Aniz Alani
[redacted]
Tel.: 604.600.1156
E-Mail: senate.vacancies@anizalani.com

January 22, 2016

Federal Court of Appeal
701 West Georgia Street
Vancouver, BC V7Y 1B6

Attention: Courts Administration Service

Dear Sirs/Mesdames:

Re: ***Canada (Prime Minister) et al. v. Alani***
Court No: A-265-15
Response to Court's Direction issued January 19, 2016

I write in my capacity as Respondent in the above referenced appeal, which is currently scheduled to be heard in Vancouver on Monday, January 25, 2016 at 9:30am.

On January 19, 2016, the Court issued the following Oral Direction:

> "The Court indicates that the parties be asked if the appeal is not made moot by the Minister's January 19, 2016 announcement with respect to the establishment of an independent commission to advise the Government on Senate appointments, together with the Government's undertaking to fill the current vacancies within the calendar year. If they agree that the matter has become moot, would they please advise us as soon possible. If not, they should come prepared to argue the issue of mootness as a preliminary question."

Further to the Direction, I advised counsel for the Appellants on January 19th that, in my view, the Minister's announcement did not make the appeal moot. I also proposed that, subject to counsel's comments, correspondence be provided to the Court advising of the lack of agreement among the parties as to mootness.

In response to the Court's Direction, and as a courtesy to the Appellants, I have included below a preliminary outline of the submissions I intend to make on the preliminary issue of mootness as contemplated by the Court's Direction of January 19th.

1. The Minister's announcement does not render moot the appeal or the underlying application.
2. The Federal Court is the appropriate forum for determining mootness in the circumstances of this case

3. If this Court nevertheless concludes that the Minister's announcement makes the appeal or the application moot, the Court ought to exercise its discretion to hear the appeal and permit the Federal Court to exercise its discretion as to whether to hear the underlying application.
4. If this Court declines to hear the appeal, or allows the appeal on the new ground of mootness, costs ought to be awarded in favour of the Respondent in this Court and below.

The Minister's announcement does not render moot the appeal of the underlying application

The Court's Direction refers to "the Government's undertaking to fill the current vacancies within the calendar year". In fact, nothing in the Minister's news release commits to filling the current vacancies within the current year, or at all.[1]

The news release accompanying the Minister's announcement indicates that an Advisory Board has been established to recommend to the Prime Minister nominees for five of the existing 22 vacancies. With respect to timing, the news release also states: "It is hoped that five vacancies (two in Manitoba, two in Ontario and one in Quebec) will be filled by early 2016." [Emphasis added]. It goes on to state: "The permanent process will be established later in 2016 and will include an application process open to all Canadians."

Notwithstanding the reference in the Court's Direction to the Government's "undertaking", the news release is silent on the Government's intentions regarding:

a) when an Advisory Panel will be established to recommend nominees for 17 of the 22 existing vacancies,
b) when the 17 remaining vacancies will actually be filled,
c) when Advisory Panels will be established to recommend nominees for any of vacancies that will necessarily arise as a result of the upcoming mandatory retirements of:
    i. the Hon. Senator Irving Gerstein (Ontario) on February 10, 2016;
    ii. the Hon. Senator C. Hervieux-Payette (Quebec) on April 22, 2016;
    iii. the Hon. Senator David P. Smith (Ontario) on May 16, 2016;
    iv. the Hon. Senator Michel Rivard (Quebec) on August 7, 2016;
    v. the thirty other Senators whose mandatory retirement will occur before the next scheduled federal election.

In its Reasons for Order declining to expedite the hearing of the underlying application to occur before the federal election of October 19, 2015, the Federal Court (Gagné J.) stated:

> "However, if [the Applicant's] real intention is to have a declaration from the Court dealing with a Prime Minister's duties and obligations with respect to Senate

[1] Government of Canada, "Minister of Democratic Institutions Announces Establishment of the Independent Advisory Board for Senate Appointments", January 19, 2016 (News Release): http://news.gc.ca/web/article-en.do?nid=1028349

> appointments, this application for judicial review might not be moot if the vacancies are filled before a final judgment is rendered."[2]

It follows, *a fortiori*, that neither the appeal nor the application is made moot by the announcement of an *intention* to fill some of the vacancies, and which is devoid of any commitment, reflected in an Order-in-Council, statute, or otherwise, to fill all existing vacancies according to any stated timeline.

