

The Constitutionality of Suspending Senators

Introduction

On November 5, 2013, the Senate voted to suspend Senators Brazeau, Duffy, and Wallin.^[1] The suspensions mark the latest development in the ongoing Senate expense scandal, which began in June 2012 when the Auditor General released a report stating that some Senators' travel and living expenses were not supported by the appropriate documentation.^[2] This article briefly summarizes the Senate expense scandal, and explores the constitutionality of the vote that led to the suspension of three Senators.

Background

In June 2012, the Auditor General, Michael Ferguson, released a study of Senate expense claims. The Senate administration, in some cases, did not have the proper documentation to support claims for travel and living expenses. Over the next several months, both the Senate and an independent auditing company called into question expense claims made by Senators Patrick Brazeau, Mike Duffy, Mac Harb, and Pamela Wallin.^[3]

Senators Brazeau, Duffy, Harb, and Wallin all claimed that their primary residences were outside of Ottawa in order to claim living expenses for working in Ottawa. These claims sparked the debate regarding residency requirements for Senators. It is unclear whether Senator Duffy, who was appointed to represent Prince Edward Island, and Senator Wallin, who was appointed to represent Saskatchewan, satisfied the residency requirements for the Senate seeing as both Senators were long-time residents of Ontario.^[4]

The *Constitution Act, 1867* states that a Senator "shall be resident in the Province for which he is appointed."^[5] In 2009, Christopher McCreery, a senior political aide to the Government Senate leader Marjory LeBreton, sent a memorandum to the newly appointed Senators, Duffy and Wallin, expressing his opinion regarding the residency requirements. McCreery stated: "The Senate has never disqualified anyone for not being a "resident" of the province of appointment, providing they own property there."^[6] Sébastien Grammond, a constitutional lawyer and the dean of the civil law faculty at the University of Ottawa, pointed to section 31(5) of the *Constitution Act, 1867* that lists the ways in which a Senator can become disqualified. The relevant section reads: "If he ceases to be qualified in respect of Property or of Residence."^[7] For Grammond, owning property in the province which the Senator was appointed to represent is insufficient; Senators must also reside in that province.^[8]

The expense scandal has pushed the issue of Senate reform to the forefront of the Canadian Government's agenda. While the larger issue of Senate reform works its way through the

political and legal processes, Prime Minister Stephen Harper urged the Senate to suspend Senators Brazeau, Duffy, and Wallin.[\[9\]](#) Senator Harb had previously announced his retirement and repaid all of his questionable expenses.[\[10\]](#)

The Vote to Suspend the Senators

On October 17, 2013, Senator Claude Carignan, the Government's new leader in the Senate, introduced motions to suspend Senators Brazeau, Duffy, and Wallin from the Senate. The motions called for the three Senators to lose their pay, benefits, and Senate resources. Over the next several weeks, the Senate debated the impending suspensions. On November 5, 2013, Senators voted to suspend Senators Brazeau, Duffy, and Wallin without pay for the remainder of the parliamentary session, which could last until 2015. The suspended Senators will retain their health, dental, and life insurance benefits.[\[11\]](#)

Does the Senate have Legal Authority to Suspend Senators?

Senator Wallin described the vote for suspension as "a flawed process." She asked: "If we can't expect the rule of law in Canada, then where on Earth can we expect it?"[\[12\]](#) Similarly, Senator Hugh Segal, the only Conservative to vote against the suspension motions, was concerned that the vote violated due process. Generally, the Senators in question believed that due process was violated because they "were not given a reasonable opportunity to defend themselves," and they were presumed to be guilty.[\[13\]](#)

Additionally, Senators Brazeau, Duffy, and Wallin "argued that they were victims of political expediency."[\[14\]](#) Since the three Senators were all appointed by Prime Minister Harper, there is some criticism that he wanted "to distance himself from the controversy," especially since the Prime Minister's Office was directly implicated in the scandal by Senator Duffy.[\[15\]](#) Nigel Wright, the Prime Minister's chief of staff, gave Senator Duffy \$90,000 to repay housing expenses. Additionally, Senator Duffy alleged that the Prime Minister's Office gave him a script to follow when he was speaking in public about the repayment.[\[16\]](#)

Those who voted in favour of the suspensions, however, argued that the Senators violated public trust, and that there was a persistent pattern of gross negligence on their part.[\[17\]](#) The *Constitution Act, 1867* seems to support the legality of the Senate suspension. Section 36 states: "Questions arising in the Senate shall be decided by a Majority of Voices."[\[18\]](#) This provision reinforces the commonly held belief that Senators are masters in their house.[\[19\]](#) There does not appear to be anything illegal about the process of holding a vote to suspend Senators before they are formally convicted of an offence.

Did the Senate Set a Dangerous Precedent?

