

FEDERAL COURT OF CANADA

(Before the Examiner)

T-2506-14

Vancouver, B.C.

August 6, 2015

BETWEEN:

ANIZ ALANI,

Appellant;

AND:

THE PRIME MINISTER OF CANADA,

THE GOVERNOR GENERAL OF CANADA and,

THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents.

EXAMINATION OF CHRISTOPHER P. MANFREDI FOR DISCOVERY,

pursuant to appointment.

Mr. A. Alani,

Appearing on His Own Behalf;

Mr. J. Brongers,

Mr. W. Newman,

Mr. O. Pulleyblank,

Mr. J. Khan,

Appearing for the Respondents;

CHRISTOPHER MANFREDI, Affirmed:

CROSS-EXAMINATION BY MR. ALANI:

1 Q Thank you, and good afternoon, sir. Now that we're on record I just want to formally extend my thanks for making yourself available and also my thanks to counsel for the respondents for facilitating this cross-examination by video conference today.

Sir, I would like to begin with attached to your affidavit as Exhibit B is an instruction letter, if I could take you to that.

A Certainly.

2 Q And on page 2 of your instruction letter it states:

"As an expert witness, you have a duty to the Court which is set out in the attached Code of Conduct for Expert Witnesses. Please carefully review the Code of Conduct and, after doing so, sign the attached certificate and send it back to us."

Is that correct?

A Yes, I see that.

3 Q And you carefully reviewed the Code of Conduct as instructed?

A I did.

4 Q You signed the certificate?

A I did.

5 Q You understand and agree that as an expert witness named to provide a report for use as evidence that you have an overriding duty to assist the court impartially on matters relevant to your area of expertise?

A Yes, I do.

6 Q And sir, what are your areas of expertise?

A Well, as stated in my affidavit my areas of scholarly expertise are within political science, public law, Canadian politics, constitutionalism and judicial politics.

7 Q You understand and agree that your duty to the court overrides any duty you may have to a party in the proceeding including the party that retained you?

A Yes, I do.

8 Q And just to confirm that party that retained you was the Government of Canada?

A Yes, it did.

9 Q You understand and agree, sir, that as an expert you are to be independent and objective?

A Yes.

10 Q And you understand and agree that you are not

an advocate for any party?

A I understand that and I agree to it.

11 Q So, to put that another way, it's safe to say that, you know, you're here to help the court get to the right answer through your evidence and we can rely on your evidence as being the best available given your expertise. Is that correct?

A Yes, I think that's fair to say.

12 Q You understand and agree that as an expert witness you are required to report without delay to persons in receipt of your report any material changes affecting your qualifications or opinions expressed or the data contained in your report.

A If I am aware of them, yes.

13 Q And as of now are you aware of any such material changes?

A I'm not aware of any material changes to the content of the affidavit, no.

14 Q If I could take you through to paragraph 6 of your affidavit. You depose at paragraph 6, that:

"The average number of vacancies during the period from the 30th to 40th Parliaments was 7."

Is that correct?

A That's what I calculated, yes.

15 Q And at paragraph 8, you depose that the mean number of vacancies in the Senate during the 41st Parliament to July 15th, 2015 has been seven.

A That's correct. It may be a rounded number, but yes, that's correct.

16 Q Referring next to Exhibit D of your affidavit, you have a table 1.

A I'm trying to find that, sorry. Yes.

17 Q And that table includes a column indicating the mean number of vacancies for each of the parliaments listed on that table, is that correct?

A As well as the final row that lists the average of those.

18 Q Right. Could you just explain how you calculated each of those averages?

A The averages were calculated by looking at the data in -- taking the material contained in Exhibit E, basically for example the 41st Parliament I would have taken for each week roughly that a number of vacancies is reported I would have added it up and then calculated the mean of all of those numbers.

- 19 Q So do I understand correctly that the average is essentially calculated on a weekly weighted basis?
- A Well, it's calculated on -- it's taken all the vacancies for the periods that are reported and -- yes, that's correct.
- 20 Q And does that time weighting include only the weeks on which the Senate was sitting or does it include the breaks taken by the Senate as well?
- A It includes simply what's reported in the data that's available to me. I don't know whether that includes breaks or just when it was sitting, it's what was in the data.
- 21 Q So looking, for example then, at the reported data for the 41st Parliament at Exhibit E, of your affidavit.
- A Yes.
- 22 Q I see that the last row indicates data beginning on May 2nd, 2011 corresponding to the election.
- A Correct.
- 23 Q And there were, as I understand it, three vacancies at that specific point in time. And the data in that same table is reported up to and including July 4th, 2015 --

A Right.

24 Q -- when the vacancies had reached twenty-two.

A Correct.

25 Q So do I understand from your previous answer that if, between May 2nd, 2011 and July 4th, 2015, the Senate was sitting or not sitting or on a holiday break or -- essentially your average of vacancies is kind of indiscriminate on that basis?

A It's simply the average of the data that's reported in the table that you have before you for vacancies.

26 Q If you could turn to paragraph 16 of your affidavit.

A Yes.

27 Q In your sample, in your sample do I read your table at paragraph 16 correctly to indicate that half of all vacancies in your sample were filled in 213 days or less?

A That's correct.

28 Q At paragraph 20, do I read your table there correctly to indicate that 49.1 percent of all vacancies in your sample were filled in 200 days or less?

A That looks correct, yes.

29 Q If you want you can just take a moment to do

the same mental math that I did.

A 49.1 that's what we get.

30 Q And do I read your table at paragraph 20, correctly to indicate that more vacancies were filled within 100 days than during any other 100 day increment?

A That would be correct.

31 Q I'd like to turn next to your CV that's attached as Exhibit A, to your affidavit, specifically on page 15 of your CV. You reference there your role in providing an expert opinion on the possible effects of Bill C-7, *An Act respecting the election of Senators and amending the Constitution Act, 1867*, filed by the Government of Canada in the Quebec Court of Appeal and the Supreme Court of Canada. Is that correct?

A Yes.

32 Q And this was the reference case litigation that resulted in the Supreme Court of Canada judgment in the *Senate Reform Reference* of 2014?

A Yes.

33 Q And as an expert providing your opinion to the court in that case you agree that you had a similar duty as in this litigation to provide

independent and objective opinions to the court?

A Yes, I did.

34 Q Your opinion in that case included an assessment of whether the Federal Government Senate reform proposals would have profound effects on the fundamental features or essential characteristics of the Senate, is that correct?

A Yes.

35 Q And it was your opinion that:

"The essential function of the Senate is to supplement the legal guarantee of autonomy provided to the provinces by the *Constitution Act 1867*, through a national political institution whose basis of representation is equality of sub-national units and whose purpose is to protect their interest through independent action."

Is that right?

A That's sounds like what I wrote, yes.

