A HOUSE UNDIVIDED

Making Senate Independence Work

By Michael Kirby and Hugh Segal

September 2016

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ISBN 978-1-927009-80-2

PREFACE
BY THE PUBLIC POLICY FORUM

WHEN IT IS CONSIDERED AT ALL, Canada's Senate has been widely held in public disrepute. Yet it is a fundamental part of the country's Constitution and governing system, a body that has contributed to good policy outcomes for Canadians and can contribute again. Its new arrangements create renewed opportunities.

Whether one likes the Senate or not, the simple truth is that it's here to stay. That is the inevitable conclusion of the 2014 Supreme Court of Canada decision in response to a reference by the government of Stephen Harper. If neither abolition nor constitutional reform are in the cards, the question becomes: How can the Senate be made to work in a way that will serve and satisfy Canadians?

The decision by Prime Minister Justin Trudeau to gradually choke off the chamber's supply of partisan oxygen by overhauling the system of appointments marks perhaps the greatest actual reform of the institution—as opposed to the many mooted ones—since Confederation. In so doing, though, the Prime Minister has provided little guidance as to how this independent Senate should function. The thinking seems to be that if it is to be independent, it must find its own way.

Thus the Senate will be the author of its own fortune or misfortune.

To help map out the best path ahead and ward off the calamity of a fumbled opportunity, the Public Policy Forum sought out two of the most independent-minded Senators of the past generation, Michael Kirby and Hugh Segal—one who sat as a Liberal, the other as a Conservative, and both of whom fulfilled their duties in an independent-minded manner and stepped down many years before their terms would have come to an end. We asked them to jointly consider what it will take for an independent Senate to succeed, a request that led to the publication of this paper

The Public Policy Forum is grateful for the time and wisdom the former Senators devoted to helping us understand two fundamental questions above all: how will the influx of more Independent Senators change the Senate and how should the rules governing the institution be revised in light of this change.

Their insights and guidance that follow are drawn from decades of experience in government and several conversations and email exchanges over the summer between the ex-Senators and Public Policy Forum President and CEO Edward Greenspon. ▮

ABOUT THE AUTHORS

Michael Kirby was appointed to the Senate in 1984 as a Liberal from Nova Scotia. From 1994 to 1999 he was chair of the Banking, Trade and Commerce Committee. From 2000 to 2006 he was chair of the Social Affairs, Science and Technology Committee. In 2002, his committee completed an influential six-volume report on reforming the health care system. In 2006, his committee published Canada's first national report on mental health, "Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada." It led to the creation of the Mental Health Commission of Canada, of which Mr. Kirby became the first chairman on stepping down from the Senate in 2006. He is a former president of the Institute for Research on Public Policy and has also held senior political and public service positions, including Secretary to Cabinet for Federal-Provincial Relations and Deputy Clerk of the Privy Council from 1980–83. Mr. Kirby was deeply involved in the patriation of the Canadian Constitution and adoption of the Charter of Rights and Freedoms. He also founded the organization Partners for Mental Health, of which he remains Founding Chair.

Hugh Segal was appointed to the Senate in 2005 by Liberal Prime Minister Paul Martin, and sat as a Conservative. He served as the Chair of the Standing Senate Committee on Foreign Affairs and International Trade and the Special Senate Committee on Anti-Terrorism. He led the Foreign Affairs committee's major look at Canadian foreign aid in 2007, "Overcoming 40 Years of Failure: A New Road Map for Sub-Saharan Africa." Prior to the Senate, Mr. Segal served in a variety of political and public service roles, including as Chief of Staff to both Ontario Premier William Davis and Prime Minister Brian Mulroney. Like Mr. Kirby, he was a key figure in the adoption of the 1982 Constitution, including the Charter of Rights and Freedoms. He is also a former president of the Institute for Research on Public Policy. He left the Senate in 2014 to become the fifth Master of Massey College at the University of Toronto.

INTRODUCTION
BY MICHAEL KIRBY AND HUGH SEGAL

THERE IS NOTHING IN THE ALTERED appointments process introduced in January 2016 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 raised 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. Some in the latter group feel trapped in the seeming paradox that aligning themselves with other Senators will potentially compromise their new-found independence. A number of them are wary of being drawn into a formal caucus or associating with the newly created Government Representative in the Senate.

The authors of this paper believe it self-evident that Independents are not anarchists and independence is not disorder. We take the position that independent Canadian Senators require, like U.K. crossbenchers, some measure of organizational structure in order to carry out their responsibilities effectively, and that the old structures require reforms of the sort that are within the purview of the Senate itself. 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. ▮

Today's Senators have an historic opportunity to lift a weakened institution from its torpor and demonstrate its value to good governance in Canada.

RECOMMENDATIONS AT A GLANCE

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 necessary for the good functioning of an independent Senate. Indeed, the partisan structure of the current Orders of the Senate leaves zero role for Independents.

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

We recommend that the key passage from the Senate rules that favour party affiliation be rewritten to read 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 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.

We recommend the regional convenors meet weekly with the Government Representative in the Senate, the Government Liaison and the Speaker of the Senate. This group will constitute the Senior Council within the Senate and may or may not select another committee to enforce rules and standards agreed to by Senators. We also recommend that the Senior Council, subject to the support of the majority of regional caucuses, quickly move to set compensation levels for the newly named positions as well as budgets for their offices in keeping with levels established for partisan officers in the previous rules.

