Court File No. T-2506-14

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

WRITTEN REPRESENTATIONS OF THE APPLICANT
(Motion for Abridgment of Time and Expedited Hearing)

Aniz Alani
[redacted]

Applicant

On his own behalf

Department of Justice
Regional Director General's Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Solicitor for the Respondents

Jan Brongers and Oliver Pulleyblank
Counsel

OVERVIEW

1. According to the *Federal Courts Rules*, all procedural steps in an application for judicial review – from the filing of a Notice of Application to the requisition for a hearing – must be completed within 130 days absent consent or order of the Court.[1]

2. Given the statutory requirement under section 18.4(1) of the *Federal Courts Act* that applications "shall be heard and determined without delay and in a summary way",[2] obtaining resolution according to a timeframe that reflects the 130 day default timeline is not naively idealistic but a legitimate expectation of reasonably diligent litigants.

3. In this proceeding, the application's timeline stood still and was disrupted for 126 days to indulge the Respondents' election to invoke an extraordinary pre-hearing tool said to be reserved for an exceptional category of the very clearest of cases: an interlocutory motion to strike and dismiss the application for judicial review before a hearing on its merits.

4. The Applicant, meanwhile, has consistently demonstrated a clear intention to have the application heard and determined in an expeditious manner. The Applicant has complied with every time limit and has not requested a single extension of time.

5. The Respondents' motion to strike now having been dismissed,[3] the Applicant moves this Court to reclaim just a few of the days already lost such that the application can be heard in less than 315 days from when it began and, significantly, before the federal election scheduled to be held on October 19, 2015.[4]

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[1] *Federal Courts Rules*, ss. 7, 8, 304-306, 308- 310, 314, 317-318.
[2] *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 18.4(1).
[3] *Alani v. Canada (Prime Minister)*, 2015 FC 649.
[4] *Canada Elections Act*, S.C. 2000, c. 9, s. 56.1(2).

PART I – STATEMENT OF FACTS

6. On Monday, December 8, 2014, the Applicant filed a notice of application for judicial review seeking, *inter alia*, a declaration that the Prime Minister must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after the Vacancy happens.[5]

7. The proceeding was commenced within one business day of the Applicant having first learned through media reports of the Prime Minister's public statements indicating that he did not intend to "name more Senators right about now" to fill the 16 vacancies then existing in the Senate.[6]

8. On January 5, 2015, the Applicant sought to avail of the Court's procedure for requesting a hearing date before the perfection of the application as set out in the Notice to the Parties and the Profession entitled "Early Hearing Dates for Applications in the Federal Court" issued by Lutfy C.J., as he then was, on November 18, 2010.

9. To do so, the Applicant wrote to counsel for the Respondents seeking confirmation of agreement as to the ordinary timetable provided by the *Federal Courts Rules* as follows:

"January 15, 2015:	Rule 318 material transmitted
January 26:	Applicant's affidavits served
February 25:	Respondents' affidavits served
March 17:	cross-examination on affidavits to be completed
April 7:	Applicant's record served and filed
April 27:	Respondents' record served and filed" [7].

[5] Affidavit of Aniz Alani ("Alani Affidavit"), Exhibit B.
[6] Alani Affidavit, paras. 2-3, Exhibit A.
[7] Alani Affidavit, para. 8, 10, Exhibit D.

10. The Applicant sought the Respondents' agreement "to jointly requesting hearing dates in anticipation of the application being perfected along the timeline indicated above, or with any modifications [they] would like to discuss."[8]

11. On January 15, 2015, the deadline for the transmittal by the Prime Minister of "a certified copy of the record of all materials placed before and considered by the Prime Minister in making the decision not to advise the Governor General to fill the currently existing Vacancies",[9] the Respondents served a Notice of Motion to strike the application for judicial review.[10]

12. Despite the Applicant's efforts to resolve the scope and merits of the Respondents' objection to transmitting material under Rule 318, and the impact of the pending motion to strike on the timetable for remaining steps in the application, these issues were deferred until after the adjudication of the Respondents' motion to strike. [11]

13. The Applicant voiced his concerns that a motion to strike was not appropriate in the context of the present application, would frustrate the objective of obtaining a just, speedy and expeditious determination of the issues, and may result in the unnecessary delay and duplication of argument if the Respondents were unsuccessful in establishing that the "plain and obvious" test for striking an application had been met.[12] To mitigate this, the Applicant offered various proposals to the Respondents and to the Court, including:

    i) that the Respondents' motion be disposed of in writing, with an oral hearing scheduled only if the Court determines it to be appropriate upon review of the materials;[13]