36 Q And does that remain your opinion of the senates essential function today?

A One of them, yes.

37 Q And in your opinion is that essential function

of the Senate materially affected by the failure to appoint Senators to reflect the level of regional representation legally guaranteed by the *Constitution Act 1867*?

A I'm not sure I have an opinion on that. It might at a certain point.

38 Q Could you elaborate on that?

MR. BRONGERS: Mr. Alani, could I just ask where you're going with this. Obviously the opinion given with respect to the Senate reference is different from the one we are dealing with in this particular case. And how is that relevant to assessing the opinion of Professor Manfredi has provided for your Senate vacancy case? I don't understand the connection between the two.

MR. ALANI: Well, perhaps, counsel, without revealing in advance a line of questioning that I intend to pursue that I think will be of obvious relevance, I will perhaps come back to this question once that basis is more fully established.

39 Q Sir, if I could take you to paragraph 9 of your affidavit, you depose at paragraph 9 that:

"It is generally accepted by Canadian political scientists that

constitutional conventions are non-legal rules that impose limits on how public office holders exercise their legal powers under the Constitution."

Do you personally accept that as well?

A Yes, I do.

40 Q And at paragraph 9 you include a footnote number 5, in which you refer to a text authored by Andrew Heard, and you describe that as:

"The most comprehensive treatment of constitutional conventions by a political scientist."

Do you agree with Professor Heard's treatment of conventions contained within that text?

A You'd have to point to a specific statement by Professor Heard for me to be able to answer that question.

41 Q Let me put it this way, are there any specific points of departure that you have with Professor Heard's text?

MR. BRONGERS: Mr. Alani, to be fair to the witness here, you're going to have to identify a specific passages that you want to know whether this witness has a disagreement with. It's not fair to ask the witness whether they have disagreements with every -- any specific

sentence without providing some clear example of what you're asking for here. So, no, we won't answer a vague question like that. But if you have a specific passage that you can put to the witness then perhaps we can assist you.

MR. ALANI:

42 Q Where a valid convention requires power to be exercised in a certain way is there any room for flexibility or do all conventions require compliance with concrete fixed terms?

A I'm not quite sure I understand the question.

43 Q Well, perhaps I can give you an example. Is there a convention that a minister without a seat in Parliament must obtain a seat?

A I'm not sure.

44 Q You don't dispute that such a convention may exist?

MR. BRONGERS: The witness answered the question. The witness says he doesn't know.

MR. ALANI:

45 Q Sir, is -- are you aware of a convention that permits the Governor General to properly refuse the Prime Minister's advice for a fresh election within a period after a general election?

A I am not aware of such convention.

46 Q Are you aware of a convention that any particular province be represented in cabinet?

A I'm not aware that that's a convention.

47 Q Given your area of expertise would you consider yourself to be generally aware -- sorry generally aware of the conventions that do exist within Canada?

A In those areas in which I am an expert, yes.

48 Q And one of the areas in which you're an expert is public law and constitutionalism, correct?

A That is correct.

49 Q So if there were an existing convention that related to constitutionalism you would expect, given your expertise, to be aware of it?

A I would hope that I would be.

50 Q At paragraph 9 of your affidavit you depose that:

"As non-legal rules, conventions are not enforced by the courts...."

Can you elaborate on what you mean by "not enforced."

A Well, I think what I mean by that is that there no particular remedy, no particular judicial remedy for finding that a convention has been, had not been followed.

51 Q Would you agree that the existence of

conventions has been recognized by the courts?

A Yes.

52 Q Would you agree that the scope of conventions has been defined by the courts?

A Conventions generally or specific conventions?

53 Q The scope of specific conventions.

A I believe the court has, from time-to-time defined the scope as specific conventions, yes.

54 Q And when you say in your affidavit that "conventions impose limits on the exercise of legal powers" is there any type of conventions that creates or expands power beyond what is provided for in the constitution?

A I don't know.

55 Q From your understanding of conventions is it possible that such a convention could exist?

MR. BRONGERS: Mr. Alani, the witness has answered the question, he says he doesn't know.

MR. ALANI: And I'm trying to clarify whether he doesn't know whether such a type of convention exists or he simply is not aware of any specific conventions that fit that description.

MR. BRONGERS: No, with respect, Mr. Alani, you're asking the witness to speculate, you're saying "is it possible". After he says he doesn't know the answer you're asking him to speculate on

another possible answer is yes. So no we're not going to answer the question.

MR. ALANI: Well, I will repose the question.

56 Q You're not aware of any convention that has the effect of creating or expanding power beyond what is provided for in the Constitution?

A I suppose my answer was I don't know whether there is or there is not.

57 Q So just so we're clear, there may be, you just don't know of any.

MR. BRONGERS: Mr. Alani, I'm now going to ask you what the relevance is of this line of questioning. You know that this expert has provided his opinion on whether there exists a convention with respect to the timing of Senate appointments. I'm not sure what this witness can add to the debate in terms of whether there are legal limits that can be expanded by way of convention to the constitution, it strikes me that that is a completely separate issue, and the one on which Professor Manfredi has no comment. So again, you've asked the question and the witness has said he doesn't have an answer to it, and we can't see any relevance to this line of questioning. So I suggest you move on.

MR. ALANI:

- 58 Q At paragraph 10, sir, you cite a passage in which the Supreme Court of Canada adopts Sir Jennings' proposed requirements for establishing a convention. Do you agree that that is the governing test in Canada?
- A For the most part, yes.
- 59 Q Are there --
- A That test, that test is partially expanded upon in the *Quebec Veto* reference.
- 60 Q And is that the Quebec Veto Conference -- sorry the *Quebec Veto* reference that you go on to cite further in paragraph 10?
- A Yes.
- 61 Q And in that passage you cite the Supreme Court of Canada's opinion in that case that:
- "...recognition by the actors in the precedents is not only an essential element of conventions...it is the most important element."
- Do you agree with that statement?
- A That is what the Supreme Court declared, yes.
- 62 Q At paragraph 12, you depose that one of the requirements for establishing constitutional conventions is determining whether precedents establish a clear rule that Prime Ministers

explicitly recognized and by which they considered themselves bound. That's correct?

A I'm trying to look and see that. Yes.

63 Q And what sources did you rely upon, sir, to determine recognition by the relevant political actors?

A Of the particular event -- of the particular matter that I was asked to opine?

64 Q Yes.

A I did two things: One is I checked secondary sources to determine whether any of the secondary literature had mentioned such a precedent, and then of course I looked empirically, which is the core of my affidavit, whether a pattern of behaviour or actions by a Prime Minister might point to a particular precedent.

65 Q And did you research or review any express statements made by sitting Prime Ministers?

A Other than -- no.

66 Q The Jennings test also requires that there be a principled reason for a convention or a constitutional principle being protected by the convention, is that correct?

