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

APPLICANT'S MEMORANDUM OF FACT AND LAW

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Applicant, on his own behalf

INDEX

OVERVIEW

1. The Prime Minister of Canada has notoriously declared a moratorium on filling vacancies in the Senate of Canada by refusing to provide advice to the Governor General necessary to effect such appointments. This application for judicial review seeks a declaration as to the legality of the Prime Minister's unilateral inaction.

2. In particular, this application calls upon the Federal Court, in the exercise of judicial review jurisdiction over federal decision makers including the Prime Minister, to interpret the relevant textual provisions of the *Constitution Act, 1867* in light of the assumptions, conventions and organizing principles that form the internal architecture of the Constitution as a whole.

PART I – STATEMENT OF FACTS

A. COMPOSITION OF THE SENATE

3. The Constitution mandates that the Senate shall be composed of 105 Senators.[1]

4. There are currently 83 Senators and 22 vacancies – more than at any previous time in Canada's history.[2] The allocated and actual distribution among the provinces and territories are as follows:[3]

Province or Territory	Number of Senators Allocated by Constitution[4]	Actual Current Distribution of Senators[5]	Current Vacancies
Ontario	24	17	**7**
Quebec	24	18	**6**
Nova Scotia	10	8	**2**
New Brunswick	10	8	**2**
Prince Edward Island	4	3	**1**
Manitoba	6	3	**3**
British Columbia	6	5	**1**
Saskatchewan	6	6	**0**
Alberta	6	6	**0**
Newfoundland and Labrador	6	6	**0**
Yukon Territory	1	1	**0**
Northwest Territories	1	1	**0**
Nunavut	1	1	**0**
Total	**105**	**83**	**22**

5. The Senate has not had 105 appointed Senators since September 6, 2012.[6]

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[1] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 21. ("*Constitution Act, 1867*").
[2] Library of Parliament, "Party Standings in the Senate since 1867", online: http://www.parl.gc.ca/Parlinfo/lists/PartyStandingsHistoric.aspx?Section=b571082f-7b2d-4d6a-b30a-b6025a9cbb98; retrieved: August 30, 2015. ("*Historical Senate Standings*").
[3] Library of Parliament, "Party Standings in the Senate", online: http://www.parl.gc.ca/Parlinfo/lists/PartyStandings.aspx?Section=b571082f-7b2d-4d6a-b30a-b6025a9cbb98&Gender=; retrieved: August 30, 2015. ("*Current Senate Standings*").
[4] *Constitution Act, 1867*, s. 22.
[5] *Current Senate Standings*, *supra*.

6. No person has been appointed to the Senate since March 25, 2013.[7]

B. WHEN A VACANCY HAPPENS IN THE SENATE

7. Vacancies happen in the Senate upon the resignation,[8] death,[9] or disqualification of a Senator,[10] when a Senator reaches the age of 75,[11] and upon the addition of four or eight Senators where permitted by section 26 of the *Constitution Act, 1867*.

8. Section 32 of the *Constitution Act, 1867* provides that "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."[12]

9. Section 24 of the *Constitution Act, 1867* provides for the formal appointment of Senators by the Governor General:

> **24.** The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.[13]

10. In the *Senate Reform Reference*, the Supreme Court of Canada confirmed: "In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada when filling Senate vacancies."[14]

C. THE HISTORY OF THE PRIME MINISTER'S COURSE OF CONDUCT REGARDING

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[6] *Historical Senate Standings*, *supra*.
[7] *Ibid.*
[8] *Constitution Act, 1867*, s. 30.
[9] *Constitution Act, 1867*, s. 32.
[10] *Constitution Act, 1867*, s. 31.
[11] *Constitution Act, 1867*, s. 29(2).
[12] *Constitution Act, 1867*, s. 32.
[13] *Constitution Act, 1867*, s. 24.
[14] *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 50. ("*Senate Reform Reference*").

VACANCIES IN THE SENATE

11. On September 7, 2006, the Prime Minister appeared before the Special Senate Committee on Senate Reform to speak on the issue of Senate reform:

> As everyone in this room knows, it has become a right of passage for aspiring leaders and prime ministers to promise Senate reform on their way to the top. The promises are usually made in Western Canada. These statements of intent are usually warmly received by party activists, editorial writers and ordinary people but, once elected, Senate reform quickly falls to the bottom of the government's agenda, nothing ever gets done and the status quo goes on.
>
> Honourable senators, this has to end for the Senate must change and we intend to make change happen. The government is not looking for another report but is seeking action.
>
> Honourable senators, years of delay on Senate reform must come to an end, and it will. The Senate must change and we intend to make it happen. The government is not looking for another report — it is seeking action that responds to the commitments we made to Canadians during the recent federal election.
>
> As you all know, we made a commitment during last election campaign that, if we were elected, we would proceed with a Senate reform. I came here today to reiterate personally my commitment to reform this institution.[15]

