

March 1, 2016

The Right Honourable Justin Trudeau, P.C., M.P.
Prime Minister of Canada
Langevin Block
80 Wellington Street
Ottawa, ON K1A 0A3

Dear Prime Minister:

Re: Vacancies in the Senate

As Prime Minister, you inherited from your predecessor an unprecedented accumulation of Senate vacancies and a pending constitutional challenge to the delay in filling them.

In your open letter to Canadians of November 4th, you immediately sought to differentiate your leadership style by committing to “an open, honest government that is accountable to Canadians, lives up to the highest ethical standards, brings our country together, and applies the utmost care and prudence in the handling of public funds.”

This letter invites you to demonstrate that commitment by being more transparent about your government’s approach to filling Senate vacancies. In particular, do you share or disagree with Mr. Harper’s view that, as Prime Minister, you ought to have untrammelled discretion over how long vacancies in the Senate remain unfilled?

I also offer a modest proposal to avoid further public expense defending a court challenge that your government can resolve through clear commitments on its own terms.

The Senate Vacancies Challenge You’ve Inherited

As things stand, your government and I have conflicting positions on whether there is a legally enforceable obligation on the Prime Minister to advise the Governor General to fill Senate vacancies within a reasonable time.

This letter is not an attempt to persuade you to reconsider the legal merits of your government’s position or the advice provided through your able counsel copied on this letter.* Rather, I suggest some steps your government could take to promote positive governance outcomes and reinforce its commitment to constitutionalism and respect for the rule of law.

* Notably, however, both the Federal Court and Federal Court of Appeal have overruled objections raised in the government’s bid to dismiss court proceedings aimed at determining this very question.

On December 4, 2014, former prime minister Stephen Harper indicated he wasn't planning to appoint any more Senators. There were then 16 vacancies in the Upper Chamber. For his part, then opposition leader Tom Mulcair suggested the Senate be left to "wither on the vine" through attrition.

Earlier that year, as leader of the Liberal Party of Canada, you announced the expulsion from caucus of all Liberal Senators. You also proposed an "open, transparent, non-partisan process" that would see all Senators sit as independents.

Although the Liberal Party was the only major national political party whose plans for the Senate weren't, in my view, obviously unconstitutional, it was also limited at the time to third-party status. If memory serves, it was not long after that polling models projected only a 0.7% chance that you would lead a majority government following the October 2015 election.

When confronted with the news that a sitting Prime Minister was by all appearances defiantly flouting the Constitution – and without any other mechanism for accountability obviously available – I brought an application for judicial review of the Prime Minister's decision not to advise the Governor General to fill Senate vacancies and asked the Federal Court to issue a declaration that the Prime Minister must provide such advice within a reasonable time after a vacancy happens.

This litigation was brought on my own behalf and at my own expense. The lawsuit did not seek any damages -- just a decision from the courts declaring what the law requires from a Prime Minister when it comes to filling Senate vacancies.

As the case made its way through the court process, the government responded by seeking to have the case dismissed outright before the application could be heard. The government lost, then appealed, and then, most recently (after the election) lost again on appeal. The case is now scheduled to be heard by the Federal Court on June 22-23, 2016.

Steps Your Government has Taken to Address Senate Vacancies

Two months after your Cabinet was sworn in, the Hon. Minister Monsef announced the establishment of the Independent Advisory Board for Senate Appointments and expressed hope that five vacancies would be filled by early 2016 with a permanent process set up later in 2016.

I applaud your government's willingness to confront some of the challenges affecting the Senate, including the perception many Canadians have that the Senate is a patronage dumping ground for partisan hacks. I hope this experiment works and, assuming it does, that it serves as a persuasive blueprint for future Prime Ministers to consider adopting. But let's not forget it's an experiment in its very early stages.

More can and should be done to protect the integrity and functioning of the Senate, which you have recognized can be "[a] place that allows for reflective deliberation on legislation, in-depth studies into issues of import to the country, and, to a certain extent, provide a check and balance on the politically driven House of Commons." You have also reminded us that "in Canada, better is always possible."

With today's resignation for health reasons of Senator Chaput from Manitoba, there are 24 vacancies in the 105-seat Senate. Never since Confederation has there been as many empty seats

as exists today. While most of those vacancies accumulated before you took office as Prime Minister, the fact remains that the level of representation guaranteed by the Constitution has worsened, not improved, during your watch.

Share Your Rationale for a Staggered Approach to Filling Senate Vacancies

I am not suggesting that it's unreasonable that your government appears to be proceeding cautiously with its bold experiment. I understand that the initial recommendation of five Senators was focused on the three provinces with the greatest number of unfilled vacancies: Manitoba, Ontario and Quebec.

