



Former Senators Michael Kirby and Hugh Segal write that the new appointment process provides “the opportunity to rescue the Senate” from partisan furies as well as manipulation by PMO. Saffron Blaze: Wikimedia photo

Sober Second Thought 3.0

Michael Kirby and Hugh Segal

Canada's unelected Senate has experienced its most sustained period of upheaval since Confederation. The expenses scandal, the decoupling of Liberal senators from their party caucus, a new appointments process and the proliferation of independent Senators amount to an institutional revolution. In this excerpt from their Public Policy Forum paper on making Senate independence work, former Liberal Senator Michael Kirby and former Conservative Senator Hugh Segal, highly respected instinctive reformers both, present a blueprint for a post-partisan Senate.

There is nothing in the altered Senate appointments process introduced last January that automatically assures a positive outcome for an independent Senate. Nor is there anything that automatically condemns it to failure. Success will depend on the wisdom and flexibility of the men and women who have been called upon to serve in the Senate: the objectives they pursue, the operational processes they choose, the goodwill they can muster in a house pedigreed with partisan division and—increasingly in recent decades—dependent on direction from

their party leaders in the House of Commons. Today's Senators have an historic opportunity to lift a weakened institution from its torpor and demonstrate its value to good governance in Canada.

The current cohort of Senators can be divided into two basic groups: partisans trying to figure out how their role has been altered while trying to cling to familiar and favoured power arrangements; and appointed or converted independents working their way through the puzzle of how independence and effectiveness will co-exist.

We believe it self-evident that independents are not anarchists and independence is not disorder. As the first trickle of independent Senators grows toward a plurality and ultimately a majority, it is essential to get the right pieces in place sooner rather than later.

The recent reforms to the appointment process of the Senate—from which must flow changes to its rules and procedures—provide the opportunity to rescue the Senate from what it has generally become: a sibling of the House of Commons in partisanship and increasingly a child of the same helicopter parental executive, particularly the Prime Minister's Office. If the Senate is to be little more than a mirror of the House of Commons, it falls short of fulfilling the role envisaged by the architects of Confederation.

Sir John A. Macdonald was prescient in setting out the need for the Senate to serve as an independent actor in order to provide value in calmly considering legislation. As we will see, the Senate has often risen to the occasion in its nearly 150 years, contributing in ways that make it worthy of rescue.

The 2014 Supreme Court decision served to underline that no matter how much the public may desire change, the amending formula necessary to reform the structure of the Senate was clear and precluded

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unilateralism. Unanimity between provinces and Ottawa is required to abolish any part of the three pillars of Parliament (Commons, Senate, Crown) and the concurrence of seven provinces whose combined population is at least 50 plus one per cent of the country's population is required for other substantive changes, such as an elected Senate.

This was consistent with the prolonged negotiations that led to the patriation of the Constitution and adoption of the Charter of Rights and Freedoms in 1982. Neither would have occurred without the amending formula that protected small provinces and Quebec from any tyranny of the majority. This parallels the essential ‘protection of the minority role’ of the Senate itself, without which Canada, a federal state with two orders of power, would not have come about in 1867.

The Court's conception of the Senate was remarkably similar to that of Macdonald, upon whose writing it drew. The Court referred to the Senate as “a complementary chamber of sober second thought” and argued it was not intended to be “a perennial rival of the House of Commons in the legislative process.”

It was not the Supreme Court decision that influenced Justin Trudeau, then the leader of the third party in the House of Commons, to banish Liberal Senators from the national Liberal Caucus in January 2014. Nor was it merely the so-called spending scandals dominating the news at the time. More broadly, these were at-

tached to more profound problems that the narrowly partisan structure of the Senate's rules, procedures and appointments process had conspired to create. As he stated at the time:

“The Senate was once referred to as a place of sober second thought. A place that allows for reflective deliberation on legislation, in-depth studies into issues of import to the country, and, to a certain extent, provide a check and balance on the politically driven House of Commons. It has become obvious that the party structure within the Senate interferes with these responsibilities. Instead of being separate from political, or electoral concerns, Senators now must consider not just what's best for their country, or their regions, but what's best for their party.”

The Senate is the master of its own rules. The last time these were subjected to a major overhaul was in 1991, as a result of the debate over the Goods and Services Tax. This was the most comprehensive overhaul of Senate rules since 1906. The amended rules included a time limit on Senators' speeches, time allocation in the Senate, and changes to the Speaker's authority.

We recommend that a major rewrite of the Senate rules once again be undertaken.