We offer these specific recommendations in the hopes it will be useful to the Modernization Committee and the Senate as a whole. In this we make five recommendations we believe can be effected either within the Senate itself or by an Act of Parliament passed by both houses and the Crown, as was the case with the 1965 elimination of new life appointments for Senators:

1. **That the Speaker of the Senate be chosen by Senators themselves by secret ballot,** as Members of Parliament in the House of Commons do, rather than by the current practice of appointment by the Prime Minister advising the Governor General.
2. **That standing committee chairs be selected by the committee membership** as has become the practice in the House of Commons and that they serve for the full-term of the Parliament unless otherwise removed by a disciplinary process.
3. **That question period in the Senate, which was always severely limited in effectiveness by the presence in the chamber of a single government minister, be refashioned altogether** given the elimination of the position of Government Leader in the Senate. Instead, question period should be organized around three purposes: questioning of committee chairs; questioning of

the Government Representative in the Senate on plans for government legislation; the new practice of weekly questioning of invited government ministers, as designated by the Senate. We are also impressed by the quality and depth of information gathering that has flowed from government ministers who are sponsoring legislation appearing before the Senate in committee-of-the-whole. This process is well grounded in precedent created by a 1947 rule change to permit a minister from the House of Commons to take part in a Senate debate in such circumstances.

4. **That the minimum age requirement of 30 for a Senator be scrapped.** While in most cases, we prefer a Senate of experience across a wide spectrum of knowledge and pursuits, we see no need for official age discrimination.
5. **Removal of the requirement that Senators have a personal net worth of at least $4,000.** Initially imposed to obstruct non-elites from entering the Senate, the logic today is as anachronistic as the sum is paltry. Either way, the principle is bad. The Senate legal affairs committee called for the removal of this condition in 1980 and the Supreme Court opened the door in its reference decision, finding: "It is precisely the type of amendment that the framers of the Constitution Act, 1982 intended to capture" under the unilateral federal amending procedure in that it updates the workings of the Senate "without affecting the institution's fundamental nature and role."

We recommend the Senate be the initiator of the necessary legislative measures, introducing them first in the upper chamber while asking the leaders of all parties in the House and the Minister of Democratic Institutions to support the changes when they arrive in the House of Commons.

We offer two recommendations regarding conflict resolution between the House of Commons and the Senate:

1. **The revival of the long-standing convention of holding conferences between the two Houses in times of deadlock.** We recommend conferences be reconstituted as a means of resolving dispute. Though it is nearly 70 years since they have been attempted, they offer civil and transparent method of conflict resolution appropriate for the newly independent Senate. We suggest that when conferences are convened, there be equal members from the House and Senate represented.
2. **The legislated self-limitation of the Senate's absolute veto (excepting money bills and certain constitutional provisions) to a six-month suspensive veto.**

We recommend the Government Representative should convene and chair a weekly meeting to which all Independents as well as other Senators are invited. This should not be seen as a partisan activity, but one of assisting the cause of a better informed Senator.

We strongly recommend that the Privy Council Office provide the same level of support to the Government Representative as it did to the Government Leader beforehand.

THE SENATE AT CREATION

AT THE QUEBEC CITY CONSTITUTIONAL conference of 1864, where the real horse-trading of Confederation occurred in the weeks before the more famous Charlottetown conference, the issue of the Senate, and most particularly from where and in what numbers its members would be selected, occupied nearly six of 14 days spent on the details of union, according to one historical account. Make no mistake: without the Senate to provide a regionally based check and balance on the popularly elected House of Commons, the Confederation project would have failed. "On no other condition could we have advanced a step," Upper Canada's George Brown said of the regionally based and appointed Senate that emerged.

Equality of representation of the regions of Canada (the Maritimes, Quebec, Ontario and later the West) was fundamental to the original intent of the Senate. So was its appointed nature. The Fathers of Confederation determined it best to have an ostensibly equal upper chamber "of sober second thought," without injecting it with the same political legitimacy as the House of Commons. This was subtle genius. The Senate could block legislation when necessary, but it would need to pick its spots with exquisite judiciousness.

Meanwhile, its regional equality would assure that small provinces and the French-Canadian minority, who constituted the majority in Lower Canada (pre-Confederation Quebec), could never be swamped by the majority in the House of Commons from Ontario and the West. The Senate was thus designed to serve as a brake on the tyranny of the majority. Such was the sensitivity of this issue that Prince Edward Island remained outside of Canada for six years because its demand for equal provincial rather than equal regional representation had not been met.

Two dozen Senators were appointed per region. Constitutionalizing minimum age and property requirements for Senators was designed as a means to protect the role of the elites versus the more varied backgrounds of the elected representatives in the Commons. Thus the Senate was specifically designed to be different in both economic and demographic representations from the House of Commons, as well as being its legal, but not political, equivalent (on all but money bills).

Of the painstaking design of this regional and appointed Senate, John A. Macdonald stated:

> "There would be no use of an Upper House, if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the Lower House. It would be of no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, but it will never set itself in opposition against the deliberate and understood wishes of the people."

Many of the principles underlying our recommendations in this report for a high-functioning, contemporary, independent Senate are consistent with Macdonald's statement of its intent. 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.

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 Senate of Canada is modelled on the House of Lords in that its members are appointed, not elected, and in that the British North America Act sets its powers in relation to those exercised by the Parliament of the United Kingdom. Both upper houses tend to limit their interventions to exceptional cases of contentious legislation pushed through the Commons without appropriate oversight or seen to be tainted by the overly partisan desires of a single party.

