

Editorial ? Was Duffy's appointment legal?

In all the massive coverage the trial of Senator Mike Duffy has been given, perhaps the most important testimony to date concerned a comment Prime Minister Stephen Harper made when his former in-house legal adviser expressed concern about the legality of the senator's appointment.

In February 2013, Benjamin Perrin was asked by Harper's then chief of staff, Nigel Wright, to investigate the qualification issue and did so by examining the ?concept of residency.?

Wright apparently told Perrin that he was ?gravely concerned? that Duffy could be legally considered a resident of Ontario, an obvious disqualification for someone sitting as a P.E.I. senator.

At the time, the Prime Minister's Office (PMO) was trying to quash the scandal over the senator's \$90,000-odd questionable expenses by getting him to repay them and issue a public mea culpa in exchange for, among other things, a public statement by the PMO that he, and other Harper Senate appointees, were all qualified to represent their provinces.

Perrin, now a University of British Columbia law professor, testified that when he questioned the prime minister about the Duffy appointment, the PM had replied that it was based on Duffy's ownership of a cottage near Summerside, P.E.I., which was worth a lot more than the \$4,000 required by the Constitution Act, formerly the British North America Act of 1867.

?I was immediately taken aback at the prime minister's decision that if you simply own \$4,000 of property that made you a resident,? he told the Duffy trial.

?Both legally and practically, it seems untenable,? he added. ?I would not be able to consider myself a resident of Nunavut ? having never visited there ? simply by having \$4,000 of real property.?

Perrin said he had replied, ?as diplomatically as possible,? through the PMO chain of command that the view taken by the prime minister was not consistent with basic legal interpretation and that ?I didn't agree with it.?

Clearly, the legality of the appointment has never been challenged and likely never will be. However, the BNA Act's wording is easily understood: Section 23, listing the ?Qualifications of a Senator,? reads in part:

(4.) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities:

(5.) He shall be resident in the Province for which he is appointed:

(Note that the property ownership need not be in the province of residency, which is dealt with separately, with the mandatory ?shall.?)

Perhaps the ultimate irony is that if Harper had managed to find and appoint a loyal Tory who actually lived in P.E.I., that person would have had no difficulty billing for a residence in the Ottawa area, a charge that by now might easily have exceeded the \$70,000 or so involved in the charges against Duffy.

It will be interesting, indeed, to see whether Ontario Court Justice Charles Vaillancourt ultimately comments on the legality of the Duffy appointment and recommends a process for avoiding such appointments in future.

As we have already suggested, the easiest (best?) Senate reform would involve Harper and his successors delegating the appointment power to the provinces and territories, and meeting the BNA Act's requirements by confirming the appointments by Order-in-Council.

It would then be up to each province to come up with a suitable means of filling vacancies as they occur, perhaps by Internet-based elections or by invoking a process similar to that now used to select members of the Order of Canada.