12. The Prime Minister stated:

> **The government prefers not to appoint senators unless it has the necessary reasons to do so.** I mentioned one of these reasons in the case of senator Fortier. Frankly, we are concerned about the representation in the Senate and about the number and the age of our Senate caucus. **It is necessary for the government, even in the present system, to have a certain number of senators to do the work of the government in the Senate.**
>
> **We have not reached a point where it is necessary to appoint certain senators to meet this objective.** At this time, I prefer to have an election process where we can consult the population

[15] Special Senate Committee on Senate Reform, *Minutes of Proceedings*, 39th Parliament, 1st Session, No. 2 (7 September 2006). ("*Senate Reform Committee*").

rather than to appoint senators traditionally.[16]

13. With respect to the then existing vacancy from Prince Edward Island:

> **Senator Hubley:** Since July of 2004, my province of Prince Edward Island has had a Senate vacancy. My question is: Are you ignoring my province's constitutional right to representation within the Parliament of Canada by not filling that vacancy?
>
> **Mr. Harper:** […] **The government does not feel any pressure from the population at large to fill the vacancies.** I think it would become a bigger issue were the Senate viewed as the kind of effective body it could be. Once an electoral option was in place, I suspect the pressure to deal with any vacancy would become much greater.[17]

14. On December 13, 2007, Bill S-224, *An Act to Amend the Parliament of Canada Act (Vacancies)*, was introduced and read a first time in the Senate. It proposed, in part, that the *Parliament of Canada Act* be amended by adding the following:

Vacancies		Vacance	
Vacancy in Senate	13.1 Within 180 days after a vacancy happens in the Senate, the Prime Minister shall recommend to the Governor General a fit and qualified person for appointment to the Senate to fill the vacancy.	13.1 Dans les 180 jours suivant toute vacance au Sénat, le premier ministre recommande au gouverneur général une personne capable et ayant les qualifications voulues pour nomination au Sénat.	Vacance au Sénat
Transitional	(2) In respect of a vacancy that exists in the Senate at the time this Act receives royal assent, the Prime Minister shall, within 180 days after the day of that assent, recommend to the Governor General a fit and qualified person for appointment to the Senate to fill the vacancy.	(2) Dans le cas d'une vacance existant au Sénat à la sanction de la présente loi, le premier ministre recommande au gouverneur général, dans les 180 jours suivant la sanction, une personne capable et ayant les qualifications voulues pour nomination au Sénat.	Disposition transitoire

15. On May 7, 2008, the Honourable Peter Van Loan, Leader of the Government in the House of Commons and Minister for Democratic Reform, appeared before

[16] *Ibid*. at 2:19. (Emphasis added).
[17] *Ibid.* at 2:19-20. (Emphasis added).

the Standing Senate Committee on Legal and Constitutional Affairs as part of its study of Bill S-224. Minister Van Loan stated in part:

> This bill is unacceptable to the government. We will not support a bill that seeks to force the Prime Minister to make undemocratic appointments to an institution that is not consistent with modern democratic principles.[18]

16. On whether the Prime Minister's statement to the Special Senate Committee on Special Reform on September 7, 2006 continued to reflect the position of the Prime Minister and the government, Minister Van Loan stated:

> It most certainly is. That statement goes to the core of our concern with this bill. We made a commitment to Canadians in the last election to move to a process where they have a say in electing their senators. We have a bill that seeks to achieve that process. It is being studied right now at a special legislative committee of the House of Commons. The hope is that the bill will ultimately pass, become law and there will be an opportunity for Canadians to have a say in filling those vacancies so that those who are in the Senate can truly be representative of the people of the provinces that they say they are here representing so there is a genuine democratic element there. That is what we seek to do.[19]

D. THE *SENATE REFORM REFERENCE*

17. On February 1, 2013, the Governor in Council referred a series of questions to the Supreme Court of Canada regarding the legislative authority of the Parliament of Canada, acting alone pursuant to section 44 of the *Constitution Act, 1982*, to provide for:

a) imposing term limits for Senators,

b) establishing a framework for consultative elections within each province or territory, and

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[18] See Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings*, 39th Parliament, 2nd Session, No. 17 (7 May 2008) at 17:13. ("*LCJC No. 17*").
[19] *Ibid*. at 17:20.

c) the repeal of property qualifications for Senators.

18. The Governor in Council also referred questions to the Supreme Court as to the amending procedure that applied to the abolition of the Senate.

19. On April 25, 2014, the Supreme Court of Canada released reasons for judgment in the *Senate Reform Reference*. The Court rejected the Attorney General of Canada's arguments that the Parliament of Canada, acting unilaterally under section 44 of the *Constitution Act, 1982* could change the duration of senatorial terms or implement consultative elections.[20]

20. On December 4, 2014, the Prime Minister is reported to have stated publicly in Markham, Ontario, when asked when he would fill vacancies in the Senate:

> I don't think I'm getting a lot of calls from Canadians to name more senators right about now. […] We will be looking at this issue, but for our government the real goal is to ensure the passage of our legislation by the Senate and thus far, the Senate has been perfectly capable of fulfilling that duty."[21]

21. On December 8, 2014, the Applicant filed a notice of application for judicial review in this proceeding. At the time of filing, there were 16 Vacancies in the Senate. [22]

22. On June 15, 2015, counsel for the Respondents wrote to the Court to advise "that there was no 'decision not to advise the Governor General to fill the currently existing [Senate] Vacancies' as alleged…" and that no Rule 317 material would be transmitted.[23]

23. On July 24, 2015, the Prime Minister confirmed at a press conference held in Regina, Saskatchewan that he would not name any Senators:

> The government is not going to take any actions going forward

[20] *Senate Reform Reference*, *supra*.
[21] Affidavit of Aniz Alani, paras. 10-11.
[22] *Historical Senate Standings*, *supra*.
[23] Affidavit of Aniz Alani, Exhibit "S".