The current rules are premised on assumptions that are out of sync with the values that are necessary for the good functioning of an independent Senate. Indeed, the partisan structure of the current Orders of the Senate

leaves no role for independents. The basic organizing principle of the Senate revolves around a “recognized party,” which is defined as:

a caucus consisting of at least five Senators who are members of the same political party. The party must have initially been registered under the Canada Elections Act to qualify for this status and have never fallen subsequently below five Senators. Each recognized party has a leader in the Senate.

Embedded in the above wording is the acceptance of a Senate organized around partisan principles. The language represents a direct affront to the fundamentals of an independent Senate: recognized party, caucus, members of the same political party, registered under the Canada Elections Act, never fallen below five Senators, has a leader in the Senate. Current rules also formally set out the positions of government leaders, deputy leaders and whips, and allocate extra compensation and extra budgets for Senators filling these partisan roles.

Everything about how the Senate currently works—membership on committees, allocation of offices, who speaks in the Chamber and in what order, who is permitted to travel with committees—is determined by the party whips based on partisan interests. This includes the much-discussed rules on spending as well as travel and attendance. The Liberals and Conservatives (the only parties present in the Senate) depended for many years on partisan Senators to raise party funds, travel to party events and chair party campaign committees; The Senate rules embraced this reality and allowed for maximum spending flexibility. While the public and the media could not comprehend how no rules could have been broken in the so-called spending scandals, there were actually none to break since rules had always been inconvenient to the Senate’s partisan masters.

Given that the rules by and large remain intact and serve as a severe impediment to the good functioning of an independent Senate, the question arises as to how best replace partisanship as the foundational concept for the Senate rules and party leaders and whips as the enforcers.

The answer can be found in the institution’s origins.

Clearly, the concept of equal regional representation must remain central to the Senate’s workings. Without the agreement to have a Senate, there is no way that the bargain of Confederation would have been reached. Moreover, the Supreme Court has affirmed the Senate’s protection in the Constitution, assuring its continued existence as a practical matter. And the smaller provinces and Quebec have continued over nearly 150 years to stand fast for a regionally representative Senate.

Meanwhile, the standing committees of the Senate need to be populated. Who speaks when and in which debates, needs to be determined. Decisions and trade-offs are necessary. Authority must rest somewhere.

As the Senate was originally organized on the basis of regional representation, we recommend this as a sound way to proceed in replacing the prerogatives of partisanship.

With growing numbers of independents in the Senate, the necessary rules changes will be significant. Soon the independents will form a plurality; eventually a majority. Independent Senators must secure proportional rights *vis-a-vis* partisan Senators in order to play a meaningful role in the management of the Senate agenda, rules on committee membership, the way the Senate budget is spent and so on. As things stand now, the independent Senators have no access to funding for research, which is granted to “parties” only. The independent Senators therefore need to work within the existing rules in order to change these same rules so

they can enjoy the same access to support and research capacity as do Senators currently situated within partisan party caucuses.

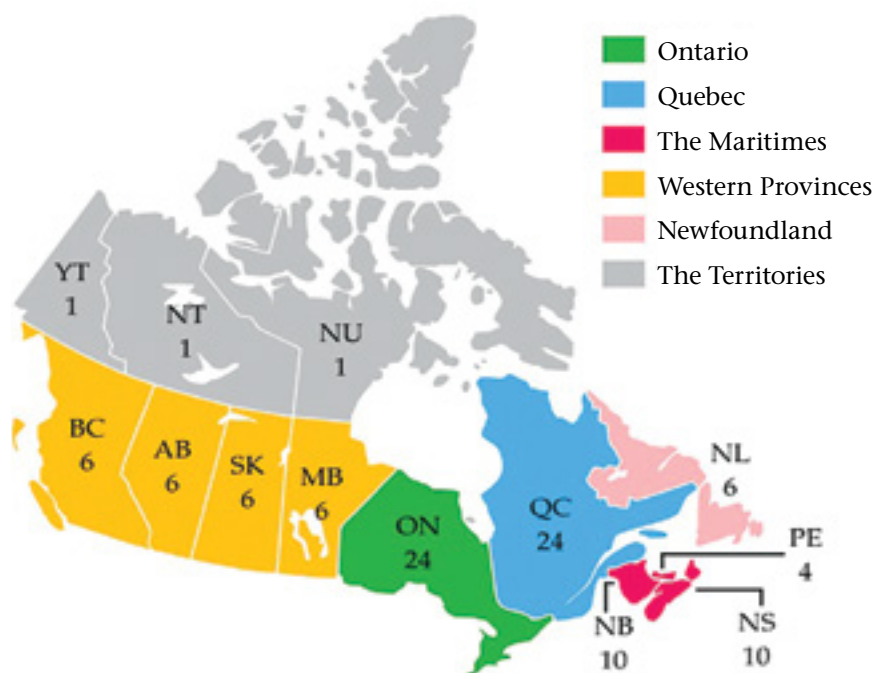
When implemented, these changes must reduce the massive partisan bias of the present rules governing the chamber. Independent Senators, no matter how some of them may feel about banding together being a contradiction to their independence (a simplistic proposition with which we don’t agree) must act in unison at least once—to get the rule changes required to assure their relevance.

