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

RESPONDENTS' MEMORANDUM OF FACT AND LAW

William F. Pentney, Q.C.
Deputy Attorney General of Canada
Per: Jan Brongers
Oliver Pulleyblank
Department of Justice
900 – 840 Howe Street
Vancouver, British Columbia
V6Z 2S9
Tel: (604) 666-0110
Fax: (604) 666-1585

Solicitor for the Respondents

TABLE OF CONTENTS

OVERVIEW

1. There are four reasons why the Court should not grant Mr. Alani a declaration 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".

2. First, Mr. Alani lacks standing. There is no evidence that he has any direct interest in Senate appointments, nor has he suffered any prejudice from Senate vacancies. Mr. Alani's concern with unfilled Senate seats arose just three days before he commenced his application for judicial review, and he has provided no evidence that could justify granting him public interest standing. Accordingly, Mr. Alani is not entitled to seize the Court of what amounts to a private reference by an individual without a history of engagement with Senate issues.

3. Second, Mr. Alani's application for a declaration that the Prime Minister "must" provide advice on Senate appointments is not justiciable. The Prime Minister has no legally enforceable obligation to provide such advice. Rather, he does so pursuant to a constitutional convention. As with all constitutional conventions, these political decisions are neither made nor subject to judicial review by the courts. Indeed, were the Court to declare that the Prime Minister "must" advise on Senate appointments, it would convert a conventional practice into a common law rule, contrary to the Supreme Court of Canada's express prohibition of such a result. Political disagreements with Prime ministerial decisions on Senate appointments are to be resolved in the political realm, not by the judiciary.

4. Third, Mr. Alani's application is outside of the judicial review jurisdiction of the Federal Court. That jurisdiction is limited to oversight of federal officials who exercise statutory or prerogative powers. It does not extend to reviewing political decisions taken pursuant to constitutional convention.

5. Fourth, even if Mr. Alani had standing and his application were both justiciable and within the Court's jurisdiction, his request for the specific declaration he is seeking would still be unfounded. There is no evidence of the existence of a constitutional convention that Prime Ministerial advice on Senate appointments must be given within a certain time period. To the contrary, the expert evidence tendered in these proceedings demonstrates that Prime Ministers have a broad discretion in determining when appointments to the Senate ought to be made,

according to their personal political assessment of when it is reasonable and appropriate to do so. As such, asking the Federal Court to issue a declaration that a Prime Minister "must" provide advice on Senate appointments within a "reasonable time" after a vacancy arises would be devoid of any practical utility and, as such, unjustified.

6. Like all Canadians, Mr. Alani is free either to support or oppose political decisions made by a Prime Minister with respect to the nature and timing of advice on Senate appointments. Mr. Alani is also free to advocate democratically for change with respect to Prime Ministerial policies on Senate appointments. However, Mr. Alani is not entitled to enlist the courts in seeking judicial validation for his political views on what the parameters of a constitutional convention ought to be. This application should be dismissed.

PART I - STATEMENT OF FACTS

A. Procedural History of this Proceeding

7. On December 5, 2014, Mr. Alani became aware of an article in the Toronto Star that reported a response by the Prime Minister to a journalist's questions about Senate vacancies. The Prime Minister was quoted as having said: "I don't think I'm getting a lot of calls from Canadians to name more senators right about now" and that "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."[1]

8. Prior to December 5, 2014, Mr. Alani was not aware of Senate vacancies as a political issue. He nevertheless formed the view that "the Prime Minister's apparent refusal to appoint Senators was a violation of the Constitution of Canada" and, just three days later, filed this application for judicial review in the Federal Court on December 8, 2014.[2] A Canadian Bar Association National

[1] Affidavit of Aniz Alani made June 23, 2015 ("Alani Affidavit") at paras. 10 and 11, Ex. B [Applicant's Record ("AR") at 11, 206-207].
[2] Alani Affidavit at paras. 12 and 19 [AR at 11-12]; Transcript of August 10, 2015 Cross-Examination on Alani Affidavit ("Alani Transcript"), p. 26:33-28:15 [Respondents' Record ("RR") at 157-159].

Magazine reporter who prepared a feature story on Mr. Alani's litigation wrote: "[Mr. Alani] admits he did it on a bit of whim, recalling that he saw the issue crop up on Twitter one morning."[3]

9. Mr. Alani's original notice of application indicates that he has brought "an application for judicial in respect of the decision of the Prime Minister, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified Persons to fill existing vacancies in the Senate". It states that Mr. Alani seeks a declaration 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."[4]

10. Mr. Alani's original notice of application is almost entirely devoid of factual particulars, including any explanation of who Mr. Alani is, what interest he has in the matter of Senate appointments, or what prejudice Senate vacancies have caused for him. Indeed, the only factual allegation advanced in this notice is that "[t]here are currently 16 Vacancies in the Senate."[5]

11. On January 15, 2015, the respondents ("Canada") filed a notice of motion to strike and dismiss Mr. Alani's application on the grounds that it is not justiciable and is outside the Federal Court's jurisdiction. That motion was dismissed by the Federal Court (Harrington J.) on May 21, 2015. While the Court was critical of the lack of particulars in Mr. Alani's notice of application, it dismissed the motion because the Court felt that it was not "plain and obvious" that Mr. Alani's application had no chance of success. The Court noted that this would allow the parties "to provide proof of the existence and scope of any relevant [constitutional] convention at the hearing of the application on the merits." That said, the Court found that "serious issues were raised" by Canada on the motion, and denied Mr. Alani's request that Canada be sanctioned by an award of costs payable in any event of the cause.[6] Canada's appeal of this order is pending before the Federal Court of Appeal (Court File No. A-265-15).