> that would do anything to further entrench that unelected, unaccountable Senate. […]
>
> We'll entrench it simply in this way, which is we're just not going to make the appointments. […]
>
> I can't formalize a non-appointment. That would be a constitutional change. But under the Constitution of the day, the prime minister has the authority to appoint or not appoint. […]
>
> The number of vacancies 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 will complain.[24]

PART II – POINTS IN ISSUE

24. This application raises two central issues:

a) Is the Prime Minister obliged to advise the Governor General to fill Senate vacancies within a reasonable time after they happen?

b) If so, should declaratory relief be granted?

PART III – SUBMISSIONS

E. THE PRIME MINISTER CANNOT WITHHOLD ADVICE REQUIRED TO FILL SENATE VACANCIES

25. Two interpretation issues arise:

a) Under the Constitution of Canada, does the Prime Minister have a duty to advise the Governor General to fill Senate vacancies?

b) If so, does the Constitution of Canada require that the Prime Minister provide such advice within a reasonable time?

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[24] CBC News, "Stephen Harper vows not to name any senators before reforms made", http://www.cbc.ca/news/politics/stephen-harper-vows-not-to-name-any-senators-before-reforms-made-1.3167112; retrieved: August 30, 2015.

i. Key Constitutional Features

26. The constitutionality of the Prime Minister's moratorium on Senate appointments is principally informed by:

a) 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.

b) Section 21 of the *Constitution Act, 1867*:

> The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators.

27. Section 22 of the *Constitution Act, 1867*, which provides for specific numbers of Senators representing each province and territory.

28. The convention that the Governor General will not fill vacancies other than on the advice of the Prime Minister.[25]

ii. Interpreting the Textual Provisions

29. Throughout the *Constitution Act*, textual signals distinguish between mandatory ("shall"), permissive ("may"), prohibitive ("shall not"), and presumptive ("shall, subject to") provisions.

30. Of the mandatory obligations that remain in effect today, one is that a general census be taken in the year 1871 and in every tenth year thereafter.[26] Members of the Queen's Privy Council for Canada "shall be from Time to Time chosen and summoned by the Governor General" to "aid and advise in the Government of Canada".[27] The "Seat of Government of Canada shall be Ottawa" until the

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[25] *Senate Reform Reference*, *supra,* at para. 50.
[26] *Constitution Act, 1867*, s. 8.
[27] *Ibid.*, s. 11.

Queen otherwise directs.[28]

31. Many of the *Constitution Act, 1867*'s mandatory provisions involve the Senate. There "shall be" one Parliament for Canada consisting of the Queen, the Senate, and the House of Commons.[29] The Senate shall consist of 105 Senators.[30] Four divisions of Canada (Ontario, Quebec, the Maritime Provinces, and the Western Provinces) "shall" be equally represented in the Senate according to a specific allocation provided. Newfoundland, the Yukon Territory, the Northwest Territories, and Nunavut each "shall be entitled to be represented" by a specified number.[31]

32. Each Senator "shall" meet certain qualifications,[32] and a Senator's place "shall" be vacant upon resignation or disqualification on specified grounds.

33. A plain reading of section 32 of the *Constitution Act* establishes that Senators **shall** be summoned **when** a vacancy happens.[33] This is contrasted, for example, with the permissive and non-time limited provision that the "Governor General may from Time to Time" appoint a Speaker of the Senate and "may" remove and appoint another in his place.

34. As Kunz observes:

> The maintenance, to be sure, of the specified number of members in the Senate was very carefully provided for by the wording of two sections of the BNA Act. In addition to section 24, which provides for the appointment of Senators, section 32 says: "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." The reason that the Senate does not have a provision similar to the one in force in the House of Commons regarding a time limit within which vacancies must be filled is that **the constitution itself is so clear and plain upon**

[28] *Ibid.*, s. 16.
[29] *Ibid.*, s. 17.
[30] *Ibid.*, s. 21.
[31] *Ibid.*, s. 22.
[32] *Ibid.*, s. 23.
[33] See *LCJC No. 17*, *supra*, at 17:28.