That said, the two upper bodies have, from the beginning, reflected differences as well as similarities: unlike the Senate, there is no fixed number of Lords, nor is the House of Lords necessarily the main professional commitment of all its nearly 800 members. As well, the House of Lords is always home to at least several government ministers, unlike the Canadian Senate, and, critically, there is no regional factor to representation. And while both institutions serve as a check on the popularly elected House of Commons, the power of the Lords has been limited since 1911 to the ability to delay, but not kill, legis-

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lation—the so-called suspensive veto. The Canadian Senate knows no such limits. Its only legal constraints apply to the fact that money bills must originate in the House of Commons and that certain amendments to the Constitution, under the Constitution Act, 1982, can be made without the Senate's consent.

In its move toward the selection of independent Senators, Canada is once more following a path cut by the House of Lords, yet again with its own particularities. In Canada, the selection of independent Senators is based on region and province, unlike the U.K. As well, the appointment committees are composed of political outsiders in Canada, whereas the committee selection for the new members of the House of Lords in the U.K. is made up primarily of representatives from parties with seats in the House of Commons.

While Prime Minister Trudeau is driving toward a fully non-partisan Senate, the House of Lords is more of a hybrid system, with partisan representatives drawn from political parties as well as the so-called crossbenchers that come from a broader swath of society. These independents are relegated to a permanent minority in the Lords whereas they are intended to become a majority in Canada. Nonetheless, all parties to the U.K. selection process agree that no partisan grouping should ever again constitute a majority in the Lords, thus denying a political party the convenience of a majority in both chambers.

For Canada's growing ranks of Independent Senators, there are some lessons worth embracing. Similar to Canada's Independents, their U.K. equivalents are not subject to a party whip on votes. They are free to make up their minds on a case-by-case basis. The crossbenchers do, however, gather at a weekly meeting chaired by a Convenor, where matters of common interest can be raised and coordination effected. The position exists, as the name implies, not to exercise power over the crossbenchers but to help bring a semblance of order. The Convenor is elected by the crossbenchers. We will recommend a different system for the Canadian Senate, one that takes into consideration that it is to become, over time, a body without party representation in its ranks.

The vetting process for future members of the House of Lords is, again, both similar and dissimilar to the process instituted by Prime Minister Trudeau. Unlike Canada, the independent nomination commission in the U.K. is made up of representatives of all parties in the House of Commons as well as some non-aligned members. Perhaps the most salient point is the acceptance by all of the principle that no party should hold a majority in the Lords, which theoretically would compromise its independence in rendering judgment on legislation originating in the House of Commons. This comes back to the essential point that the Senate cannot be allowed to devolve into a subsidiary of the executive or of the House of Commons, although by dint of being appointed, the Senate should generally subordinate itself to the House.

One small footnote to our enthusiasm for an independent Senate: it is not the intention of this report to suggest that a partisan background is necessarily bad, only that a partisan Senate is bad. Both authors served as partisans during their political careers and both sat in partisan caucuses as Senators and both are distressed by how partisanship, which always existed, has grown out of control in the Senate.

That does not mean that those who have served in partisan capacities should be excluded from consideration within the appointment process. It would be irony of the highest order if the only Canadians not in the running for appointment as a Senator were those who happened to choose active forms of civic engagement within our competitive political system.

The new custodians of appointments, under the leadership of the distinguished former public servant Huguette Labelle, have identified six merit-based criteria for applicants. The second is non-partisanship. It reads:

Individuals must demonstrate to the Advisory Board that they have the ability to bring a perspective and contribution to the work of the Senate that is independent and non-partisan. They will also have to disclose any political involvement and activities. Past political activities would not disqualify an applicant.

While we concur that past political activities should not disqualify an applicant, the tone of the wording, including having 'to disclose any political involvement and activities' is hardly embracing.

We suggest that greater clarity be brought to the thinking of the appointments committee and Prime Minister on the role of past partisans in an independent Senate.

THE DRIVE TO **NON-CONSTITUTIONAL REFORM**

THREE FACTORS OVERALL HAVE PROPELLED Prime Minister Trudeau to launch the Canadian Senate on its bold experiment in independence: first, the disrepute into which the Senate had fallen over the last several decades; second, the highly publicized if largely erroneous accusations of spending abuses by certain Senators that dominated the political media from 2012–16 and; third, the Senate reference case brought by a Harper government intent on unilaterally reforming the constitutionally protected aspects of the Senate.

The Supreme Court decision of April 25, 2014 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 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.

While referendums could certainly be held on abolition or substantive reform, they would not be binding. Only resolutions passed through the federal Parliament and the requisite number of provincial legislatures would meet the constitutional test for reform. Clearly, change within the Constitution was the only path for meaningful change, albeit a perilous path to negotiate. And abolition was a non-starter. Yet doing nothing also represented a politically unacceptable route.

The Supreme Court decision of April 25, 2014 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 unilateralism.

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."

The Court, according to Simon Fraser University political scientist Andrew Heard, did leave room for the Parliament of Canada to effect some limited changes on its own, as long as these were not seen to have an impact on provincial prerogatives.

In a November 2015 article in Constitutional Forum, Professor Heard writes: "Within these parameters, non-constitutional change may still be possible to address three areas of needed reform: appointments, standards of conduct for Senators and the exercise of the Senate's leg-

islative powers. Certain revisions can be undertaken if they are intended to improve the quality of appointments, foster the independence of the chamber, and to ensure that the Senate is a complement to the Commons rather than a rival." Heard argues—and we agree—that such changes should be achievable without resort to constitutional amendment if they are aimed at "fostering the accepted nature of the Senate as an appointed body that is to provide sober second thought in the legislative process."

It is worth nothing that this same logic had applied in 1965, long before the 1982 Constitution, when Prime Minister Lester Pearson changed the length of service for a Senator to 75 from life through a simple Act of Parliament.

It was not the Supreme Court decision that influenced 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 attached 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."