12. The motions judge also granted Mr. Alani's request to amend his notice of application, which was effected on May 25, 2015. The amended notice of application does not differ substantively from

---

[3] Alani Transcript, p. 32:26-33:30, Ex. 3 [RR at 163-164, 175-176].
[4] Amended Notice of Application [AR at 5].
[5] Amended Notice of Application [AR at 6].
[6] *Alani v. Canada,* 2015 FC 649, paras. 10, 15, 24 and 41 [Applicant's Book of Authorities ("ABOA") Tab 5].

the original, with the only additional factual particulars relating to publicly available information regarding the updated number of Senate vacancies distributed geographically, and the date of the most recent Senate appointment.[7]

13. The deadlines for the parties' affidavit material and the Rule 318 response to Mr. Alani's Rule 317 request were set by orders of the case management judge (Lafrenière P.) dated June 2 and 9, 2015, as follows:

    (1) Canada's Rule 318 response: June 15, 2015
    (2) Mr. Alani's affidavit material: June 24, 2015
    (3) Canada's affidavit material: July 31, 2015[8]

14. On June 15, 2015, Canada provided its response to Mr. Alani's Rule 317 request for a certified copy of the material that was "placed before and considered by the Prime Minister of Canada and the Queen's Privy Council for Canada" in making the alleged "decision of the Prime Minister, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified Persons to fill existing Vacancies in the Senate." Canada responded that: "there was no 'decision not to advise the Governor General to fill the currently existing [Senate] Vacancies' as alleged by Mr. Alani" and that accordingly, no material would be transmitted pursuant to Rule 318.[9] Mr. Alani did not bring a motion to challenge Canada's Rule 318 response.

15. On June 16, 2015, Mr. Alani brought a motion seeking to abridge the timelines for the judicial review application so that it would be heard before the October 19, 2015 federal election. That motion was dismissed by the Federal Court (Gagné J.) on July 14, 2015. The Court expressly rejected Mr. Alani's contention that the timing of Senate appointments is an issue in respect of which the Canadian public requires judicial guidance in advance of the election. Madam Justice Gagné wrote:

    > [21] Not only is [Mr. Alani's] sense of urgency rather speculative but he has not presented evidence that the Canadian electorate, or himself for that matter, requires the

---

[7] Amended Notice of Application [AR at 3-9].
[8] *Alani v. Canada,* FC No. T-2506-14, unreported (Lafrenière P.), 02 June 2015 and 09 June 2015 [Respondent's Book of Authorities ("RBOA") Tab 2].
[9] Alani Affidavit, Ex. S [AR at 241-242].

benefit of a ruling from this Court on Senate vacancies in order to make an informed decision at the next election.[10]

16. On June 23, 2015, Mr. Alani served the only affidavit that he intends to rely upon in support of his application, one that he has made himself.[11] The affidavit consists mainly of references to media articles about Senate vacancies and the Federal Court litigation he has brought. Curiously, Mr. Alani did not see fit to attempt to lead any evidence in relation to the existence and scope of the constitutional convention that he has put in issue, notwithstanding Mr. Justice Harrington's invitation to provide such proof set out in the Court's reasons for dismissing the motion to strike .[12]

17. Canada, on the other hand, did tender an expert affidavit to address the constitutional convention issue raised by Mr. Alani. It was prepared by Dr. Christopher Manfredi, a Professor of Political Science who is currently serving as Provost and Vice-Principal (Academic) of McGill University. Professor Manfredi had previously presented expert evidence to the Supreme Court of Canada and the Quebec Court of Appeal in relation to their respective Senate Reform References.[13] In his expert affidavit sworn July 22, 2015, Professor Manfredi opined that there is no constitutional convention that Prime Ministerial advice on Senate appointments must be provided within a fixed period of time after a vacancy occurs, and that Prime Ministers have broad discretion determining the time delay in filing Senate vacancies.[14] Further details of Professor Manfredi's evidence in respect of Senate vacancies is described below at paragraphs 22 to 29.

18. Cross-examinations of Professor Manfredi and Mr. Alani took place on August 6, 2015 and August 10, 2015, respectively.[15]

19. As part of a "with prejudice" settlement offer of his application for judicial review, Mr. Alani has twice requested that the government submit a reference to the Supreme Court of Canada to provide an advisory opinion on whether there is a constitutional requirement for the Prime Minister to

---

[10] *Alani v. Canada,* 2015 FC 859 [ABOA Tab 6].
[11] Alani Affidavit [AR at 10-242]; Alani Transcript at p. 4:12-4:42 [RR at 135].
[12] *Alani v. Canada, supra*, note 6 at para. 24.
[13] *Reference re Senate Reform,* 2014 SCC 32, [ABOA Tab 12]; *Projet de loi fédéral relatif au Sénat (Re),* 2013 QCCA 1807 [RBOA Tab 16].
[14] Affidavit of Christopher Manfredi made July 22, 2015 ("Manfredi Affidavit") [RR at 1 - 129].
[15] Alani Transcript [RR at 130 - 169]; Cross-Examination on Manfredi Affidavit ("Manfredi Transcript") [AR at 243-307].

provide advice on Senate appointments, and whether there is a time limit by which such advice must be given. These proposals have not been accepted.[16]

20. On two occasions, on December 27, 2014 and June 11, 2015, Mr. Alani has written to all of the provincial and territorial attorneys general to alert them to the existence of his application for judicial review, and to ask whether they intend to intervene. In his second letter of June 11th, Mr. Alani asked whether the provinces and territories intend to submit reference questions in relation to Senate vacancies to their respective courts.[17] To date, none of the provinces or territories have intervened in this case or sought to bring references in relation to Senate vacancies.[18]

21. Canada acknowledges that on July 24, 2015, the Prime Minister announced a policy of a moratorium on further Senate appointments pending sufficient provincial agreement on reform or abolition of the Senate, or until appointments become necessary in order for government legislation to be passed by the Senate. However, Mr. Alani has not brought judicial proceedings to challenge this July 24, 2015 policy announcement. Rather, Mr. Alani has elected to pursue this present judicial review application brought in relation to the information he learned from the Toronto Star on December 5, 2014.

B. <u>Senate Vacancies in Canada</u>

22. As noted above, Canada has provided the Court with expert evidence in the form of an affidavit prepared by Professor Christopher Manfredi of McGill University on the historical patterns of vacancies in the Senate, and the amount of time it generally takes for vacancies to be filled after they occur. Professor Manfredi's evidence reveals that the Senate ordinarily functions with less than its full complement of Senators, and that there is no consistent pattern as to how long it takes for vacancies to be filled. In fact, it is rare for the 105-member Senate to be in a position where there are no vacancies at all within its ranks.[19]

---

[16] Alani Affidavit, paras. 37 and 38, Ex. "P" and "Q", referencing Mr. Alani's offer of April 27, 2015 that was declined by Canada on April 29, 2015 [AR at 16, 236-238]. Mr. Alani's subsequent offer of July 27, 2015 that was declined by Canada on July 28, 2015 post-dates the Alani Affidavit and is not referenced therein.
[17] Alani Affidavit, paras. 36 and 39, Ex. "O" and "R" [AR at 16, 233-235, 239-240].
[18] Alani Transcript, pp. 36:37 to 37:41 [RR at 167-168].
[19] Manfredi Affidavit [RR at 1- 129].