> **the subject**. It distinctly says that appointments shall (not "may") be made when vacancies occur. This certainly does not mean the moment they occur because that would be impracticable. **The principle in interpreting directory words of this kind is that action must be taken within a reasonable time.**[34]

iii. Interpreting the Constitution in light of its internal architecture

35. The Constitution must be understood by reference to "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning". Constitutional documents must "be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts".[35]

36. Interpretation must also "be informed by the foundational principles of the Constitution", including federalism, democracy, protection of minorities, and constitutionalism and the rule of law.[36] The essential functions of the Senate relate to these foundational principles, and any failure to maintain the Senate according to the Constitution – absent constitutional amendment – serves to undermine these principles.

37. The doctrine of parliamentary privilege and the principle of judicial independence are further examples of "unwritten principles" that the Supreme Court has recognized despite neither being found in the written text of the Constitution.[37]

38. The Constitution's "internal architecture" or "basic constitutional structure" is such that "individual elements are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole":

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[34] F. A. Kunz, *The Modern Senate of Canada 1925-1963, A Re-Appraisal*. (Toronto: University of Toronto Press, 1965) at p. 57. (Footnote omitted; emphasis added).
[35] *Senate Reform Reference*, *supra*, at para. 25
[36] *Ibid*. See also Andrew David Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed. (Toronto: Oxford University Press, 2014) at 220-230.
[37] Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2007) at 1-17. ("*Constitutional Law of Canada*").

> …[T]he Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.[38]

39. The Prime Minister's central role in effecting Senate appointments is beyond dispute, yet there is no mention whatsoever of the Prime Minister in the *Constitution Act, 1867.* As Professor Hogg explains, the "real power is exercised by the elected politicians who give the advice to the Queen and her representatives."[39] Indeed, this principle of "responsible government is probably the most important non-federal characteristic of the Canadian Constitution"[40]:

> The Constitution Act, 1867 was drafted the way it was because the framers knew that the extensive powers vested in the Queen and Governor General would be exercised in accordance with the conventions of responsible government, that is to say, under the advice (meaning direction) of the cabinet or in some cases the Prime Minister.[41]

40. The assumption that the power to summon Senators formally granted to the Governor General would in practice be exercised by elected officials is reflected in at three ways.

41. First, the intention to continue the same system of responsible government after confederation as was recommended by Lord Durham in 1839 and implemented beginning in 1846 was evidenced by the assertion in the preamble to the *Constitution Act, 1867* that Canada was to have "a constitution similar in principle to that of the United Kingdom."[42]

42. Second, section 11 of the *Constitution Act, 1867* establishes a "Queen's Privy

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[38] *Senate Reform Reference*, *supra*, at para. 26.
[39] *Constitutional Law of Canada*, *supra*, at 9-2.
[40] *Ibid*. at 9-5.
[41] *Ibid*. at 1-29 to 1-30.
[42] *Ibid*. at 9-4 to 9-6.

Council for Canada" whose function is "to aid and advise in the government of Canada".

43. Third, between 1896 and 1935, a series of Minutes of Council provided that certain recommendations are the special prerogative of the Prime Minister, including the appointment of Senators.[43]

iv. Applying a purposive approach

44. The text of the *Constitution Act, 1867* requires the Governor General to summon Senators to fill vacancies when they happen. This formal power is constrained by convention such that it will only be exercised on the advice of the Prime Minister. Yet the Prime Minister refuses to name more Senators as long as he commands a majority in the Senate to approve government legislation.

45. A purposive approach to constitutional interpretation must consider the effect of the Prime Minister's unilateral inaction on the structure of the Constitution generally. An overly formalistic approach that is limited to the express textual provisions would, in practical terms, serve to immunize the Prime Minister from judicial oversight even if the undisputed effect of his inaction is to undermine and flaunt the supreme law of Canada.

46. Viewed holistically, the Constitution requires that the Prime Minister perform his duty to support the pillars of the constitutional architecture by providing advice to the Governor General to permit His Excellency, in turn, to perform the formal duty imposed on the Governor General under section 32 of the *Constitution Act, 1867*.

47. Taking into account the specific guarantee of regional representation, and the

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[43] P.C. 1896 – 1853 (May 1, 1896); P.C. 1896 – 2710 (July 13, 1896); P.C. 1935 – 3374 (October 23, 1935); see also *House of Commons Debates*, 20th Parliament, 2nd Session, Vol. I, 1946 (1 April 1946) at 433-434 (Rt. Hon. Mackenzie King); *Constitutional Law of Canada*, *supra*, at 9-11.

practical impact that accumulated vacancies may have on the Senate's ability to perform its essential functions – even in the absence of a direct threat to meeting bare quorum – the law of Canada implicitly requires that the Prime Minister perform his advisory role within a reasonable time after a vacancy occurs in the Senate.

48. The parameters of what constitutes a "reasonable time" may be left to be contextually determined. As is the case within the area of administrative law generally, "reasonableness" is a concept that is sufficiently flexible to account for a panoply of policy and legal considerations.

49. For example, a vacancy that is anticipated by virtue of a Senator's mandatory retirement at age 75 would presumably require less time to fill than one occasioned by an untimely and unexpected death or sudden resignation. The comparative remoteness or population of a region may also inform the reasonableness of a delay in filling a vacancy from that region.

