Court File No. A-265-15

FEDERAL COURT OF APPEAL

BETWEEN:

THE PRIME MINISTER OF CANADA and
THE GOVERNOR GENERAL OF CANADA

Appellants

and

ANIZ ALANI

Respondent

RESPONDENT'S MEMORANDUM OF FACT AND LAW

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Respondent, on his own behalf

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OVERVIEW

THE APPLICATION FOR JUDICIAL REVIEW AND MOTION TO STRIKE

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. The Respondent brought an application for judicial review seeking a declaration as to the legality of the Prime Minister's unilateral inaction.

2. The Appellants, the Prime Minister of Canada and the Governor General of Canada ("Canada"), moved to strike the application on grounds of justiciability and jurisdiction.

3. On justiciability, Canada's objection fixates on the uncontroversial application of the constitutional convention by which the Governor General relies exclusively upon the Prime Minister's advice to appoint Senators. Canada's emphasis on the role of convention obfuscates the legal nature of the central question posed by the application for judicial review: under the Constitution of Canada, is the Prime Minister's discretion to advise on Senate appointments so broad as to permit him to refuse to provide the advice within a reasonable time?

4. On jurisdiction, Canada says that the Prime Minister's role in advising on Senate appointments arises only by convention, without involving a prerogative of the Crown, and therefore falls outside the Court's jurisdiction over a "federal board, commission or other tribunal". By relying on a confused understanding of conventions and a refusal to recognize the reality of Canada's constitutional architecture, this objection fails to account for the historical prerogative right of the Governor General to receive advice and a corresponding common law or prerogative *duty* of responsible ministers to provide advice.

5. Canada's motion to strike had the practical effect of delaying the judicial review proceeding from January 15, 2015 – the date on which the Prime

Minister's Rule 318 materials were due – to May 21, 2015, when Justice Harrington dismissed the motion to strike.

CANADA'S APPEAL OF THE UNSUCCESSFUL MOTION TO STRIKE

6. Canada now appeals against Justice Harrington's discretionary decision to allow the judicial review application to proceed to a hearing on its merits. A stay pending appeal has not been sought by Canada, however, and the underlying application proceeds to a hearing in parallel with the current appeal.

7. Given that the underlying application may well be heard and determined on its merits before this appeal is resolved, the practical utility of this appeal is entirely unclear. At best, it is a test case through which Canada seeks the Court's guidance for future unrelated proceedings. At worst, it serves to test a self-represented Respondent's resolve to pursue public interest litigation with limited time and resources.

8. Canada's unwillingness to defer determinations of arguable points of law to the hearing of the application on its merits flies in the face of this Court's jurisprudence and manifestly frustrates the plain objectives of the *Federal Courts Act* including the promotion of timely and cost-effective access to justice.

9. This appeal invites the Court to confirm the role of a motions judge determining a motion to strike an application for judicial review and the consequences, if any, for a party bringing a motion to strike other than in the "clearest of cases".

10. Absent such direction from this Court, preliminary motions to strike applications for judicial review – particularly those concerning politically sensitive matters – may serve to unduly delay meritorious proceedings or deplete the relatively modest resources of applicants legitimately seeking judicial review remedies against federal decision makers.

PART I – STATEMENT OF FACTS

11. On December 4, 2014, the Prime Minister communicated publicly an intention not to advise the Governor General to summon fit and qualified Persons to fill existing Vacancies in the Senate.[1]

12. 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. [2]

13. The application sought, *inter alia*, a declaration that the Prime Minister must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after the Vacancy happens.[3]

PART II – POINTS IN ISSUE

14. This appeal raises the following issues:

    a) What is the standard of review?

    b) What is the test for allowing a motion to strike an application for judicial review?

    c) What is the appropriate procedure for raising an objection to an application for judicial review?

    d) Is it plain and obvious that the application for judicial review is bereft of any possibility of success?

15. The Court's procedures for raising objections to applications for judicial review must either be clarified for future cases, or confirmed and enforced through appropriate costs orders. The *status quo* risks undue delay and expense during

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[1] Appeal Book, Tab 4, p. 27.
[2] *Ibid*. p. 29.
[3] *Ibid*. p. 27.

what by statute is required to be a process for hearing and determining applications without delay and in a summary way.

PART III – SUBMISSIONS

A. STANDARD OF REVIEW

16. The Respondent agrees with Canada's submissions at paragraph 11 of its Memorandum of Fact and Law regarding the standard of review applicable to an appeal of a motion to strike.

17. The Court's reminder in *Apotex Inc. v. Canada (Governor in Council)* is apposite:

> Before any of the issues are addressed, it needs to be emphasized that, above all else, this is an appeal of a motion to strike. It is not an appeal of a preliminary determination of a question of law. Thus, there is really only one question: is it plain and obvious that the application for judicial review is bereft of success?[4]

18. The Federal Court's refusal to grant Canada's motion to strike was discretionary. It should be afforded deference by an appellate court.[5] The motions judge appropriately exercised his discretion to defer a final disposition of Canada's objections on grounds of justiciability and jurisdiction to the hearing of the application on its merits. In doing so, he did not proceed on a wrong principle of law warranting reversal by this Court.