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[8] Alani Affidavit, para. 8, 10, Exhibit D.
[9] Alani Affidavit, Exhibit B; *Federal Courts Rules*, ss. 317-318.
[10] Alani Affidavit, para. 11, Exhibit E.
[11] Alani Affidavit, paras. 13, 17-19, 25-29, Exhibits G, K, L, M, S, T, U, V.
[12] Alani Affidavit, paras. 12-20, 25, Exhibits F-N, S.
[13] Alani Affidavit, Exhibit F.

ii) that the parties discuss mutually satisfactory amendments to the notice of application to reflect a further articulation of the grounds for the application to the extent they would satisfy the Respondents' concerns as to justiciability and jurisdiction;[14]

iii) that the hearing of the motion to strike be adjourned and heard at the outset of the hearing of the application itself.[15]

14. In the course of a case management conference held on February 16, 2015, Prothonotary Lafrenière commented that the discrete objections raised in the Respondents' motion to strike would be *res judicata* such that they could not be re-argued at the hearing of the application, and that it should be possible to arrange for hearing dates relatively quickly, if the motion were unsuccessful.[16]

15. Although the Respondents did not indicate a contrary view during a case management conference, they were unwilling to stipulate as to whether their objections would be *res judicata* until after they had reviewed the reasons for judgment following the Court's determination of the motion to strike.[17]

16. At the hearing of the Respondents' motion to strike on April 23, 2015, Harrington J. commented that, with respect to the Respondents' ability to re-argue the same objections following an unsuccessful motion to strike, although "[i]t might be unfortunate that this is the state of our law", the Respondents "can argue the darn thing over again".[18]

17. On May 21, 2015, Harrington J. dismissed the Respondents' motion to strike.[19]

18. That same day, the Applicant wrote to counsel for the Respondents to solicit

[14] Alani Affidavit, Exhibit G.
[15] Alani Affidavit, Exhibit S.
[16] Alani Affidavit, paras 27-28, Exhibit U.
[17] Alani Affidavit, paras. 30-31, Exhibits W-X, Z.
[18] Alani Affidavit, Exhibit Z.
[19] Alani Affidavit, para. 34.

feedback on a timetable for the remaining steps in the application as follows:

> May 25, 2015 – Applicant to serve and file amended notice of application
>
> June 15, 2015 – Rule 318 material to be transmitted
>
> June 22, 2015 – Applicant to serve any further supporting affidavits
>
> June 29, 2015 – Respondents to serve any affidavits
>
> July 6, 2015 – Cross-examination on affidavits to be completed
>
> July 20, 2015 – Applicant to serve and file application record
>
> August 4, 2015 – Respondents to serve and file Respondents' record[20]

19. On May 22, 2015, counsel for the Respondents responded that they did "not see any justification for abridging them in the manner" proposed.[21]

20. The same day, Applicant requested a case management conference to discuss the possibility of fixing dates for the remaining steps in the proceeding, including the potential fixing of a hearing date.[22]

21. On May 25, 2015, the Applicant served and filed an Amended Notice of Application.[23]

22. By letter to the Court dated May 29, 2015, counsel for the Respondents provided submissions opposing the adjudication of the Applicant's request other than by way of a formal Rule 8 motion.[24]

23. The same day, the Applicant responded with submissions in support of an abridgement of time limits and the fixing of a hearing date, as well as the appropriateness of a case management order to resolve these issues.[25]

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[20] Alani Affidavit, para. 35, Exhibit Y.
[21] Alani Affidavit, para. 35, Exhibit Y.
[22] Alani Affidavit, para. 36, Exhibit Z.
[23] Alani Affidavit, para. 37, Exhibit AA; Amended Notice of Application.
[24] Alani Affidavit, para. 38, Exhibit BB.
[25] Alani Affidavit, para. 39, Exhibit CC.