50. Whatever reasonableness may require in a particular case, it is antithetical to the rule of law for a Prime Minister to deliberately refrain from providing the advice necessary to fill Senate vacancies because of personal dissatisfaction with the Senate, political embarrassment, or a desire to apply pressure to political actors to effect constitutional reform.

F. THE COURT OUGHT TO GRANT DECLARATORY RELIEF

51. If the Court accepts that the failure to fill Senate vacancies is inconsistent with the Constitution, the appropriate remedy is to clarify the state of the law by issuing a declaration setting out the applicable legal obligations.

i. The Senate Appointments Moratorium Exists against a Backdrop of Uncertainty

52. The fact that Senate vacancies exist and remain unfilled is not unprecedented. However, the Prime Minister is the first to state openly as a matter of policy

that he does not intend to fill vacancies.[44] There is a clear divergence of views within Canada as to whether the Prime Minister is under any legal obligation to appoint Senators, whether it is permissible to let the Senate "wither on the vine" through attrition, the point at which the extent of vacancies is constitutionally intolerable, and how the accumulation of vacancies ought to be addressed.[45]

ii. A Declaration is an Appropriate Remedy to Address Legal Uncertainty

> A declaratory judgment is a formal statement by the court upon the existence or non-existence of a legal state of affairs. … The declaration pronounces on what is the legal position.[46]

53. The declaration can be employed "as a supervisory remedy to determine the validity of some administrative action or decision",[47] including policies and even informal guidelines.[48] As Brown and Evans describe, "the declaration can plausibly claim to be *the* administrative law remedy of the late twentieth century."[49] It is available against the Crown, [50] can be used to "declare the extent of the legal powers, immunities or duty of a public authority", [51] and "its

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[44] Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings*, 39th Parliament, 2nd Session, No. 15 (17 April 2008) at 15:18. ("*LCJC No. 15*").
[45] *Senate Reform Committee*, *supra*; *ibid*. at 15:15-31; Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings*, 39th Parliament, 2nd Session, No. 16 (30 April 2008 – 1 May 2008) at 16:3-74; *LCJC No. 17, supra*, at 17:12-35 ; Senate *Debates*, Vol. 144, No. 59 (May 13, 2008) at 1324-1326; *Senate Debates*, Vol. 146, No. 8 (February 10, 2009) at 160-163; *Senate Debates*, Vol. 146, No. 034 (May 12, 2009) at 818; Affidavit of Aniz Alani at paras. 21-32.
[46] Brown and Evans, *Judicial Review of Administrative Action in Canada*, looseleaf, (Toronto, On: Carswell, 2013) at 1-68 ("*Judicial Review of Administrative Action in Canada*"), citing H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review*, 6th ed. (London: Sweet and Maxwell, 2007), c. 18-038.
[47] *Judicial Review of Administrative Action in Canada*, *ibid*.
[48] *Ibid*. at 1-72.
[49] *Ibid*. at 1-69.
[50] *Ibid.*
[51] *Ibid.* at 1-71.

terms can be moulded to suit the particulars of any given situation".[52]

iii. A declaration would provide practical relief

54. Although a declaration is not in itself enforceable, the absence of coercive relief is rarely a problem when the subject is a government or a public body that can normally be relief upon to obey the declaratory judgment.[53] Meanwhile, with the benefit of the Court's analysis in its reasons for judgment, the government can reassess its approach with a view to achieving compliance with the Constitution.

55. Subject to the scope of the margin of manoeuvre indicated by the Court's reasons for judgment, implementation of a declaratory judgment may take the form of re-calibrating informal policies or taking steps to define the period within which Senate vacancies will be filled on a go-forward basis. The latter approach is consistent with the practical outcome following the Supreme Court's judgment in the *Reference re Secession of Quebec*[54], including the enactment of the *Clarity Act* to establish a framework for responding to proposed referenda seeking popular mandates for secession from Canada.[55]

56. Declaratory relief also accounts for the prospect that subsequent enforcement of the Court's judgment may reside exclusively in the political realm[56] while deferring in part to the executive's expertise in matters the Court itself may not be particularly well suited to address.[57]

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[52] *Ibid.* at 1-69.
[53] *Constitution Law of Canada*, *supra*, at 59-4.
[54] [1998] 2 SCR 217.
[55] *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26.
[56] *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470 at para. 65.
[57] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paras. 2, 36-48; see also Hon. Mr. Justice Marshall Rothstein, "Address to the American Bar Association Section of Administrative Law and Regulatory Practice" (2011), 63 *Administrative Law Review* 961 at 964. ("*Rothstein Address*").

iv. The Court in its discretion ought to grant the Applicant standing

57. Section 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by "anyone directly affected by the matter in respect of which the relief is sought." This phrase has been interpreted as allowing a court discretion to grant standing "when it is convinced that the particular circumstances of the case justify status being granted."[58]

58. As Brown and Evans explain, "[t]he standing requirement focuses principally on the suitability of the applicant to invoke the court's judicial review jurisdiction…".[59] It exists "to protect the public's interest in ensuring that government is conducted in accordance with law".[60] For this reason, "a private litigant who, for public rather than private reasons, wishes to raise a constitutional question ought to be allowed to do so."[61]