The suspension of Senators prior to a conviction of an offence appears to be constitutional. However, there is a fear among some Senators and political commentators that the Senate has set a dangerous precedent: by simple majority, the Senate can suspend Senators. The expense scandal is clearly a unique situation, and public pressure demanded action on the part of the Government. The question has been raised, however, if the precedent established

to oust Senators for inappropriate expense claims can be stretched to apply to Senators who are deemed to be a political threat.^[20] Senator Patrick Brazeau reminded his colleagues: “If this can happen to me, it can happen to you.”^[21]

Conclusion

The vote to suspend Senators Brazeau, Duffy, and Wallin is another development in the evolving Senate expense scandal. The RCMP^[22] and the Auditor General^[23] continue to investigate claims of gross negligence and fraud, but no charges have been laid.^[24] The Senate expense scandal has prompted the Federal Government to seriously reconsider the issue of Senate reform. The Senate Reference, currently being decided by the Supreme Court of Canada, is the next step towards modifying or abolishing the Senate. In the meantime, Senators Brazeau, Duffy, and Wallin will remain off the Government’s payroll.

[1] Kim Mackrael, Josh Wingrove, & Gloria Galloway, “Senators’ suspension reveal rifts in Conservative ranks,” *The Globe and Mail* (6 November 2013) online: The Globe and Mail < <http://www.theglobeandmail.com/news/politics/more-conservative-senators-express-doubt-about-suspensions-in-expenses-scandal/article15262547/>>.

[2] “A timeline of the Senate expenses scandal,” *Metro News* (5 November 2013) online: Metro News .

[3] *Ibid.*

[4] Leslie MacKinnon, “Senate scandal: Does it matter where a senator is from?” CBC News (10 November 2013) online: CBC News < <http://www.cbc.ca/news/politics/senate-scandal-does-it-matter-where-a-senator-is-from-1.2418837>>.

[5] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 23(5), reprinted in RSC 1985, App II, No 5.

[6] Memorandum from Christopher McCreery to Mike Duffy & Pamela Wallin (6 January 2009) online: CBC News < <http://www.cbc.ca/news/politics/senate-scandal-does-it-matter-where-a-senator-is-from-1.2418837>> . .

[7] *Constitution Act, 1867*, *supra* note 5, s 31(5).

[8] MacKinnon, *supra* note 4.

[9] Bruce Anderson, “Before suspending Brazeau, Wallin, Duffy, senators need to ask themselves some questions,” *The Globe and Mail* (28 October 2013) online: The Globe and Mail < <http://www.theglobeandmail.com/news/politics/before-suspending-brazeau-wallin-duffy-se>

[nators-need-to-ask-themselves-some-questions/article15116355/>.](#)

[10] Andrea Janus, "Mac Harb resigns from Senate, repays eight years' worth of expenses," *CTV News* (26 August 2013) online: CTV News < <http://www.ctvnews.ca/politics/mac-harb-resigns-from-senate-repays-eight-years-worth-of-expenses-1.1427436>>.

[11] *Timeline*, *supra* note 2.

[12] Jordan Press & Andrea Hill, "'An extremely sad day for democracy': Wallin rails against Senate after vote to suspend her," *National Post* (5 November 2013) online: National Post < <http://news.nationalpost.com/2013/11/05/senate-set-to-finally-determine-fate-of-duffy-wallin-and-brazeau/>>.

[13] Mackrael, Wingrove, & Galloway, *supra* note 1.

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] Kim Mackrael, "Duffy, Wallin and Brazeau to be suspended for 'gross negligence'," *The Globe and Mail* (17 October 2013) online: The Globe and Mail < <http://www.theglobeandmail.com/news/politics/senate-to-debate-suspending-duffy-wallin-without-pay/article14908111/>>.

[18] *Constitution Act, 1867*, *supra* note 5, s 36.

[19] *Memo*, *supra* note 6.

[20] Andrea Janus, "Suspension of three senators 'dangerous,' Joe Clark says," *CTV News* (6 November 2013) online: CTV News < <http://www.ctvnews.ca/politics/suspension-of-three-senators-dangerous-joe-clark-says-1.1531154>>.

[21] "Patrick Brazeau warns MPs, senators: "If this can happen to me, it can happen to you," *The Guardian* (4 November 2013) online: *The Guardian*.

[22] Susana Mas, "Harper tells Commons RCMP not investigating his office," *CBC News* (5 November 2013) online: *CBC News* < <http://www.cbc.ca/news/politics/harper-tells-commons-rcmp-not-investigating-his-office-1.2415518>>.

[23] "Auditor general to review all senators' expenses," *CBC News* (16 August 2013) online: *CBC News* < <http://www.cbc.ca/news/politics/auditor-general-to-review-all-senators-expenses-1.1379822>>.

[24] Mackrael, *supra* note 18.