24. Also on May 29, 2015, the Respondents filed a Notice of Appeal of Harrington J.'s Order dismissing the Respondents' motion to strike.[26]

25. A case management conference was held on June 1, 2015, during which counsel for the Respondents advised the Court that the Respondents anticipated commissioning an expert to provide affidavit evidence to address issues relating to constitutional conventions and might need additional time to do so. [27]

26. The Court ordered that the Respondents advise the Court no later than June 8, 2015 when they anticipated being able to produce their affidavits. The Court also ordered that Rule 317 material be transmitted by June 15, 2015, any further Applicant's affidavits be produced by June 24, 2015, and that subsequent steps be taken within the timelines provided in Part 5 of the *Federal Courts Rules* or as otherwise ordered by the Case Management Judge.[28]

27. On June 8, 2015, the Respondents advised that they expected to be able to serve their responding affidavit evidence and file proof of service by July 31, 2015. The Respondents indicated: "While it is our hope that this reasonable request will meet with the consent of the Applicant and can be adjudicated informally by the Court, the Respondents are prepared to file a formal Rule 8 motion if necessary."[29]

28. The same day, the Applicant consented to the Respondents' informal request for an extension of time.[30]

29. Also on the same day, the Applicant wrote to counsel for the Respondents to request confirmation of the timetable for the remaining steps in the

[26] Alani Affidavit, para. 40.
[27] Alani Affidavit, para. 41.
[28] Alani Affidavit, para. 42, Exhibit DD.
[29] Alani Affidavit, para. 43, Exhibit EE.
[30] Alani Affidavit, paras. 44-45, Exhibit FF.

proceeding.[31]

30. The Court granted the Respondents' request by Order dated June 9, 2015.[32]

31. On June 9, 2015, counsel for the Respondents clarified that the period for completion of cross-examination on affidavits would end on August 20, 2015 if the Respondents' affidavits were produced on July 31, 2015. Counsel also indicated, in part:

> "…[W]e think it preferable to await the completion of the parties' affidavit material before committing to a position on whether extensions or abridgements would be appropriate for the remaining procedural steps in this application."[33]

32. On June 11, 2015, the Applicant wrote to counsel for the Respondents regarding the potential mootness of the application after the federal election, stating in part:

> "As indicated in my correspondence to the Court of May 29th, I have concerns that if the hearing of the application does not take place in advance of the scheduled federal election of October 19th the issues raised in the application may become moot. It may be the case that a hearing date can be accommodated before October 19th without any further modifications to the timetable, depending on the parties' and Court's availability and whether an early hearing date is requested as contemplated in the Practice Direction already referenced.
>
> Before taking steps to determine whether this is the case, including, if necessary, by way of a formal Rule 8 motion to abridge time limits as necessary to accommodate a hearing date before October 19th, I note that you referred at the June 1st case management conference to being prepared to make submissions regarding why the issues in the application may not become moot after October 19. Those submissions were not heard.
>
> If I have understood correctly that the respondents take the position that the issues would not necessarily be moot after the election, I would respectfully request that you provide me with the basis for that position. If we can agree that mootness will not be an issue, it may not be necessary in my view to take any further steps to fix a hearing date

[31] Alani Affidavit, para. 46, Exhibit II.
[32] Alani Affidavit, para. 47, Exhibit GG.
[33] Alani Affidavit, para. 48, Exhibit II.

at this time."[34]

33. On June 15, 2015, the Respondents advised the Court that no material would be transmitted under Rule 318 because "…[T]here was no 'decision not to advise the Governor General to fill the currently existing [Senate] Vacancies'…".[35]

34. By letter dated June 15, 2015, counsel for the Respondents stated, in part:

> "In the absence of a formal motion to expedite or any evidence in support of your assertions, we see no utility in engaging in an academic debate on the merits of your apparent position at this time. Suffice it to say that, in our respectful submission, we find neither of the grounds you have raised to be persuasive. They certainly do not provide a justification for denying either party the opportunity to properly prepare their respective cases. In sum, it is our position that the timing of the next federal election is not a factor that ought to govern the determination of either the procedural deadlines or the hearing date of this application."[36]

35. On June 15, 2015, the Applicant wrote to counsel for the Respondents reiterating his intention to request through case management a direction as to whether the Court can accommodate a hearing date between the current time limit for service and filing of the Respondents' Record (i.e., September 29, 2015) and October 19, 2015.[37]

36. Referring to the Notice to the Parties and the Profession dated November 18, 2010, the Applicant inquired as to counsel's time estimate for the hearing of the application and counsel's availability for a hearing after September 29, 2015.[38]

37. By reply dated June 16, 2015, counsel for the Respondents declined to provide a time estimate for the hearing of the application or advise as to their availability for a hearing until after the production of the Respondents' record

