

**FEDERAL COURT**

BETWEEN:

ANIZ ALANI

Applicant

and

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

Respondents

**NOTICE OF CONSTITUTIONAL QUESTION**

The Applicant intends to question the constitutional validity, applicability or effect of such law, order, regulation, instrument of advice, minute of council, common law rule, convention, practice, usage, custom, grant of discretion, or policy (together, the “**Impugned Enabling Law**”) that enables or authorizes the policy, act or decision of the Prime Minister of Canada, or alternatively the Queen’s Privy Council for Canada acting on the recommendation of the Prime Minister of Canada, reflecting or resulting in the refusal to advise the Governor General to summon fit and qualified persons to the Senate within a reasonable time after a vacancy happens in the Senate.

The Applicant seeks a declaration pursuant to the *Federal Courts Act* that 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.

A copy of the Amended Notice of Application filed in the within proceeding is attached.

The question is to be argued at a time and place to be fixed by the Judicial Administrator. The Applicant has requested that the application be heard at Vancouver.

The following are the material facts giving rise to the constitutional question:

1. There are currently 20 vacancies in the Senate.

2. There are currently 85 Senators in the Senate, not excluding suspensions.
3. There are currently six vacancies in Ontario, five vacancies in Quebec, three vacancies in Manitoba, two vacancies from each of Nova Scotia and New Brunswick, and one vacancy from each of Prince Edward Island and British Columbia.
4. The Senate has not had 105 appointed Senators since September 6, 2012.
5. No person has been appointed to the Senate since March 25, 2013.
6. On December 4, 2014, the Prime Minister of Canada communicated publicly that he did not intend to advise the Governor General to summon fit and qualified persons to fill existing vacancies in the Senate.

The following is the legal basis for the constitutional question:

1. Section 32 of the *Constitution Act, 1867* provides:

“**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.” [Emphasis added].
2. Section 21 of the *Constitution Act, 1867* provides that “[t]he Senate shall, subject to the Provisions of this Act, consist of One Hundred and five members, who shall be styled Senators.”
3. Section 22 of the *Constitution Act, 1867* provides that each province and territory “shall be entitled to be represented in the Senate” as follows:
  - a. 24 Senators shall be appointed from each of Ontario and Quebec;
  - b. 10 from each of Nova Scotia and New Brunswick,
  - c. six from each of Manitoba, British Columbia, Alberta, Saskatchewan, and Newfoundland and Labrador;
  - d. four from Prince Edward Island; and
  - e. one from each of Yukon Territory, Northwest Territories, and Nunavut.
4. Section 24 of the *Constitution Act, 1867* provides for the formal appointment of Senators by the Governor General.
5. However, as the Supreme Court of Canada confirmed in the *Senate Reform Reference*, “In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada when filling Senate vacancies.”

6. A reduction in the number of Senators requires formal constitutional amendment in accordance with the amending formula set out in the *Constitution Act, 1982*.
7. The Governor General has a prerogative power or common law right to receive, and the Prime Minister of Canada, or alternatively the Queen's Privy Council for Canada acting on the recommendation of the Prime Minister of Canada, has a corresponding prerogative power or common law duty to provide advice necessary to enable the Governor General to comply with the formal legal duty under section 32 of the *Constitution Act, 1867* in light of the constitutional convention described in paragraph 5 above.
8. Having regard to:
  - a. the aforesaid constitutional convention,
  - b. the aforesaid prerogative or common law rights, powers and duties,
  - c. the internal architecture of the Constitution of Canada, and
  - d. the principles underlying the Constitution of Canada as described by the Supreme Court of Canada including the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities,

the Prime Minister of Canada, or alternatively the Queen's Privy Council for Canada acting on the recommendation of the Prime Minister of Canada, cannot fail or refuse to provide, or unreasonably delay in providing advice to the Governor General regarding the appointment of fit and qualified persons to fill vacancies in the Senate.

9. An Impugned Enabling Law that purports to authorize or enable the Prime Minister of Canada or the Queen's Privy Council for Canada to fail or refuse to provide, or unreasonably delay in providing advice to the Governor General regarding the appointment of fit and qualified persons to fill vacancies in the Senate, such Impugned Enabling Law is inconsistent with the Constitution of Canada and is, to the extent of the inconsistency, of no force or effect.

June 11, 2015



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ANIZ ALANI, Applicant

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**Minister of Justice for Nunavut**

Department of Justice  
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**Minister of Justice of Yukon**

Box 2703  
Whitehorse, YT Y1A 2C6  
Fax: 867.393.6379

Amended with leave pursuant to Rule 75 and  
the Order of Harrington J dated May 21, 2015

Court File No. T-2506-14

FEDERAL COURT

e-document	T-2506-14	
F I L E D	FEDERAL COURT COUR FÉDÉRALE  May 25, 2015  Julia Orchard Vancouver, BC	D É P O S É

ANIZ ALANI

Applicant

and

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

Respondents

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the Federal Court in Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the

Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date:

Issued by: \_\_\_\_\_  
(Registry Officer)

Address of local office:       Federal Court  
  Courts Administration Service  
  P.O. Box 11065, 3<sup>rd</sup> Floor  
  701 West Georgia Street  
  Vancouver, BC V7Y 1B6

TO:

THE PRIME MINISTER OF CANADA  
80 Wellington Street  
Ottawa, ON K1A 0A2

THE QUEEN'S PRIVY COUNCIL FOR CANADA  
85 Sparks Street  
Ottawa, ON K1A 0A3

THE GOVERNOR GENERAL OF CANADA  
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ATTORNEY GENERAL OF CANADA  
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Ottawa, ON K1A 0H8