23. For example, between the 1st and 29th Parliaments, the average number of Senate vacancies at dissolution was six, and the average number of vacancies at election was five. At the dissolution of every Parliament in that period, except for the 2nd and 3rd, vacancies existed. On six occasions, there were 10 or more vacancies at the time of dissolution of Parliament.[20]

24. Between the 30th to 40th Parliaments, the average number of Senate vacancies was seven. The number of vacancies reached 10 or more during eight of these eleven Parliaments.[21]

25. Of the last twelve Parliaments, only six have *ever* operated with a full complement of Senators. Leaders of both the Liberal and Conservative parties have allowed entire Parliamentary terms to pass without a full complement of Senators.[22]

26. While the most recent 41st Parliament had a record number of vacancies at dissolution (22), its mean average number of vacancies, calculated on a weekly basis, for the entire Parliament was only seven, consistent with the average for the previous ten Parliaments. Indeed, during five of these Parliaments, the mean number of vacancies was higher than it was in the 41st Parliament as of July 15, 2015.[23]

27. On the issue of the timing of appointments, Professor Manfredi makes clear that no conventional rule has emerged governing how long a vacancy may be left open. Rather, different Prime ministers, representing different political parties, acting during different periods of time, have allowed vacancies to build up in the Senate. Professor Manfredi opines that the decision to advise the Governor General to fill Senate vacancies is "largely driven by political expedience and the unique circumstances surrounding particular vacancies".[24]

28. Professor Manfredi notes that individual vacancies have been allowed to remain open for up to ten years, and the average wait is 350 days.[25] In over 50 percent of the vacancies, Prime Ministers have waited more than 213 days before advising on a replacement.[26] Notably, Prime Ministers were just as likely to take more than 556 days to fill a vacancy as they were to fill the vacancy in

---

[20] Manfredi Affidavit, para. 5 [RR at 3].
[21] Manfredi Affidavit, para. 6 [RR at 3-4].
[22] Manfredi Affidavit, para. 8 [RR at 4].
[23] Manfredi Affidavit, para. 6 [RR at 3-4].
[24] Manfredi Affidavit, para. 13 [RR at 7].
[25] Manfredi Affidavit, para. 17 [RR at 8-9].
[26] Manfredi Affidavit, para. 17 [RR at 8-9].

46 days or less.[27] For 6.5% of vacancies, the incumbent Prime Minister waited over 1000 days to fill the seat, and 16% of the vacancies were left open for more than 700 days.[28]

29. Professor Manfredi concludes that Prime Ministers generally take as much time as they consider necessary under the particular circumstances of each case to fill vacancies, though the evidence suggests that Prime Ministers do not allow vacancies to remain unfilled indefinitely. Further, no constitutional convention requires that a vacancy must be filled within any particular fixed period of time. In fact, the time delay variation—between 0 and 3,870 days to fill a vacancy—indicates a broad discretion in determining the time delay in filling Senate vacancies.[29]

[27] Manfredi Affidavit, para. 19 [RR at 9-10].
[28] Manfredi Affidavit, paras. 20-21 [RR at 10-11].
[29] Manfredi Affidavit, paras. 24-25 [RR at 12-13].

PART II – POINTS IN ISSUE

30. The issue in this application is whether the Court should, at the behest of Mr. Alani, issue a declaration 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".

31. Mr. Alani is not entitled to such a declaration for the following reasons:

    a) Mr. Alani has no standing to bring this application as he is not directly affected by Senate vacancies, and does not qualify for public interest standing.

    b) The matter is not justiciable. The declaration sought is an impermissible attempt to enforce a constitutional convention.

    c) The matter is outside of Federal Court jurisdiction. Mr. Alani does not seek judicial review in respect of an exercise of statutory or prerogative authority by a federal official.

    d) There is no constitutional imperative imposed upon the Prime Minister, by convention or otherwise, to provide advice with respect to Senate appointments within a certain period of time.

PART III - SUBMISSIONS

A. Mr. Alani Lacks Standing

32. By operation of s. 18.1(1) of the *Federal Courts Act,* only a person who is "directly affected" by a matter in respect of which relief is sought can bring an application for judicial review. A person is "directly affected" for the purposes of this provision only if the matter affects the applicant's legal rights, imposes legal obligations upon the applicant or prejudicially affects the applicant in some way.[30]

33. Mr. Alani does not satisfy this condition. Mr. Alani has not identified any tangible impact or prejudice that he has experienced as a result of unfilled vacancies in the Senate, either in his notice of application, his supporting affidavit or his memorandum of fact and law. Furthermore, in cross-examination on his affidavit, Mr. Alani confirmed the following:

a) Mr. Alani is not interested in becoming a Senator;

b) Mr. Alani has no expectation of being made a Senator;

c) Mr. Alani has not been involved in any campaign or lobbying efforts to have a particular individual appointed to the Senate;

d) Mr. Alani has not suffered any personal prejudice from Senate vacancies;

e) Mr. Alani has not experienced any negative economic or psychological impacts from Senate vacancies;

f) Mr. Alani has not been deprived of any *Charter* rights he enjoys, including democratic rights, as a result of Senate vacancies; and

g) Mr. Alani has never asked anything of the Senate or been involved with the Senate's business such that he might be denied a benefit or a service he would otherwise be entitled to as a result of Senate vacancies.[31]

34. If any of Mr. Alani's rights or legitimate expectations were threatened by the timing of Senate appointments, he would have provided evidence to that effect and claimed private interest standing.

---

[30] *League for Human Rights of B'Nai Brith Canada v. Odynsky,* 2010 FCA 307 at paras. 57-58 [RBOA Tab 15].
[31] Alani Transcript, pp. 20:20-21:25; 30:28-32:2 [RR at 151-152; 161-163].