[34] Alani Affidavit, para. 49, Exhibit II.
[35] Alani Affidavit, para. 52, Exhibit HH.
[36] Alani Affidavit, para. 50, Exhibit II.
[37] Alani Affidavit, para. 51, Exhibit II.
[38] Alani Affidavit, para. 51, Exhibit II.

under Rule 310.[39]

38. Counsel also indicated that, if the Applicant brought a Rule 8 motion to expedite the proceeding, it was likely that the Respondents would cross-examine on any supporting affidavit. [40]

39. By reply dated June 16, 2015, the Applicant confirmed his intention to first ask the Court whether it could accommodate a hearing date between September 29, 2015 and October 19, 2015, which, if so, would obviate the need for a Rule 8 motion to abridge time limits.[41]

40. By further reply dated June 16, 2015, counsel for the Respondents advised that they were both not available to attend a hearing from September 28 to October 16 inclusive.[42]

41. The Applicant served and filed a Notice of Motion in respect of the present motion on June 17, 2015.[43]

42. The current time periods fixed by Order of the Court and the *Federal Courts Rules* are as follows:

July 31, 2015 – Respondents to serve affidavits and file proof of service

August 20, 2015 – Cross-examination on affidavits to be completed

September 9, 2015 – Applicant to serve and file application record

September 29, 2015 – Respondents to serve and file Respondents' record

43. A federal general election is scheduled to be held on October 19, 2015.[44]

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[39] Alani Affidavit, para. 53, Exhibit II.
[40] Alani Affidavit, para. 53, Exhibit II.
[41] Alani Affidavit, para. 54, Exhibit II.
[42] Alani Affidavit, para. 55, Exhibit II.
[43] Alani Affidavit, para. 17; Notice of Motion (A.M.R.).
[44] *Canada Elections Act*, S.C. 2000, c. 9, s. 56.1(2).

PART II – ISSUES

44. There are two issues before the Court on this motion:

i) Should a hearing date for the application be fixed?

ii) Should the Court exercise its discretion to abridge time periods for the remaining procedural steps in the application to accommodate a hearing date before October 19, 2015?

PART III – SUBMISSIONS

A. BACKGROUND

45. The application proceeds against the backdrop of 20 vacancies[45] having accumulated in the 105-member Senate -- the effects of which include that the guaranteed level of regional representation set out in the *Constitution Act, 1867*[46] is denied in respect of seven of Canada's provinces -- and the Prime Minister's stated intention not to appoint any more Senators.

46. By the time this motion is heard, a 21st vacancy will have arisen by the mandatory retirement of Senator Fortin-Duplessis on June 30, 2015. That same week, Senator LeBreton's retirement will create a 22nd vacancy.[47]

47. The application seeks declaratory relief interpreting and giving effect to s. 32 of the *Constitution Act, 1867* and, in particular, determining whether the requirement to summon qualified persons to the Senate "when a Vacancy happens" imposes an obligation to cause appointments to be made within a

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[45] Library of Parliament, "Party Standings in the Senate – Forty-first (41st) Parliament", online: Parliament of Canada <abbreviated URL: http://bit.ly/SenateStandings41>; retrieved: June 23, 2015

[46] *Constitution Act, 1867*, ss. 21-22.

[47] "Senators by Date of Retirement", online: Parliament of Canada <URL: http://www.parl.gc.ca/SenatorsBio/default.aspx?Language=E&sortord=R>; retrieved: June 23, 2015.

reasonable time.[48]

48. Section 18.4(1) of the *Federal Courts Act* requires that applications "be heard and determined without delay and in a summary way".

49. Rule 3 of the *Federal Courts Rules* declares:

3. General Principle – These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3. Principe general** – Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

B. FIXING OF HEARING DATE BEFORE PERFECTION OF APPLICATION

50. Before undertaking an analysis of why the abridgement of time is justified in this proceeding, it is helpful to consider at the outset what options for abridgment might be considered – and whether any abridgment of time is required at all in order to grant the Applicant's overarching request for a hearing date that facilitates the determination of the issues in the application ahead of the federal election scheduled for October 19, 2015.

51. The extent to which time periods might be abridged to accommodate a hearing of the application before the federal election of October 19, 2015 depends in part on the following variables:

i) the Court's availability to hear the application before October 19, 2015;

ii) the amount of time the Court requires for review of the application records before the hearing of the application; and

iii) the availability of counsel.

