Bills, is limited. The government must retain the confidence of the House of Commons, but the same does not apply to the upper house. Ministers must appear at daily question time in the House of Commons only, with questions in the Senate restricted to the government house leader, and debates in committees.

In addition to the powers described above, the Senate shares some other powers with the House of Commons. Committees in both Chambers carry out investigations, call witnesses and present reports to Parliament, and joint committees of the two Chambers are used for certain forms of work. The Senate plays a part in some key public appointments. Members of either House may propose private members' Bills.

## Public perceptions of an appointed Senate

*“Of all the second chambers in Western advanced industrial societies, the Canadian Senate is without a doubt the most obsolete and anachronistic, clearly nosing out even the British House of Lords for this dubious honour”<sup>12</sup>*

Although British commentators might find the latter part of this assertion questionable, there is no doubt that the Canadian Senate attracts much criticism and only limited respect amongst Canadians. As in Britain, political commentators, academics and the public almost exclusively focus their attention on the work of the House of Commons. Attention generally only shifts to the Senate when a conflict arises between the Houses, at which time it will be considered controversial that unelected members should seek to challenge the supremacy of the democratically elected lower house.

The way in which the appointments system has traditionally been used by Prime Ministers has served to aggravate this problem. There is no tradition in Canada of Prime Ministers making appointments to the Senate from outside their own party<sup>13</sup>. Thus during a government's term of office its Senate majority will steadily increase, whilst new governments often inherit a Senate which is politically hostile. For example, the 1993 parliament, which saw the Conservatives reduced to two representatives in the House of Commons, nevertheless included a Conservative majority in the Senate.

This situation is worsened by the fact that seats in the Senate are almost invariably given as a prize for long party service, rather than to individuals who necessarily have a record in, or commitment to, the region they are appointed to represent. Many senators have backgrounds as party organisers, fundraisers, donors, MPs and ministers. Senate seats are frequently left vacant for long periods, with quite open competition within the governing party for appointment. Seats are always filled before a general election, to secure them for the party, and it has been alleged that long periods of vacancy may encourage competing candidates to work harder and/or commit more money to party funds as the election approaches.

Although Senate appointments are intended to rebalance parliament in terms of underrepresented groups, only 29% of Senate members are women and the Senate currently includes only six members under the age of 50. Consequently the Senate has been described by one of Canada's most respected commentators as “a dignified pasture for superannuated political war horses”<sup>14</sup> and Senate seats as “the choicest plum in the patronage basket”<sup>15</sup>. There have also famously been accusations that the Senate operates as a “lobby from within”<sup>16</sup>, due to the overrepresentation of business interests amongst its members.

All of this adds to the generally low esteem in which the Canadian Senate is held. The fundamental problem of an appointed Senate which lacks any clear democratic mandate is

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<sup>12</sup> Earl H. Fry, *Canadian Government and Politics in Comparative Perspective*, University Press of America, 1984, p. 180.

<sup>13</sup> The only major deviation from this tendency was during the long period of Liberal government under Pierre Trudeau, when the number of Liberal senators became so excessive that Trudeau eventually adopted a convention of replacing outgoing Conservative senators with other Conservatives.

<sup>14</sup> C.E.S Franks, *The Parliament of Canada*, University of Toronto Press, 1987.

<sup>15</sup> Robert J. Jackson and Doreen Jackson, *Politics in Canada*, 4th edition, Prentice Hall, 1998.

<sup>16</sup> C. Campbell, *The Canadian Senate: A Lobby from Within*, Macmillan of Canada, 1978.

exacerbated by the perceived abuses of the appointment system for cynical political ends. This leads to a lack of respect for the Senate amongst the Canadian public, and to an attitude in the press which at best ignores, and at worst ridicules the Senate. Set against a lower House which is regularly elected to reflect the public's mood and political priorities, the Senate is widely believed to have no mandate to justify obstructing measures which have been approved by the House of Commons.

### **The power of the Senate in practice**

*“On paper, the Canadian senate is one of the strongest second chambers imaginable, because it has a full veto power .... in practice it is one of the weakest legislative bodies because it has so little political credibility”<sup>17</sup>*

Canadian Senators are well aware of the low esteem in which they are held, and the likely response from the public and government if they were to flex their constitutional muscles. In any case, once the governing party manages to secure a majority in the Senate, through use of the appointment system, Senate members will tend to concur with the House of Commons majority. Consequently the Canadian Senate's powers have tended to be far greater in theory than in reality.

Until around 1940, the Senate was prepared to use its power of veto freely, if not often. However, as concerns grew about the lack of democratic legitimacy of the unelected Senate this was followed by over 40 years when it never challenged the supremacy of the House of Commons by blocking a Bill. This situation ended abruptly after Brian Mulroney's new Conservative government in 1984 inherited a Liberal dominated Senate. After many political wrangles between the houses, the Senate effectively forced an election in 1988 by blocking the Free Trade Bill. This caused mu

Because of their perceived lack of legitimacy, and consequent reluctance to use their full powers, Senators generally restrict themselves to detailed legislative scrutiny work and inquiries. Their ability for carrying out this work is considerable. Insiders recognise that Senate committees often do better quality work than their counterparts in the Commons, because of the maturity and experience of Senators and the fact that they are unencumbered by constituency work and other duties. Members of the Senate are also somewhat more independent of party discipline than their counterparts in the lower house, as they are not subject to the rigours of reselection. Nevertheless, despite production of many high quality reports by Senate committees, this work is largely ignored by the media and government, and in general the Canadian polity remains unconvinced of the virtues of its appointed Senate.

