Federal Court  Cour fédérale

Date: 20150521

Docket: T-2506-14

Citation: 2015 FC 649

Ottawa, Ontario, May 21, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA AND THE GOVERNOR GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] Last December, Prime Minister Harper is said to have publicly communicated his decision not to advise the Governor General to fill existing vacancies in the Senate. Mr. Alani, a Vancouver lawyer, considers this "decision" illegal. He has applied for judicial review thereof. He seeks various declarations, the main one being that the Prime Minister must call upon the Governor General to appoint his nominees to the Senate within a reasonable time after a vacancy occurs. He does not ask that the Prime Minister be so ordered.

[2] The Deputy Attorney General, on behalf of the Prime Minister and the Governor General, has moved this Court for an order that the application for judicial review be struck at the outset, before it is heard on the merits. He submits it is plain and obvious that the application is bereft of any chance of success.

[3] For the reasons that follow, I am not persuaded, on the record presently before me, that it is plain and obvious that Mr. Alani has no chance of success. No matter the generality of the language which follows, it is always cushioned by this "plain and obvious" concept.

[4] The respondents' motion references s. 221(1)(*a*) of the *Federal Courts Rules* which provides:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(*a*) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;

[5] No evidence is to be heard on such a motion. The facts pleaded are taken to be true. The burden falls upon the respondents to persuade me that even if the facts are true, no cause of action is made out.

[6] The leading case on point is the decision in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959. The Supreme Court held that the test to be applied was whether it was "plain and obvious" that

the pleadings disclosed no reasonable claim. "[I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat"." It is certainly not for the Court, at this stage, to weigh the applicant's chances of success. See also *Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735 and *Operation Dismantle v The Queen*, [1985] 1 SCR 441.

[7] Also relevant is *Dyson v Attorney-General*, [1911] 1 KB 410 at 419, in which Fletcher Moulton LJ said:

> Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers.

I. Issues

[8] The following issues arise:

a. Should the motion to strike be heard now, or at the same time as the application is heard on the merits?

b. Does Mr. Alani have standing?

c. Was there a decision to be judicially reviewed?

d. Is there a constitutional convention by which the timing of Senate appointments is left to the Prime Minister's discretion?

e. If there is such a convention, is it valid if contrary to an imperative requirement of the constitution?

f. Is this a question of statutory interpretation, no more, no less?

g. Is the matter justiciable or better left to the political arena?

h. If justiciable, does the Federal Court have jurisdiction?

i. Costs.

A. *Should the motion have been postponed?*

[9] Applications to this Court, by way of judicial review or otherwise, are supposed to be summary in nature (*Federal Courts Act*, s 18.4). Interlocutory motions interrupt the flow of proceedings. Nevertheless, there are circumstances, whether under *Federal Courts Rule* 221 or otherwise, in which the Court in control of its own process will not permit an application to run its course (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA)). More recently, Mr. Justice Stratas speaking for the Court of Appeal referred to *David Bull Laboratories* and said "[t]here must be a "show stopper" or a "knockout punch" – an obvious fatal flaw striking at the root of this Court's power to entertain the application" (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 47).

[10] This application was put under case management and a case management conference has already been held. Serious issues were raised which is why, in my discretion, I decided to hear the motion to strike now.

B. *Does Mr. Alani have standing?*

[11] The respondents have not challenged Mr. Alani's standing as such, at least not at this stage. Section 18.1 of the *Federal Courts Act* provides that: "An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought." Is Mr. Alani directly affected? In any event, as this is a matter which falls within my discretion, I grant him standing on a public interest basis to oppose the motion to have his application struck (*Thorson v Attorney General of Canada*, [1975] 1 SCR 138).

[12] The respondents submit that Mr. Alani is really referring a point of law to this Court for decision. Only federal boards, commissions and tribunals, and the Attorney General of Canada may refer a question of law to this Court (s. 18.3 of the *Federal Courts Act*). On the other hand, it is open to the Court to grant declaratory relief in accordance with s. 18 of the Act. The application is framed as a judicial review of a decision, not as a reference.

C. *Is there a decision to be judicially reviewed?*

[13] The language of this decision, and the circumstances in which it was allegedly made, are not set out in the pleadings. Was this a statement made in the House of Commons? Or was it a statement made during a media scrum? An off-the-cuff remark may not be a decision at all. Nevertheless, I am required to assume, at this stage, that a decision was made.

[14] For their part, the respondents do not deny at this stage that a decision was made. Perhaps, otherwise, we would be facing the thorny issue as to whether *mandamus* to fulfill a public duty lies.