At a later press conference, he went on to say that taken together with patronage, partisanship within the Senate "is a powerful, negative force. It reinforces the prime minister's power instead of checking it." He declared in favour of the non-partisan body now under construction, one "composed merely of thoughtful individuals representing the varied values, perspectives and identities of this great country. Independent from any particular political brand."

HOW PARTISANSHIP WEAKENED THE CANADIAN SENATE

WE AGREE THAT MOUNTING PARTISANSHIP has undermined the effectiveness of the Senate, reducing its standing with the public, the self-respect of its members and its capacity to meet its constitutional obligations. While the original plan for the Senate ensconced in the Constitution did not exclude partisanship in aspects of the appointment and its operational conventions and rules, what has developed is a gross distortion of the original intent of the 1864 Quebec conference. It isn't just the appointments process. The present Parliament of Canada Act creates a partisan bias in the Senate operations and compensation rules.

If "thoughtful individuals representing the varied values, perspectives and identities of this great country" are to populate the Senate, members will need to move with haste to alter the existing rules. Otherwise, an independent Senate will become a failed experiment. In its 2014 reference ruling, the Supreme Court reminded us that "the framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives." This must be the objective of changes to the Senate rules.

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 now 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 necessary for the good functioning of an independent Senate. Indeed, the partisan structure of the current Orders of the Senate leaves zero 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.

This partisan structure not only militates against independent sober second thought, but has inexorably led the Senate to become a partisan echo chamber of the House of Commons. Indeed, a 'partisanship uber alles' exists in the operational assumptions of the Senate.

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.

The situation was made worse by the partisan posturing of the Internal Economy Committee of the Senate, often under the direction of the Prime Minister's Office, which found it easier to throw people under the bus rather than fix the advantageous laxness on spending and travel. A judgment reached in open court finally called out this self-reverential and self-protective partisan excess, although not first without serious damage to the reputations of individuals and the institution.

BACK TO **REGIONAL ROOTS**

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 how best to 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. As explained above, 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, 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.

This is a separate question from whom Senators choose to fraternize with for policy and political purposes. All kinds of voluntary ginger groupings might arise in the new Senate: a military affairs group; a LGBTQ group; a minority language rights group; a free enterprise group; an anti-poverty group; even the politically like-minded. The coming together of those with common interests is all to the good. But it is not a sustainable base upon which the Senate should organize itself. The regional factor is fundamental to the Senate's founding purpose.

UNITED THE INDEPENDENTS MUST STAND — AT LEAST FOR A MOMENT

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 required rule changes to assure their relevance.

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 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.

Furthermore, we recommend the regional convenors meet weekly with the Government Representative in the Senate, the Government Liaison and the Speaker of the Senate.

This group will constitute the Senior Council within the Senate and may or may not select another committee to enforce rules and standards agreed to by Senators. This council will also be tasked with ensuring committees are appropriately populated in terms of gender and minorities representation, something impossible for an individual regional convenor to accomplish. (The Government Liaison is a Senator who gives the Government Representative in the Senate up-to-date information on the likely results of forthcoming votes in the Senate and which senators will be voting for and against the forthcoming motion. It is essentially the job performed in the past by a party whip. Of course, under the new structure there are no party members to whip.

We also recommend that the Senior Council, subject to the support of the majority of regional caucuses, quickly move to set compensation levels for the newly named positions as well as budgets for their offices in keeping with

levels established for partisan officers in the previous rules. These should be subject to annual review.

In opting for regional caucuses as the Senate's primary organizing principle, we implicitly endorse the March 2014 motion of the same nature brought forth by former Liberal and now Independent Senator Pierrette Ringuette. In the following pages, we will express our concurrence with others among her proposals, as well as additional internal reforms brought forth by other Senators over the years. 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). While we recognize that the original allocations of seats is open to attack in terms of Atlantic Canada's representation and that considerable discussion has occurred in recent decades of whether Canada consists of four or five regions, one of the principles of this paper is to embrace the possible rather than engaging in matters that would require constitutional change.

As for the three Senators from Northern Canada, we recommend they be given a one-time election as to which caucus to join.

Many past proposals have stated they should sit with the West, but this does not adequately account for the creation of Nunavut in 1999.

We part company with Sen. Ringuette's motion when it comes to the composition of her proposed Upper House Affairs committee, which, in fairness, was put forth before the changes that created the position of a Government Representative in the Senate. We believe that gathering in regional caucuses is consistent with the original intent of the founders of Confederation. It will be a big help in getting the Senate to set aside partisan excess in favour of a direct and dispassionate revising and reviewing role. It should go a long way toward reversing the unproductive approach of the Senate as a mirror of the partisan divisions in the House of Commons.

RULE CHANGES OF A STATUTORY NATURE

ALL THIS MAY COME TO PASS AS A RESULT OF THE report of the Special Senate Committee on Modernization. The committee is hearing from experts on the impact going forward of an independent Senate, how it would work, which rules require change, whether the Speaker and committee chairs should be elected and whether any rule changes require amending the Parliament of Canada Act. We urge the authors of the report and its recommendations to complete their work on a timely basis and address the necessary elements for Independent Senators to participate fully and proportionately based on their numbers both in the chamber and in committee.

In the meantime, we will offer further specific recommendations in the hopes it will be useful to the Modernization Committee and the Senate as a whole.

In this we make five recommendations we believe can be effected either within the Senate itself or by an Act of Parliament passed by both houses and the Crown, as was the case with the 1965 elimination of new life appointments for Senators:

1. **That the Speaker of the Senate be chosen by Senators themselves by secret ballot**, as Members of Parliament in the House of Commons do, rather than by the current practice of appointment by the Prime Minister advising the Governor General.