In sum, the *raison d'être* of the application has not disappeared. All of the relief claimed in the amended notice of application remains relevant.[3]

The Federal Court is the appropriate forum for determining mootness in the circumstances of this case

The hearing of the underlying application, which has already been perfected with complete memoranda of fact and law, affidavit evidence, transcripts of cross-examination, has been adjourned generally by consent pending disposition of this interlocutory appeal from a dismissed motion to strike the application.

Unlike an appeal from a final judgment, the record before this Court lacks the factual record and written representations of the parties on all of the issues raised in the application rather than merely the written representations of the parties on the narrow issues raised in the appeal.

It would be appropriate to defer the issue of mootness to the Federal Court where the parties may have the benefit of preparing fulsome arguments and referring to a complete factual record.

Moreover, as this Court recently noted in *Cathay Pacific Airways Limited v. Air Miles International Trading B.V.*, it is preferable to have some determinations made by the Federal Court, which are then subject to appeal to this Court:

> "As a practical matter, since the Federal Court's decision is subject to appeal to this court, both the Court and the parties are entitled to have the Federal Court's assessment of the probative value of the new evidence. If this Court finds that the Federal Court erred in a way which justifies its intervention, the absence of that assessment is a factor which militates for the return of the matter to the Federal Court for redetermination, rather than for the exercise of this Court's discretion under subparagraph 52(1)(b)(i) of the *Federal Courts Act*, R.S.C. 1985 c. F-7."[4]

The Court ought to exercise its discretion to hear the appeal and permit the Federal Court to exercise its discretion as to whether to hear the underlying application

In the alternative that the Court determines that the Minister's announcement of the government's intentions regarding some of the existing vacancies renders the appeal moot, the Court ought nevertheless to exercise its discretion to permit the underlying application to proceed in order to resolve the underlying issue, which has been fully canvassed in the application already perfected.

As Sopinka J. wrote in *Borowski* "…an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure than

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[2] *Alani v. Canada (Prime Minister)*, 2015 FC 859 at para. 24.
[3] See *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at 357 [*Borowski*].
[4] 2015 FCA 253 at para. 19.

an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly."[5]

As the Supreme Court of Canada observed in *Borowski*, there are a category of cases where "[i]f the point was ever to be tested, it almost had to be in a case that was moot."[6]

The scope of the Prime Minister's constitutional obligation to recommend Senate appointments within a reasonable time is such a case. If the doctrine of mootness were applied strictly, the question could evade review by the judiciary, whose duty it is "to ensure that the constitutional law prevails",[7] by requiring fresh proceedings each time a single Senate vacancy is filled, or, in this case, the government announces an *intention* to fill some of the existing vacancies at some indeterminate point in the future.

As for this specific appeal itself, subject to the Appellants' election to discontinue their appeal, the procedural issues raised are of general interest to other Federal Court litigants and ought to be resolved in any event.

In particular, this appeal provides this Court with an opportunity to clarify whether the preliminary motions to strike applications for judicial review ought to be encouraged, as the Appellants contend, rather than raising objections on points of law to be determined at the hearing of an application on its merits.

Costs ought to be awarded in favour of the Respondent in this Court and below

If this Court determines that the appeal is moot, or allows the appeal on the new ground that the underlying application is moot, and declines to exercise its discretion to hear the appeal or permit the Federal Court to exercise its discretion to hear the underlying application, costs ought to be awarded to the Respondent.

If the issues in the underlying litigation have become moot with the passage of time, it was through no fault of the Respondent. Throughout this proceeding and in the Court below, each time limit has been complied with, and not once has an extension of time been sought, by the Respondent. A motion to expedite the underlying application was brought, without success, to recover some of the delay occasioned by the Appellants' motion to strike. Meanwhile, the scope and timing of the Minister's announcement has presumably been known to the Appellants for some time. Nevertheless, the Appellants did nothing to raise the issue of mootness in advance of the hearing of this appeal. If the Court determines that any of its or the parties' time and resources were needlessly expended, such loss was occasioned solely by the Appellants.

Finally, as the Supreme Court of Canada recently confirmed in *Caron v. Alberta*, it is open to a Court to exercise its discretion, in appropriate circumstances, to award costs on appeal and in the courts below regardless of the outcome. As in *Caron*, this litigation has raises issues of considerable public interest and has served an important public function.[8]

* * *

I respectfully request an opportunity to elaborate upon or supplement these submissions in response to any arguments raised by the Appellants at the hearing of this appeal.

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[5] *Borowski*, *supra* at 360.
[6] *Ibid*. at 360-361.
[7] *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 745.
[8] *Caron v. Alberta*, 2015 SCC 56 at paras. 109-114.

Sincerely,

Aniz Alani

cc: Counsel for the Appellants (by e-mail)