[15] As mentioned by Mr. Justice Stratas at paragraph 40 of *JP Morgan*, above, a "concise" statement of the grounds on which judicial review is sought must include the material facts necessary to establish that the Court can and should grant the relief sought. However, it does not include the evidence. As judge, I certainly would have preferred better particulars.

D. *Is there a constitutional convention?*

[16] All agree that a constitutional convention has developed whereby the Governor General will only fill vacancies in the Senate on the advice of the Prime Minister (*Reference re Senate Reform*, [2014] 1 SCR 704 at para 50). The Prime Minister's role may have developed and be evidenced by Minutes of Council going back to 1896. The parties disagree as to whether these Minutes of Council simply constitute recognition of a convention, or whether they show that the Prime Minister's advice is provided pursuant to Crown prerogative.

[17] However, no constitutional convention has been brought to my attention as to the timing of the Prime Minister's recommendations. Certainly, at some stage, senators have to be appointed. If there were to be no quorum, (the quorum being fifteen), Parliament could not function as it is composed of both the House of Commons and the Senate.

E. *Is the Convention Valid?*

[18] The convention is that the Governor General will not do something except on the recommendation of the Prime Minister. In the past, there were conventions that Parliament in Westminster would not amend the *British North America Act* except on Canada's request. These are conventions that provide that something will not be done except in certain circumstances. However, if the Constitution requires something to be done promptly, *i.e.* that Senate vacancies be filled, can the law be flaunted by convention? This goes to the merits of the application and cannot be answered at this time as the full scope of the convention has not been laid out before me.

F. *Is this a question of statutory interpretation?*

[19] Mr. Alani submits that this is a straightforward case of statutory interpretation. For instance, it had to go all the way to the Judicial Committee of the Privy Council before it was decided that women were "persons" eligible to be appointed to the Senate (*Edwards v Attorney–General for Canada*, [1930] AC 124).

[20] Mr. Alani's case is based upon section 32 of the *Constitution Act, 1867* which provides:

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.	32. Quand un siège deviendra vacant au Sénat par démission, décès ou toute autre cause, le gouverneur-général remplira la vacance en adressant un mandat à quelque personne capable et ayant les qualifications voulues.

When shall a vacancy be filled? When it happens, not at the pleasure of the Prime Minister.

[21] Sections 21 and following of the same Act provide that the Senate shall consist of 105 members. Quebec and Ontario shall each be represented by 24, 10 from Nova Scotia, 10 from New Brunswick, 4 from Prince Edward Island, 6 from Manitoba, 6 from British Columbia, 6 from Saskatchewan, 6 from Alberta and 6 from Newfoundland and Labrador. The Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented by one senator each. As noted above, the quorum is 15.

[22] Mr. Alani's other point is that the Senate was not intended to serve as a rest home for old political war horses. Apart from being a sober second chamber, it provides for regional representation. As of 20 March 2015, only 87 of the 105 seats in the Senate were filled, with no one having been appointed since 25 March 2013. Seven provinces are currently shortchanged, with Manitoba only having three of its six allocated seats.

[23] Again, the timing question cannot be answered at this time as we do not know the actual scope of the constitutional convention. The respondents must provide proof thereof as indeed stated at page 888 of *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 (the *First Reference*):

> 2. Requirements for establishing a convention
>
> The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice. They must be normative. We adopt the following passage of Sir W. Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), at p. 136:

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

[24] The parties will have an opportunity to provide proof of the existence and scope of any relevant convention at the hearing of the application on the merits.

G. *Is the matter justiciable?*

[25] The respondents submit there is no justiciable issue because the Prime Minister advises on Senate appointments by constitutional convention (true); constitutional conventions are not enforced by the courts (true); constitutional conventions do not become rules of law unless adopted by statute (true); and advice on Senate appointments is not given pursuant to the Crown prerogative (there is some debate on this point). It is further submitted that this Court, as a statutory court created by virtue of s. 101 of the *Constitution Act, 1867*, only has jurisdiction conferred by or under an act of Parliament or Crown prerogative (s. 2 of the *Federal Courts Act*). Consequently, even if the Prime Minister's advice in respect of Senate appointments were justiciable, this Court lacks jurisdiction. Since a constitutional convention does not arise from statute and is not a prerogative of the Crown, the Prime Minister is not a federal board, commission or other tribunal when performing this advice-giving function.