A That is the third part of the test as I understand it, yes.

67 Q So in other words the Senate precedent without
a principled reason for it is no convention at
all?

A That would be what that would imply.

68 Q Can you provide some examples of what might,
what has counted as a principled reason for a
convention?

A I'm trying to think of some good examples. I'm
blinking out at the moment.

69 Q Perhaps I could provide one. The convention
which you referred to in paragraph 11, the
convention recognized by the Supreme Court in
the *Senate Reform Reference* that the Governor
General will only summon persons to the Senate
on the advise of the Prime Minister. I would
suggest to you that the principled reason for
that convention is respect for democracy and
the principle responsible government --

A Yes, that's correct. That is perfectly
correct.

70 Q You're familiar with the *Persons* case, I'll
just refer to it colloquially, from the --

A Which case, sorry, I didn't hear you.

71 Q Sorry, the *Persons* case from the 1920s.

A Yes, I am familiar with that.

72 Q Before that case, you agree of course, that

there were no women appointed to the Senate.

A That's correct.

73 Q And so if one were to analyze the Senate appointments made before that decision you would expect that a hundred percent of the senator would be male.

A I would, yes.

74 Q In your opinion could it have been said that there was a convention that Senators must be male?

A I'm not sure I would put it that way, there was a convention that Prime Ministers did not advise the Governor General to appoint non-males.

75 Q In 2010 you served on a committee that provided recommendations to the Prime Minister with respect to the appointment of the Governor General, is that correct?

A Yes.

76 Q And that was the same Prime Minister and the same Governor General currently in office and respondents in this proceeding?

A Yes.

77 Q And in the course of serving on that committee did you have occasion to interact personally with the current Prime Minister?

A He met with the committee twice, yes.

78 Q And in the course of serving on that committee did you have occasion to interact personally with the current Governor General?

A I did not.

79 Q If I could take you to paragraph 5 of your affidavit. You depose there that it is evident from your tables 1 and 2, attached as Exhibit D, that it is not uncommon for the Senate to function with less than it's full complement of Senators, is that correct?

A That's correct.

80 Q Does the Senate convene for sitting between dissolution of Parliament and an election?

A That's a question in which I do not know the answer.

81 Q Do you know whether Senate committees meet between dissolution of Parliament and an election?

A I do not.

82 Q Do I understand correctly that your table 2, which again is attached as Exhibit D, is limited to the number of vacancies on the first and last day of each Parliament?

A Yes, because that is the extent of the data that's available for those periods.

83 Q Are you saying if you had access to data indicating when vacancies existed between dissolution and -- sorry, between the first and last day of each Parliament you would have incorporated that into your analysis?

A Yes.

84 Q Is it fair to say, sir, that table 2 doesn't tell us anything about how well the Senate functions on a qualitative basis with less than its full complement of Senators?

A Let's go to table 2. I think that's fair. It's simply a descriptive empirical or empirical description.

85 Q So when you depose that it is not infrequent that the Senate functions with less than its full complement -- I'm trying to guess what the basis for that opinion is. Is it for example that there hasn't been a -- rather than me speculating, why don't you tell me what the basis of that opinion is?

A Well I suppose I was referring to the fact that it operates, it sits, it does it's work, whether it's -- from time-to-time whether it's at full complement or not, just as the House of Commons does when it's without its full complement of members. It continues to do its

business.

86 Q But you can't express an opinion on how well it does its business with less than its full complement?

A I don't have an opinion on that.

87 Q At paragraph 7, of your affidavit, you deposed that Prime Minister Harper had not advised the Governor General to summon any additional members to the Senate since March 25th, 2013 when the Governor General summoned Scott Tannas of Alberta. Is that correct?

A That's correct, that's what I write.

88 Q Is that based on your personal knowledge of the facts or are you inferring a lack of advice based on your understanding of conventions?

A Well, I'm assuming that's -- that's an assumption based on my understanding that since the Governor General has not summoned anyone since then he has not received advice from the Prime Minister to do so.

89 Q If I could go back your CV, which is attached as Exhibit A.

A Yes.

90 Q And specifically page 9 of your CV.

A Yes.

91 Q And at the second entry from the top of the

page it refers to a book review you published in 1991 regarding Professor Heard's text entitled *Canadian Constitutional Conventions: The Marriage of Law and Politics* and I would just like to ask you about your published comments in that case.

A That's a very long time ago and that was the first edition of a book.

92 Q Yes. I put to you sir that in your book review you stated:

"Heard's argument that courts should abandon legal formalism in order to give judicial recognition and force to the informal constitutional norms based on political agreement that had superseded formal constitutional rules is in general sound."

A If you say I wrote that, that's what I wrote almost 25 years ago.

93 Q Does that remain your opinion today?

A I would have to -- I can't, I can't say that I specifically changed it.

94 Q Turning to paragraph 14 of your affidavit, I'd like to ask you some questions about your sample set.

A Sure.

95 Q First of all, your sample set, sir, includes
220 data points, is that correct?

A That's correct.

96 Q And how many total appointments have there been
to the Senate?

A It's somewhere over 900 if you include the
sitting members at the moment.

97 Q And just to be fair I don't -- I know in
paragraph 15 you say:

"The samples constitutes
approximately 26 percent of all
Senators, excluding those sitting at
the time of drawing the sample."

A And so it would be about 80 plus, the time that
I drew the sample there were 20 vacancies, so
that would be 85, so let's say we're at 965
roughly, in that range, Senators who have been
appointed.

98 Q If I take the number 220 and I divide it by
.26, I get a calculation of approximately 846.
Is it fair to say that the population at the
time you drew your sample was then about 846?

A It would be in that, plus or minus one or two,
I would imagine.

99 Q And how did you decided to set your sample size
at 220?

A I thought it was a reasonable number to get a, as I said, as I refer to, a robust approximation of the practices of the Prime Ministers. It allowed me to get a reasonable number of data points across both time and region.

100 Q Do I understand correctly that in drawing your sample you basically took a list of every Senator that had ever been appointed, sorted it by the date of their appointment and selected every fourth name on the list?

A That's what I did, yes.

101 Q I put to you sir, that there's another way, another method you could have used to draw your sample, and I'll ask you to comment on that in a moment. I put to you that an alternative method would have been to use a random number generator to draw 220 random numbers without replacement and to then fill your same set using the corresponding numbered data point from your overall list. Is what I'm describing, in your opinion, a reasonable sampling methodology?

A That would be. I used a stratified sample. I stratified it -- I wanted to make sure I had representation from all the different regions

across time and across region. That would be another way of doing it, yes.

102 Q So the way you did it, with what I understand you call a stratified sample?

A Well, it's a stratified random sample. Every fourth -- I went province by province basically so it wasn't a full -- it wasn't all the Senators appointed as a single list. I did it list by list for each province and territory as I say in point two of paragraph 14.

