

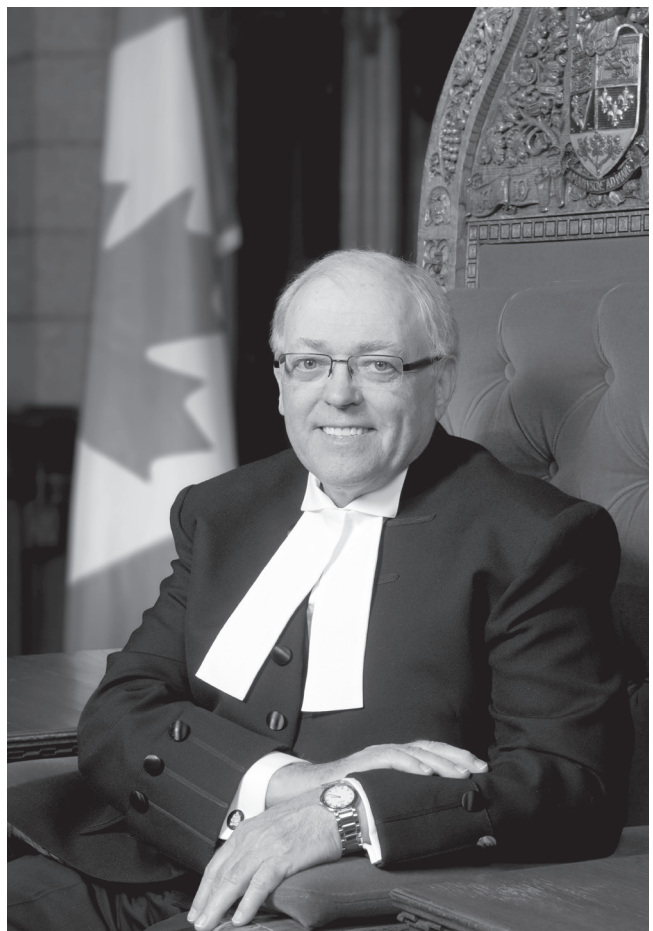
The New Senate: Still in Transition

Over the course of the past two years, a confluence of events has dramatically altered Canada's Senate. The upper chamber's response to the Auditor General's Report on Senators' Expenses, the absence of a government caucus in the Senate at the start of the 42nd Parliament, and a new appointment process that brought in a significant number of Independent senators have all contributed to institutional change. In this article, based on his remarks to the 34th Canadian Presiding Officers Conference, Senator George J. Furey provides some observations of the impact of these events from his unique vantage point as Speaker. While acknowledging that these changes have created some tensions, he concludes that this transition can be defined by openness, flexibility, adaptability and a general willingness to move forward slowly without forcing permanent rule changes until the landscape is better defined.

Hon. George J. Furey

After decades of reform proposals, a recent change has had a significant impact on the Senate. This change is reducing the partisan character of the Senate and making it a more independent, non-affiliated and deliberative body. What is curious about this change, is that it was achieved by non-constitutional means.

For years, proposals to reform the Senate to make it elected, to limit the mandate and to change the level of representation of each province went nowhere and as we now know, for good reason. The Supreme Court of Canada's decision on the Senate reference in April 2014, noted that any substantive reform of the Senate along these lines would require at a minimum support of seven provinces representing 50 per cent of the Canadian population. The abolition of the Senate would require unanimity. None of this is likely to happen soon. Yet a significant change that has already improved the image of the Senate was achieved by an approach taken by the current government to implement a new non-partisan, merit-based process for Senate appointments. This change did not require any sort of statutory approval, but was done within the framework of the Prime Minister's Office.



Hon. George J. Furey

The Honourable George J. Furey is an unaffiliated senator from Newfoundland and Labrador. He was appointed to the upper chamber on the advice of Prime Minister Jean Chretien in 1999. He became Speaker of the Senate in 2015.

The new appointment process was applied to fill the large number of vacant seats left by the previous government. One might say that timing and circumstances lent themselves to the “real change” that was promised for the Senate. After all, there were 22 vacant seats in the Senate when Prime Minister Trudeau’s government took over in October 2015.

Another important factor reinforcing the impact of the large number of appointments was the fact that the Senate, itself, was addressing the fallout from the *Report of the Auditor General of Canada to the Senate of Canada on Senators’ Expenses*. In the lead-up to Autumn 2015, invaluable work had already been accomplished by the Standing Committee on Internal Economy, Budgets and Administration, to make the Senate more accountable and transparent.