59. The Applicant meets the criteria set out by the Supreme Court of Canada[62] for obtaining public interest standing as a private person:

a) the Applicant has a genuine interest in the issues raised in the application, the promotion of the rule of law, and adherence to the Constitution;[63]

b) the application raises a justiciable issue of constitutional interpretation,[64] which is readily susceptible to resolution by adjudication, amenable to the adversarial process, sufficiently grounded in basic facts, and does not involve

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[58] *Judicial Review of Administrative Action in Canada, supra,* at 4-17, citing *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229 at 283 (F.C.T.D.), rev'd in part (1995), 131 D.L.R. (4th) 285.
[59] *Judicial Review of Administrative Action in Canada*, *ibid*. at 4-13.
[60] *Ibid*. at 4-1.
[61] *Constitutional Law of Canada*, *supra*, at 59-3 to 59-4.
[62] *Judicial Review of Administrative Action in Canada*, *supra*, at 4-43, citing *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras. 18-51.
[63] Affidavit of Aniz Alani at paras. 10-20; Cross-Examination of Aniz Alani at 12:21-23, 31:30-42.
[64] *Alani v. Canada (Prime Minister)*, 2015 FC 649 at para. 35. ("*Alani (No. 1)*").

a hypothetical question;[65]

c) there is a serious issue of public importance to be tried;[66] and

d) the application is a reasonable and effective means of bringing the matter before the Court.[67]

60. Notably, there is also no other reasonable and effective manner for the issue to be resolved. No province or territory, or the federal government, has indicated a willingness to submit a reference question despite having been invited by the Applicant to do so.[68]

61. Even if the Court concludes that the Applicant has no standing, it remains open to the Court in its discretion to render judgment on the merits if the merits have been fully argued.[69]

v. The application raises a justiciable issue of constitutional interpretation

62. The rule of law and our Constitution require courts to engage in the judicial review of executive decisions when they conflict with the Constitution.[70] While there is a political aspect to Senate appointments, whether the Prime Minister is obliged to cause appointments to be made *at all* is a legal question well suited to the Court's interpretive role. Given the legitimacy and capacity of the courts to adjudicate the matter, it is justiciable.[71]

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[65] *Judicial Review of Administrative Action in Canada*, *supra*, at 4-51.
[66] *Alani (No. 1)*, *supra*; *Alani v. Canada (Prime Minister)*, 2015 FC 859 at paras. 18, 28. ("*Alani (No. 2)*"); Affidavit of Aniz Alani at paras. 33-35; Cross Examination of Aniz Alani at 33:43-46.
[67] *Constitutional Law of Canada*, *supra*, at 59-10.1.
[68] Affidavit of Aniz Alani at paras. 36-39; Cross-Examination of Aniz Alani at 35:27-34, 36:37-47, 37:1-24.
[69] *Judicial Review of Administrative Action in Canada*, *supra*, at 4-14, 4-43, 4-44, citing *Professional Institute of the Public Service of Canada v. R.*, [1990] 2 S.C.R. 367.
[70] *Rothstein Address*, *supra*, at 964.
[71] Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002), 47 McGill L.J. 435 at 447-449, 451.

63. The Federal Court of Appeal summarized the principles relevant to a justiciability analysis:

a) Whether the question before the Court is justiciable bears no relation to the source of the government power.[72]

b) In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is executive accountability to legal authority and protecting individuals from arbitrary executive action.[73]

c) Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, i.e., within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers.[74]

d) The category of non-justiciable cases is very small.[75]

64. Nor does the non-controversial and tangential role of convention in limiting the Governor General's formal power make the application non-justiciable. As Dean Lorne Sossin observes, conventions are "justiciable in the sense that a court could interpret the scope of a convention and declare whether a convention has been breached by government action."[76]

65. In this case, however, there is no suggestion of a breach by the Governor General of the relevant convention to appoint Senators only on the advice of the Prime Minister. Rather, the interplay between the convention and the Governor General's formal obligation to appoint Senators is relevant to tracing the Prime

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[72] *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4 at para. 63. ("*HFN*").
[73] *Ibid.* at para. 66.
[74] *Ibid.*
[75] *Ibid*. at para. 67.
[76] Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed., 2012, Toronto: Carswell, at pp. 11-12.

Minister's *de facto* role in enabling the Governor General to comply with the textual requirement of the *Constitution Act, 1867*.

66. Similarly, the Supreme Court's analysis in the *Senate Reform Reference* relies on the recognition and, in turn, indirect enforcement of constitutional conventions. With respect to the legality of consultative elections absent constitutional amendment, the Court expressly recognized the role of the Prime Minister in appointing Senators, and concluded that the proposed changes to the executive appointment process would "fundamentally modify the constitutional architecture" even if "the provisions regarding the appointment of Senators would remain textually untouched".[77]

vi. The Prime Minister is a "federal board, commission or other tribunal" in relation to Senate appointments by virtue of a power conferred by or under a prerogative of the Crown

67. The Federal Court has jurisdiction over the subject matter of the application either by virtue of its exclusive jurisdiction to judicially review "federal boards, commissions or other tribunals" or its concurrent jurisdiction where relief is sought against the Crown.