103 Q I see. Would you agree that the alternate sample methodology that I just described a moment ago would produce an actual random sample while your methodology does not, strictly, speaking produce a random sample.

A I think they're both random samples.

104 Q Okay. Using your sampling methodology which is based on a chronologically sorted list of Senate appointments, would I understand correctly that the appointments made by a specific Prime Minister would tend to be listed immediately next to each other? At least from within the same province.

A I imagine so, yes.

105 Q And is it fair to say then that if an individual Prime Minister consistently took a

particularly long or short amount of time to fill vacancies relative to other Prime Ministers, that the impact of that would tend to be understated within your sample set?

A Can you repeat that?

106 Q So, let's say there's a specific Prime Minister who consistently takes less time or more time relative to the other Prime Ministers to fill his Senate vacancies. The impact of that Prime Minister's variation would tend to be understated using your methodology.

A Well, the purpose of the methodology is to get a sense of what the historical practice across all time periods are. So you wouldn't want to, you wouldn't want it -- you wouldn't want your sample to over-sample any particular Prime Minister.

107 Q But you wouldn't want it to under-sample them either.

A Well, I don't think it under-samples them. Because it goes across by time I think it ensures that Prime Ministers, as a proportion, are included in the sample. But you're correct you wouldn't want to under- or over-select by Prime Minister.

108 Q Can you describe, sir, just in general terms

what a standard deviation is?

A Well, standard deviation is the extent to which -- the variation from the mean of a particular number.

109 Q And at paragraph 16 of your affidavit, you provide a calculation of the minimum, maximum, median and mean number of days taken to fill Senate vacancies based on your sample. Did you calculate a standard deviation as well?

A I did not calculate a standard deviation, no.

110 Q Does your sampling method permit the calculation of a standard deviation?

A I think it would, yes.

111 Q Does your sampling method permit the calculation of sampling error?

A It would, I think.

112 Q But you haven't calculated either of those?

A I didn't calculate either of those, no.

113 Q At paragraph 17, of your affidavit at footnote 9, you describe an outlier that you hypothesis resulted from Prime Minister Mulroney's appointment of eight additional Senators under section 26 of the *Constitution Act 1867* in 1990, is that correct?

A That was speculation. I was trying to understand why that outlier would exist, yes.

114 Q And then you provide a restated data table that
excludes that single outlier. That's correct?

A Yes.

115 Q Did you otherwise account for the impact of the
other seven additional Senators?

A While I wasn't -- this wasn't really about
accounting for the other seven additional
Senators, this was just trying to understand
why would that particular vacancy have taken so
long to have been filled.

116 Q Right.

A So it's not really related to the addition of
the Senators, it's just what is it, what might
explain that.

117 Q Right.

A And I took it what would have happened to what
happens, to the numbers I calculated earlier.

118 Q But once you turned your mind to a seemingly
plausible explanation for why that single
outlier would exist, did you think to consider
what impact the other seven Senators
appointments under a section 26 might have had
on your sample?

A I did not do that, no.

119 Q I'd like to turn next to paragraph 22 of your
affidavit. And I know, sir, you can read what

you wrote there but just for ease of reference in the transcript I'm just going to read out what you depose, and correct me if I'm wrong. But you depose that, in your opinion

"...an analysis of the time delays in your sample of 220 Senate vacancies does not provide any evidence of historical practices that would constitute a precedent on which a constitutional convention would rest with respect to either (a) the general timing of Prime Ministerial advice on Senate appointments, or (b) an obligation to advise the Governor General to fill vacancies within a fixed period of timing."

And my question to you is this, is that accurate that the data does not provide any evidence?

A Well, it's the data, the sample indicates a very wide variation in practices across time and province or territory that would indicate that, that Prime Ministers don't follow any particular rule in determining when to advise the Governor General in the appointment.

120 Q So would it be more fair to say that in your

opinion the data does not provide any strong evidence, or do you stand by your statement that it provides, it does not provide any evidence at all?

A It doesn't, to me, indicate that there's any particular pattern of -- with respect to general timing or a particular basic period of time within which the advice is given.

121 Q Sir, are you familiar with what's sometime referred to as "the caretaker convention"?

A I'm aware of it, yes.

122 Q And do you accept that it exists as convention?

A I understand it does, yes.

123 Q And maybe just so that we're talking about the same thing, would it be fair to characterize the caretaker convention as constraining the ability of the executive government from taking certain steps in the period between the issuance of a writ of election and the summoning of the subsequent Parliament?

A I think that's accurate. I understand the government can take care of routine or emergency business, I guess is what it can do.

124 Q Okay. And did your analysis account for the impact the caretaker convention might have had on the timing of Senate appointments?

- A I didn't calculate that specifically.
- 125 Q But you agree that a delay in filling Senate vacancies might be explained in part by the caretaker convention?
- A If one were to go through and deduct all of those periods you might get some slight changes in the analysis, yes.
- 126 Q Would it be fair then to say, in your opinion, that a Prime Minister might feel bound by the caretaker convention such that that Prime Minister might delay the filling of his Senate vacancy during the period governed by the caretaker convention?
- A I think that's accurate.
- 127 Q Would it be accurate to say that the caretaker convention would affect the general timing of Prime Ministerial advice on Senate appointments?
- A I don't think it would affect it in any systematic way. I think the affect might be random. And I think we have to understand something known as the tyranny of large numbers, that you'd have a change, for example in the sample size of plus or minus 220 days on any particular vacancy to change the mean by one, plus or minus one day, for example.

128 Q At paragraph 25, of your affidavit, you depose that with respect to there being a convention that the Prime Minister must advise the Governor General to fill a vacancy within a fixed period of time, the evidence from the sample of 220 Senate vacancies is that no such convention exists. Is that correct?

A That's what I wrote, yes.

129 Q And you're referring there to a convention about advising within a fixed period of time. Does your analysis preclude any recognition of a precedent about providing the advice within a more flexible period of time?

A Well, I found in the sample is that the period within which advice was given ranged from zero days all the way up to 3,900 and something days. Ranging across a range, I did find the -- I did find the time delay to be sort of -- the sample to be clustered in any particular, any particular period of time.

130 Q Paragraph 23, of your affidavit, you refer to certain recent statements made by former Prime Minister Brian Mulroney in which he urged the current Prime Minister to refrain from making any appointments to the Senate until a Code of Conduct for Senators designed by a specifically

appointed commission could go into affect, is that correct.

A That is what Mr. Mulroney said and I did refer to that statement.

131 Q Did you consult with Mr. Mulroney before making your affidavit?

A I certainly did not.

132 Q So you're relying exclusively on his reported statements?

A Yes.

