

Aniz Alani

Tel.: 604.600.1156

E-Mail: senate.vacancies@anizalani.com

July 27, 2015

BY E-MAIL

Department of Justice Canada
B.C. Regional Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Attention: Mr. Jan Brongers, Senior General Counsel
Mr. Oliver Pulleyblank, Counsel

Dear Sirs:

Re: ALANI, Aniz v. Canada (Prime Minister) et al.; Court No: T-2506-14
Canada (Prime Minister) et al. v. ALANI, Aniz; Court No. A-265-15
Proposed Resolution

I write further to the Prime Minister's public announcement of Friday, July 24, 2015 purporting to declare a moratorium on the appointment of Senators to fill existing and future vacancies in the Senate.

I also write to respectfully propose a resolution of the issues raised in the above referenced court proceedings, namely the application for judicial review currently before the Federal Court of the Prime Minister's refusal to advise the Governor General to fill Senate vacancies, and Canada's appeal currently before the Federal Court of Appeal of Mr. Justice Harrington's decision dated May 21, 2015 denying the Respondents' motion to strike the application before a hearing on its merits.

On Friday, the Prime Minister publicly stated, in part: "Let me be kind of blunt about this: The number of vacancies in the Senate will continue to rise, and other than some voices in the Senate, and some people who want to be appointed to the Senate, no one's going to complain."

The Prime Minister's public statement confirms and makes clear that he does not intend to advise the Governor General to summon fit and qualified persons to the Senate to fill vacancies when they occur so long as he remains in office and can command a majority of sitting Senators to pass bills approved by the House of Commons.

I understand from the Prime Minister's comments that he considers it to be a matter left to his untrammelled discretion whether to appoint or not appoint Senators as he sees fit. With respect, for the reasons set out in the grounds of the Amended Notice of Application and Notice of Constitutional Question filed in the judicial review proceeding before the Federal Court, it is my view that the Constitution of Canada requires the Prime Minister to provide advice to the

Governor General so as to enable His Excellency to comply with the plain requirements of section 32 of the *Constitution Act, 1867*: “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.”

In my opinion, the Prime Minister can declare a moratorium on filling Senate vacancies no more validly than he can declare an end to the granting of Royal Assent to bills approved by Parliament or the use of French or English as an official language of Canada. In such cases, the requirements of the Constitution remain in effect and binding within Canada unless and until amended in accordance with the constitutional amending formulae.

In any event, it is clear that there is a difference of opinion on the constitutionality of the Prime Minister’s approach to these issues. It is for that reason that I have pursued a declaration from the Federal Court in these judicial review proceedings.

In light of the significant public interest in having the constitutionality of these issues determined in a final and conclusive manner, I am writing to propose that the Governor in Council refer these questions at the earliest possible opportunity to the Supreme Court of Canada for its consideration.

To illustrate my interest in having these issues resolved, I am also offering to waive any entitlement to costs related to the application for judicial review and Canada’s appeal of Justice Harrington’s order, subject to the conditions set out below.

I must emphasise that, in making this proposal, my resolve to pursue these matters before the Court should not be doubted. Rather, given the strong possibility that the judicial review proceedings will give rise to further appeals with resulting expense and delay, I respectfully suggest that submitting these questions to the Supreme Court of Canada by way of a reference would be the most efficient and effective way of resolving questions of significant national importance.

I would also point out that seeking the Supreme Court of Canada’s guidance in such matters is hardly without precedent. As Justice Harrington observed, it was not until the Supreme Court of Canada and subsequently the Judicial Committee of the Privy Council considered a reference in the “Persons Case”, brought by petition by private citizens to the federal Cabinet, that Canada had the benefit of a definitive interpretation of the constitutional provisions concerning the appointment of Senators.

As well, the Prime Minister’s own government sought and obtained the Supreme Court of Canada’s opinion concerning the constitutionality of certain proposals for reform in the *Senate Reform Reference*.

A reference to the Supreme Court of Canada on the issues raised by the Prime Minister’s moratorium would, in my respectful opinion, continue this longstanding tradition of resolving constitutional controversies while promoting respect for the rule of law.

In light of the foregoing, I respectfully propose that the above referenced proceedings be resolved on the following terms:

1. The Governor in Council shall refer questions for the opinion of the Supreme Court of Canada pursuant to section 53 of the *Supreme Court Act*, including questions substantially as follows:
 - a) Does the Constitution of Canada require the Prime Minister to recommend to the Governor General that a qualified person be summoned to the Senate when a vacancy happens in the Senate by resignation, death or otherwise?
 - b) If the answer to the previous question is “yes”, when does the Constitution of Canada require that such recommendation be made?

(the “Reference”)
2. The parties will jointly request orders, by consent, holding Federal Court File T-2506-14 and Federal Court of Appeal File A-265-15 in abeyance pending the determination of the Reference.
3. The parties will jointly seek, by consent, the discontinuance of Federal Court File T-2506-14 and Federal Court of Appeal File A-265-15 without costs to any party forthwith upon the determination of the Reference.

While the Governor in Council is of course at liberty to refer such questions to the Supreme Court of Canada whenever it sees fit, subject to the applicable conventions, my offer in respect of my waiver of costs is open for acceptance until the next writ of election is issued under the *Canada Elections Act*, upon which issuance this offer is withdrawn.

I reserve the right to disclose the terms of this proposal; for greater certainty, settlement privilege does not apply in respect of this communication.

Subject to acceptance of this proposal, I look forward to receiving this week Canada’s memorandum of fact and law in the appeal proceeding and finalizing arrangements for cross-examination on affidavits in the judicial review proceeding.

Would you kindly communicate this proposal to your clients.

Sincerely,



Aniz Alani