B. TEST FOR ALLOWING MOTIONS TO STRIKE JUDICIAL REVIEW APPLICATIONS

19. This Court confirmed in *Apotex* the test for striking judicial review applications:

> "A motion to strike an application for judicial review is a judicial

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[4] *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 at para. 11. [Emphasis in original] ("*Apotex*").
[5] *Ibid*., at para. 15.

> tool which should be used in very exceptional cases and should only succeed if the application for judicial review is so clearly improper as to be bereft of any chance of success."[6]

20. Although the "plain and obvious" test described by the Supreme Court of Canada in the leading of authority of *Hunt v. Carey*[7] arose in a different context, this Court has used its language to inform the test for striking judicial review applications:

> In the context of an action (as opposed to an application), the test for a motion to strike, as laid out by the Supreme Court of Canada for summary judgment in *Hunt v. Carey Canada Inc.* [citation omitted] is whether it is "plain and obvious" that the pleadings disclose no reasonable cause of action. Without commenting on the appropriateness of applying a test for striking out an action to a motion to strike out an application, the language used in the *Hunt v. Carey* test is useful in framing the legal issues to be decided in this case.[8]

21. After confirming the test described in *David Bull*[9] (and cited above in *Apotex)* and referencing *Hunt v. Carey*, Stratas J.A. writing for this Court in *JP Morgan* discussed the rationale for an onerous standard:

> There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 (CanLII). Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, *supra*, subsection 18.1(2) and section 18.4. An unmeritorious motion – one that raises matters that should be

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[6] *Ibid*., at para. 16..
[7] *Hunt v. Carey Canada Inc.* 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. (*"Hunt v. Carey*").
[8] *Apotex*, *supra* note 4, at para. 16.
[9] *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 (C.A.) ("*David Bull*").

advanced at the hearing on the merits – frustrates that objective.[10]

22. This appeal invites the question: what counts as "plain and obvious"?

23. The phrase seemingly speaks for itself. Yet, Canada's success in this appeal would require this Court to reverse its own established jurisprudence by adopting a new test that either parts ways with guidance from the Supreme Court of Canada, or questions the capacity of motions judges to determine what is, and what is not, "clearly improper".

24. The "plain and obvious" test described in *Hunt v. Carey* and subsequently adopted by this Court in *David Bull* and *JP Morgan* was informed by the historical development of summary dismissal procedures including within the United Kingdom:

> In *Metropolitan Bank, Ltd. v. Pooley*, the Lord Chancellor explained at p. 951 that before the *Supreme Court of Judicature Act, 1873*, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even although there was no written rule stating that courts could do so. The Lord Chancellor noted, at p. 951, that "The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure". **That is, it was open to courts to ensure that their process was not used simply to harass parties through the initiation of actions that were obviously without merit.**
>
> Before the advent of the *Supreme Court of Judicature Act, 1873* and the new *Rules of the Supreme Court* (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. […] **But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised.** As the Lord Chancellor explained in *Pooley*, **it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless.** It was with this objective in mind that O. 25, r. 4 of the 1883 *Rules of the Supreme Court* came into force

[10] *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 (CanLII) at para. 48. ("*JP Morgan*").

[…].

One of the most important points advanced in the early decisions […] was the proposition that **the rule was derived from the courts' power to ensure both that they remained a forum in which genuine legal issues were addressed and that they did not become a vehicle for "vexatious" actions without legal merit designed solely to harass another party.** In *Pooley*, Lord Blackburn asserted that the new rule "considerably extends the power of the court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law." Nonetheless, as Chitty J. subsequently observed in *Peruvian Guano Co.*, **the rule was not intended to prevent a "substantial case" from coming forward. Its summary procedures were only to be used where it was apparent that allowing the case to go forward would amount to an abuse of the court's process.**

[…] Lindley M.R. stated:

> The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases. [Emphasis in *Hunt v. Carey*.]

[…]

The Master of the Rolls had made this very point some six years earlier:

> Then the Vice-Chancellor says: "The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious [Emphasis in *Hunt v. Carey*]; therefore, I should let the parties plead in the usual way". […] It appears to me that the object of the rule is to stop cases which ought not to be launched -- cases which are obviously frivolous or vexatious, or obviously unsustainable; and **if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly**

> **of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether.**[11]

25. Canada argues that "in modern day Canada", complex questions of law should be resolved on a motion to strike rather than deferred to a hearing on the merits. The Appellants criticize time-honoured principles, such as those referenced by Moulton LJ in *Dyson v. Attorney General*[12] and in turn by Harrington J. in the order under appeal, by dismissing *Dyson* as merely "a decision rendered over 100 years ago".[13]

26. The timelessness of the passage in *Dyson* cited by Harrington J. is illustrated, however, by the fact that the Supreme Court of Canada cited *the same passage* as Harrington J., with approval – noting it as being "particularly instructive".[14]

How Plain and Obvious Must a Plain and Obvious Defect Be?

27. While the parties in this appeal apparently agree on the test to be applied on a motion to strike a judicial review application, they part ways on whether the notice of application considered by the motions judge is "so clearly improper as to be bereft of any possibility of success".