133 Q You go on to depose that in your opinion the fact that Mr. Mulroney made these statements suggests that no convention exists that prohibits a Prime Ministerial moratorium on making Senate appointments, is that correct?

A It certainly -- to me it suggest that, yes.

134 Q And does that remain your opinion today?

A That's the conclusion that I draw from Mr. Mulroney's statement.

135 Q You agree -- sorry, I think I might have cut you off there.

A I said that certainly that's what he suggests.

136 Q You agree, sir, that Mr. Mulroney had been out of office for approximately 22 years when he made this statement?

A Yes.

137 Q And you would agree with me that Mr. Mulroney's memory of the relevant convention is more likely to have worsened rather than improved in those 22 years?

A I don't think I can comment on that.

138 Q You agree that when Mr. Mulroney made these statements he likely wouldn't have had the benefit of the same advice about conventions he would have had when he was a sitting Prime Minister?

A I don't know to whom he spoke before he made those statements.

139 Q In your opinion when Mr. Mulroney made these statements, would he have been considered a relevant political actor who could have been bound by convention himself?

A At the moment he made the statements?

140 Q Correct.

A No.

141 Q Sir, in your opinion, given your expertise in constitutionalism and conventions, in the absence of a constitutional convention prohibiting a Prime Ministerial moratorium on making Senate appointments, would such a moratorium be constitutionally sound?

MR. BRONGERS: Mr. Alani, that's a legal question that

first of all is not before the court expressly, and you can't ask this witness his opinion on pure legal question like that. He's given an opinion on whether a constitutional convention exists or not. He's not given any opinions about the constitutionality of particular actions. So, no, we won't be answering that question.

MR. ALANI:

142 Q At paragraph 24, you state that the evidence is that Prime Ministers don't allow vacancies to remain unfilled indefinitely. Is that correct?

A That's what I -- that's my opinion, yes. That's what the data indicate that eventually, at least in that sample of 220, eventually a vacancy is filled.

143 Q So what do you mean then by "indefinitely?"

A Of the 220 cases I looked at, they were all eventually, eventually filled either by the Prime Minister under whom the vacancy occurred or by a subsequent Prime Minister.

144 Q So -- are you saying there's a convention that, that requires that vacancies not remain unfilled indefinitely?

A That's not the question I was asked so I would have to look at that more closely before I

could answer that question.

145 Q Well, the question you were asked is whether there is any convention regarding the timing of the filling of vacancies. And you're saying here in your affidavit that the evidence is that Prime Ministers don't allow vacancies to remain unfilled indefinitely, so I'm asking whether, in your opinion, there's a convention that requires that they eventually be filled.

A There seems to be a practice and a precedent that vacancies are filled, yes.

146 Q What would be required to make the logical leap from the practice that you've just described and a constitutional convention?

A I'm sorry, I don't quite understand the question.

147 Q Well, did I understand correctly that you're saying there's evidence of a practice or a custom that Senate vacancies eventually be filled?

A Yes.

148 Q So, what would you need to say that there is a convention rather than merely a practice or a custom?

A If you were to ask me is there a precedent, is there a practice, is there a -- is it the case

that eventually a Prime Minister fills vacancies, the answer is yes. And you're correct, I see no evidence that that's -- that that practice hasn't been the case.

149 Q Your sample set methodology excluded all 22 existing vacancies, correct?

A Yes, it did.

150 Q So based on its design wouldn't it be completely impossible for your sample set to provide any evidence about vacancies left unfilled indefinitely because using your own selection criteria such vacancies would be definition be omitted from your sample set?

A Well, my expectation based on the research I did is that eventually those 22 vacancies will be filled.

151 Q Sorry, are you providing an opinion that the currently existing 22 vacancies will eventually be filled?

A Well, based on what I have seen historically I would, if you were to ask me the question, I would assume that at some point they will be filled.

152 Q And would they be filled by the requirements of a convention?

A I'm not sure that I can answer that question.

- 153 Q You've just told me that if I ask the question you would assume that the vacancies will eventually be filled based on the practice, precedent and custom that you've observed. And so what I'm asking is that given that a practice, precedent and custom is not binding how do you arrive at the conclusion that those vacancies will in fact be filled?
- A Based on my observations of the past.
- 154 Q Your observation in the past as reflected in your sample set?
- A That's correct.
- 155 Q A sample set which by definition excludes all currently existing vacancies.
- A Yes, because the sample set was designed to measure the amount of time that Prime Ministers took before they filled vacancies, and since those vacancies haven't yet been filled it's impossible to measure the amount of time that it took to fill those vacancies.
- 156 Q Right. So hypothetically if John A. Macdonald said back in the 1880s -- sorry say 1870s, I don't know how long he remained in office, if he said, "Forget it, I'm not appointing any more Senators," the vacancies will continue to pile up. That vacancy or those vacancies would

continue to this day and they would be excluded from your data set.

MR. BRONGERS: Mr. Alani, how is that hypothetical of value to us? We are dealing here with an opinion based on natural and empirical facts. So no we're not going to answer a question based on a hypothetical that did not occur.

MR. ALANI: Well, in fairness the witness has already provided an opinion on a hypothetical that the currently existing vacancies will be filled. And I think I am entitled to explore the grounds on which he reaches that opinion in the absence of what he's willing recognize as a binding convention.

MR. BRONGERS: The witness has said that it is his expectation based on past practice that the vacancies will eventually be filled. That's all he said. So the hypothetical of John A. Macdonald asserting that he will never name any Senators is simply not relevant or of assistance to the court in determining the question that you posed. So no we won't be answering those questions, Mr. Alani.

MR. ALANI:

157 Q Sir, given your expectation that the currently existing vacancies will eventually be filled,

and based on your observations that allow you to lead to that, to arrive at that conclusion, can you provide any opinion as to how long it will be before those vacancies are filled?

MR. BRONGERS: No, Mr. Alani, we're not going to answer that question.

MR. ALANI: Could you please state the basis of your objection to that question.

MR. BRONGERS: The question is irrelevant.

MR. ALANI:

158 Q Sir, in your analysis did you observe any differences between the time take to fill vacancies for Alberta Senators relative to the time take for vacancies in other provinces or territories?

A I didn't do that measure, which is one reason why we wanted that variance, or I wanted that variance across the provinces to ensure that we weren't biasing it by those kinds of differences in particular. So, no, I didn't measure it by province by province.

159 Q But based on your observations, are there any detectable differences in the time taken to fill vacancies arising in Alberta than from other provinces?

A I would have to do an entirely separate

analysis to determine that.

160 Q Do I understand correctly that within the structure of your analysis every single day that an Senate vacancy existed was essentially counted equally along with every other day without any adjustments.

A What sorts of adjustments are you referring to?

161 Q For example there's no adjustment for the caretaker convention.

A That's correct.

162 Q Was there any adjustment made to account for the time taken to fill vacancies from Quebec for example, where a Senator must be from a particular district?