He has not done so. Instead, Mr. Alani asks the Court to accept that he merits a discretionary grant of public interest standing in order to proceed with this application.[32]

35. In accordance with the guidance provided by the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence Society* ["*Downtown Eastside*"], Mr. Alani's request requires the Court to conduct a purposive weighing of three interrelated considerations:

    a) whether Mr. Alani is raising a serious justiciable issue;

    b) whether Mr. Alani has a real stake or a genuine interest in this issue; and

    c) whether, in all the circumstances, Mr. Alani's application is a reasonable and effective way to bring the issue before the court.[33]

36. In his memorandum of fact and law, Mr. Alani claims that he "meets the criteria" for public interest standing, but does not justify the assertion beyond noting that none of the federal, provincial or territorial governments have expressed any interest in submitting a reference question on Senate vacancies to the Courts in spite of Mr. Alani's "invitation" to them.[34] This is insufficient to justify a request to be granted public interest standing, particularly when Mr. Alani bears the burden of doing so.[35]

37. With respect to the first consideration, Mr. Alani's application does not raise a justiciable issue as the timing of Prime Ministerial advice on Senate appointments is a purely political matter of constitutional convention. Canada's detailed submissions on this point, which are made independently of whether or not Mr. Alani is granted standing, are set out below at paragraphs 44 to 70.

38. Turning to the second consideration, Mr. Alani does not have a real stake or genuine interest in the issue of Senate vacancies. According to the jurisprudence, for a person or organization to satisfy this consideration, they must be able to demonstrate strong engagement and familiarity with the

---

[32] Applicant's Memorandum of Fact and Law ("Mr. Alani's MOFL") at paras. 57-61 [AR at 326-327].
[33] *Canada v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 at paras. 37-52 [RBOA Tab 6].
[34] Mr. Alani's MOFL at paras. 59-60 [AR at 326-327].
[35] *Downtown Eastside, supra,* note 33, at para. 37; *Sierra Club of Canada v. Canada* (1998), [1999] 2 F.C. 211 at para. 24 [RBOA Tab 19].

issue in question. Their interest cannot simply be temporary or contingent. An applicant without a reputation for expertise and commitment in relation to a cause that he or she wishes to advance on behalf of others before a court will be considered to be a mere "busybody". Such persons are not entitled to access scarce judicial resources to consider matters that do not have a direct impact on that person or organization.[36]

39. Mr. Alani is a "busybody" as that term is understood in the jurisprudence. His affidavit contains no indication of any longstanding interest in the Senate generally or the process for appointing Senators specifically. As confirmed in cross-examination, he is not engaged with any formal organization involved with Senate reform, and has no expertise in the Senate or constitutional law issues related thereto. While Mr. Alani is a lawyer and enjoys following politics in the media, he candidly admits to not having any real expertise or experience with constitutional or public advocacy law. Furthermore, the temporary and contingent nature of Mr. Alani's interest in the subject matter of his lawsuit is patently demonstrated by the fact that just three days before filing his notice of application, Mr. Alani did not even know that vacancies had accumulated in the Senate.[37]

40. With respect to the third consideration, Mr. Alani's application for judicial review is not a "reasonable and effective way" of bringing constitutional issues in relation to the Senate before the Court. This is a factor which the Supreme Court has said should be applied in light of the need to ensure full and complete adversarial presentation and to conserve judicial resources. In *Downtown Eastside*, affidavit evidence was presented to show that the applicant seeking public interest standing was a well-organized association with considerable expertise in the subject matter of that case, represented by experienced lawyers who together with their clients would be able to provide

---

[36] *Downtown Eastside, supra,* note 33 at paras. 25, 41, 43, 57-59; *Jayaraj v. Canada*, 2015 FC 211 at para. 8 [RBOA Tab 14] [; *Galati v. Canada,* 2015 FC 91 at para. 26 [RBOA Tab 13]; *Forest Ethics Advocacy Association v. Canada,* 2014 FCA 245 at para. 33 [RBOA Tab 12]; *Canwest Media Works v. Canada,* 2008 FCA 207 at para. 13 [RBOA Tab 9]; *Canadian Federation of Students v. Natural Sciences and Engineering Research Council of Canada*, 2008 FC 493 at para. 36 [RBOA Tab 7].

[37] Alani Affidavit at paras. 8, 10 to 20 [AR at 11-13]; Alani Transcript, pp. 1:40-3:2, 3:31-4:6, 14:15-14:41, 18:1-18:27, 19:36-20:19, 21:26-22:39; 22:43-23:37, 26:28-28:15, 32:3-33:42, 34:17-34:20, 35:5-35:41, 36:7-36:36. [RR at 132-134;134-135;145;149;150-151;152-153;153-154;157-159;163-164;164;165-166].

the Court with a concrete factual background and advocate on behalf of those most directly affected by the legal issues to be considered by the Court. [38]

41. This third consideration also militates against a grant of public interest standing. A "reasonable and effective" public interest litigant does not, three days after learning for the first time of the issue of Senate vacancies from a newspaper article read on Twitter, commence a Federal Court lawsuit based on just "some initial research into the status and history of vacancies in the Senate". [39] A "reasonable and effective" public interest litigant does not submit a notice of application to the Federal Court that contains no factual information about the case beyond the simple number of outstanding vacancies in the Senate. Most significantly, a "reasonable and effective" public interest litigant does not fail to provide the Court with any proof regarding the existence and scope of a constitutional convention put in issue by his case, particularly when a motions judge effectively indicates that the Court is in need of such evidence.

42. Finally, Mr. Alani's assertion of the disinterest to date of the federal, provincial and territorial governments in commencing reference proceedings in relation to Senate vacancy issues is not a justification for granting public interest standing to Mr. Alani. Indeed, the only reasonable inference that can be drawn from this fact is that, in the context of competing demands for time and attention to matters of public policy, expending scarce judicial resources on an advisory opinion regarding the timing of Senate appointments is not a high priority for any government at the present time.

43. In sum, Mr. Alani has provided no evidence that could justify a finding that he has private interest standing to bring this application. He also has not provided evidence that could reasonably justify a discretionary grant of standing on a public interest basis. Mr. Alani's application can and should be dismissed for lack of standing alone.

---

[38] *Downtown Eastside, supra,* note 33, at paras. 49-51, 73-74.
[39] Alani Affidavit at para. 13 [AR at 12].

B. Mr. Alani's Application is Not Justiciable

44. Mr. Alani's claim is not justiciable because the relief sought, if granted, would result in judicial enforcement of a constitutional convention. The role that the Prime Minister plays in Senate appointments is created by convention. For a court to declare that the Prime Minister "must" fulfil this role is to say that the Prime Minister "must" adhere to convention, and, given the binding effect of declaratory relief on government actors, amounts to enforcement of the convention.

