

The Real Problem with Senate Appointments

Canada has observed a ‘winner take all’ approach to making Senate appointments. Historically, the prime minister has made all appointments to the Upper Chamber. Even now, the current prime minister is making all the appointments, albeit from names submitted by the Independent Advisory Board for Senate appointments. In this article, the author suggests that a procedure for sharing appointments to ensure all leaders of parties are fairly represented. If the current process for selecting independent senators is maintained by future governments, all party leaders should still take turns in choosing senators from the nominees selected by the Independent Advisory Board for Senate Appointments.

David Gussow

The real problem with Senate appointments has been that the different party leaders since Confederation have not shared the appointments when they have become prime minister.¹ Even now, the current prime minister is making all the appointments, albeit from names submitted by the Independent Advisory Board for Senate appointments. It’s the same problem whether independent senators are named or party-based ones. Sharing the appointments among the party leaders is the only solution. Interestingly enough, appointments to the House of Lords have been shared by the prime ministers of the United Kingdom.²

Sharing appointments

For the first appointments to the Senate, the Québec Conference decided that “...all political parties...be fairly represented.”³ It’s now time to let the leaders of parties be fairly represented in making the nominations. If the current prime minister wants to at least have the possibility of a long-term ‘independent’ Senate then he should start sharing the appointments. Let each of the party leaders in their proper turn select their nominee from those recommended by the Independent Advisory Board for Senate Appointments. And if a new prime minister decides the appointments should be party-based or some other method, then they should still be shared in the same way.

Who nominates and how many?

The process of sharing has to be clear. The simplest way is to allocate the appointments in proportion to the popular vote at the latest federal election in each of the provinces and territories.⁴ This way all the party leaders would have nominations to make. It would be like proportional representation (PR) but would be proportional appointments by party leaders. It is very simple, just use the Sainte-Laguë method⁵ for deciding which party leader would be entitled to nominate senators and how many.

As a result of the 2015 federal election in Ontario, the current leaders⁶ of the different federal parties would be entitled to nominate the following numbers according to the Sainte-Laguë method:

- Justin Trudeau 11 senators
- Andrew Scheer 8 senators
- Jagmeet Singh 4 senators
- Elizabeth May 1 senator

If one could start with a clean slate after each federal election it would be very simple. The above leaders would immediately make their appropriate number of nominations. However, a fixed membership of the Senate (no swamping⁷) and tenure to the age of 75 both foreclose that possibility. The opportunity to make a nomination, therefore, is only available if there is a vacancy. This means there must be another step in the process.

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Filling each vacancy

It must be clear which leader will receive the next nomination. That too can be very simple—give it to the most deserving leader. There is an unambiguous mathematical approach that can determine this leader. The next choice, whenever there is a vacancy, is decided by making the following calculation for each of the leaders⁸ that are to nominate a senator:

$$\frac{\text{(the number of senators for a province or territory already nominated by the leader)} \times 100}{\text{(the number of senators for a province or territory entitled to be nominated by that leader)}}$$

The leader with the lowest percentage would be the most deserving. If the lowest percentages happen to be tied, then the leader with the higher/highest popular vote at the time of the election would choose.

Since neither the New Democratic Party leader (Jagmeet Singh) nor the Green Party leader (Elizabeth May) have nominated any senators in Ontario, according to the above formula they both would have zero percent and therefore would be the most deserving. Since the NDP recorded the higher popular vote at the most recent election, Singh would be able to fill the first vacancy from the list provided by the Independent Advisory Board for Senate Appointments; May would make the second choice if and when a vacancy occurred. If a leader decides not to participate then the appointment would immediately go to the next most deserving leader.⁹

Approval by the Senate and House of Commons

How can a system like this be put in place? The policy should be agreed to by the Senate and House of Commons. The Nickle Resolutions, which related to a policy of ceasing to confer royal titles upon Canadians,¹⁰ are a good example of how this policy would work.¹¹ After their agreement, the policy has been followed by every prime minister to this day – now nearly 100 years.¹² It's quite possible that a policy respecting Senate appointments could become the accepted practice. The motion to create this procedure could be something along the lines of the following:

That, in the opinion of this House, whenever there is a vacancy in the Senate, the names to be submitted to the Governor General for summoning to the Senate should be recommended by the leaders of the different

parties according to the following rules: (a) for each province and territory the Sainte-Laguë method is applied to the popular vote from the last federal election to calculate the number of names to be submitted by each leader, (b) the names are recommended by each leader in turn starting with the leader having the lowest percentage of names already recommended for submission divided by the number of names entitled to be submitted pursuant to the Sainte-Laguë method, (c) if more than one leader has the same percentage of names, the leader with the party having the highest/higher popular vote starts first, and (d) if any leader does not participate in recommending names then the next leader in turn would make the recommendation.