The Senate now has an online attendance register, as well as a new expense disclosure model which provides more information on travel expenses, service contracts and hospitality expenses. We can expect that over the course of the coming year an independent oversight body will be established. The Communications Directorate has been completely restructured to provide more robust coverage of the work done by the Senate and senators.

Paralleling these changes, a Special Committee on Senate Modernization is considering methods to update our practices and to improve the Senate’s capacity to work as a complementary body in our bicameral parliament. The active work of this committee further supports that the senators themselves are fully engaged in the transformation they believe is underway.

We have a convergence of events that, combined, have been very dramatic. The senators themselves feel it and the media has taken notice of it.

Phase 1 – Early Transition (October 2015 to June 2016)

During the first four months of the 42nd Parliament, there was no government presence in the Senate. The Senate Independent Liberals generally helped with government business in an informal capacity. In the history of the Senate, this was an unprecedented role for a political group that did not participate in caucus with the governing party in the House of Commons. This situation gave rise to a question of privilege which I ruled against. In some ways, the ruling helped remind senators that they had already demonstrated

their capacity to be flexible and to adapt in ways to function and to work effectively.

For example, with respect to Question Period, we had no leader and no ministers to answer questions. We therefore decided to invite a minister once a week to respond to questions for 30 minutes. This practice has now become widely accepted and the period of time has been expanded to 40 minutes. The result has been a focused exchange between senators and the invited minister on the business of his or her portfolios.

Independent Advisory Board on Senate Appointments

In January 2016, the Independent Advisory Board on Senate Appointments, which was mandated to provide merit-based recommendations on Senate nominations, was established. During what was termed a “transitional phase”, the first seven Senate vacancies were filled in March 2016 after broad consultation between the Board and the three provinces with the greatest number of vacancies in the Senate (two from Manitoba, three from Ontario and two from Quebec). All of these new senators agreed to be independent and to not be aligned with a party caucus.

In some ways the appointment of the seven provided an indication of what might actually happen through this transformation. It in itself was not enough to challenge the Government/Opposition model, but it did give rise to tensions in the house.

Government Representation

As part of its commitment to an independent non-partisan Senate, the government chose to identify one of the new appointees as the Government Representative rather than the Government Leader. Senator Peter Harder was named to this position shortly after he was appointed. As Senator Harder explained, he is the voice of the government in the Senate and he is also the voice of the Senate to the government.

Shortly after Senator Harder assumed his responsibilities as Government Representative, two other senators were identified by him as Legislative Deputy to the Government Representative in the Senate and Government Liaison. The Legislative Deputy is Senator Diane Bellemare who was formerly a Conservative before becoming an Independent. The Government Liaison is Senator Grant Mitchell who was a Senate Liberal prior to becoming an Independent.

The appointment of these two prompted a point of order which led to a decision by me with respect to the flexibility in titles. In making my ruling, I also referenced decisions from the House of Commons. In this decision, contrary to normal practice, I chose to elaborate on examples demonstrating the history of this flexibility. The benefit of this approach was that it helped to diffuse the force of the debate and helped settle the house.

Bill C-14

The Senate's capacity to be flexible was not limited to this adaptation of titles in leadership positions. It was also used in working out the debate on third reading of C-14, the medically assisted dying bill. An exceptional meeting took place, involving all interested senators, to discuss how the debate at third reading should be structured. The result was a special order that allowed for open debate on third reading. Senators could intervene more than once and therefore move targeted amendments. This was very different from our normal third reading process but allowed for a coherent, focussed debate. It mimicked, in some ways, the clause-by-clause consideration that takes place in committees.

This experience turned out to be deeply rewarding for the entire Senate. We were proud of the quality of the debate for many reasons. There was a very healthy and frank exchange among the members that did not depend overtly on partisan identity but rather reflected the views of the senators who spoke. The debate on the bill was reasoned, measured and extremely personal for many. This could, perhaps, prove to be a model or example of how an independent Senate might behave when considering legislation and public policy.

Committee Memberships

While the Senate was able to deal with C-14 in a collaborative and effective way, some tensions in the Chamber were still apparent. Committee memberships and substitutions, for instance, were issues for senators who did not belong to a recognized party and did not fall under the responsibility of the whip of one of the parties or of the government. Under the current rules, the Independent senators, with no caucus, were in practice excluded from membership on committees. This was a cause for tension.

After extensive negotiations and discussions, the Selection Committee presented a report in June 2016, allocating two seats for Independents on each of

the Standing Committees. The report was adopted on division. The presence of seven additional Independents had started to shift the dynamics in the Chamber enough for a difference to be felt.