A No, there wasn't.

163 Q Did you adjust for the reason a vacancy arose, for example an unexpected death as opposed to an anticipated mandatory retirement?

A I did not do that, no.

164 Q Did you account for the relative standings of the political parties within the Senate at the time the vacancy arose?

A No, I did not.

165 Q Did you account for whether the Prime Minister in office at the time the vacancy arose was relatively new to the job rather than a longer

term incumbent?

A Not specifically but I think the, the covering across time probably captures that to some degree.

166 Q Okay. Does covering it across time account for improvements in the speed of communications?

A One would have to look very closely to see if there's evidence that it generally took longer earlier than later, and I'm not sure -- I don't have the evidence in front of me to be able to answer that question.

167 Q Does your analysis account in any way for whether constitutional reforms were being actively negotiated during the time when Senate vacancies were left unfilled?

A No, it doesn't.

168 Q Does it account for whether a Prime Minister's preferred appointee was unavailable to take office as a Senator before a specific date?

A It doesn't look at that, no.

169 Q Does it account for the size of the population of the province from which the Senate vacancy arose?

A Only in a sense that the sample is roughly proportionate to the number of Senators appointed in each of the -- in each of the

provinces and territories.

170 Q Right, but if it took, for example, ten days to fill a vacancy from Ontario versus ten days to fill a vacancy from the Yukon Territory, those same -- those ten days would be treated indiscriminately within your analysis.

A It would be it took ten days to fill vacancy A, and vacancy B regardless of where they came from, that's right.

171 Q Thank you. Did it account for differences in the time taken to fill vacancies between periods when Canada was engaged in war versus peace time?

A It didn't make any specific account for it, no.

172 Q Did it account for the number of recently appointed Senators who, let's say, were in the early stages of being absorbed into their new role?

A I'm not sure I understand that question.

173 Q Did your analysis look at whether the time it took to fill the vacancies at any particular period of time might have been affected by how many other appointees had been made in the recent past.

A No.

174 Q I put to you, sir, that if your analysis had

accounted for one or more of these factors that you say went unaddressed, the variation you observed or the lack of variation you observed might be explained by one or more of these factors. Would you agree with that?

A Well, you're asking for me to explain why it may have taken a particular period of time to fill a vacancy, one vacancy or another vacancy. That wasn't the question I was asked. I do allude to it, in which I say the evidence seems to suggest that Prime Ministers take the amount of time necessary given the political -- given the circumstance and the context and the circumstances of each particular case. So obviously there'll be variation and all of those factors may feed into that variation.

175 Q Do you consult with any Prime Minister before making this affidavit about what constraints on the exercise of their power regarding Senate appointments they considered binding on them by convention?

A I did not.

176 Q And did you consult with any Governor General before making this affidavit regarding what, if any, constraints on their exercise of power regarding Senate appointments they considered

binding on them by convention?

A I did not.

177 Q Other than Prime Ministers who provide the advice and the Governor Generals who receive the advice are there any other relevant political actors who might be bound by the conventions you were tasked with exploring?

A Well, I assume the Prime Minister speaks to advisors and has individuals he speaks to, but I don't think any of them would be bound by these conventions.

178 Q And in any event you didn't consult with any of them making your affidavit?

A No, I did not.

179 Q If I could turn to paragraph 3, of your affidavit, and I'm going to be looking at paragraph 3 along side with Exhibit C of your affidavit, so I'm just going to bookmark both of those points.

A I have to find Exhibit C, excuse me. Okay, I think I've got it, yes.

180 Q Okay, so at paragraph 3 of your affidavit you depose that Senator Joseph Cauchon replaced Mr. Belleau on November 2nd, 1867.

A Yeah, I see paragraph 3. I have to find it. That's right, that's what I describe.

181 Q And now, flipping back to Exhibit C, page 1 of
4. You agree that Mr. Belleau, B-E-L-L-E-A-U,
was appointed from Stadacona, Quebec.

A That's what I says, yes.

182 Q And Senator Joseph Cauchon was also appointed
from Stadacona, Quebec.

A That's what is says on page 3 of 4, yes.

183 Q So do I understand correctly that you're
inferring from the timing of Senator Cauchon's
appointment being 10 days after -- being after
Mr. Belleau's appointment and that they're from
the same district that Mr. Belleau was in fact
replaced by Senator Cauchon?

A That's what I determined from that information,
yes.

184 Q And if I could flip you, momentarily, to
Exhibit S, do you agree that Senator Cauchon's
appointment is not captured in your sample?

A I'm sorry I'm having trouble finding Exhibit S.
I think Cauchon is in my sample.

185 Q Sorry, could you point me to it.

A Let me find Exhibit S. It's not his
appointment but his replacement, I'm sorry.

186 Q Okay, so just to confirm Senator Cauchon's
appointment is not captured within your sample?

A Well, he's one of the Senators whose

replacement, he was in the sample but it's not his -- it's not the calculation of who he replaced that's captured in the sample.

187 Q Right.

A It's the calculation of who replaced him.

188 Q Understood. Going back to Exhibit C, page 1, there's a Senator Joseph-Nöel Bossé, the Senator from De la Durantaye, Quebec.

A Yes.

189 Q I see from the data that he resigned from the Senate of January 1st, 1868.

A That's what the Parliamentary information reports, yes.

190 Q And Senator Chapais appointed also from De la Durantaye, Quebec on the advise of John A. Macdonald he was appointed 29 days later on January 30th, 1868. That's on page 3 of your Exhibit C.

A What was the name of that, Chapais?

191 Q Sorry, Chapais.

A Yes.

192 Q So Chapais is appointed from De la Durantaye, Quebec on the Advise of John A. Macdonald, 29 days later, January 30th, 1868.

A That appears to be correct, yes.

193 Q So am I understanding correctly that Senator

Chapais, you would infer then filled the vacancy created by Senators Bossé resignation?

A Yes.

194 Q And going back to Exhibit S, Senator Chapais' appointment, which is to say, Senator Bossé's replacement is not captured in your sample.

A Sorry, could you repeat that again for me, please?

195 Q Is Senator Chapais' appointment captured in your sample?

A Senator Chapais' appointment captured in my sample. Yes, I believe so.

196 Q Sorry, and to be clear I am referring to the Senator Chapais who's appointed on January 30th, 1968.

A Sorry, I'm having trouble finding that on my -- I'm sorry I'm just having trouble finding in my list here. It might be easier if I take off my clip and do it that way.

197 Q I suggest to you --

A Could you run that by me again, please.

198 Q Sure. I'm suggesting to you that Senator Chapais' appointment on January 30th, 1868, being 29 days following the resignation of Senator Bossé, whom he replaced is not captured in your sample.

A I don't have Chapais as replacing someone in a time lapse of 29 days, no.