52. The first of these two variables are to be determined by the Court itself.

[48] Amended Notice of Application.

53. With respect to the third variable, counsel for the Respondents has advised that they are both unavailable between the current time limit for production of the Respondents' record (i.e., September 29) and October 16, 2015.[49]

54. Set out below are three illustrative examples of potential options for achieving an expedited hearing date with and without abridgments of time periods.

Option 1: No order for abridgment of time necessary; hearing date fixed on or after September 10, 2015

55. It may be possible that an early hearing date can be set in advance of the October 19th election without any abridgment of time periods under Rule 8.

56. Pursuant to the Order of the Court (Lafrenière P.) of June 9, 2015 and Part V of the *Federal Courts Rules*, the existing time periods for the steps currently remaining in the proceeding are as follows:

i) July 31, 2015: Respondents to serve affidavits and file proof of service

ii) August 20, 2015: Cross-examination on affidavits to be completed

iii) September 9, 2015: Applicant to serve and file application record

iv) September 29, 2015: Respondents to serve and file Respondents' record

v) October 9, 2015: Requisition for hearing to be filed

57. It is noteworthy that the time period for the service and filing of the Respondents' record under Rule 310 is defined as 20 days after service of the Applicant's record. If, for example, the Applicant's record were served on the due date for cross-examinations to be completed (i.e., August 20, 2015), the Respondents' record would by default be required to be served and filed on September 9, 2015.

[49] Alani Affidavit, para. 55, Exhibit II.

58. Under this or a substantially similar timetable, to which the Applicant would be prepared to commit if a hearing date were to be fixed accordingly, the Court could hear the application after the perfection of the application on September 9. Twenty days of time would be "reclaimed" by the Applicant's unilateral commitment to producing his application record earlier than required.

59. Subject to the Court's and counsel's availability, this would yield 39 days between the perfection of the application and the October 19th election in which to conduct a pre-hearing review of the materials, hear the application, and potentially render judgment.

Option 2: Time period for cross-examinations expedited and abridged

60. With respect to cross-examination on affidavits, the Applicant has already produced the totality of his Rule 306 affidavits. But for the prohibition under Rule 84 against cross-examining deponents of an affidavit before having served every affidavit a party intends to rely on and against filing affidavits after cross-examining the deponent of an affidavit, the Respondents would be free to cross-examine the deponents of the Applicant's Rule 306 affidavits at any time.

61. The Applicant is prepared to consent to waive the requirements of Rule 84 in order to obtain an expedited hearing date. To that end, the Applicant seeks an order granting leave under Rules 84(1) and (2) as necessary to modify the time periods to accommodate an early hearing date as requested on this motion.

62. The Applicant is also prepared to present for cross-examination on his own Rule 306 affidavit forthwith if the Respondents seek to cross-examine him.

63. As the Respondents' affidavits are currently due on or before July 31, 2015, and the Applicant does not oppose an early cross-examination on his Rule 306 affidavits, the Applicant proposes that the time period for cross-examinations

to be completed be abridged from August 20, 2015 to such earlier date as the Court determines to be appropriate in the circumstances.

Option 3: Time period for production of application records to be abridged

64. If additional time is required between the perfection of the application an early hearing date as requested beyond that which might be "saved" through any combination of Options 1 and 2 above, the Applicant proposes that the 20 day time period for the production of each party's record be abridged at the Court's discretion.

65. As indicated above, the Applicant is prepared to commit to producing his record on or shortly after the time period for completing cross-examinations. Subject to the need to cross-examine the Respondents' affiants at all, and their availability to attend for cross-examination, this could reasonably include producing the Applicant's record shortly after the current July 31, 2015 time limit for the production of the Respondents' affidavits.

C. GENERAL PRINCIPLES GOVERNING THE ABRIDGMENT OF TIME

66. Rule 8(1) of the *Federal Courts Rules* provides:

Extension or abridgement	**Délai prorogé ou abrégé**
8. (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.	**8.** (1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.