28. The difficulty in consistently applying the "plain and obvious" test lies in distinguishing flaws that are "plain and obvious" from those flaws which could become evident, if at all, only after an exhaustive examination of a complex question of law.

29. This difficulty is reminiscent of the "epistemological confusion" over the relationship between "patent unreasonableness" and "reasonableness

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[11] *Hunt v. Carey*, *supra* note 7, at S.C.R. 968-971. [Citations omitted; emphasis added, except where otherwise indicated in original].
[12] [1911] 1 KB 410 (C.A.) ("*Dyson*").
[13] Appellants' Memorandum of Fact and Law, paras. 18-19.
[14] *Hunt v. Carey*, *supra* note 7, at S.C.R. 972-973.

simpliciter" that afflicted federal administrative law prior to *Dunsmuir*.[15]

30. How "plain and obvious" should an alleged flaw be in order to justify driving an applicant from the judgment seat by depriving him or her of a hearing on its merits? Historical definitions of "patent unreasonableness", albeit largely antiquated in light of *Dunsmuir*, are helpful in determining the contours of what constitutes a "plain and obvious" defect.

31. In *Southam*, Iacobucci J. described a patently unreasonable decision as one marred by a defect characterized by its "immediacy or obviousness":

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.[16]

32. Mirroring the language of LeBel J.'s inquiry in his concurring reasons in *C.U.P.E*, the question might be posed: does the "plain and obvious" nature of a defect in a notice of application for judicial review refer to the "immediacy or obviousness" of the flaw, or rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe?[17]

33. Any alleged defect in the notice of application based on either of Canada's two objections grounded in complex and novel questions of law cannot, in the absence of direct controlling authority on point, be "plain and obvious" in the sense referring to the "immediacy or obviousness" of the flaw.

34. Conversely, the defects identified by this Court in *JP Morgan* were marked by their "immediacy or obviousness": a clear and unambiguous statutory provision expressly excluded the subject matter of a tax case from the Federal Court's

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[15] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9
[16] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, 1997 CanLII 385 (SCC) at para. 57, as cited in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63 (CanLII), at para. 110. ("*C.U.P.E.*").
[17] See *C.U.P.E., ibid.*, at para. 124.

jurisdiction in favour of the Tax Court of Canada. Moreover, the jurisdictional defect in *JP Morgan* was one that had materialized in numerous similarly doomed applications and had already been the subject of specific guidance from the Courts.

35. Justice Harrington's reasons make clear that he did not recognize the immediacy or obviousness of defects relating to jurisdiction or non-justiciability in the notice of application such that the application should not be heard on its merits. Canada argues that he erred in not probing further and, in effect, determining the objections as questions of law. If he had done so, Canada apparently argues, the alleged defects could have *become* "plain and obvious".

36. The shifting goalposts of the "plain and obvious" test to suit Canada's litigation objectives is reminiscent of the comments quoted by LeBel J. in his concurring opinion in *C.U.P.E.*:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.[18]

37. In the context of an action to which Rules 220 and 221 apply, a party responding to a motion for summary dismissal or motion for a preliminary determination of a question of law has the benefit of knowing the case to be met before responding. An applicant in a judicial review proceeding does not.

38. While the Court's jurisprudence speaks of "plain and obvious" defects and "obvious, fatal flaws", it remains unclear whether motions to strike judicial review applications are intended to be reserved for "clear" cases not requiring

[18] *Ibid.*, at para. 63, citing *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 1997 CanLII 10862 (NL SCTD), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27.

detailed analysis or are to be taken as invitations to bifurcate judicial review proceedings by determining potentially novel and complex questions of law before a hearing on the merits.

39. Canada's position clearly invites the latter approach within this appeal by asking this Court to substitute its own discretion following a necessarily probing review of questions of law concerning:

a) the extent to which courts may validly give effect to constitutional conventions when called upon to determine the legality of actions taken by federal decision makers, and

b) whether the source of the Prime Minister's undisputed power to advise the Governor General on Senate appointments is based, even in part, on a prerogative of the Crown – albeit one not specifically addressed in prior case law.

40. However, having failed to characterize its motion in the Court below as being for a preliminary determination of a point of law, and having reserved the right to characterize the dismissal of the motion to strike as being without prejudice to its ability to re-argue the objections at the hearing of the application on its merits,[19] it would be unfair and inappropriate for this Court to entertain Canada's invitation.

41. If this Court concludes that the motions judge improperly exercised his discretion to defer the final determination of Canada's objections to the hearing of the application on its merits, the appropriate remedy would be to either:

a) refer back to the Federal Court the issues of justiciability and jurisdiction raised in Canada's motion to strike for determination as questions of law to be final and conclusive subject to being varied on appeal, or

b) given that Canada's objections are otherwise available to be raised at the

[19] Appeal Record, Tab 10, at p. 221.

hearing of the application on its merits and that the underlying application may have been perfected, if not heard and determined, before the hearing of this appeal, refer the issues of justiciability and jurisdiction to the applications judge as part of the hearing of the application on its merits.

C. THE APPROPRIATE PROCEDURE FOR RAISING OBJECTIONS TO JUDICIAL REVIEW APPLICATIONS

42. As noted at paragraph 17 above and in *Apotex*, this is an appeal of a motion to strike rather than of a preliminary determination of a question of law.