2 **That standing committee chairs be selected by the committee membership** as has become the practice in the House of Commons and that they serve for the full-term of the Parliament unless otherwise removed by a disciplinary process.

3 **That question period in the Senate, which was always severely limited in effectiveness by the presence in the chamber of a single government minister, be refashioned altogether** given the elimination of the position of Government Leader in the Senate. Instead, question period should be organized around three purposes: questioning of committee chairs; questioning of the Government Representative in the Senate on plans for government legislation; the new practice of weekly questioning of invited government ministers, as designated by the Senate. We are also impressed by the quality and depth of information gathering that has flowed from government ministers who are sponsoring legislation appearing before the Senate in committee-of-the-whole. This process is well grounded in precedent created by a 1947 rule change to permit a minister from the House of Commons to take part in a Senate debate in such circumstances.

4 **That the minimum age requirement of 30 for a Senator be scrapped.** While in most cases, we prefer a Senate of experience across a wide spectrum of knowledge and pursuits, we see no need for official age discrimination.

5 **Removal of the requirement that Senators have a personal net worth of at least $4,000.** Initially imposed to obstruct non-elites from entering the Senate, the logic today is as anachronistic as the sum is paltry. Either way, the principle is bad. The Senate legal affairs committee called for the removal of this condition in 1980 and the Supreme Court opened the door in its reference decision, finding: "It is precisely the type of amendment that the framers of the Constitution Act, 1982 intended to capture" under the unilateral federal amending procedure in that it updates the workings of the Senate "without affecting the institution's fundamental nature and role."

We recognize that some of these changes require amendments to the Parliament of Canada Act.

We recommend the Senate be the initiator of the necessary legislative measures, introducing them first in the upper chamber while asking the leaders of all parties in the House and the Minister of Democratic Institutions to support the changes when they arrive in the House of Commons.

SHARPENING THE TOOLS OF **CONFLICT RESOLUTION**

THE SENATE RARELY MAKES THE NEWS OTHER than through scandal or on those occasions when it challenges the legislative wishes of the House of Commons, which usually also means the legislative wishes of the Prime Minister's Office. Like most news, these incidents tend to be the exception rather than the rule. Either way, they have amplified the narrative of the Senate as a blocking institution.

The facts don't support this conclusion. Studies show the Senate tends to amend approximately five to 10 per cent of the bills that come its way per session. Either because of reticence associated with its unelected status or its partisan joining at the hip with the House of Commons in times where the majority in the Senate is the same as in the House, the Senate has historically practiced extreme self-restraint.

There are some exceptions, most notably during the term of Prime Minister Brian Mulroney and the Senate Liberals under the leadership of Allan MacEachen. But even in these epic battles over free trade and the GST, the Senate stuck to long-held conventions governing the legitimacy of intervention, including the support for legislation that has been subjected to the voters.

In the case of free trade, the handling of the Mulroney government's free trade bill by the still-majority Senate Liberals in 1988 illustrates the point. To the extent the issue had been discussed during the 1984 election campaign, it was for Progressive Conservative Leader Brian Mulroney to deny having any plans in that direction. Once in government, circumstances changed. A Royal Commission convened when Pierre Trudeau was prime minister reported in 1985 with free trade as its main recommendation. A supportive president occupied the White House. Various sectoral free trade talks were going nowhere.

Negotiations with the United States were completed in late 1987 and President Ronald Reagan and Prime Minister Mulroney signed the agreement in January, subject to ratification. The issue became extremely contentious in Canada, but with his large majority, Mulroney pushed the free trade bill through the Commons.

The Senate, still in the control of the Liberals, was a different story. It refused to pass the bill and demanded the free trade agreement be put to the test of an election. Mulroney accused the Senate of "hijacking the rights of the House of Commons." The Senate continued to hold the free trade bill ransom and Mulroney, in the fourth year of his mandate in any case, called an election and won. He recalled Parliament and the Free Trade Agreement Act again reached the Senate, where it was dutifully passed. Whatever the various motives, Parliament had done its job as its architects had intended.

In more recent times, the Senate killed an NDP-sponsored private member's climate change bill in 2010 that had been passed by a majority of the House of Commons not once but twice (the first time it died on the order paper when the 2008 election was called). It enjoyed the support of all parties but the Conservatives, then leading a minority government. Although still lacking a majority in the upper chamber, Conservative Senators called a snap vote on the Climate Change Accountability Act while many Liberals were absent, succeeding in using the Senate to do what the government could not in the House.

The defeat of the climate change bill raised anew accusations of the Senate's illegitimacy. "To take power that doesn't rightfully belong to them to kill a bill that has been adopted by a majority of the House of Commons representing a majority of Canadians is as wrong as it gets when it comes to democracy in this country," NDP leader Jack Layton said at the time. (This is the kind of situation that would be better addressed by our conflict resolution recommendations stated further down in this report.)

An independent Senate can be expected, if anything, to be on the more challenging end of the spectrum to the House of Commons. We already saw it testing the bound-

aries in the spring of 2016 in its sweeping rejection of an RCMP unionization bill and its handling of Bill C-14, the assisted suicide legislation.

In the latter, it shook off the pressure of ministers and court-imposed deadlines and introduced seven amendments. Some of these were accepted when the bill was sent back to the House of Commons—such as ensuring consultation on palliative-care options—but the House stood fast that assisted dying be permitted only for those near the end of their life. When the bill came back to the Senate for a second time, the upper house acquiesced to the will of the popularly elected House on this point despite its misgivings.