67. Rule 8 does not codify factors constraining the Court's discretion to abridge time.[50] However, the Court's jurisprudence has established that the following non-exhaustive factors may be considered:

i) the effect of the abridgement on the respondent generally and on its ability

[50] *Canadian Wheat Board v. Canada (Attorney General)*, 2007 FC 39 at para. 13 ["*Wheat Board*"].

to defend its legal position;[51]

ii) whether the proceeding would be rendered moot if not decided prior to a particular event;[52]

iii) evidence that the applicant has acted expeditiously in the proceeding;[53]

iv) an urgent reason to proceed quickly;[54]

v) whether it is in the public interest to have a speedy determination of the issues;[55] and

vi) the effect of abridgment on other matters pending before the Court.[56]

i) The proposed abridgments will not unduly prejudice the Respondents in the circumstances of this case

68. The Respondents have had notice of the application since it was filed on December 8, 2014.

69. With respect to the time limit for the Respondents' affidavits, the Respondents have already sought and obtained, on consent, an extension of time to July 31, 2015 to produce affidavits. But for the motion to strike, the Respondents' affidavits would have been served by February 25, 2015.

70. The Applicant does not propose that the current time limit for the Respondents' affidavits to be produced.

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[51] *Wheat Board* at para. 13; *Conacher v. Canada (Prime Minister)*, 2008 FC 1119 at para. 16 ["*Conacher*"]; *Gordon v. Canada (Minister of National Defence)*, 2004 FC 1642,
[2004] F.C.J. No. 2000 (Q.L.) at para. 11 ["*Gordon*"]; *May v. CBC/Radio Canada*, 2011 FCA 130 at para. 14 ["*May*"].
[52] *Wheat Board* at para. 13; *Conacher* at para. 16.
[53] *Winnicki v. Canadian Human Rights Commission*, 2007 FCA 3 at para. 3.
[54] *Wheat Board* at para. 13; *Conacher* at para. 16; *Gordon* at para. 11.
[55] *May* at para. 17; *Trotter v. Canada (Auditor General)*, 2011 FC 498 at para. 17 ["*Trotter*"].
[56] *Wheat Board* at para. 13; *Conacher* at para. 16.

71. However, it must be noted that the Respondents will have had ample opportunity to prepare and present an evidentiary record in response to the application. No prejudice to the Respondents can fairly be said to arise on this account.

72. With respect to the timing of the Respondents' record, the issues of justiciability and jurisdiction were already thoroughly argued according to the enhanced "plain and obvious" test in the context of the Respondents' motion to strike.

73. Since these same issues will need to be re-argued if the Respondents maintain their position on justiciability and jurisdiction, there can be no prejudice to the Respondents arising from an abridgement of time to prepare written submissions on these identical issues. They have already been prepared and argued, both in writing and orally, albeit in the context of a motion that did nothing to resolve the issues raised.

74. The Applicant has also provided counsel for the Respondents with a certified copy of a transcript of the hearing of the motion to strike. With the benefit of a verbatim account of the parties' oral submissions on these issues, any potential prejudice arising from an abridgment of time to prepare the Respondents' memorandum of fact and law is mitigated accordingly.

75. Beyond the issues of justiciability and jurisdiction, the principal remaining issues of statutory interpretation, remedy and costs are relatively straightforward. These are primarily legal issues to be argued and in respect of which the Respondents are well positioned to defend fully through their able representation by two counsel within the largest legal department in Canada.

ii) Whether the proceeding would be rendered moot if not decided prior to a particular event

76. While neither party nor the Court can predict with certainty the impact of the October 19th federal election on this proceeding, the Applicant submits the

following as reasonable hypotheticals that could realistically render the proceeding moot:

i) If shortly before the election the Prime Minister resiles from his stated intention not to appoint Senators, it is reasonably foreseeable that the Respondents may raise mootness as a bar to proceeding with the application;

ii) If the Prime Minister remains in office following the election and thereafter resiles from his stated intention not to appoint Senators, it is also reasonably foreseeable that the Respondents may raise mootness as a bar to proceeding with the application; and

iii) If the Prime Minister does not remain in office following the election, it is reasonably foreseeable that the Respondents may raise ripeness as a bar to proceeding with the application unless and until the new Prime Minister states a similar intention not to appoint Senators.

iii) Evidence that the applicant has acted expeditiously in the proceeding

77. In each of the Court's reasons in *Wheat Board*, *Conacher*, *Gordon*, *May*, *Trotter*, and *Winnicki*, the applicants' requests for an expedited timetable were denied on the basis that the applicants had each failed to bring and conduct proceedings in a timely manner.