45. Indeed, it is plain from a review of Mr. Alani's written representations that the only relief he seeks is judicial enforcement of the Prime Minister's conventional role in Senate appointments. Though Mr. Alani asks for a declaration that advice be provided "within a reasonable time", he does not ask the Court to provide any guidance on acceptable timing of advice on appointments. He suggests that the "parameters of what constitutes a 'reasonable time' may be left to be contextually determined", presumably in a subsequent case. Also, Mr. Alani does not assert that any particular current vacancy has been left open for an unreasonable period of time. Instead, he recognizes that the question of timing involves "a panoply of policy and legal considerations". As Mr. Alani does not ask the Court to declare what might be reasonable timing, the only actual effect of the declaration sought would be to judicially mandate that the Prime Minister must provide advice on Senate vacancies to the Governor General. In other words, Mr. Alani is asking for nothing more than judicial enforcement of a convention.[40]

The Prime Minister's role in Senate appointments arises only by constitutional convention

46. No statute, regulation, or common law rule directs the Prime Minister to provide advice on Senate appointments to the Governor General. Rather, the Prime Minister's advice-giving authority regarding Senate appointments exists as a constitutional convention.[41]

47. That the Prime Minister acts only pursuant to a convention when he provides advice on Senate appointments is illustrated by the non-enforceability of that advice. If a Governor General were *not* to follow the Prime Minister's advice on a particular appointment, a court would nonetheless

---

[40] Mr. Alani's MOFL, esp. para. 48 [AR at 323].
[41] *Reference re Senate Reform, supra,* note 13, at para. 50; *Projet de loi fédéral relatif au Sénat (Re), supra*, note 13, at para. 52.

recognize that appointment as valid (if the specific requirements set out in the *Constitution Act, 1867,* were met). That point is well-established. As Professor Hogg explains:

> The *Constitution Act, 1867*, and many Canadian statutes, confer extensive powers on the Governor General or on the Governor General in Council, but a convention stipulates that the Governor General will exercise those powers only in accordance with the advice of cabinet or in some cases the Prime Minister...
>
> ... [This convention is] not enforceable in the courts. If the Governor General exercised one of his powers without (or in violation of) ministerial advice, the courts would not deny validity to his act.[42]

48. Advice given by the Prime Minister on Senate appointments is, legally, just that: advice. It has no binding effect on anyone. In that respect, it is distinct from an order made pursuant to a statute or a Crown prerogative. Even if a court were to grant the relief Mr. Alani seeks and declare that the Prime Minister *must* provide advice on Senate appointments, there would be no legal basis for the court to insist that the Governor General follow that advice.

Constitutional conventions carry political, not legal, sanctions

49. Judicial non-enforceability is a fundamental and defining feature of constitutional conventions. The proper forum for Mr. Alani, or indeed any interested individual, to take issue with the Prime Minister's performance of his conventional role in advising on Senate appointments is the political arena, not the law courts. As the Supreme Court of Canada has held, "the remedy for breach of a constitutional convention must be found outside the courts, if a remedy is to be found at all".[43]

50. In the *Patriation Reference*, the Supreme Court thoroughly explained the reasoning for the premise that conventions, by their nature, cannot be judicially enforceable:

> The very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement.[44]

---

[42] Peter Hogg, *Constitutional Law of Canada, Loose-leaf,* (Toronto: Carswell, 2007), at 1-22.1 [ABOA Tab 16].
[43] *Ontario English Catholic Teachers' Association v. Ontario (Attorney General),* 2001 SCC 15, at para. 63 [ABOA Tab 10].
[44] *Re Resolution to Amend the Constitution,* [1981] 1 SCR 753 ("*Patriation Reference*") at 774-775 [RBOA Tab 17].

The Court continued:

> It is because the sanctions of convention rest with institutions of government other than courts, such as the Governor General or the Lieutenant Governor, or the Houses of Parliament, or with public opinion and ultimately, with the electorate, that it is generally said that they are political.[45]

51. Similar comments were made by Laskin C.J. and Estey and McIntyre JJ., who concurred with the majority that conventions are politically, rather than judicially, enforceable:

> As has been pointed out by the majority, a fundamental difference between the legal, that is the statutory and common law rules of the constitution, and the conventional rules is that, while a breach of the legal rules, whether of statutory or common law nature, has a legal consequence in that it will be restrained by the courts, no such sanction exists for breach or non-observance of the conventional rules. The observance of constitutional conventions depends upon the acceptance of the obligation of conformance by the actors deemed to be bound thereby. When this consideration is insufficient to compel observance no court may enforce the convention by legal action. The sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences, but it will not engage the attention of the courts which are limited to matters of law alone. Courts, however, may recognize the existence of conventions and that is what is asked of us in answering the questions. The answer, whether affirmative or negative however, can have no legal effect, and acts performed or done in conformance with the law, even though in direct contradiction of well-established conventions, will not be enjoined or set aside by the courts.[46]

52. In *Samson v. Canada*, the Federal Court specifically noted the political and non-justiciable nature of Senate appointments. The Court held:

> [6] The Governor General's constitutional power to appoint qualified persons to the Senate is also purely political in nature. In practice, the Governor General exercises his power of appointment on the advice and recommendation of the Governor-in-Council. In the event that the Governor-in-Council makes a recommendation which ignores the pending election to be held in Alberta under the provisions of the provincial Senatorial Selection Act, it proceeds at its own political peril. However, that is a purely political decision to be made by politicians, without the interference or intervention of the Court.[47]

---

[45] *Patriation Reference, supra,* note 44 at 882 – 883.
[46] *Patriation Reference, supra*, note 44 at 853.
[47] *Samson v. Canada* (1998), 165 D.L.R. (4th) 342, 155 F.T.R. 137 (T.D.) at para. 6 [RBOA Tab 18]. It should be noted that in fact it is the Prime Minister, not the Governor-in-Council, who provides

53. Just as it is inappropriate to try to use the courts to enforce a convention, it is also inappropriate to use the courts as a tool to assert political pressure in relation to a convention. This point was made by the Alberta Court of Appeal in *Brown v. Alberta*, where the applicant sought a declaration "because a declaratory order from the Court would, in [the applicant's] view, have considerable persuasive effect". The Court upheld the striking of the application on the grounds the Court did not have jurisdiction to grant the declaration in the absence of a legal issue.[48]

54. Indeed, the fact they are not enforced by the courts is a feature, not a flaw, of constitutional conventions. Non-enforceability is essential to a constitutional convention's special place in the Canadian constitutional framework. Non-enforceability allows conventions to evolve over time without the need to invoke official constitutional amendment. This point was made by the Quebec Court of Appeal:

> [58] Moreover, to assimilate an amendment of the powers of the Prime Minister with those of the Governor General for the purposes of paragraph 41(a) of the Constitution Act, 1982 would limit Parliament's powers because of a constitutional convention. Such a limitation does not exist, or at a minimum, does not concern the courts.
>
> [59] On the contrary, constitutional conventions are not justiciable, contrary to the text of the Constitution, which by its nature is susceptible of evolution, as Hogg, (supra, no. 1.10(e), p. 1-29) affirms:
>
> > [T]he conventions allow the law to adapt to changing political realities without the necessity for formal amendment.
>
> [60] If Parliament were precluded from amending a constitutional convention by the adoption of a statute, this would a fortiori imply that conventions could never be amended by the conduct of political actors. Such reasoning shows that subjecting constitutional conventions to the amending procedure is untenable.[49]

55. The fact that Mr. Alani seeks a declaration rather than injunctive relief is no answer to the charge that he seeks to enforce a constitutional convention. As the Supreme Court affirmed in the *Patriation Reference,* "non-observance of a convention... will not engage the attention of the courts which are limited to matters of law alone."[50] Granting any relief, declaratory or

---

advice to the Governor General on Senate appointments pursuant to constitutional convention: *Reference re Senate Reform, supra* note 13 at para. 50.

[48] *Brown v. Alberta,* 1999 ABCA 256 at paras. 24-25 [RBOA Tab 5].

[49] *Projet de loi fédéral relatif au Sénat (Re), supra,* note 13 at paras. 58-60.

[50] *Patriation Reference, supra,* note 44 at 853.

otherwise, to address an alleged breach of a convention, is to engage the attention of the Court in an attempt to give the convention legal effect.

56. Further, when declaratory relief is granted against the Crown, it is not simply optional guidance offered by a court. Unlike a hypothetical situation where the Governor General declined to follow the Prime Minister's advice on Senate appointments, legal consequences could follow if government officials do not obey a court's declaration. As the Federal Court of Appeal recently stated:

> [15] As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, ("*Doucet-Boudreau*") at par. 62, the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully. However, should this not be the case, the Supreme Court of Canada has laid to rest any doubt about the availability of contempt proceedings in appropriate cases in the event that public bodies or officials do not comply with such an order. As noted by Iacobucci and Arbour JJ. at par. 67 of *Doucet-Boudreau*: "[o]ur colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases" (emphasis added).[51]

57. Therefore, any suggestion that a declaration that a public official must follow a particular constitutional convention is anything other than enforcement of that convention is incorrect. Judicial review cannot be sought in respect of duties that can only be said to exist on the basis of a constitutional convention.

58. Nor can the rule against non-enforcement of conventions be avoided by asserting that the conventional rule has, through consistent practice, evolved into a common law rule. As set out by the Supreme Court, conventional rules only become enforceable through statutory adoption:

> Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules.
>
> [...]
>
> This conflict between convention and law which prevents the courts from enforcing conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption.[52]

---

[51] *Assiniboine v. Meeches*, 2013 FCA 114 at para. 15 [RBOA Tab 3].
[52] *Patriation Reference, supra*, note 44 at 880-881;882.

59. If Mr. Alani feels that the Prime Minister's performance of his conventional role regarding Senate appointments is problematic, he is free to campaign to endeavour to put political pressure on the Prime Minister to make recommendations. However, he is not entitled to use the courts to enforce a convention, nor is he entitled to use the courts as an instrument to create political pressure.

"Constitutional Architecture" does not render constitutional conventions enforceable

60. It is true that the Supreme Court of Canada recognized the role a non-elected Senate plays in the fundamental structure of the Canadian constitutional framework in *Reference re Senate Reform.* It is not true that, as Mr. Alani seems to suggest, by so doing the Supreme Court has now made the Prime Minister's advice-giving role respecting Senate appointments judicially enforceable.

61. In the *Senate Reform Reference,* the Supreme Court took the view that the internal architecture of the Constitution supposed that the Senate would remain an appointed, rather than elected, body, and thus changes to that characteristic would need to engage the provinces as well as Parliament. The Supreme Court found that the Constitution of Canada contemplates that, unlike the House of Commons, the Senate will be a non-elected body.[53]

62. Mr. Alani seems to suggest that the Constitution also contemplates that the principle of responsible government requires the Prime Minister to provide advice on Senate appointments in a reasonably timely fashion, with the "reasonableness" of the amount of time taken to make such appointments subject to review by the judiciary.[54] This suggestion is wrong.

63. Although Professor Hogg does indeed, as Mr. Alani notes, describe responsible government as "the most important non-federal characteristic of the Canadian Constitution", Professor Hogg also explains that responsible government is regulated by non-enforceable conventional rules. He writes:

> An extraordinary feature of the system of responsible government is that its rules are not legal rules in the sense of being enforceable in the courts. They are conventions only. The exercise of the Crown's prerogative powers is thus regulated by conventions, not laws.[55]

---

[53] *Reference re Senate Reform, supra,* note 13 at paras. 54-63 and 70.
[54] Mr. Alani's MOFL, esp. paras. 46-51 [AR at 323].
[55] Hogg, *Constitutional Law of Canada, supra,* note 42 at 1-22.

64. Canada's constitutional architecture may well suppose responsible government, but the rules regulating how that principle is realized in practice are conventional and not enforced by the courts.

65. Mr. Alani also contends that the Supreme Court specifically gave force to the convention that the Prime Minister will advise on Senate appointments in the *Senate Reform Reference.*[56] This assertion is also mistaken.

66. It is true that the Supreme Court acknowledged that a convention existed whereby the Governor General acts on the Prime Minister's advice on Senate appointments,[57] and the Court implicitly assumed that the convention would continue to be followed in considering the practical effect of the proposed reforms at issue in the questions referred to the Court.

67. What the Supreme Court decidedly did *not* do, however, was to mandate that the Governor General must continue to follow the Prime Minister's advice, or that the Prime Minister must continue to provide the Governor General with advice. The Court could not have done so without abandoning the well-settled and, as Professor Hogg describes it, "extraordinary feature" of responsible government that its rules are conventional only, and not capable of being enforced in the courts. It is one thing to assume a convention will be followed; it is quite another to order or declare that it must be.

68. What is troublesome for the Constitution's architecture is not the lack of a judicial declaration that appointments should be made in a "reasonable time"; rather it is Mr. Alani's position that the rule against judicial enforcement of constitutional conventions should be abandoned.