DEPARTMENT OF JUSTICE CANADA  
British Columbia Regional Office  
900 - 840 Howe Street  
Vancouver, British Columbia  
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## 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.
  - ~~b) the deliberate failure to advise the Governor General to summon a fit and qualified Person to fill a Vacancy in the Senate within a reasonable time after the Vacancy happens~~
    - ~~i) is contrary to section 32 of the *Constitution Act, 1867*;~~
    - ~~ii) is contrary to section 22 of the *Constitution Act, 1867*~~
      - ~~(1) to the extent the Vacancies when considered in the aggregate deny a province or territory of the proportion of regional representation set out in section 22 of the *Constitution Act, 1867*, and~~
      - ~~(2) to the extent that a Vacancy deprives a province or territory of the minimum number of representatives in the Senate set out in section 22 of the *Constitution Act, 1867*;~~
  - ~~iii) undermines and breaches the principles of~~
    - ~~(1) federalism,~~
    - ~~(2) democracy,~~



~~(3) constitutionalism,~~

~~(4) the rule of law, and~~

~~(5) the protection of minorities,~~

~~and underlying constitutional imperatives, as enunciated by the  
Supreme Court of Canada in *the Quebec Secession Reference*; and~~

~~iv) is unlawful absent an amendment to the Constitution of Canada according  
to the constitutional formula as set out in section 41 of the *Constitution  
Act, 1982*;~~

- 2) An Order for costs of this application on a basis that this Honourable Court deems just; and
- 3) Such further or other relief as this Honourable Court deems just.

THE GROUNDS for the application are:

- 1) Section 32 of the *Constitution Act, 1867* provides:

“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.”
- 2) Section 21 of the *Constitution Act, 1867* provides that “[t]he Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators.”
- 3) There are currently ~~46~~ 20 Vacancies in the Senate.
- 4) There are currently 85 Senators in the Senate, not excluding suspensions.
- 5) Of the 105 Senate positions, the constitutionally established allocation and the currently existing actual distribution among the provinces and territories, not excluding suspensions, are as follows:

Province or Territory	Number of Senators Allocated by Section 22 of <i>Constitution Act, 1867</i>	Actual Current Distribution of Senators	Current Vacancies
Ontario	24	18	6
Quebec	24	19	5
Nova Scotia	10	8	2
New Brunswick	10	8	2
Prince Edward Island	4	3	1
Manitoba	6	3	3
British Columbia	6	5	1
Saskatchewan	6	6	0
Alberta	6	6	0
Newfoundland and Labrador	6	6	0
Yukon Territory	1	1	0
Northwest Territories	1	1	0
Nunavut	1	1	0
<b>Total</b>	<b>105</b>	<b>85</b>	<b>20</b>

- 6) The Senate has not had 105 appointed Senators since September 6, 2012.
- 7) No person has been appointed to the Senate since March 25, 2013.
- 8) Vacancies happen in the Senate upon the resignation, death, or disqualification of a Senator, when a Senator reaches the age of 75, and upon the addition of four or eight Senators where permitted by section 26 of the *Constitution Act, 1867*.
- 9) The text of section 24 of the *Constitution Act, 1867* provides for the formal appointment of Senators by the Governor General:
24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.
- 10) In the *Senate Reform Reference*, the Supreme Court of Canada confirmed: "In

practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada when filling Senate vacancies.”

- ~~11) — By constitutional convention, appointments to the Senate are made on the advice of the Prime Minister.~~
- 12) The Prime Minister’s decision not to recommend appointments to the Senate to fill the Vacancies reflects an impermissible attempt to make changes to the Senate without undertaking the constitutional reforms required in light of the amending formula set out in the *Constitution Act, 1982* as interpreted by the Supreme Court of Canada in the *Senate Reform Reference*.
- 13) The failure to summon a fit and qualified Person to fill a Vacancy in the Senate within a reasonable time after the Vacancy happens undermines and breaches sections 21, 22 and 32 of the *Constitution Act, 1867*, and the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities, and underlying constitutional imperatives, as enunciated by the Supreme Court of Canada in the *Quebec Secession Reference*.
- 14) Section 18(1) of the *Federal Courts Act* grants the Federal Court exclusive jurisdiction to grant declaratory relief against any federal board, commission or other tribunal, and to hear and determine any application or other proceeding for relief against a federal board, commission or other tribunal.
- 15) Section 18.1(3) of the *Federal Courts Act* empowers the Federal Court to order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing.
- 16) The Prime Minister, or alternatively the Queen’s Privy Council for Canada acting on the recommendation of the Prime Minister, is a federal board, commission or other tribunal, being a body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or

under an order made pursuant to a prerogative of the Crown, when providing advice to the Governor General regarding the appointment of Senators.

- 17) Such further and other grounds as the applicant may identify and this Honourable Court may consider.

THIS APPLICATION will be supported by the following material:

- 1) Affidavit of Ashley Morton, sworn January 16, 2015, and served;
- 2) Affidavit of Aniz Alani;
- 3) The record before the Prime Minister of Canada in determining when, if at all, to fill each of the currently existing Vacancies in the Senate; and
- 4) Such further and other material as the applicant may advise and this Honourable Court may allow.

THE APPLICANT REQUESTS the Prime Minister of Canada to send a certified copy of the record of all materials placed before and considered by the Prime Minister of Canada and the Queen's Privy Council for Canada in making the decision not to advise the Governor General to fill the currently existing Vacancies, to the applicant and to the Registry.

Dated at Vancouver, British Columbia this 8th day of December, 2014.

Amended: May 25, 2015



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ANIZ ALANI, on his own behalf

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