### **The Canadian reform debate**

Almost since its creation in 1867 there have been calls for reform of the Canadian Senate. The first parliamentary debate on senate reform was in 1874, when a Liberal senator called for provinces to be able to select their own senators. In 1926 the first large scale publication on the subject appeared, claiming that “probably on no other public question in Canada has there been so much unanimity of opinion as on the necessity of senate reform”<sup>19</sup>.

The Senate reform debate in Canada has become inextricably linked with the debate on the powers of provinces, in relation both to each other and to the federal parliament. The Senate - nominally - represents the provinces, yet its members have always been appointed by the Prime Minister without any reference to provincial governments and legislatures. In reality they represent parties, not provinces, and have no links to provincial legislatures. Thus some of the more modest proposals for reform have simply included a role for provinces within the appointment system. The government in the province of Alberta have twice staged

In response to the concerns about the Senate, there have been many formal initiatives to agree the way forward. These have included two sets of government proposals in 1969 and 1978, two Joint Committees of both Houses of Parliament in 1972 and 1984<sup>21</sup>, a report of the Senate committee on Constitutional Affairs in 1980 and a Royal Commission in 1985. Conclusions from these initiatives have differed, ranging from amended appointment mechanisms for Senators to direct elections, various changes to the balance of regional representation and changes to the Senate's powers. The most complete set of proposals came from the 1982-4 Joint Committee, which toured Canada taking evidence from groups and individuals in order to build a consensus for change. Its recommendations included a transitional Senate to put in place until constitutional change was achieved<sup>22</sup>, and the phasing in of a directly elected Senate with fairer representation of provinces. The Committee recognised that an elected Senate would be more likely to use its powers, and therefore proposed that the current power of veto be reduced to one of 120 days delay.

Despite all these proposals from respected expert groups over the last three decades, Senate reform does not appear to be any nearer. All proposals made have been noted by government and parliament, but somehow never acted upon. For example, the well researched and detailed report prepared by the Joint Committee was submitted to government in 1984 and briefly debated in parliament. However, soon after its publication Prime Minister Trudeau resigned and parliament was dissolved. After the election the proposals never resurfaced.

The most recent proposals for Senate reform



party than a notionally powerful but unconfident appointed chamber. Thus there is no pressure from the top to push through proposals once they are made, or to draw the draw the perpetual Senate reform debate to an end.

It is possible the debate will one day end not in reform, but abolition. There has been a minority view for many years that Canada should simply dissolve its Senate and adopt a unicameral parliament. For many years the New Democratic Party (Canada's social democrats) have advocated abolition of the Senate. A new campaign has recently been launched by MPs of two different parties who are travelling Canada gathering signatures on a petition to this end. If public frustration continues to grow with the stalled process of reform, a campaign of this kind could one day succeed.

### **Obituary to an appointed Senate: New Zealand**

Hanging over the debate on reform in Canada is the spectre of New Zealand's experience. Like Canada, New Zealand's constitution of 1854 was modelled closely on Britain. This included a bicameral legislature, with the lower house elected by first-past-the-post<sup>24</sup> and an appointed upper house named the "Legislative Council".

Dissatisfaction with the Legislative Council was immediate. Appointments were in the hands of the government, although officially made by the Governor General on behalf of the Queen. Initially appointments were for life, but this was modified to seven year renewable terms in 1891. In fact the modification of the system only made matters worse. There was a tendency to make party political appointments, including ex-members of the lower house and party functionaries. Under the life appointment system these members developed a degree of independence. With renewable appointments the parties' grip on the upper house was strengthened, as members sought to be loyal to their party in order to retain their seat.

In 1914 legislation was passed to enable a change of system. Appointments would end, with members of the upper house instead to be elected under a proportional system. However, this change was postponed, due to the 2102 04

## **Conclusions for the UK**

As the only wholly appointed second chamber in the western world, the Canadian Senate is an obvious place to look to understand how the transitional appointed chamber might work in the UK. Despite some key differences between the Canadian and British systems the parliamentary tradition is very similar, and there are obvious lessons which can be learnt from the Canadian experience.

The Canadian Senate provides a classic illustration of the link between composition and powers of a parliamentary chamber. Despite the notional powers of the Senate, which make it almost equal to the lower house, it is effectively weak in comparison and generally unable to act due to the lack of public confidence in the way that Senators are selected.

The part appointed, part hereditary House of Lords already suffers from credibility problems which prevent it using its full powers to challenge the elected House of Commons. The transitional House, made up of life peers 5458gres5 Tow

opposing positions to develop, which might never be reconciled, and allow government to become too comfortable with their appointed house to be motivated to change it.

In summary, the government has drawn attention to the key issues which will be essential for the success of their step-by-step approach to House of Lords reform. These are the revision of the appointments system in the short term, to maximise public confidence in the appointed house, and the commitment to a second stage of reform. Whilst an appointed second chamber may be appropriate as a transitional arrangement, it would soon lose credibility in the longer term. If the UK is to have a well respected and effective second chamber it is therefore essential that momentum is kept up to move towards a permanent solution.

## **The Constitution Unit and the House of Lords**

This research was carried out as part of a comparative project on second chambers overseas, based at the Constitution Unit and funded by the Leverhulme Trust. The aim of the project is to inform the debate about reform of the House of Lords in the UK. During the course of the project further briefings will be produced, drawing on information about the second chambers in Australia, France, Germany, Ireland, Italy and Spain. The final output from the project will be a book, to be published in November 1999.

The Constitution Unit has already produced a report and three briefings on reform of the House of Lords:

Reform of the House of Lords (report) - £15

Reform of the House of Lords (briefing) - £5

Reforming the Lords: A step by step guide - £5

Rebalancing the Lords: The numbers - £5

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