68. The Supreme Court of Canada described the purpose and scope of judicial review thusly:

> Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance.[78]

69. A holistic and practical reading of the notice of application confirms that its subject matter falls squarely within the classical definition of judicial review. It is, plainly, directed at the legality and reasonableness of the actions taken – or

[77] *Ibid*., at paras. 50-70.
[78] *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 SCR 585, 2010 SCC 62 at para. 24. ("*TeleZone*").

not taken – by a government decision maker. The Applicant's sole objective is to enforce the rule of law and facilitate adherence to the Constitution.

70. The question under section 18 of the *Federal Courts Act* remains: is the Prime Minister a "federal board, commission or other tribunal" in respect of advising the Governor General to effect Senate appointments?

71. The answer, in turn, falls to be decided on whether, in advising the Governor General, the Prime Minister is a "body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred … by or under an order made pursuant to a prerogative of the Crown".

72. Firstly, the interpretation of these key terms in the *Federal Courts Act* should consider "Parliament's aim to have the Federal Courts review all federal administrative decisions."[79]

73. The Court's jurisdiction to determine this judicial review must be considered in light of the objectives of its enabling statute:

> The enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives.[80]

> An application for judicial review under the *Federal Courts Act* combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed in s. 18(1). It is only this procedure that is in the exclusive jurisdiction of the Federal Court. As the Court recently observed in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, "[t]he genesis of the *Federal Courts Act* lies in Parliament's decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions

[79] *HFN*, *supra*, at para. 54. ("*HFN*").
[80] *TeleZone*, *supra*, at para. 32.

and other tribunals" (para. 34).[81]

74. The Prime Minister's role as a "federal board, commission or other tribunal" in this context is consistent with Parliament's intent to grant exclusive jurisdiction to the Federal Court to review federal decisions having large national impact. A contrary result would be incongruous in light of the Court's broadly construed jurisdiction.[82]

75. With respect to the role of the Crown prerogative in respect to Senate appointments, the Prime Minister's advice is provided both "by a prerogative of the Crown" and "by or under an order made pursuant to a prerogative of the Crown".

76. As Professor Mark Walters explains, historically, "it was the Crown's prerogative or common law right to summon advisors to gather in the Privy Council."[83] The Crown's prerogative to summon advisors imposes on advisors, in turn, a form of common law duty.

77. In the case of Senate appointments, the Governor General enjoys the Crown prerogative power to summon and receive advice from the Prime Minister. The Prime Minister, in turn, has jurisdiction to advise "by a prerogative of the Crown".

78. In addition, the Prime Minister's role in providing advice on Senate appointments to the Governor General on behalf of the Queen's Privy Council for Canada is established by various Minutes of Council issued between 1896 and 1935.[84]

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[81] *TeleZone*, *supra,* at para. 47.
[82] *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at paras. 23-25.
[83] Mark D. Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2001), 5 *Journal of Parliamentary and Political Law* 127 at 143-144.
[84] P.C. 1896 – 1853 (May 1, 1896); P.C. 1896 – 2710 (July 13, 1896); P.C. 1935 – 3374 (October 23, 1935); see also *House of Commons Debates*, 20th Parliament, 2nd Session, Vol. 1, 1946 (1 April 1946) at 433-434 (Rt. Hon. Mackenzie King).

79. Pursuant to the Minutes of Council, which themselves are orders made pursuant to a prerogative of the Crown, the Committee of the Privy Council resolved that "certain recommendations are the special prerogative of the Prime Minister" including the appointment of Senators.[85] It follows that, absent their repeal, the Prime Minister's exercise of authority in this regard is made "by or under an order made pursuant to a prerogative of the Crown".

vii. The Court's jurisdiction to review decisions and courses of conduct

80. As Brown and Evans explain, the enactment of section 18.1(3)(b) of the *Federal Courts Act* has expanded the jurisdiction of the Federal Court considerably:

> Specifically, reviewable administration action now includes not only "a decision or order," but also an "act or proceeding" of a federal board, commission, or other tribunal. And with some exceptions, the words "decision, order, act or proceeding" have been held to encompass a wider range of administrative action than was previously reviewable in the Federal Court of Appeal.[86]

81. The distinction between a "decision" and a "course of conduct" that falls short of a "decision or order" is that the 30-day time limit for bringing proceedings under section 18.1(2) of the *Federal Courts Act* only applies to "decisions or orders".[87]

82. In this application, it is open to the Court to review the legality of the Prime Minister's refusal to appoint Senators as a continuing course of conduct, illustrated by:

a) The Prime Minister's statement to the Senate Special Committee on Senate Reform in 2006 indicating a preference not to appoint Senators,

b) Minister Van Loan's statement to the Senate Committee indicating that the

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[85] *Ibid*.
[86] *Judicial Review of Administrative Action in Canada*, *supra*, at 2-74.
[87] *Ibid*. at 5-15 to 5-16.

government would not appoint Senators until consultative elections had been implemented,

c) The Prime Minister's public statements in Markham, Ontario on December 4, 2014,

d) The Prime Minister's public statements in Regina, Saskatchewan on July 24, 2015, and

e) The historical record indicating the accumulation of Senate vacancies during the Prime Minister's term in office.