Independent vs. Non-affiliated

Even as we came up with some solutions, there remained other problems that didn't allow the tension to fully dissipate. During its work on the issue of proactive disclosure, the Internal Economy Committee made a decision that the Independents would be identified as non-affiliated in all related documents. Done without consultation – the Independents were annoyed. A senator raised a question of privilege which led to another decision in which I tried to mediate relations between the caucus senators and the Independents.

Phase 2 – Further Adaptations and the Second Wave (September 2016 to December 2016)

The Independent Senators Group

When the Senate resumed after the summer adjournment, the transition process continued. As of late September, 15 Independents had chosen to identify themselves with the Independent Senators Group (ISG), a group set up in March. As stated by the group's "Facilitator", a past Alberta PC cabinet minister, Senator Elaine McCoy, the members of the ISG have individual autonomy in exercising their parliamentary duties. Yet they understand that ensuring the Senate functions smoothly is a shared and collective responsibility. The group is now funded and has a secretariat to support its efforts. As of December 2016, the number of ISG members had risen to 33.

Innovations in Scroll Meetings

Logistically, the increased representation of the various groups in the Chamber had a significant change in the planning meetings for each sitting. During these meetings, representatives of the leaderships meet to review the Order Paper and Notice Paper, and share information about which items are likely to be spoken to and possibly decided.

With the changes that have occurred in the Senate, there is a much larger group of people participating in these meetings. In addition to the Legislative Deputy to the Government Representative, and the Deputy Leader of the Opposition, the Deputy Leader

of the Senate Liberals and a representative of the Independent Senators Group are also in attendance, along with their staff. While the senators continue to share information regarding how they anticipate the sitting unfolding, there is a significantly higher level of uncertainty and unpredictability, as the discipline imposed through political caucuses diminishes. This adds to the challenges of being Speaker, as I am often faced with unexpected events in the Chamber.

The Second Wave

The Senate composition changed dramatically in November and December 2016, when 20 new senators were appointed under the permanent phase of the appointment process, which was open to all Canadians. As the Independents grew to 42 members, pressure mounted for further adjustment to more fully and accurately reflect the emergence of the Independents as a large – and now the largest – group in the Senate. This applied in particular for representation on committees.

Full Representation on Committees

On December 7, 2016, a sessional order regarding committee memberships was moved by the Leader of the Opposition and, with leave, seconded by the Government Representative, the Senate Liberal Leader and the ISG Facilitator. This was unprecedented. It demonstrated a general agreement, and a clear commitment from all groups to properly accommodate the Independents.

The motion renewed the membership of the Committee of Selection. It increased the size of the committees and the number of seats for Independents to better represent their numbers, and established a comprehensive system for committee membership changes. The motion was adopted unanimously and, pursuant to the order, the Selection Committee met and proceeded with the nomination of senators to sit on committees. The committee presented a report to the Senate in short order. It was adopted the following day and resulted in renewed memberships that closely reflect the current proportions within the Senate.

The sessional order is valid for the remainder of the current session or until October 31, 2017, whichever comes earlier. Of course, as the Senate continues to

evolve, committee memberships may need to be re-evaluated, and there may well be an openness to this.

Bill C-29

In this new period of accommodation, it is interesting to consider what was happening in terms of the legislative agenda at the time of these 20 appointments. Bill C-29, the second *Budget Implementation Act* (BIA), was an example of openness, sober second thought and collegiality. The Senate amended the bill to remove controversial provisions dealing with consumer and provincial rights specific to banks. Senators met in a spirit of collaboration, with the goal of upholding our country's principles and protecting Canadian consumers. The Senate upheld its constitutional role as a forum for considered reflection and review. It did not allow partisan considerations to overwhelm the Senate's ability to conduct its legislative review. Ultimately, the House of Commons agreed with the Senate's recommendations. It is difficult to imagine that such a major change to a BIA would have occurred in the past.

Conclusion

The structure the Independents will eventually assume has yet to be determined. Will they form a generally cohesive grouping organized like a caucus, or will they act alone as individuals and/or come together in some way on an *ad hoc* basis? Will they choose to remain non-partisan or group together on a regional, professional, linguistic, or other basis?

In incorporating a growing number of Independents into the Senate structure, changes in the way the Senate operates have occurred and will probably eventually require amendments to our procedural rules to ensure that the institution continues to conduct business effectively. Change is never easy and tensions have certainly been evident throughout this period of transformation. However, this transition can be defined by openness, flexibility, adaptability and a general willingness to move forward slowly without forcing permanent changes to the *Rules of the Senate* until the landscape is better defined. It is a time of reflection and, on occasion, a time of tension. It is also a fascinating period to be observing, and assisting colleagues from the Speaker's chair.