Again, that is the Senate striking an historical balance: seeking improvements to a hurried and controversial bill and ultimately accepting its place as a complementary chamber of sober second thought and not a rival to the House of Commons. In the RCMP bill, it will take until the fall of 2016 to see how or whether the two houses reconcile their differing views. The Government Representative in the Senate explained the government needs a "period of reflection" to "carefully consider the chamber's advice."

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 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.

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 Con-

federation 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. They have been supplanted by official "messages" between the House and the Senate and appearances by ministers before House and Senate committees and, more recently in the Senate, ministerial appearances before Committee of the Whole.

Former Senate Speaker Dan Hays is a longtime advocate of a return to conferences. According to a 2008 article he wrote in Canadian Parliamentary Review, the Senate attempted as recently as 1987 in regards to a drug patent bill and 1990 with respect to a contentious unemployment bill to seek conferences with the Commons. In both cases, they were rejected amidst an unusual amount of partisan ill-will between the two chambers.

"The usual explanation as to why conference committees have fallen into disuse is that present day procedures now regularly include official messages as to the details of the amendments to which a chamber is objecting and the frequent appearance of ministers before committees of the House and Senate," Hays has written. "Such procedures are poor substitutes for a process whereby parliamentarians representing the different social bases of the Canadian polity can meet face-to-face in an open public forum to discuss concerns on important policy matters."

In the 1947 case, the House and Senate were deadlocked over two amendments to the Criminal Code, one dealing with public disturbances and the other with the use of a weapon in the commission of a crime. On July 14, a conference was requested by the House and accepted by the Senate. Three representatives of each met the following day and resolved the differences.

The advent of an independent Senate and the prospect of more impasses regarding amendments to legislation makes this a propitious time to revisit the vehicle of conferences. According to the Parliament of Canada website, conferences can be initiated by either house, although usually the sponsoring minister or member would propose the Senate be invited to participate in a conference to resolve differences on disputed amendments.

If the invited House agrees to participate, the time, place and names of conference members (called managers) are exchanged. The conference can lead to three possible outcomes, according to the website:

- **a compromise is reached**—one of the representatives of the House tables a report in the House of Commons concerning the conference and moves that the report be approved and a message be sent to the Senate so informing the Senate;
- **the House accepts the Senate amendments or the Senate accepts the House amendments**, as the case may be—if one House decides not to press for its amendments and to accept those of the other House, it sends a message to that effect to its counterpart; or

- **the conference fails**—the matter is closed and the bill remains on the Order Paper where it dies at the end of the session; no new bill may be introduced in the Commons on the same subject matter and containing similar provisions.

We agree with Sen. Hays, who has argued that a revitalized conference procedure would allow the Senate to engage in a more meaningful and open dialogue with the House of Commons, particularly on controversial legislation.

We recommend conferences be reconstituted as a means of resolving dispute.

Though it is nearly 70 years since they have been attempted, they offer civil and transparent method of conflict resolution appropriate for the newly independent Senate. We suggest that when conferences are convened, there be equal members from the House and Senate represented.

We disagree, as we will show in a moment, with the notion that a failed conference necessarily must mean the disputed legislation would die on the order paper and that no new similar bill can be introduced. The stakes must be high in any negotiation. The public attention inevitably generated by a conference would help raise tension on all sides. But should resolution prove elusive, the Senate should have a second tool in its conflict resolution kit rather than see legislation go into a state of suspended animation.

2 The legislated self-limitation of the Senate's absolute veto (excepting money bills and certain constitutional provisions) to a six-month suspensive veto.

In the early 1980s, the Senate Standing Committee on Legal and Constitutional Affairs took a comprehensive look at its own institution in the context of the broader constitutional examinations of the era. While it found cause for the perpetuation of the institution amid calls for major reforms, it also cast doubts on its own greatest power, the right of the Senate to impose an absolute veto on most pieces of legislation—a right denied to the House of Lords in the U.K. since reforms made in 1911.

It found the Senate's power to veto legislation passed by the elected House unwarranted in a democratic society. Not only did it feel the Senate could and should meet its legislative duties through a six-month suspensive veto, it argued this could increase Senate activism since a suspensive veto would be a less draconian step than the option of an absolute veto.

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.

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

The Senate could resort to the suspensive veto when either a conference is rejected by the House or ends in failure. In those exceptionally rare instances when the Senate feels compelled to frustrate the will of the Commons, the suspensive veto would compel all players to think again. The Senate would have time to put its case squarely before the public. If, when the six months were up, the government and the House of Commons were so convinced of public support for the bill that they insisted on re-passing it in the House of Commons, then the Senate would have done its duty and could acquiesce with a clear conscience. It would be essential, of course, that the bill be re-introduced in the House of Commons and re-passed there. A mere lapse of six months, after which the bill would come into effect without any re-consideration by the Commons, would diminish the political purpose of the suspensive veto.

Looking again to Westminster for its experience, the suspensive veto appears to have done its job, allowing the Lords to be both more activist while not over-playing their appointed hand. Moreover, there is already precedent in Canada. The Constitution Act, 1982 provides that for constitutional amendments the Senate has only a suspensive veto of 180 days. In the absence of Senate agreement, the House of Commons has only to wait out the 180 days and then adopt the constitutional amendment a second time.

The beauty of the suspensive veto, as alluded to by the 1980 study, is that by its very usage it encourages the public to take a closer look at the issues at play. This will usually increase the political pressure on the government to justify its actions. The Commons ultimately holds the hammer, as it should. But not without an appropriate political risk on contentious legislation.

THE NEW KID IN THE SANDBOX

THE FIRST RESPONDENT IN AVOIDING conflicts between the government and the Senate is the newly created Government Representative in the Senate, which replaces the historic position of Government Leader in the Senate. Unlike the Leader, the Representative is not a member of the governing party or cabinet, yet is called upon to explain the government and its plans to the Senate. The current incumbent was among the first seven Independent Senators selected in January 2016 via the new appointments process.