83. The Court may also determine that, notwithstanding the Respondents' communication to the Court of June 15, 2015 regarding the Rule 317 request for materials, there was necessarily a decision made not to provide advice to the Governor General such that the Senate vacancies be filled.

84. In either case, as a course of conduct or a decision, the Court is called upon to interpret and declare the state of the law with respect to any duty the Prime Minister may have in respect of tendering advice necessary to fill Senate vacancies.

G. CONCLUSION

85. Constitutional text requires, in the clearest of terms, that Senators be appointed "when", that is to say within a reasonable time after, "a vacancy happens".

86. Appointing Senators is a duty that the law of the Constitution imposes on the Governor General. However, like the beneficiary in a trustee relationship, the Governor General is fully dependent on the Prime Minister's advice for the fulfillment of that duty.

87. The constitutional architecture, therefore, requires that the Prime Minister advise the Governor General to appoint Senators. The Prime Minister's failure, and, *a fortiori*, his refusal to provide the advice on which the Governor General

is dependent undermines this architecture, and thus violates the Constitution itself, by making it impossible for the Governor General to fulfill his constitutional role in relation to the Senate.

PART IV – ORDER SOUGHT

88. The Applicant respectfully requests the Court issue judgment as follows:

a) The Court adjudges and declares that the Prime Minister of Canada must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate.

b) The Applicant shall be entitled to a fixed amount of costs payable by the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Aniz Alani, on his own behalf
Applicant

August 31, 2015

PART V – LIST OF AUTHORITIES

Statutory Materials

1) *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26

2) *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5

3) *Federal Courts Act*, R.S.C. 1985, c. F-7

Case Law

4) *Air Canada v. Toronto Port Authority*, 2011 FCA 347

5) *Alani v. Canada (Prime Minister)*, 2015 FC 649

6) *Alani v. Canada (Prime Minister)*, 2015 FC 859

7) *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 SCR 585, 2010 SCC 62

8) *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44

9) *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4

10) *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470

11) *Reference re Secession of Quebec*, [1998] 2 SCR 217

12) *Reference re: Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704

Secondary Sources

13) Brown and Evans, *Judicial Review of Administrative Action in Canada*, looseleaf, (Toronto, On: Carswell, 2013)

14) CBC News, "Stephen Harper vows not to name any senators before reforms made", http://www.cbc.ca/news/politics/stephen-harper-vows-not-to-name-any-senators-before-reforms-made-1.3167112; retrieved: August 30, 2015

15) Andrew David Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed. (Toronto: Oxford University Press, 2014)

16) Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2007)

17) F. A. Kunz, *The Modern Senate of Canada 1925-1963, A Re-Appraisal*. (Toronto: University of Toronto Press, 1965)

18) Library of Parliament, "Party Standings in the Senate", online: http://www.parl.gc.ca/Parlinfo/lists/PartyStandings.aspx?Section=b571082f-7b2d-4d6a-b30a-b6025a9cbb98&Gender=; retrieved: August 30, 2015

19) Library of Parliament, "Party Standings in the Senate since 1867", online: http://www.parl.gc.ca/Parlinfo/lists/PartyStandingsHistoric.aspx?Section=b571082f-7b2d-4d6a-b30a-b6025a9cbb98; retrieved: August 30, 2015

20) Hon. Mr. Justice Marshall Rothstein, "Address to the American Bar Association Section of Administrative Law and Regulatory Practice" (2011), 63 *Administrative Law Review* 961

21) Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed., 2012, Toronto: Carswell

22) Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002), 47 McGill L.J. 435

23) Mark D. Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2001), 5 *Journal of Parliamentary and Political Law* 127

Minutes of Council

24) P.C. 1896 – 1853 (May 1, 1896)

25) P.C. 1896 – 2710 (July 13, 1896)

26) P.C. 1935 – 3374 (October 23, 1935)

Parliamentary Debates

27) *House of Commons Debates*, 20th Parliament, 2nd Session, Vol. 1, 1946 (1 April 1946)

28) *Senate Debates*, Vol. 144, No. 59 (May 13, 2008)

29) *Senate Debates*, Vol. 146, No. 8 (February 10, 2009)

30) *Senate Debates*, Vol. 146, No. 034 (May 12, 2009)

31) Special Senate Committee on Senate Reform, *Minutes of Proceedings*, 39th Parliament, 1st Session, No. 2 (7 September 2006)

32) Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings*, 39th Parliament, 2nd Session, No. 15 (17 April 2008)

33) Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings*, 39th Parliament, 2nd Session, No. 16 (30 April 2008 – 1 May 2008)

34) Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings*, 39th Parliament, 2nd Session, No. 17 (7 May 2008)