[26] Courts are certainly called upon to determine whether or not a convention exists. In addition to the *First Reference*, the Supreme Court again referred to constitutional conventions in *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793 (the *Quebec Veto Reference*). More recently, this Court was called upon to review the Prime Minister's decision advising the Governor General to dissolve Parliament and to set an election date, in light of the *Canada Elections Act* having been amended to provide fixed election dates (*Conacher v Canada (Prime Minister)*, 2009 FC 920, [2010] 3 FCR 411). Mr. Justice Shore was not satisfied that a new convention existed that limited the ability of the Prime Minister to advise the Governor General. He was upheld by the Federal Court of Appeal from the bench (2010 FCA 131) and leave to appeal to the Supreme Court was refused ([2010] SCCA No 315).

[27] Consequently, it is arguable at this stage that we are only left with the interpretation of statute, albeit a very important one. In the circumstances, it is not necessary for this Court to consider constitutional conventions in detail. Suffice it to say that both the majority and the minority in the *First Reference* and the Court in the *Quebec Veto Reference* adopted the definition given by Chief Justice Freedman in the *Reference re: Amendment of Constitution of Canada*, [1981] MJ No 95 (CA) (the *Manitoba Reference*), as quoted in the *Quebec Veto Reference* as follows at page 802:

> The majority opinion as well as the dissenting opinion both approved, at pp. 852 and 883, the definition of a convention given by Freedman C.J.M. in the Manitoba Reference and quoted at p. 883 of the *First Reference*:
>
> > What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and Judges who have contributed to that literature, the essential features of a convention may be set forth

> with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that "a convention is a rule which is regarded as obligatory by the officials to whom it applies". Hogg, *Constitutional Law of Canada* (1977), p. 9. There is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal.

[28] If there is a valid constitutional convention, it is clear that the Court will not enforce it. The respondents submit that the Court should not even make a declaration on the point, because failure to adhere to a declaration may, in some circumstances, lead to contempt of Court and, thereby, indirect enforcement of a convention. They base themselves on *Assiniboine v Meeches*, 2013 FCA 114.

[29] *Assiniboine v Meeches* was a decision of Mr. Justice Mainville of the Federal Court of Appeal, sitting alone as duty judge. The appellants were seeking to stay a judgment of the Federal Court which declared that an Indian band election appeal committee had made a final and binding decision requiring new elections. At paragraphs 14 to 15 he referred to the decision of Mr. Justice MacGuigan in *LeBar v Canada*, [1989] 1 FC 603 (CA) and to the decision of the Supreme Court in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62. It was said in the latter that in appropriate cases, if public bodies or officials do not comply with a declaratory order, contempt proceedings could lie against the Crown.

[30] However, those circumstances were not spelled out. The statement in respect of contempt was in the majority reasons, written by Mr. Justice Iacobucci and Madam Justice Arbour, in which they disagreed with Mr. Justice Lebel and Madam Justice Deschamps, dissenting, that the trial judge's order that the court supervise the implementation of its decision was void.

[31] If we took this point to its logical extreme, there would be no scope for a declaration that a constitutional convention requires a government official to do something.

[32] *LeBar* was an appeal from a judgment of the Federal Court Trial Division which declared that Mr. LeBar was entitled to have been released from prison earlier than when he in fact was released.

[33] Mr. Justice MacGuigan set out the principles of declarations in great detail. For these purposes it is sufficient to note that at pages 610-611, he said:

> … [A] declaration is a peculiarly apt instrument in dealing with bodies "invested with public responsibilities" because it can be assumed that they will, without coercion, comply with the law as stated by the courts. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory proceedings vis-à-vis the Government. Any power to enforce such a judgment against the Government would be superfluity.
>
> In my opinion, the necessity for the Government and its officials to obey the law is the fundamental aspect of the principle of the rule of law, which is now enshrined in our Constitution by the preamble to the Canadian Charter of Rights and Freedoms…
>
> …
>
> Elusive as it is as a concept, the rule of law must in all events mean "the law is supreme" and that officials of the Government have no option to disobey it. It would be unthinkable, under the rule of law,

> to assume that a process of enforcement is required to ensure that the Government and its officials will faithfully discharge their obligations under the law. That the Government must and will obey the law is a first principle of our Constitution.

[34] It is to be emphasized that Mr. Alani only seeks a declaration, and does not ask that it be enforced.

[35] Certainly it is premature to say now that this matter is not justiciable. If this is merely a matter of interpreting a statute, and it is not plain and obvious that it is not, then certainly the matter is justiciable.