43. Whether a binding decision on Canada's objections would issue, and the impact the motion to strike would have in delaying the proceeding, were both live questions in the Court below.

44. Within case management, the Respondent requested that Canada's motion to strike be adjourned to the beginning of the hearing of the application on its merits,[20] which would have been consistent with an order issued in another judicial review application where Canada objected on grounds of justiciability and jurisdiction.[21]

45. The Respondent's request was declined[22] on the basis that Canada's objections would be *res judicata* following the motion to strike. Subsequent correspondence to counsel for Canada seeking agreement that the objections would be *res judicata* met with the reply that Canada was unwilling to stipulate as to their position in advance of the Court's ruling on the motion to strike.[23]

46. This ambiguous invocation of the Court's inherent jurisdiction to hear motions to strike presents a problematic uncertainty and asymmetry for applicants responding to a motion to strike.

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[20] Appeal Record, Tab 10, at pp. 219-220.
[21] *Galati et al. v. Canada (Governor General) et al.*, Order (Milczynski P.) issued August 15, 2014, T-1476-14 (Unreported).
[22] Appeal Record, Tab 9, at p. 43.
[23] Appeal Record, Tab 10, at pp. 220-221.

47. The party moving to strike knows it must put its best foot forward in order to establish that it is "plain and obvious" that its objections should prevail. The applicant, meanwhile, may not know until part way through the hearing of the motion to strike whether a binding determination of the objections will be made -- necessitating a comprehensive response being fully argued – or deferred to the hearing on its merits upon failing to meet the "plain and obvious" threshold for summary dismissal, necessarily yielding a less onerous case to be met.

48. To prevent unnecessary delay and duplication of argument, the Respondent expressly invited the motions judge to consider Canada's objections as if Canada had brought a motion for a preliminary determination of a question of law under Rule 220 rather than a motion to strike under Rule 221.[24] The former would have been final and conclusive, subject to being varied on appeal, while the latter would permit Canada to re-argue the same objections at the hearing of the application on its merits.

49. However, the motions judge declined to exercise his discretion to make a binding decision on Canada's objections. In doing so, the Court referred to the jurisprudence stemming from the *Toney* litigation.[25]

50. In that case, an action for damages was brought against defendants including Alberta following a fatal boating accident alleging a breach of search and rescue duties. Alberta moved to strike the statement of claim on grounds that the Federal Court lacked *in personam* jurisdiction. Justice Harrington dismissed the motion to strike, concluding that this was "…as maritime an action as one could have" with a cause of action ground in the federal *Marine Liability Act*.[26] The Court of Appeal upheld the refusal to strike the claim while referencing the "plain and obvious" standard.[27]

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[24] Appeal Record, Tab 10, at p. 218.
[25] Appeal Record, Tab 10, pp. 218-219, 221.
[26] *Toney v. Canada*, 2011 FC 1440.
[27] *Canada v. Toney*, 2012 FCA 167.

51. The issue of *in personam* jurisdiction over Alberta came back to the Court, this time by way of a motion for a determination on a point of law. No longer applying the "plain and obvious" standard but rather deciding the substantive issue on its merits, the Federal Court determined it had jurisdiction over the defendant Alberta.[28] Reviewing that determination for correctness, however, the majority judgment of the Federal Court of Appeal concluded that jurisdiction was lacking and, in effect, dismissed the claim against Alberta.[29]

52. That substantially the same objection could be argued four times before a trial on the merits might be considered unexceptional in the context of typically lengthy civil litigation proceedings. That Canada may be arguing the same objections two or three times *before any appeal* of the judicial review application on its merits demonstrably runs afoul of the statutory injunction that applications be heard and determined without delay and in a summary way.

53. It could be argued that time and expense could have been spared in *Toney* had the motions judge issued a final determination of the jurisdictional issue in the context of the initial motion to strike. However, as in this proceeding, it was a responding party that elected to frame its request as a motion to strike rather than a motion for a preliminary determination of a question of law. That strategic choice carries consequences.

Should the Court Encourage More "Robust Use of Interlocutory Procedure"?

54. Canada draws heavily on certain comments by the Federal Court of Appeal in the 2013 decision in *JP Morgan*,[30] which it apparently takes to be an endorsement of the use of motions to strike generally. Canada further suggests that its attempt to strike the application in this proceeding by motion before a hearing on its merits is consistent with the Supreme Court of Canada's

[28] *Toney v. Canada*, 2012 FC 1412.
[29] *Canada v. Toney*, 2013 FCA 217.
[30] *Supra* note 10.

encouragement of "the robust use of interlocutory procedure".[31]

55. With respect, the interpretation Canada advocates relies on a selective reading of its cited authorities divorced from the context in which they arose.

56. Read alongside the Court's longstanding jurisprudence concerning motions to strike applications for judicial review, *JP Morgan* illustrates and confirms, rather than discards, the Court's repeated insistence that such motions be reserved for an exceptional category of the very clearest of cases in which applications for judicial review are manifestly doomed to failure, rather than merely those in which an arguable point of law might be raised in objection.