78. The evidence tendered in support of this motion establishes that, in contrast to the cases referenced above, the Applicant has acted expeditiously throughout this proceeding.

79. As a result, the time abridgment sought by this motion in order to accommodate the Applicant's request for an early hearing date – if abridgments are needed at all – is relatively minor compared to the significant abridgments requested in the cases referenced above in which the Court was unwilling to exercise its discretion under Rule 8.

80. In *Wheat Board*, the applicant waited 34 days to commence an application in respect of a barley plebisicite after the Minister announced it and the applicant was aware of it. The applicant also "waited another month after filing its application for judicial review before bringing [its] motion for an expedited hearing". The applicant had requested that the case be heard within a month of the Rule 8 motion.[57]

81. In *Conacher*, the applicants filed their notice of application 19 days after the issuing of Writs of Election and six days before the hearing of their motion to expedite. They had requested that the case be heard in less than a week, on October 8, 2008, ahead of an election fixed for October 14, 2008.[58]

82. In *Gordon*, Lafrenière P. found that the urgency suggested by the applicants was refuted by their failure to take steps to protect their asserted *Charter* rights between the commencement of tribunal proceedings on October 8, 2004 and the applicants' request for access during the first week of November.[59] As a result, the Court concluded: "The applicants have created an artificial sense of urgency through their own delay."[60]

83. The Federal Court of Appeal, per Nadon J.A., dismissed a motion for an expedited hearing brought by Green Party leader Elizabeth May in respect of an application for judicial review of a CRTC policy that had the effect of excluding her from participating in televised leaders' debates. In doing so, Nadon J.A. noted that the applicant could have brought her application before the election writ was dropped rather than waiting until 12 days before the first leaders' debate.[61] In that case, the applicant sought a timetable that would have had records produced, the application heard, and judgment issued within

[57] *Wheat Board*, para. 19.
[58] *Conacher*, para. 18.
[59] *Gordon*, para. 14.
[60] *Gordon*, para. 15.
[61] *May* at paras. 8, 11.

6 days of the Rule 8 motion being heard.[62]

84. In *Trotter*, an application filed April 26, 2011 seeking to make public a report of the Auditor General ahead of a general election scheduled for May 2, 2011 was the subject of a Rule 8 motion.[63] While Nöel J. expressed doubts about whether the application could could be prepared and heard in time,[64] he indicated that "This situation would have been different had the Applicant not filed her application less than a week before the election", noting that the Auditor General's refusal had "been public and unequivocal since at least April 11, 2011."[65]

85. In *Winnicki*, Nöel J.A. rejected a motion for an expedited hearing where the applicant was in a position to proceed with its application since November 24, 2006, but, for reasons unexplained, failed to do so until December 22, 2006. As a result, the Court concluded that the applicant's "desire to expedite the application only arises because it failed to present the application earlier."[66]

86. In this case, the application for judicial review was filed on December 8, 2014 – less than two business days after the Prime Minister announced that he did not intend to fill Senate vacancies on December 4, 2014, and 3 calendar days after the applicant learned of the announcement on December 5, 2014.[67]

87. The Applicant in this proceeding clearly and consistently demonstrated an intention to avoid unnecessary delays in bringing forward the application to a hearing on its merits.

88. With respect to the fixing of hearing dates for the application, the Applicant attempted at various stages of the proceeding to apply the Court's guidance set out in its Notice to the Parties and the Profession of November 18, 2010,

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[62] *May* at paras. 15-16.
[63] *Trotter* at para. 3, 12.
[64] *Trotter* at para. 14.
[65] *Trotter* at para. 15.
[66] *Winnicki* at para. 3.
[67] Alani Affidavit, paras. 2-4.

which contemplates that parties may request that a hearing date for an application be set prior to the filing of their application records[68] rather than waiting to file a requisition for hearing under Rule 314.

89. The Notice states: "The Court will endeavour to accommodate early requests for hearing dates whenever possible." The key prerequisite for such a request is the parties' agreement to a schedule of steps required for the perfection of the application.

90. On January 5, 2015, the Applicant sought the Respondents' consent to a timetable and to jointly request hearing dates in anticipation of the application being perfected according to the ordinary time periods set out in the *Federal Courts Rules* – without the need for any abridgments of time. Under the Rules, the application at that time would have been perfected on or before April 27, 2015.[69]

91. The Applicant's first attempt to confirm a timetable and request hearing dates accordingly was ultimately thwarted by the filing of the Respondents' motion to strike the application on January 15, 2015.