[36] Without a doubt there is a political aspect to Senate appointments. From time to time the Senate, or some Senators, may be a source of embarrassment to the Government, to the House of Commons as a whole, and indeed, to many Canadians. However, I know of no law which provides that one may not do what one is otherwise obliged to do simply because it would be embarrassing. The Supreme Court made it perfectly clear in the *Reference re Senate Reform* that significant changes to the Senate, including its abolishment, require a formal constitutional amendment.

H. *Does this Court have jurisdiction?*

[37] I think some confusion arises between the concepts of justiciability and jurisdiction. If there is a valid constitutional convention the courts will not enforce it, but may make declarations in respect of its content. However, the jurisdiction to hear this application is quite a different matter. In accordance with sections 2 and 18 and following of the *Federal Courts Act*,

this Court may judicially review the decisions of federal boards, commissions or other tribunals, which are defined as any body or person having, exercising or purporting to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown…". Many decisions of Ministers of the Crown are subject to judicial review *(Irving Shipbuilding Inc v Canada (Attorney General)*, [2010] 2 FCR 488 (CA)). Current thought is that the Constitution, although originally enacted by the United Kingdom, is, following the patriation of our constitution, a law of Canada (*Canadian Transit Company v Windsor (Corporation of the City)*, 2015 FCA 88 at paras 47-49).

[38] The respondents submit that constitutional conventions do not form part of the Crown prerogative, and therefore are not subject to judicial review. However, at this stage it cannot be said with any certainty whether or not the decision was grounded on a valid constitutional convention. Furthermore, there are some who would argue that constitutional conventions are akin to the Crown prerogative so that *Dyson*, above, would call for a hearing on the merits.

[39] In the alternative, Mr. Alani states that this Court has jurisdiction by virtue of section 17 of the *Federal Courts Act* as the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

[40] There are not enough established facts to justify going down that road at this time.

I. *Costs*

[41] Both sides sought costs. The respondents seek an order for $1,000.00 all inclusive, which is clearly much less than any amount which might be set under the tariff. Mr. Alani seeks costs in the same amount in any event of the cause on the basis that it was "plain and obvious" that this motion to strike at this stage was "doomed to failure". If an award is not granted now he reserves his right to seek a higher amount. He also seeks a public interest immunity from costs. I think it better to simply order that costs be in the cause.

II. Amendments to the Notice of Application

[42] In his reply to the respondents' motion to strike, Mr. Alani proposed certain amendments should the motion fail, and other amendments should it succeed, as in such instances the Court may strike with leave to amend. These latter proposed amendments need not be considered as the motion is dismissed.

[43] A good part of the proposed amendments simply reflect a shuffling of parts of the application to the grounds therefore, and pose no problem.

[44] He also proposes that the Queen's Privy Council for Canada be added as a respondent in light of the cabinet minutes referred to above. This is simply meant to cover the bases, and I see no issue.

[45] However, he wishes to delete his reference to the Prime Minister making a decision. He rather seeks a declaration with respect to the Prime Minister's failure, refusal or unreasonable delay, or alternatively the Queen's Privy Council acting on his recommendation to advise the Governor General to fill existing vacancies in the Senate. This is not acceptable.

[46] The whole basis on which this application has proceeded is that it is a judicial review of a decision. If those assertions are deleted, the application would look like a reference. Only federal boards and tribunals and the Attorney General of Canada may refer matters to the Court. Mr. Alani cannot.

[47] Thus the opening of the amended application shall read as it did in the original Notice of Application:

> THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of the decision of the Prime Minister, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified Persons to fill existing Vacancies in the Senate.
>
> THE APPLICANT makes application for:
>
> 1) A declaration that:
>
> a) the Prime Minister of Canada must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate.

[48] The rest of the application and the grounds therefore may be amended as requested save and except for the beginning of number 12 of the Grounds of the amended application, which will read: "The Prime Minister's decision not to recommend…"

[49] This amended application is to be formally served and filed forthwith. Thereafter the normal delays set out in Rule 304 and following of the *Federal Courts Rules* shall be followed.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. This motion to strike is dismissed, costs in the cause.

2. The style of cause is amended to add the Queen's Privy Council for Canada as a party respondent. It now reads:

ANIZ ALANI

Applicant

and

**THE PRIME MINISTER OF CANADA,
THE GOVERNOR GENERAL OF CANADA
AND THE QUEEN'S PRIVY COUNCIL FOR
CANADA**

Respondents

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ANIZ ALANI v THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA AND THE QUEEN'S PRIVY COUNCIL FOR CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 23, 2015
ORDER AND REASONS	JUSTICE HARRINGTON
DATED:	MAY 21, 2015

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