57. The commentary in *Federal Courts Practice* related to s. 18.4 of the *Federal Courts Act* suggests that the weight of authority indicates that motions to strike applications for judicial review are rare, exceptional, and discouraged.[32] Apart from the commentary related to *JP Morgan*, discussed in further detail below, the following relevant principles are referenced in the most recent version of this leading text:

a) "The proper way to contest an originating notice of motion which a respondent thinks to be without merit is to appear and argue at the hearing of the motion itself rather than to bring a motion to strike. While the Court has jurisdiction to dismiss in a summary manner an originating notice of motion which is so clearly improper as to be bereft of any possibility of success, such cases must be very exceptional."[33]

b) "The rationale for the ruling in *David Bull*, above, is that judicial review proceedings are designed to proceed expeditiously, and motions to strike have the potential to unduly and unnecessarily delay their determination. Justice is

[31] Appellants' Memorandum of Fact and Law, para. 16.
[32] *Federal Courts Practice*, Saunders, Hon. Justice Rennie, Garton, eds., 2015 ed. (Toronto: Carswell, 2014).
[33] *Federal Courts Practice* at 186-187, citing *David Bull Laboratories (Can.) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.).

better served by allowing the application judge to deal with all of the issues raised by the judicial review application."[34]

c) "Unlike proceedings commenced by action, there is little merit in bringing a motion to strike proceedings brought by way of application, except in the clearest of cases. Much of the argument expended on a motion to strike is simply duplicative of arguments that can be raised at the hearing of the application itself."[35]

d) "A Court should strike an application for judicial review for lack of standing on a preliminary motion only in very clear cases. At this stage of the proceeding, the Court may not have all the relevant facts before it, nor the benefit of full legal argument on the statutory framework within which the administrative action in question was taken."[36]

e) "A motion to strike is appropriate where authority exists which is directly contrary to the position on which the application is based and where no further development of the factual record is required."[37]

f) "Where a proceeding is commenced by application, any issue of a time bar should, in the usual case, be argued at the hearing of the application, and not on a motion to strike."[38]

g) "The Court struck an application for prohibition as an abuse of process where the applicant sought to litigate the same issue as had been litigated in price prohibition applications, albeit against different respondents."[39]

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[34] *Ibid.* at 187, citing *Odynsky v. League for Human Rights of B'Nai Brith Can.*, 2009 FCA 82.
[35] *Ibid.*, citing *Chrysler Can. Inc. v. Canada*, 2008 FC 1049.
[36] *Ibid.*, citing *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374.
[37] *Ibid.,* citing *LJP Sales Agency Inc. v. Canada (National Revenue)*, 2007 FCA 114.
[38] *Ibid.*, citing *John McKellar Charitable Foundation v. Canada (C.R.A.)*, 2006 FC 733.
[39] *Ibid.* at 188, citing *Hoffman-LaRoche Ltd. v. Canada (Min. of National Health & Welfare)* (1998), 158 F.T.R. 135, 85 C.P.R. (3d) 50 (T.D.)

h) "On a preliminary motion, the Court struck out an application for lack of jurisdiction where the decision challenged had been made by a person who was not a federal board."[40]

58. The Appellants point to language in *JP Morgan* as directing that respondents can and should bring motions to strike to determine questions of law rather than deferring them to the hearing of the application on its merits.

59. Indeed, Canada has expressed concern that the Court may have faulted it *had it not* brought a preliminary motion to strike in the circumstances. Apparently, however, Canada's concern did not extend to attempting to bring a motion for a stay pending the appeal of Harrington J.'s refusal to strike the application.

60. The context in which the *JP Morgan* judgment arose informs its interpretation. It was a tax case. JP Morgan brought an application for judicial review alleging that the Minister of National Revenue departed from an administrative policy when assessing tax under Part XIII of the *Income Tax Act*. JP Morgan characterized the challenge as being in relation to an improper exercise of discretion. The Minister took the position that JP Morgan was in fact challenging the validity of the tax assessments, a matter within the exclusive jurisdiction of the Tax Court of Canada.

61. As noted by the Federal Court of Appeal in *JP Morgan*, Parliament has expressly removed from the Federal Court's broad powers of judicial review matters for which an Act of Parliament provides for an appeal to the Tax Court of Canada.

62. In light of the plain and obvious effect of section 18.5 of the *Federal Courts Act*, it is unsurprising that the Federal Court of Appeal expressed its frustration and impatience with the volume of tax-related applications for judicial review improperly brought before the Federal Court:

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[40] *Ibid.*, citing *Mennes v. Canada (A.G.)* (1998), 149 F.T.R. 317, 9 Admin L.R. (3d) 119 (T.D.), affirmed by (1999), 247 N.R. 295 (Fed. C.A.)

> Time and time again, this Court strikes out taxpayers' applications for judicial review. What explains the flow of unmeritorious applications for judicial review in the area of tax?[41]

63. Stemming the tide of taxpayers' unmeritorious applications for judicial review, especially given their clear statutory exclusion from the Federal Court's jurisdiction, understandably warranted offering "wider guidance" on the practices and procedures governing notices of application for judicial review and motions to strike them. However, if applied without regard to the principles underlying motions to strike, the Court's *dicta* in *JP Morgan* may be used to rationalize approaches that frustrate the objectives of the *Federal Courts Act* and *Federal Courts Rules*.