There has been much huffing and puffing over the appropriate prerogatives and budgets of the position. Suffice it to say we see no justification for denying the Government Representative in the Senate the same treatment formerly accorded the Government Leader. As for the argument that he is less deserving because he is not a member of cabinet, former Prime Minister Harper's last Government House Leader was denied a cabinet seat as part of the political fallout from the mismanagement of Senate spending controversies but retained his budget and access to advice from the Privy Council Office. While the current partisan Senate leadership has partially acceded to the requests of the Government Representative for greater funds, the process is unsound. They should not be making such determinations, as we've discussed in our recommended rule changes. It is certainly within the realm of reason that the job of the Government Representative in having to marshal the forces of an independent Senate to pass legislation without resort to the whip makes a case for more staff and budget. The job is a difficult one. As the only liaison with the government, the Representative stands at the centre of the relationships among Senate, House and cabinet.

All Senators hold an interest in being well informed of government plans, arming them with the necessary information with which to make their own determinations. Though not elected by the other independent Senators, the Government Representative serves a function akin to that of the Convenor in the U.K. Parliament, and then much more again given the absence of a Government Leader in the Senate.

We recommend the Government Representative should convene and chair a weekly meeting to which all Independents as well as other Senators are invited. This should not be seen as a partisan activity, but one of assisting the cause of a better informed Senator.

One of the points of uncertainty in the early days of the new Senate is whether the Privy Council Office should support the Government Representative as it has in the past the Government Leader. The argument against is that he is not a member of cabinet. This seems to us a thin line of logic. The Government Representative is sworn in as a Privy Councillor—privy to the secrets of Her Majesty—precisely because such a function is required by the government within the Senate. He is often briefed by cabinet and he carries forth the government's agenda within the Senate.

A new play is unfolding in the upper chamber and it is not unnatural that many actors are struggling to learn their new roles.

In this context, we strongly recommend that the Privy Council Office provide the same level of support to the Government Representative as it did to the Government Leader beforehand.

An independent Senate is not a Senate in exile from the other institutions of Parliament and government. It remains a critical partner in governing and requires at least one member, if not more, with access to the professional advice of the public service.

THE FALLACY OF THE MAJORITY

IT IS IMPORTANT TO NOTE THAT THE government of the day in the United Kingdom has not enjoyed a working majority in the House of Lords for more than a quarter century. Still, the business of Parliament gets done.

It is sometimes asserted in Canada that a government needs majority support in the Senate to get its program passed, and that an independent Senate renders governing difficult if not impossible. This proves to be untrue. In 25 of the 59 years since John Diefenbaker upset the long-entrenched Liberals in 1957, Canadian governments have operated with minorities in the Senate. In the cases of Diefenbaker and Brian Mulroney, it took seven years into their prime ministerships until their appointment of partisans finally secured them a Senate majority. For Stephen Harper, it took five years and for Jean Chretien four. These governments all managed to pass important legislation and although they were sometimes frustrated, the functioning of Parliament was not notably impaired.

Indeed, it can be argued that the Senate has often been at its best in fulfilling John A. Macdonald's vision of usefulness during these periods of co-habitation with an Opposition majority in the Senate. The Senate isn't often a factor in obstructing legislation, but it has served as a check on the kind of arbitrary approach that sometimes befalls governments with a high concentration of power.

Macdonald, in the Confederation debates, set out the principle that the upper chamber "of sober second thought" should not oppose the express wishes of the people. The Senate has taken up this point by convention; there has long been tacit concurrence among Senators that they will refrain from blocking government legislation deriving from an election platform, partisanship notwithstanding.

There is no reason to believe this principle will wither under an independent Senate. The task of securing Parliamentary support for a bill may well grow more challenging—as it might under a different electoral system for the House of Commons, too—but changing the laws of the land is not meant to be an easy proposition. It requires the kind of careful consideration and sometimes-studious compromise the Senate was designed to inject into the process.

Co-habitation With Senate Majority Oppositions

- When **John Diefenbaker** ended 22 years of Liberal rule on June 10, 1957, there were only 3 Progressive Conservative Senators vs. 78 Liberals, 5 others and 16 vacancies. When Diefenbaker was defeated in April 1963, he still faced a Liberal majority in the Senate by 59 to 36 with 4 others and 3 vacancies.

- When **Joe Clark** took office in May 1979, he faced 73 Liberals to his 18 PCs, 4 others and 9 vacancies. When he was defeated the following February, the standings were Liberals 71, PCs 27, 4 others and 2 vacancies.

- When **Brian Mulroney** won office in September 1984, he faced similar numbers to Clark: Liberals 74, PCs 23, 3 others and 1 vacancy. He would not secure a plurality of Senators until his extraordinary invocation—the only time in Canadian history—of the right to appoint up to eight extra Senators, two from each region. In September 1990, the Conservatives had 54 Senators to 52 for the Liberals, and 6 others. Mulroney did not secure an outright majority in the Senate until September 1991.

- When **Jean Chretien** won election in October 1993, the standings were PCs 58, Liberals 41 and 5 Independents. The Liberals edged into a plurality in February 1996 and gained a majority in September 1997. When Stephen Harper took power in January 2006, his new Conservative Party of Canada had 23 Senators vs. 67 Liberals, 4 Progressive Conservatives and 6 others. CPC gained a plurality in January 2010 and a majority in December 2010 with 54, 47 Liberals and 4 others.