69. To declare that the Prime Minister "must" provide advice in the absence of any legal duty to do so is effectively to make a mandatory order solely on the basis of a constitutional convention. It would violate the principle, enunciated in the *Quebec Secession Reference,* and restated by Iacobucci J. in *Ontario English Catholic Teachers Association,* that "the remedy for a breach of constitutional convention must be found outside the courts, if it is to be found at all".[58]

70. The remedy sought by Mr. Alani is not available from any court, and his application is consequently not justiciable.

---

[56] Mr. Alani's MOFL, esp. para. 66 [AR at 329].
[57] *Reference re Senate Reform, supra,* note 13 at para. 50.
[58] *Ontario English Catholic Teachers' Association v. Ontario, supra*, note 43 at para. 63.

C. Mr. Alani's Application is Outside the Jurisdiction of the Federal Court

71. No court has jurisdiction over a non-justiciable matter. Consequently, it is not surprising that the *Federal Courts Act* makes clear that the Federal Court has no jurisdiction over Mr. Alani's claim.

72. The Federal Court has jurisdiction to issue declaratory relief in the context of an application for judicial review pursuant to s. 18(1)(a) of the *Federal Courts Act.* However, such relief is only available against a "federal board, commission or other tribunal", a term that is defined in s. 2 of the *Federal Courts Act* as:

> ...any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown...[59]

73. While the Federal Court of Appeal recently found that the *Constitution Act, 1867* is a "Law of Canada" for the purposes of s. 101 of the *Federal Courts Act*, it does not follow that the *Constitution Act, 1867* is an "Act of Parliament" for the purposes of the *Federal Courts Act*'s definition of "federal board, commission or other tribunal".[60] The *Constitution Act, 1867* was an act of the imperial parliament, not the Parliament of Canada.

74. Mr. Alani candidly admitted at the hearing of the Motion to Strike that his judicial review engaged no "Act of Parliament":

> MR. ALANI: "I agree with [counsel for Canada's] characterization of my position in that I'm not saying that the jurisdiction of the prime minister or the governor general arises by an Act of Parliament and so the only option left to me is to persuade the court that there is a prerogative power invoked."[61]

75. However, contrary to Mr. Alani's assertion, the Prime Minister does not provide such advice pursuant to a prerogative power. The advice is simply provided pursuant to a constitutional convention.[62]

76. If the advice were given pursuant to a prerogative power, it would be expected to have some independent legal effect. As discussed above, however, when a Prime Minister provides advice on a Senate appointment, the Governor General is under no legal obligation to follow it. As a matter

---

[59] *Federal Courts Act,* R.S.C. 1985, c. F-7, s. 2(1) ("federal board, commission or other tribunal), s.18(1) [RBOA Tab 1].
[60] *Canadian Transit Co. v. Windsor (City),* 2015 FCA 88, at para. 49 [RBOA Tab 8].
[61] Alani Affidavit, Ex. "A" [AR at 164].
[62] *Reference re Senate Reform, supra,* note 13 at para. 50.

of law, the power to summon (and thereby appoint) persons as Senators lies with the Governor General. Nobody - not the Prime Minister, nor a disappointed Senate candidate, nor an attorney general, nor a member of the public - would have any judicial recourse in such a situation.

77. This illustrates the distinction between an order made pursuant to a prerogative of the Crown and an action taken pursuant to a constitutional convention. The former can have legal effect, the latter does not.

78. The Crown prerogative is a source of legally enforceable power that exists outside of statute. Professor Hogg describes it as "the powers and privilege accorded by the common law to the Crown".[63] Both the existence and exercise of a prerogative power can be judicially reviewed, although the exercise of a prerogative power is only justiciable if it affects the rights or legitimate expectations of an individual.[64]

79. The distinction is straightforward: while the Crown prerogative is a source of legal powers, constitutional conventions are unenforceable rules of political conduct. When the Prime Minister provides advice on Senate appointments, he does not act pursuant to a statute or a Crown prerogative. If he did, his advice would have some legal effect. As it stands, the advice is only effective if the convention is observed and the recommendation is followed. An appointment by the Governor General made contrary to the advice of the Prime Minister would be legally valid.

80. Furthermore, as prerogative powers are those historically afforded directly to the Crown, it makes little sense to suggest that giving non-legally binding advice on Senate appointments is an exercise of the Crown prerogative. The Crown need not give itself optional advice. Advice given pursuant to a constitutional convention may inform and, to the extent the convention is observed, limit the exercise of power reserved for the Crown, but its roots lie neither in statute nor the Crown prerogative.

81. In sum, even if Mr. Alani's application for judicial review in respect of Prime Ministerial advice regarding Senate appointments were justiciable, which Canada denies, such advice is not given by a "federal board, commission or other tribunal". It is consequently outside of Federal Court jurisdiction.

---

[63] Hogg, *Constitutional Law of Canada, supra,* note 42 at 1-18.
[64] *Copello v. Canada (Minister of Foreign Affairs),* 2003 FCA 295 at paras. 16 – 21 [RBOA Tab 10]; *Black v. Canada* (2001), 54 O.R. (3d) 215 (C.A.) at para. 46 [RBOA Tab 4].

D. The Declaration Mr. Alani Seeks is Substantively Unjustified

82. Canada's primary position is that this matter is not justiciable, as it is an obvious attempt to enforce a constitutional convention. As with all non-justiciable matters, there is then a certain artificiality to proceeding to argue, in the alternative, "the merits" of a non-justiciable issue that is not properly capable of judicial determination.

83. That said, it is Canada's alternative position that if this Court decides that (1) Mr. Alani has the requisite standing; (2) Mr. Alani's application is justiciable; and (3) Mr. Alani's application relates to the exercise of a statutory or prerogative power over which the Federal Court has supervisory jurisdiction, the declaration Mr. Alani seeks is nevertheless one that is substantively unjustified on the evidence before the Court.

84. The specific wording of the declaration Mr. Alani seeks is 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". Mr. Alani essentially argues that because there are outstanding vacancies and no apparent prospect that they will be filled in the immediate future, he is justified in obtaining such a declaration in order to ensure that Canada's constitutional rules are complied with.

85. For the Court to grant such a declaration, it must be one whose issuance can be supported based on the Court's factual findings and its understanding of the applicable law. The declaration must also have some practical utility and settle a real issue between the parties that is not academic.[65]

86. As noted previously, the *Constitution Act, 1867* is silent with respect to the Prime Minister's advice-giving role on Senate appointments. Accordingly, the Court cannot turn to that instrument for guidance with respect to whether Prime Ministerial inaction on providing such advice to the Governor General is contrary to a constitutional rule. Instead, the only possible source of a "rule" is to be found within the realm of constitutional conventions. The question then becomes whether

[65] *Daniels v. Canada*, 2014 FCA 101, esp. paras. 62-64, 79 [RBOA Tab 11].

there is a constitutional convention regarding the timing of Prime Ministerial advice on Senate appointments and, if so, is it being breached?