64. Stratas J.A., writing for the the Court of Appeal in *JP Morgan*, writes:

> …[A]ny of the following qualifies as an obvious, fatal flaw warranting the striking out of a notice of application:
>
> (1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
>
> (2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; or
>
> (3) the Federal Court cannot grant the relief sought.[42]

65. Notably, Stratas J.A.'s identification of "obvious, fatal flaws" falls immediately following a subject heading labeled:

> **E. General principles governing when notices of application for judicial review <u>in tax matters</u> should be struck**[43]

66. The examples of "obvious, fatal flaws" set out and discussed in further detail by Stratas J.A. are expressly derived from authorities including *Canada v.*

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[41] *JP Morgan*, *supra* note 10 at para. 29.
[42] *Ibid*., at para. 66.
[43] *Ibid.*, heading "E" at para. 66. [Emphasis added].

Addison & Leyen Ltd.,[44] which, notably, was also a judicial review application brought in respect of a tax matter and struck out for lack of jurisdiction in accordance with section 18.5 of the *Federal Courts Act*.

67. As for the other examples of "modern day" Canadian judgments cited by Canada as authority for resolving complex questions of law on a motion to strike, not one involves a notice of application for judicial review.[45]

68. In each case cited by Canada as an endorsement of the "robust use of interlocutory procedure", the alternative to resolving a preliminary issue on a motion to strike or summary judgment was the trial of an action, complete with document discovery, examinations for discovery, requests for admissions, particulars, and live testimony.

69. As this Court has already observed, motions to strike a notice of application must be distinguished from motions to strike a statement of claim.[46] Unlike actions, applications are, by statute, required to be heard and determined without delay and in a summary way.[47]

70. Rather than accepting Canada's invitation to further encourage the use of interlocutory motions to strike applications for judicial review *in case* they might have the effect of avoiding the need for a hearing on the merits, the Respondent respectfully submits that this Court should provide guidance to motions judges on whether and how to deter motions to strike applications from being "used [other than] in very exceptional cases".

71. The consequences for a litigant seeking a judicial review remedy confronted with a motion to strike are antithetical to timely access to justice:

    a) the ordinary time limits for procedural steps under the *Federal Courts Rules*

[44] [2007] 2 SCR 793, 2007 SCC 33 (CanLII).
[45] Appellants' Memorandum of Fact and Law, at para. 19.
[46] *Apotex*, *supra* note 4, at para. 16.
[47] *JP Morgan*, *supra* note 10 at para. 48.

are, in effect, held in abeyance;

b) time and resources must be spent defending against a motion to strike without knowing whether the hurdle to overcome is more closely related to a "non-suit" motion or a bifurcated hearing of a legal issue on its merits; and

c) even if the applicant is successful in overcoming the motion to strike, the unsuccessful party has an appeal as of right of the interlocutory order dismissing the motion to strike, resulting in further strain on time and resources and a distraction from preparing its case in support of the underlying application.

72. What are the corresponding consequences for a respondent bringing a motion to strike? If successful, the respondent need not defend the application. If unsuccessful, an appeal lies as of right. Meanwhile, the timing of any judgment in the underlying application is necessarily delayed, even if the applicant, as here, is found to have conducted the proceeding in a timely manner.[48] Viewed this way, there is little disincentive to bringing a motion to strike an application for judicial review, especially on a politically sensitive matter.

73. It is open to this Court to rationalize the current procedure by encouraging the use of costs awards to penalize respondents who use motions to strike other than in the "clearest of cases", knowing that, once filed, there is little that an applicant can do to prevent the motion to strike from being heard.

74. Additionally, it would be helpful for this Court to provide guidance on whether, and in what circumstances, the Federal Court ought to consider adjourning motions to strike to the hearing of an application on its merits.

75. Finally, should motions to strike applications be considered, by default, to be motions for preliminary determinations of a question of law? Absent formal modification of the *Federal Courts Rules*, it is open to this Court to define the

[48] *Alani v. Canada (Prime Minister)*, 2015 FC 859 at para. 28. ("*Alani Motion to Expedite*").

plenary power to entertain such motions; the Respondent urges the Court to do so.

D. IT IS NOT PLAIN AND OBVIOUS THAT THE APPLICATION IS NON-JUSTICIABLE OR BEYOND THE COURT'S JURISDICTION

76. As submitted at paragraph 41 above, if this Court concludes that Harrington J. ought to have conclusively determined the issue of justiciability and jurisdiction, this Court should not substitute a determination resulting in the dismissal of the application. Rather, the Federal Court should be permitted to issue a ruling following full argument on the merits of the objections.

77. Oral argument on the issues of justiciability and jurisdiction exceeded five hours at the Federal Court. Had it not become clear during the course of the hearing that the motions judge was applying the very high "plain and obvious" threshold rather than undertaking a final determination of Canada's objections, it is reasonable to expect that the Respondent would have provided more fulsome submissions.