Mandate of the Independent Advisory Board for Senate Appointments

The Independent Advisory Board for Senate Appointments would implement this policy if passed by the Senate the House of Commons and agreed to by the government. Except for the additional party leaders making recommendations, in the case of appointments of independent senators there would be no change in the procedure. If party-based appointments are to be reinstated or some other method of appointment, then the criteria that the Board now uses for approving candidates would have to be updated.¹³

Result of sharing appointments

If the current prime minister is willing to proceed as outlined above regarding appointments of independent senators, the concern expressed by some about the kind of appointments made would certainly be lessened. More of a consensus would have been reached. If, for policy reasons, a future prime minister wished to revert to party-based appointments or set up a new method then at least it would be hoped that a consensus could be maintained by following the same procedure so that all party leaders share in the appointments. And finally, if it were desired, this same procedure could lead to an “elected” gender-neutral Senate and House of Commons.¹⁴

Notes

- 1 The appointments made pursuant to the Queen's Proclamation of Union in 1867 were an exception. There were occasions where prime ministers made appointments akin to sharing. Prime Ministers P. Trudeau, Mulroney, Martin and Harper made or were willing to make appointments that were party-based, but not necessarily from their own party.
- 2 See for instance “The Coalition: our programme for government” published by the Cabinet Office in May

- 2010 at p.27 where it states: "...Lords appointments will be made with the objective of creating a second chamber that is reflective of the share of the vote secured by the political parties in the last general election." See also the article "How members are appointed" on the UK parliamentary website. Under the House of Lords section, "Types of peerages": "Members can be appointed, on a party basis on political lists to 'top up' each of the three main party groups' strengths..." And, finally, see: Meg Russell and Tom Semlyen, "Enough is Enough, Regulating Prime Ministerial Appointments to the Lords," The Constitution Unit, School of Public Policy, University College London, February 2015. (In this last publication, the overall problems are applicable to appointments to the Senate, but the solutions are inapplicable because of the size of the House of Lords, the federal nature of Canada and the fixed membership of the Senate. In Canada, for example, the largest provinces only have 24 senators which obviates the need for a threshold. In any event, the solutions in the publication are far too complicated for a simple and clear process being suggested in this article.)
- 3 See resolution #14 adopted at a Conference of Delegates... held at the city of Québec, on October 10, 1864.
 - 4 One can infer from the Premier of Canada's speech at pages 238-239 of the Confederation Debates that he would have been supportive of allocating appointments in proportion to party strengths. As Premier and Chair of the Quebec Conference, Sir Étienne-Paschal Taché moved approval of the Quebec Resolutions in the pre-Confederation "Senate" of the Province of Canada. He suggested that the spirit of partisanship that existed from 1841 to 1848 regarding appointments to the pre-Confederation "Senate" would change as can be seen by the spirit of the 14th resolution. It's also exactly what the UK coalition agreement in May 2010 sets out for appointments to the House of Lords. (However, as a chamber subject to swamping, which is not the case in Canada, it could easily be unworkable if not implemented properly.)
 - 5 The Sainte-Laguë method, for instance, is used to determine the number of members elected by party in the New Zealand Parliament. The same mathematical calculation, although called the Webster method was used to determine the number of members for each state in the US House of Representatives.
 - 6 The current leaders of the different federal parties would inherit what their leader at the time of the election would have been entitled to nominate.
 - 7 Section 26 of the *Constitution Act, 1867* provides for a limited exception that has been used only once since Confederation.
 - 8 The appointments of the past party leaders would be attributed to the current leaders.
 - 9 For example, if Jagmeet Singh refused to participate then the appointment would devolve to Elizabeth May. If he continued to refuse for the next vacancy then it would go to Conservative leader Andrew Scheer.
 - 10 See, for example, the Nickle Resolution: *The Journals of the House of Commons*, Second Session, 13th Parliament, April 14, 1919, p.171.
 - 11 In the case of the Nickle resolutions only the House of Commons approved the policy. At this time it would be appropriate to have both houses agree to the policy. When one Chamber approves the motion a message can be sent to the other Chamber requesting concurrence.
 - 12 Prime Minister R.B. Bennett did not follow the policy for the last two years of his five-year term.
 - 13 In the UK, the House of Lords Appointments Commission has a role to play for both independent (crossbencher) members as well as party-based members. Also if any other method of appointment is chosen it would still be important to continue a role for the Independent Advisory Board for Senate Appointments.
 - 14 See the brief submitted by the author to the Special Committee on Electoral Reform of the House of Commons in the First Session of the 42nd Parliament. The "elected" aspect is particularly discussed in paragraph 4.5 on p.3 of the brief. Note, the Sainte-Laguë method is now proposed rather than the Droop quota method in the brief. It's much simpler. The gender-neutral aspect is particularly discussed in paragraph 4.2 on p.2 of the brief. These "elected" proposals do not need a constitutional amendment; like the appointments of independent or party-based senators, they can be changed or done away with by the next prime minister. The gender-neutral aspect would first require a legislative change for the House of Commons and could continue whether or not it was decided to use the same approach for the Senate.