- When **Justin Trudeau** won election, the standings were CPC 47, Liberals 29, others 7 and there were 22 vacancies. The official record showed 29 Liberals, but Trudeau had tossed Liberal Senators out of caucus in 2014. He has since appointed only Independents.

THE CASE FOR THE SENATE

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. In so doing, they are working off a platform that is often under-appreciated in terms of his past successes.

The Senate's shortcomings are well enumerated. In the eyes of some, the Senate is an illegitimate institution, end of story. Yet, as we have shown, it is an institution that is here to stay. It not only has a promising future but an accomplished past, as can be seen in fulfilling these essential functions:

A CHECK ON HOUSE EXCESSES

Even in recent years, the Senate has served as a built-in safety valve for excesses coming from the House:

- **Bill C-377:** The first attempt to push through Bill C-377, the anti-union Private Members' bill passed by the Conservative majority in the House in 2012, with little in the way of thorough debate. In 2013, the Senate—including 16 members of the Conservative Senate caucus—passed amendments increasing many of the trigger points for the bill's mandated disclosures of union finances and salaries to the point where the sponsoring MP said the changes "have the effect of gutting C-377."

- **Bill C-10:** Another example can be found in Bill C-10, a large and complex tax will that arrived in the Senate in December 2007 after too hasty and too cursory an examination in the Commons. Catching up with one of the many obscure passages in the bill, the film industry discovered it conferred authority on the Minister of Canadian Heritage to arbitrarily deny a critical tax credit to any Canadian film or TV production deemed "contrary to public policy" even after approvals had been granted and a project complete. The Standing Senate Committee on Banking, Trade and Commerce studied the clause in question and other under-examined aspects of the bill, which ultimately died on the order paper with the calling of the 2008 general election.

- **Bill C-69:** Finally, for the purposes of this argument, the Senate defeated Bill C-69, a 1995 bill that would have delayed the normal course redistribution of election boundaries till have the next election. This was deemed to confer partisan advantage on the then governing Liberals.

STUDYING MAJOR POLICY ISSUES

Although no reference is made in the Constitution to the role of Senate Committees in undertaking studies of major public policy issues, often politically sensitive ones, the fact is that such studies have often constituted the Senate's most useful contributions in the 149 years of its existence. Some of these studies amounted to quasi-Royal Commissions. Frequently they sparked and informed public debate which, over time, led to new government programs and legislation. Sometimes, they led to more immediate changes.

Governments have also used the Senate over the years as a place to originate complex and highly technical pieces of legislation, both because of the greater luxury of deliberative time the Senate enjoys and the fact is has often contained subject matter experts among its members. Senate committees have been involved in pre-study of bills relating to such subjects as bankruptcy and banking, sometimes with the concurrence of the government and sometimes at the instigation of the Senate giving a committee a head start on an issue while it is still in the House of Commons. There are instances, as well, of joint House-Senate committees together examining major public policy matters.

A sampling of the many special reports produced in the Senate that have made promoted public understanding and debate would include:

- **Mass Media (1970)**
- **Poverty in Canada (1971)**
- **Legalization of Marijuana (1972)**
- **the Energy Emissions Crisis (1993)**
- **Euthanasia and Assisted Suicide (1995)**
- **Social Cohesion (1999)**
- **Aboriginal Governance (2000).**

The co-authors of this report played active investigative roles during their time in the Senate, including former Senator Segal's chairmanship of the Standing Senate Committee on Foreign Affairs and International Trade 2007 report, "Overcoming 40 Years of Failure: A New Road Map for Sub-Saharan Africa," which called for the disbanding of CIDA, as ultimately occurred. Former Senator Kirby was the author of the groundbreaking 2006 report, "Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada," which led directly to the creation of the Mental Health Commission of Canada.

It would be a serious and indeed very unfortunate mistake if the newly structured Senate did not continue to undertake major policy studies either in committee or, less formally, in ginger groups that would focus on major public policies, ideally in areas too politically sensitive and difficult for governments to take on. The tricky politics of the issue in question need be of no concern to members of a Senate committee since they are not partisan and do not have to run in an election, and the reports of these committees would be very useful in promoting public debate on the issue.

With the wide range of expertise available among candidates becoming Senators under the new appointment process, these new policy groupings should have no difficulty in carrying on the most noble tradition of the Senate. A chamber driven by voices that were appointed for reasons of expertise not partisan connections and for regional, demographic, socio-economic and gender representation would more closely realize the public's legitimate expectations vis-a-vis both the form and function of the Senate.

CONCLUSION

A CHAMBER WITH A PLURALITY OF INDEPENDENT Senators, furnished with modernized rules that reflect the new composition of the Senate and with a Government Representative in the Senate who, while guaranteeing full debate of government bills passed by the Commons cannot guarantee their passage, will, over time, change the relationship for the better with both the House of Commons and the government.

As the U.K. example with the House of Lords indicates, this change need not be obstructive. This more sober, thoughtful chamber can also help relieve pressure from the faster-moving House of Commons, whose members can never fully escape political intrigue and must attend regularly to constituency duties. Governments can emulate the best of the past by more frequently seeking pre-study on seminal bills and encouraging Senators to turn their attention to policy areas in need of a deeper dive.

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. The incremental pressure on Canada's powerful cabinet-led majority governments is not a bad thing, especially in the context of less partisanship in the upper house. Moreover, with the new tool of a conference and the limits on the Senate's absolute veto to a six-month suspensive veto and the fact that any such setback for the government does not constitute a question of confidence, the new independent Senate has the opportunity to play the robust yet respectful role anticipated by its founders and reiterated by the Supreme Court—that of calmly giving second thought to legislation in complement to, but not under the control of, the elected House of Commons. ▮

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