78. As a practical matter, it would be very difficult to fully argue the merits of Canada's objections during a hearing of this appeal, which, being from an interlocutory order of the Federal Court, is presumptively limited to a total of one hour of oral argument.[49] As Gagné J. concluded in the context of a motion to abridge time limits, this "application for judicial review raises complex and novel constitutional issues and, as such, it will require a complete evidentiary record placed before the Court."[50]

79. By way of summary, however, the Respondent submits that the application is justiciable and within the Federal Court's jurisdiction because:

a) The application raises an issue of constitutional interpretation, which the

[49] Notice to Parties and the Profession: "Hearings in the Court of Appeal", issued April 27, 2000 by Robert Biljan, Administrator of the Court.
[50] *Alani Motion to Expedite*, *supra* note 48 at para. 18.

Court is perfectly suited to undertake;

b) Constitutional conventions are justiciable even if they are not legally enforceable;

c) The indirect enforcement of constitutional conventions through declaratory orders is warranted in light of Canada's constitutional architecture; and

d) 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.

The application raises an issue of constitutional interpretation

80. The judicial review application calls on the Federal Court to determine the legality of the Prime Minister's refusal to appoint Senators in light of the following features of the Constitution:

a) Section 32 of the *Constitution Act, 1867*, which provides: "When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy."

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."

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

d) The established convention that the Governor General will not fill vacancies in accordance with section 32 of the *Constitution Act, 1867* other than on the advice of the Prime Minister.

81. Canada contends that the mere involvement of a constitutional convention within the process for appointing Senators makes the issue raised in the

application wholly non-justiciable.

82. However, just as statutes may be read and interpreted in light of various features external to the text of the statutes themselves – including, for example, international law obligations, legislative debates, dictionaries, and historical settings – it is well established that the Constitution must be read having regard to the overall internal architecture of the constitution. This properly includes consideration of the organizing principles of the Constitution – including constitutionalism and the rule of law, democracy, protection of minorities, judicial independence, and federalism. It also includes the assumptions and constitutional conventions on which the architecture of the Constitution relies in order to function.[51]

Constitutional conventions are justiciable even if they are not legally enforceable

83. Canada's objection of non-justiciability hinges on a confused understanding that constitutional conventions must be enforceable in order to be 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."[52]

84. Indeed, the Supreme Court of Canada has been receptive to claims seeking declaratory relief in respect of alleged breaches of constitutional conventions, even while noting that the party seeking the declaration would be limited to subsequently pursuing extra-legal remedies.[53]

85. That the Courts may not be in a position to directly enforce its judgment does not mean that the subject matter of a claim is non-justiciable. The rule of law

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[51] See *Reference re: Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704 at paras. 25-26. ("*Senate Reform Reference*").
[52] Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed., 2012, Toronto: Carswell, at pp. 11-12.
[53] *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470 at para. 65.

and our Constitution require courts to engage in the judicial review of executive decisions when they conflict with the Constitution.[54]

The indirect enforcement of constitutional conventions through declaratory orders is warranted in light of Canada's constitutional architecture

86. It is well established that the Constitution must be viewed as having an "internal architecture" or "basic constitutional structure". In the *Senate Reform Reference*, the Court confirmed the effect of this internal architecture on constitutional interpretation:

> The mention of amendments in relation to the powers of the Senate and the number of Senators for each province presupposes the continuing existence of a Senate and makes no room for an indirect abolition of the Senate. Within the scope of s. 42, it is possible to make significant changes to the powers of the Senate and the number of Senators. But it is outside the scope of s. 42 to altogether strip the Senate of its powers and reduce the number of Senators to zero.[55]

87. If the Supreme Court had gone on to opine that, in addition to being unable to reduce the number of Senators to zero without constitutional amendment, the Constitution presupposes that the "number of Senators for each province" would be respected such that they not be deliberately reduced through wilful inaction, the ambiguity upon which the Prime Minister's approach relies would disappear and the declaratory relief sought in the notice of application likely would not be required.

88. 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

[54] 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.
[55] *Senate Reform Reference*, *supra* note 51 at para. 102.

appointment process would "fundamentally modify the constitutional architecture" even if "the provisions regarding the appointment of Senators would remain textually untouched".[56]

89. Relying on the involvement of a constitutional convention, the scope of which has already been established by the Supreme Court and is beyond dispute, as a "knockout punch" or "show stopper" to immunize the Prime Minister's inaction from judicial review would represent the triumph of form over substance, and the marginalization of constitutionalism and the rule of law.

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

90. Before the Federal Court, the Respondent argued that the Federal Court had 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.[57]

91. Following *JP Morgan*'s instruction to 'gain a realistic appreciation' of the application's 'essential character' by reading it holistically and practically without fastening onto matters of form",[58] it is worth recalling the underlying purpose and scope of judicial review generally:

> 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.[59]

92. Acknowledging that the Notice of Application could have been drafted to

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[56] *Ibid*., at paras. 50-70.
[57] Appeal Book, Tab 10, p. 208.
[58] *JP Morgan*, *supra* note 10 at para. 50.
[59] *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 SCR 585, 2010 SCC 62 (CanLII), at para. 24. ("*TeleZone*").

include greater particularization of the facts upon which it was based and the basis on which the Court is authorized to grant the requested relief, is there any serious doubt about the application's "essential character"?