92. Subsequent efforts to avail of the option for requesting early hearing dates after the dismissal of the Respondents' motion to strike -- including without the necessity of abridging time limits – were rejected by the Respondents. They took the position that it would not be appropriate to discuss time estimates for the hearing – or even their counsel's availability for a hearing – until after their responding application record had been filed and the requirement for a Rule 314 requisition for hearing was triggered.[70]

93. Unlike in previous cases where the Court has denied abridgments under Rule 8, the Applicant has not created a false sense of urgency by failing to act

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[68] Notice to the Parties and the Profession: "Early Hearing Dates for Applications in the Federal Court" issued November 18, 2010 [*"Early Hearing Dates Notice*"].
[69] Alani Affidavit, para. 8, Exhibit D.
[70] Alani Affidavit, paras. 51, 53-56, Exhibit II.

expeditiously in bringing and conducting the proceeding.

iv) An urgent reason to proceed quickly

94. In their motion to strike, the Respondents took the position that the Prime Minister's advice to the Governor General regarding Senate appointments is non-justiciable and that any remedy related to the Prime Minister's actions must be found in the political realm.

95. If the Court determines after a hearing of the application on its merits that the Respondents are correct in this regard, it follows that individual voters will be left to determine the constitutional significance of the Prime Minister's refusal to appoint Senators as a "ballot box" issue.

96. If the issues in the application are not determined until after the election and the Court concludes that the Prime Minister's inaction is non-justiciable, the Canadian voting public may be deprived of a singular opportunity to effect an obviously available political remedy.

97. The nature of the application itself, which raises a significant constitutional issue of public interest,[71] also militates in favour of exercising the Court's discretion to order an expedited hearing.

98. Finally, the Applicant's personal family circumstances are such that his own availability to prepare for and attend a hearing of the application will likely be curtailed for some time as of mid-November 2015.[72]

v) Whether it is in the public interest to have a speedy determination of the issues

99. National media coverage of the status of the Senate vacancies discloses uncertainty among political leaders and academics alike – and presumably, in turn, among Canadians generally – as to whether there is any constitutional

[71] Alani Affidavit, para. 73.
[72] Alani Affidavit, paras. 70-72.

barrier to the Prime Minister's refusal to appoint Senators to fill vacancies.[73]

100. This proceeding has itself generated national interest through media coverage.[74] Accordingly, it is reasonable to anticipate that the determination of the issues raised in the application will be effective in removing the public uncertainty that exists with respect to the alleged constitutional requirement that the Prime Minister advise the Governor General to fill vacancies within a reasonable time.

101. Unlike in several of the Rule 8 cases referenced above, this is not a case in which the public interest in having a significant constitutional issue decided will be harmed by an aggressively expedited timetable or an incomplete record to be considered by the Court.

102. On the contrary, as the application largely centers on a question of statutory interpretation against the backdrop of a publicly available and easily referenced history of Senate vacancies, there is no real risk that the Court will be asked to decide issues "on the fly" without the benefit of full legal argument and the relevant evidentiary record.

vi) The effect of abridgment on other matters pending before the Court

103. The Applicant is not aware of the Court's existing availability to hear the application following the perfection of records either according to the default time limits or according to abridged timelines. It is therefore difficult to point to the likelihood of cancellation of other hearings as a result of an abridgement.

104. Noting the Court's publicly available Western hearing list, however, it appears that the Court is presently scheduled to sit in Vancouver for a total of 13 sitting days during September and October 2015.[75]

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[73] Alani Affidavit, paras. 58-69, Exhibits JJ-TT.
[74] Alani Affidavit, para. 73.
[75] Alani Affidavit, para. 74, Exhibit UU.

PART IV – ORDER SOUGHT

105. The Applicant respectfully requests the Court to issue an order that:

i) a hearing of the application be scheduled for the earliest practicable date;

ii) the times for the remaining steps in the proceeding be abridged on terms that the Court deems just;

iii) leave be granted to the Respondents under Rule 84(1) and (2) to cross-examine the deponents of the Applicant's affidavits forthwith and in advance of serving and filing proof of service of the Respondents' affidavits; and

iv) costs of this motion payable to the Applicant in an amount to be fixed by the Court, or, alternatively, costs to the Applicant in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Aniz Alani
Applicant

June 24, 2015