“The independent Senators either hang together or no meaningful change will occur. It’s as simple as that. And hanging together on this one over-arching matter will in no way limit their right to vote and speak independently of each other on any issue, law, motion or committee report that comes before the chamber.”

On this single question, the independent Senators either hang together or no meaningful change will occur. It’s as simple as that. And hanging together on this one over-arching matter will in no way limit their right to vote and speak independently of each other on any issue, law, motion or committee report that comes before the chamber.

We recommend that the key passage from the Senate rules cited above be rewritten to read something along the lines of:

The Senate is organized around the principle of regional caucuses. These groupings reflect the original intent of the framers of the Senate. These regional caucuses



Kirby and Segal recommend the new independent Senators caucus along regional lines, meeting the intent of the Founding Fathers at Confederation. Wikimedia image

will encompass all Senators from the given region regardless of any other affiliation. They will select their own caucus convenors and deputy convenors, who will be responsible as a group for the allocation of membership on standing Senate committees, speaking lists in the chamber, allocation of offices, committee travel and any other such issues. Regional caucuses will meet weekly while the Senate is in session and at any other times deemed appropriate by their convenors.

As for the caucuses in the Senate, these would be based on the four regions originally contemplated by the founders of Confederation—Atlantic, Ontario, Quebec, the West. Each of these currently has 24 Senators, with the exception of the Atlantic, which has 30 (the original 24 allocated to the Maritime provinces and an additional six when Newfoundland joined Canada in 1949). As for the three Senators from Northern Canada, we recommend they be given a one-time election as to which caucus to join.

With an independent Senate already showing signs of being less likely

to content itself as a mirror of the House of Commons, a serious rethink is required as to how to balance the wills of the two chambers when reconciliation proves elusive.

We offer two recommendations:

1. The revival of the long-standing convention of holding conferences between the two Houses in times of deadlock.
2. The legislated self-limitation of the Senate's absolute veto (excepting money bills and certain constitutional provisions) to a six-month suspensive veto.

Conferences between the House of Commons and the Senate sound like a U.S. import. That's because few in Ottawa can recall 1947, the last and 13th time since Confederation a conference was held between a select group of Senators and MPs, usually including the minister or member sponsoring the deadlocked bill. Still, the procedure remains in the rules of the Senate and the standing orders of the House of Commons. Over the years, conferences have fallen into disuse.

We agree the current absolute veto power is not necessary; indeed, the very fact of its absoluteness makes the Senate reluctant to reject any bill, however bad, even temporarily. With only a nuclear weapon at its disposal, the Senate is naturally reluctant to enter into a conflict even when such a showdown may serve the public interest. The Senate would be more likely to fulfill its duty of sober second thought with a more proportionate tool at its disposal.

We recommend that the Senate pass a motion to limit itself to a six-month suspensive veto in place of its absolute veto.

These are exciting times for the Senate and for Senators. They are participating in a bold historic experiment aimed at reviving a wounded institution and improving its contribution to the good governing of the nation.

A chamber with a plurality of independent Senators will, over time, change the relationship for the better with both the House of Commons and the government.

At the same time, it is important to remember as we enter an era with a new political calculus that the independent Senate that is emerging may well become a greater thorn in the side of the House of Commons and executive than in previous times. Such is the way of checks and balances. **P**

Michael Kirby was appointed to the Senate in 1984 as a Liberal from Nova Scotia. He stepped down in 2006, becoming the first chair of the Mental Health Commission of Canada.

Hugh Segal was appointed to the Senate in 2005, and sat as a Conservative. He left the Senate in 2014 to become Master of Massey College at the University of Toronto.

Excerpted from "A House Undivided: Making Senate Independence Work", a paper for Canada's Public Policy Forum. The full paper is available at the PPF's website (ppforum.ca).