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

94. In considering Canada's motion to strike, Harrington J. also considered the Respondent's request for leave to amend certain portions of the Notice of Application[60] in accordance with a Case Management Order.[61] An amendment to expressly refer to a "failure, refusal or unreasonable delay" of the Prime Minister was refused on the basis that the application must refer to a "decision",[62] notwithstanding this Court's jurisprudence recognizing the broad nature of a "matter" that may be the subject of judicial review.[63] However, Harrington J.'s *dicta* in this regard did not form part of his order, and so no cross-appeal lies.

95. 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?

96. 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".

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[60] Appeal Record, Tab 6.
[61] Appeal Record, Tab 9, at p. 44.
[62] Appeal Record, Tab 3, at p. 21.
[63] *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at paras. 23-25. ("*Air Canada*").

97. 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."[64]

98. A motion to strike an application for judicial review, and the Court's jurisdiction to determine this judicial review in particular, must be considered in light of the objectives of the Court's 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.[65]

> 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 and other tribunals" (para. 34).[66]

99. A determination that the Prime Minister is not a "federal board, commission or other tribunal" in this context would necessarily carve out from the Federal Court's exclusive jurisdiction a review of decisions of the Prime Minister having large national impact. Such a result would be incongruous in light of the Court's broadly construed jurisdiction.[67]

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[64] *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4 at para. 54. ("*HFN*").
[65] *TeleZone*, *supra* note 59 at para. 32.
[66] TeleZone, para. 47.
[67] See, e.g., *Air Canada*, *supra* note 63 at paras. 23-25; see also Paul Daly, "Decisions, Decisions, Decisions: *Alani v. Canada (Prime Minister)*, 2015 FC 649", Administrative Law Matters (Blog); URL="http://www.administrativelawmatters.com/blog/2015/05/27/decisions-

100. 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".

101. 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."[68] The Crown's prerogative to summon advisors imposes on advisors, in turn, a form of common law duty.

102. 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".

103. 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.[69]

104. 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.[70] 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".

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decisions-decisions-alani-v-canada-prime-minister-2015-fc-649/", retrieved: August 25, 2015.

[68] 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.

[69] 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).

[70] *Ibid*.

CONCLUSION

105. Canada's objections of non-justiciability and jurisdiction raise arguable points of law concerning novel issues in respect of which no controlling authority exists to serve as a clear "knockout punch" or "show stopper" revealing the application to be an abuse of the Court's process.

106. The Federal Court motions judge, after five hours or oral argument and extensive written submissions, concluded that it was not "plain and obvious" that the application was bereft of any possibility of success such that he should exercise his discretion to summarily dismiss the application before a hearing on its merits. In doing so, he committed no reviewable error.

107. Canada's invitation to this Court to encourage interlocutory motions to strike applications for judicial review, under the guise of promoting the efficient use of court and litigant resources, and access to justice, should be met with a clear and unambiguous response: motions to strike must be used sparingly, and as a shield rather than as a sword. Inappropriate use will be dealt with through costs.

PART IV – ORDER SOUGHT

108. The Respondent respectfully requests the Court issue an order that the appeal is dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Aniz Alani, on his own behalf
Respondent

August 26, 2015

PART V – LIST OF AUTHORITIES

Case Law

1) *Air Canada v. Toronto Port Authority*, 2011 FCA 347
2) *Alani v. Canada (Prime Minister)*, 2015 FC 859
3) *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374
4) *Canada v. Addison & Leyen Ltd.*, [2007] 2 SCR 793, 2007 SCC 33
5) *Canada v. Toney*, 2012 FCA 167
6) *Canada v. Toney*, 2013 FCA 217
7) *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 SCR 585, 2010 SCC 62
8) *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, 1997 CanLII 385 (SCC)
9) *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250
10) *Chrysler Can. Inc. v. Canada*, 2008 FC 1049
11) *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 (C.A.)
12) *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9
13) *Dyson v. Attorney General*, [1911] 1 KB 410 (C.A.)
14) *Galati et al. v. Canada (Governor General*) *et al.*, Order (Milczynski P.) issued August 15, 2014, T-1476-14 (Unreported)
15) *Hunt v. Carey Canada Inc.* 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, 74 D.L.R. (4^{th}) 321
16) *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4
17) *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470
18) *Reference re: Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704
19) *Toney v. Canada*, 2011 FC 1440
20) *Toney v. Canada*, 2012 FC 1412
21) *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63

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22) *Federal Courts Practice*, Saunders, Hon. Justice Rennie, Garton, eds., 2015 ed. (Toronto: Carswell, 2014)

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

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

25) Notice to Parties and the Profession: "Hearings in the Court of Appeal", issued April 27, 2000 by Robert Biljan, Administrator of the Court.

26) Paul Daly, "Decisions, Decisions, Decisions: *Alani v. Canada (Prime Minister)*, 2015 FC 649", Administrative Law Matters (Blog)

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

Minutes of Council

28) P.C. 1896 – 1853 (May 1, 1896)

29) P.C. 1896 – 2710 (July 13, 1896)

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

Parliamentary Debates

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