

DRAFT FOR DISCUSSION

Re: Residence Requirement of Senators

Date: February 15, 2013

Summary

The question of whether a Senator is resident in the province for which he is appointed is one that the Constitution assigns to the Senate to determine.

Constitutional jurisprudence would interpret this residence requirement in a purposive manner. Consistent with this approach, the test should be whether a Senator is able to sufficiently demonstrate their ability to *represent* their province of appointment through their personal connection to that province. This contextual test could be applied in any given case by considering a non-exhaustive list of factors (see below), any number of which could be found to be sufficient. It would not be appropriate to import residency tests from other contexts to answer this constitutional question.

Constitutional Provisions

Subsection 23(5) of the *Constitution Act, 1867* includes as one of the qualifications of a Senator: "He shall be resident in the Province for which he is appointed". Section 22 sets out the "representation of Provinces in the Senate" with specific numbers of Senators for each province and territory.

Subsection 31(5) of the *Constitution Act, 1867* provides that "[t]he Place of a Senator shall become vacant in any of the following Cases: . . . If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there."

Section 33 of the *Constitution Act, 1867* provides: "If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate."

Discussion

The question of whether a Senator is resident in the province for which he is appointed is one that the Constitution assigns to the Senate to determine.

The Supreme Court of Canada has firmly rejected a rigid or technical approach to constitutional interpretation in favour of a broader, purposive approach. Consistent with this established doctrine, it would be necessary for the Senate to consider the purpose of

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the residence requirement for Senators to determine what "resident" means, rather than in a narrow or technical sense of the word.

The purpose of the residence requirement for Senators in section 23(5) of the *Constitution Act, 1867* is that the Senate, as the Upper House of Parliament in our federal system of government, is intended to provide for the appointment of individuals who will be able to *represent* their province of appointment. This language of "representation" is explicit in section 22 of the *Constitution Act, 1867*, which sets out the number of Senators by region and province. The residency requirement for Senators has been described by the Supreme Court of Canada as having "relevance in relation to the sectional characteristic of the make-up of the Senate": *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 at 76. The centrality of representativeness to the residency requirement is also expressed in Gil Rémillard & Andrew Turner, "Senate Reform: Back to Basics" in Serge Joyal, ed., *Protecting Canadian Democracy: The Senate You Never Knew* (McGill-Queen's University Press, 2003) at 117.

While there are myriad tests for residence in various provincial, territorial, and federal enactments, policies, and programs (e.g. taxation, health care, drivers' licences, student loans, etc.), these are all based on the particular purpose for which residence is being assessed and may lead to very different outcomes. Furthermore, it would be discordant with our constitutional legal order if statutory enactments were permitted to define the scope of a constitutional provision. For these reasons, it is not appropriate to permit such residency tests from wholly different contexts to be determinative of the question of residence for the purpose of representing a province in the Senate.

It is submitted that if the Senate is called upon, under section 33 of the *Constitution Act, 1867* to determine whether a Senator is resident in the Province for which he is appointed, the key question should be whether the Senator is able to sufficiently demonstrate their ability to represent his or her province of appointment through his or her personal connection to that province. As noted earlier, a rigid test is neither reasonable, nor appropriate, in making such a contextual assessment. It is suggested that a non-exhaustive list of factors, any number of which, could be sufficient for the Senate to determine, on a case-by-case basis, that an individual has sufficiently demonstrated his or her ability to represent his or her province of appointment through that individual's personal connection to that province, including:

- Place of birth in the province
- Ownership of residential property in the province
- Rental of residential property in the province
- Dwelling in the province, both recently and historically
- Frequency of staying in, and travel to, the province, both recently and historically
- Employment history in the province prior to appointment, including historically
- Educational history in the province
- Family history in the province
- Previous representational roles in, of related to, the province

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- o Activities as a Senator that demonstrate their representational role in relation to that province (e.g. statements in the Senate, work on Senate Committees, assistance of citizens from that province, etc.)
- o Degree of engagement with public policy matters in or particularly relating to the province
- o Degree of engagement with public policy participants and influencers in the province
- o Community involvement in the province, including historically
- o Professional or business connections to the province, including historically

Again, these factors should not be treated as a checklist. They are simply potential means by which a Senator could sufficiently demonstrate his or her ability to represent the province of appointment through the Senator's personal connection to that province – which would be the central question.

Finally, it should also be expected that because being a Senator entails spending a substantial amount of time in, and around, the National Capital Region that a Senator likely have a number of practical links to that region and the province of Ontario as a consequence of performing the duties of a Senator. Since this is a legitimate aspect of the position of being a Senator, such considerations should not detract from the contextual assessment of residence in the proper representational sense as described above.