87. While Canada maintains its objection that it is inappropriate to engage in consideration of these issues because they are not justiciable, if they must be answered, they should be answered in the negative.

88. The only evidence before the Court on the existence of a constitutional convention regarding when the Prime Minister tenders advice to the Governor General on Senate appointments is that of Professor Manfredi. He opines that there is no convention that the Prime Minister must advise the Governor General to summon a person to fill a vacancy in the Senate within a fixed period of time after a vacancy occurs. He also concludes that "Prime Ministers have broad discretion in determining the time delay in filling Senate vacancies".[66] While Professor Manfredi was subjected to cross-examination, Mr. Alani does not suggest in his memorandum of fact and law that Professor Manfredi's opinions regarding the existence and scope of the constitutional convention in relation to the timing of Senate appointments are unfounded and ought to be disregarded. More significantly, Mr. Alani has not submitted any competing expert evidence to the effect that the constitutional convention whereby it is the Prime Minister that advises the Governor General on Senate appointments is in fact subject to a temporal restriction.

89. Furthermore, Professor Manfredi's opinion is consistent with this Court's findings in *Samson v. Canada* regarding the wide discretion that the Governor General enjoys concerning Senate appointments. Madam Justice McGillis wrote:

> Under the express and unequivocal terms of sections 24 and 32 of the Constitution Act, 1867, the Governor General's power to appoint qualified persons to the Senate is purely discretionary. In other words, there are no procedural or other limitations restricting the exercise of the Governor General's discretionary constitutional power of appointment under sections 24 and 32. A limitation could only be imposed on that power by means of a constitutional amendment to sections 24 and 32, effected in accordance with the procedure prescribed in Part V of the Constitution Act, 1982. In the circumstances, the Court cannot impose procedural or other limitations on the Governor General's express power of appointment to the Senate, or otherwise fetter the exercise of his discretion. [See also *Singh v. Canada* ; *Leblanc v. Canada* (1991), 30. R. (3d) 429 (Ont. C.A.); *Reference*

[66] Manfredi Affidavit, para. 25 [RR at 12-13].

re Appointment of Senators Pursuant to the Constitution Act, 1867 (1991), 78 D.L.R. (4th) 246 (B.C.C.A.); *Brown v. The Queen in Right of Alberta*, July 28, 1998 (Alta., Q.B.)][67]

90. Accordingly, the conclusion that must be reached is that neither the outstanding Senate vacancies nor the lack of recent Prime Ministerial advice on Senate appointments constitute a breach of any recognized constitutional convention. This means that, on the facts before the Court, there is no justification for allowing Mr. Alani's application for judicial review and granting the declaration he seeks.

91. Finally, even if there were a constitutional convention to the effect that there are temporal limits on the duration of unfilled Senate vacancies, which is denied, the declaration Mr. Alani is seeking should still not be granted as it would be of no practical utility to the parties and merely fuel academic speculation as to its effect. If issued in the form Mr. Alani has requested, such a declaration would be nothing more than an unhelpful general statement that decisions on Senate appointments ought to be made "within a reasonable time". Given that the timing of Prime Ministerial advice in respect of Senate appointments will necessarily be given in accordance with what a Prime Minister personally believes is "reasonable" from a political perspective, Mr. Alani's proposed declaration would be of no tangible value.

92. This is not to suggest that consideration ought then to be given to crafting a declaration that would set a fixed temporal limit on how long a Senate vacancy can remain unfilled before the Prime Minister "must" give advice on appointing a Senator. This proceeding is not a reference or a commission of inquiry, and neither Mr. Alani nor Canada have provided the Court with the evidentiary foundation that would be needed for the Court to decide on what an appropriate temporal limit would be.[68] Indeed, to even contemplate this question reinforces the notion that, fundamentally, the issues raised by Mr. Alani in this proceeding are manifestly not justiciable.

---

[67] *Samson v. Canada, supra,* note 47 at para. 5. The citations mentioned in square brackets are listed in the original text. The emphasis is added.

[68] Mr. Alani has expressly refrained from making any suggestions as to what such temporal parameters ought to be: Mr. Alani's MOFL at para. 48 [AR at 323].

93. In conclusion on this point, there is no evidence before the Court that the outstanding vacancies impugned by Mr. Alani in his application for judicial review demonstrate that the Prime Minister has breached any constitutional rule, conventional or otherwise. Accordingly, Mr. Alani's request for declaratory relief to address these vacancies is therefore substantively unjustified in any event.

PART IV - ORDER SOUGHT

94. The Respondents respectfully request that this application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 21st day of September, 2015.

Jan Brongers
Counsel for the Respondents

Oliver Pulleyblank
Counsel for the Respondents

PART V - LIST OF AUTHORITIES

	Para. Ref.
Statutes	
Federal Courts Act, R.S.C. 1985, c. F-7	32, 72
Case Law	
Alani v. Canada, 2015 FC 649	11, 17
Alani v. Canada, 2015 FC 859	15
Alani v. Canada, FC No. T-2506-14, unreported (Lafrenière P.), 02 June 2015 and 09 June 2015	13
Assiniboine v. Meeches, 2013 FCA 114	56
Black v. Canada (2001), 54 O.R. (3d) 215 (C.A.)	78
Brown v. Alberta, 1999 ABCA 256	53, 89
Canada v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45	35, 40
Canadian Federation of Students v. Natural Sciences and Engineering Research Council of Canada, 2008 FC 493	38
Canadian Transit Co. v. Windsor (City), 2015 FCA 88	73
Canwest Media Works v. Canada, 2008 FCA 207	38
Copello v. Canada (Minister of Foreign Affairs), 2003 FCA 295	78
Daniels v. Canada, 2014 FCA 101	85
Forest Ethics Advocacy Association v. Canada, 2014 FCA 245	38
Galati v. Canada, 2015 FC 91	38
Jayaraj v. Canada, 2015 FC 211	38
League for Human Rights of B'Nai Brith Canada v. Odynsky, 2010 FCA 307	32
Ontario English Catholic Teachers' Association v. Ontario (Attorney General), 2001 SCC 15	49, 69