199 Q Flipping back to paragraph 3 of your affidavit, you state that the very first appointments to the Senate were made through Royal Proclamation and became effective on October 23, 1867, is that correct?

A That's what I -- that's what I determined from the information, yes.

200 Q And you also state that two of those original appointees declined their appointments.

A That was the historic information available to me, yes.

201 Q And you identified those two appointees who declined their appointments as Mr. Belleau and Mr. Chandler?

A Yes.

202 Q Turning back to Exhibit C, page 1.

A Yes.

203 Q Senator Blair, that's Senator Adam Johnston Fergusson Blair from Ontario, is one of the original October 23, 1867 appointments, do you see that?

A Yes, I do.

204 Q And he died on December 29th, 1867.

A That's what indicated there, yes.

205 Q And I put to you that this was the first
vacancy that arose in the Senate.

A Maybe.

206 Q Now, you depose at paragraph 3 of your
affidavit that on March 14th, 1868 Senate James
Benson replaced Mr. Chandler who declined his
appointment of October 23rd, 1967, is that
correct?

A Yes.

207 Q And I'm going to suggest to you, referring
again to Exhibit C, page 2, that Mr. Chandler
was appointed from New Brunswick.

A I see that.

208 Q And I will also suggest to you referring to
page 3, of Exhibit C, that Senator James Benson
was appointed from St. Catharines, Ontario.

A That would be -- I think that's correct, yes.

209 Q I'm going to put to you that Senator Benson
from Ontario, in fact filled the vacancy
created in Ontario by Senator Blair's death and
not the opening arising from when Mr. Chandler
of New Brunswick declined his appointment.

A I would have to look at the -- that may have
been a mistake on my part. I think he was
probably replaced by James Dever on the same
date, March 14th, 1868.

210 Q So turning back -- sorry.
A Or Mr. Glasier.

211 Q But going back to paragraph 3 of your affidavit
you'd agree that the last sentence is
incorrect?
A That appears to be the case, yes.

212 Q Earlier sir, you confirmed that there were two
initial appointees who declined their
appointments on October 23rd, 1867, being Mr.
Belleau and Mr. Chandler.
A That's what I determined when I looked at the
list, yes.

213 Q I'm going to suggest to you sir, that in fact
based on your own data there were three
appointees who declined their appointments and
not just the two you referred to in your
affidavit.
A I can see that Mr. Todd did as well, yes.

214 Q Right. So you agree, sir, that the third
sentence in paragraph 3 of your affidavit is
also incorrect.
A I would agree with that, yes.

215 Q While we have Exhibit C, handy, I'm going to
turn back to an earlier question I asked
regarding the table 2 you've included in
Exhibit D.

A Okay.

216 Q As you may recall I asked you about table 2
being limited to the number of vacancies on the
first and last day of each Parliament. And I
understood you to respond that that was the
extent of the data you had available to you and
that you would have included additional data if
it had been available. In other words, data
beyond simply vacancies that existed at
dissolution and an election.

I put to you that if you examine your
Exhibit C, it is possible to determine when
vacancies arose and when they were filled
during the first Parliament.

A That maybe the case, yes.

217 Q Well, I suggest to you that is in fact the
case, and I will just take you to an example.
I think we just covered one of those examples
in your evidence. Let's look again on page 1
of Exhibit C, Senator Blair, from Ontario, is
one of the original appointments from October
23rd, 1867 and he dies on December 29th, 1867.

A Correct.

218 Q And he is replaced -- well, you would agree
that a vacancy arose on December 29th, 1867.

A Yes.

219 Q And that data is evident from the information
you've included in your affidavit attached as
Exhibit C.

A Yes, it is.

220 Q So it's not correct to say that the fact that
you've limited the number of vacancies in your
table 2 to the number of vacancies that existed
on the first and last day of each Parliament is
a limitation that arose simply because you
didn't have the data available to you, that you
do have the data available to you.

A Well, it's a table summarizing the raw data
that's also included in Exhibit E. Table 2
summarized the exhibit available in table E or
in Exhibit E, sorry.

221 Q Sir, if I could turn to Exhibit A of your CV,
specifically page 15 --

A Yes.

222 Q -- you refer there to your involvement as an
expert witness in 2002 in the *Sauvé* litigation.

A I was actually involved -- that would be the
date of the Supreme Court decision. I was
involved at the Federal Court Trial Division --

223 Q Right.

A -- proceedings which were sometime before that.

224 Q Right. But that chain of litigation concerned

the restriction of prisoners right to vote in federal elections?

A That's correct.

225 Q And in that litigation you testified in support of the government's defence of legislation that disqualified prisoners from voting?

A Yes, I did.

226 Q And that the majority judgment of the Supreme Court of Canada was that the government legislation violated the *Charter* right to vote and wasn't justified under section 1.

A That's correct.

227 Q Going back to page 4, of your CV, the second entry from the top refers to a 2007 case comment you published in the *Osgoode Hall Law Journal*, entitled "*The Day The Dialogue Died: A Comment on Sauvé v Canada.*" Is that correct?

A Yes.

228 Q In your case comment you criticize the majority judgment in *Sauvé* written by Chief Justice McLaughlin, is that correct?

A I believe I do, yes.

229 Q In the footnotes to your case comment, I have it with me, I put to you that you identify yourself as the Dean of the Faculty of Arts and Professor of Political Science at McGill

University. Would you agree with that?

A That would have been true at the time, yes.

230 Q Right. I put to you, sir, that you don't mention anywhere in this published case comment or in the footnotes to your case comment that you were personally involved as an expert witness for the government in the case you're commenting on. You disagree with that?

A I'm surprised that's the case because there were other instances where I commented on that case where that does, that disclosure does occur. So I don't know what it wouldn't be in that, if that's the case.

231 Q But it would have been your practice to disclose your personal involvement in a case you were commenting on?

A Certainly it would be, yes.

232 Q Do I take it then that you're -- if you didn't disclose it in this *Osgoode Hall Law Journal* case comment it was merely be inadvertence?

A That would be my conclusion, yes.

MR. ALANI: What I propose before formally wrapping up is perhaps if we might take a brief five minute recess and I refer over my notes and confirm whether I have any additional questions, if that works for you.

MR. BRONGERS: That's fine, Mr. Alani, it's now 1:30 in Vancouver, 4:30 in Montreal, when would you like to go back on the record?

MR. ALANI: Let's say 1:40.

MR. BRONGERS: That's fine.

MR. ALANI: Sounds great.

MR. BRONGERS: Thank you.

(PROCEEDINGS ADJOURNED AT 1:30 P.M.)

(PROCEEDINGS RESUMED AT 1:42 P.M.)

MR. ALANI:

233 Q Sir, I had asked you a series of questions about specific factors and whether you had accounted for them within your analysis and one of the factors I didn't ask you about, but would like to, is whether you accounted for any changes over time in the speed of transportation.

A No, but you have to understand my purpose wasn't to try to explain why delays might have been, what they were, my purpose was simply to determine descriptively what were the length -- what kinds of delays occurred in this sample of cases, of vacancies.

234 Q I just wanted to --

MR. BRONGERS: Sorry to interrupt Mr. Alani, I just have to close a door here. So I'll be back in a

moment. Thank you, Mr. Alani.

MR. ALANI:

235 Q Sorry, sir, I just want to make sure I understand that point. Your purpose was to determine whether there was a pattern or variance. Could you maybe just elaborate on that.

A My purpose was to determine whether I could find, what was the practice of different Prime Ministers across different periods of time in different jurisdictions with respect to the time delay by which they gave advice to fill a vacancy. I wasn't trying to understand what factors might have led to those time delays. That's a different question.

236 Q But you agree that in order for you to determine whether a convention exists regarding the timing of Senate appointments that it would be necessary for you, in view of the Jennings test, to understand why the periods of delay might have been what they were.

A Well, I think I allude to generally why, which is in paragraph 23 of my affidavit, I suggest that political expedience and other circumstances, maybe the list of factors that you listed, drive the timing according to which

Senate vacancies are filled.

237 Q Right, so it's your hypothesis that the variation in the time taken to fill Senate vacancies historically is explained by political expediency but --

A And other circumstances.

238 Q And other circumstances which you -- you agree that the circumstances and factors I've asked you about might be those other circumstances.

A I would have to do a kind of regression analysis on that to make that determination. I think there's no particular historical -- it's not the case, for example, that vacancies or that the time delay is shorter in a modern period when transportation and communication is presumable faster than it was in an earlier period. So you'd have to look at it -- it's a fairly complicated question; one would have to look at. So there are all sorts of circumstances that might explain why it takes time for a vacancy to be filled. Finding the right person, et cetera, et cetera, et cetera. Those are all sorts of factors.

239 Q You just said a moment ago that it's not the case that in modern times it takes less time to fill vacancies, for example, given the

improvements in the speed of transportation,
did I understand that correctly?

A Well, I don't think if you look at the
distribution across the time I don't think
you'll find longer delays concentrated in any
particular time versus shorter delays, that's
all I'm saying.

240 Q Understood. Could you point me --

A That's my impression.

241 Q Could you point me to where in your affidavit
you set out the summary of the data that
supports that impression of yours?

A Well, it's really just in Exhibit S. If you
just look at the list which runs -- that lists
all of the data set in ascending order in terms
of time lapse. And you can see for example the
first two on the list both zero days. One is
from the 19th Century and one is from the late
20th Century. So that's just an example. So
you could go through that again you can look at
58 days, you see one from 1925, one from 2011
another 1925, 2011, 1995, 1907, 1940, so you've
got similar time delays in different periods.
That would suggest to me -- again one would have
to do a more comprehensive regression analysis
-- that the actual period isn't a determining

factor.

242 Q But without doing that regression analysis you can't confidently state an opinion that that's the case?

A Well, that would be the hypothesis I would start with and then I would do the analysis and based on my examination of the descriptive data then one would have to determine whether that hypothesis was correct or not.

243 Q Okay, but to confirm at this point your impression that it doesn't take less time in modern times to fill a vacancies is an impression not supported by any rigorous analysis of the data?

A It's not supported by a regression analysis, that's true.

244 Q Right. And the impression that you rely on by looking at the table in your Exhibit S, assumes, of course, that the listed pairs that you've included correctly and accurately reflect which Senator replaced -- which Senator filled which vacancy.

A To the best of my ability, yes.

245 Q Earlier I asked you about a -- whether there was a convention that permits the Governor General to properly refuse the Prime Ministers

advice for a fresh election within a period after a general election, and you stated that you were not aware of such a convention. I had also asked you if there were any points of departure in Andrew Heard's text. So I'm going to point you to one portion of Mr. Heard's text, it's page 64 of his second edition of *Canadian Constitutional Conventions, The Marriage of Law and Politics* and I will just read an excerpt and ask you to comment on whether you agree with it or not.

"A general rule prohibits the granting of elections to a government within a relatively short but undetermined length of time after it has already been granted an election."

Do you agree that such a rule exists?

A Well, that's what Professor Heard -- I would defer for the moment to Professor Heard's statement, but I would have to look at it more closely to determine whether I agreed or not.

246 Q I also asked you about whether you were aware of any convention that a particular province be represented in Cabinet, and I understood you to answer that you were not aware of any such

convention. I will refer to another set of passages in Andrew Heard's text, this time at page 88 of his second edition. He says:

"Since the first Cabinet was formed after confederation in 1867, it has been a firm principle that the Federal Cabinet should be filled on a representational basis. Perhaps the most fundamental rule in this regard is that every province, if possible, should have at least one representative in the Cabinet. However, P.E.I. has often been an exception and gone without a Minister."

Is that statement consistent with your understanding of the relevant rules and conventions?

A Again I would defer to Professor Heard on that point until I did further research to determine whether I agreed or disagreed.

247 Q Next there's a passage on his page 89 of the second edition. He says:

"There are also subsidiary rules of provincial representation that require multiple representatives in

Cabinet for the largest provinces.
Quebec, for example, has never had
less than three Ministers since 1917,
with the fleeting exception of
Meighen's 1926 government."

A I would answer that question the same way I
have answered the two previous ones.

248 Q So, to your current knowledge you're not aware
of any such convention but you momentarily
defer to Professor Heard's description of it.

A His description sounds historically accurate to
me and I would defer to him until I would find
contrary evidence.

249 Q Okay. And just to confirm your areas of
expertise, you are an expert in
constitutionalism, politics and you are an
academic in the province of Quebec?

A Yes, I am.

MR. ALANI: Those are my question. Thank you, very much.

MR. BRONGERS: Thank you, Mr. Alani. I just have one
question by way of re-examination.

RE-EXAMINATION BY MR. BRONGERS:

250 Q Professor Manfredi, Mr. Alani asked you about
paragraph 3, of your affidavit, if you could
just bring that up before you --

A Yes.

251 Q -- and identified a couple of errors in terms
of the names of Senate appointees in that
paragraph, which you conceded were made. Do
these errors modify in any way your final
conclusion with regard to the existence or non-
existence of a constitutional convention in
relation to the timing of Senate appointments?

A They would not.

MR. BRONGERS: I have no further questions. Thank you.

MR. ALANI: Thank you.

(PROCEEDINGS ADJOURNED AT 2:00 P.M.)

I HEREBY CERTIFY THAT THE FORGOING
is a true and accurate transcript
of the proceedings herein, to the
best of my skill and ability.

S.C. Leeburn, Court Reporter