But, as far as I'm aware, your government has not explained why Advisory Boards haven't been struck to consider recommendations for the 17 (now 19) other existing vacancies, or the six others that will occur due to mandatory retirements in the next year alone.

What concerns me is not that the new process your government has begun to implement is causing unreasonable delay in addressing the existing and forthcoming vacancies, but that your absence of public justification for the delay undermines respect for the Constitution.

As you know, Canada wasn't born out of revolution but was created through a series of orderly negotiations resulting in terms of Confederation. The specific formula for regional representation in the Senate has been described as the *sine qua non* of this uniquely Canadian nation-building exercise. It's also part of the supreme law of Canada, which nobody can choose to ignore. With the greatest of respect, that includes you.

I therefore urge you to share publicly the reasons why proceeding with a staggered approach to appointments supports rather than undermines the constitutional role of the Senate, and by what criteria you consider yourself accountable for ensuring the vacancies are filled in a reasonable time. By doing so, you can demonstrate that your government does not consider the express terms of the Constitution to be mere suggestions but rather an integral part of your job descriptions not to be taken lightly.

Make Yourself Accountable

As things stand, the government's position as indicated in its response to the pending judicial review application appears to be that a Prime Minister can take as long as he or she wants to fill each Senate vacancy. Mr. Harper went so far as to say last July that "under the Constitution of the day, the Prime Minister has the authority to appoint or not appoint" Senators.

Whether the government's legal arguments supporting this position will be accepted by the courts remains to be seen. But, law aside: does giving the Prime Minister unbounded discretion to decide if and when to fill empty Senate seats strike you as good public policy? Given the Senate's role in providing a check against the power of the Prime Minister and Cabinet, and the promise of regional representation bargained for at Confederation, does this cohere with your view of Canada as "a nation of fairness, of justice and of the rule of law"?

I expect that a court declaration as to a Prime Minister's obligation to advise the Governor General to fill Senate vacancies would provide enduring guidance and prevent the sort of overt obstructionism advocated by Messrs. Harper and Mulcair. But waiting for the Courts to consider weighing in is not the only option, and it's certainly not the most cost-effective option. As Prime

Minister, you are uniquely positioned to set standards for when Senate vacancies will be filled now and in the future.

Legislation establishing time limits for filling Senate vacancies would provide a brake on a subsequent administration committed to stalling (or eliminating) appointments. A Prime Minister might succeed in commanding a majority in the House of Commons to repeal these time limits, but he or she would also require the Senate's approval to do so. Whatever the partisan (or non-partisan) makeup of the Senate, one would hope sober second thought would guard against doing this absent clear justification.

As it happens, a bill imposing a time limit within which the Prime Minister must advise the Governor General to fill Senate vacancies has already been introduced and debated in Parliament. In 2007, Senator Wilfred Moore introduced Bill S-224 to clarify the law in response to Mr. Harper's unwillingness to fill the 14 vacancies that existed at the time. It proposed a statutory obligation that the Prime Minister recommend to the Governor General a fit and qualified person for appointment to the Senate within 180 days after a vacancy happens.

Bill S-224 was debated and approved by the Senate in 2008 but died on the Order Paper in the House of Commons.

I urge you to consider supporting similar legislation during your term as Prime Minister, even if it means recognizing a limit on your own power.

Recognize the Value and Cost of Public Interest Litigation

Some commentators have suggested, cynically, that Mr. Harper may have welcomed a constitutional challenge to his moratorium on Senate appointments because a court ruling would provide him with political cover to appoint Senators while allowing him to cater to populist sentiments favouring abolition by stealth. Whatever his motivation, I trust you don't need a court ruling to do what you feel is right, even if it's unpopular.

I similarly prefer to believe that you would not abide the halfhearted defence of a constitutional challenge your government inherited, of which a potential outcome would embarrass your political opponents -- even if "lost" while on your government's watch.

Holding government accountable through litigation takes time and isn't free. Under the court's existing rules, the most I could possibly hope for if successful is to recover my out-of-pocket expenses. Conversely, the government has consistently argued that I should be ordered to reimburse its legal expenses. Dangling the threat of a significant legal bill if I'm unsuccessful -- the amount of which has never been shared publicly -- the government has on numerous occasions encouraged me to withdraw the constitutional challenge on a "without costs" basis.

I'm not asking your government to fund a challenge to the legality of its own actions, as was asked (and agreed to) for example in the case of Mr. Edgar Schmidt's pending challenge to the Minister of Justice's vetting of proposed legislation for compliance with the *Charter*, or as seems to be reflected in your direction to your Ministers of Justice and Canadian Heritage to restore a modern Court Challenges Program.

I do, however, ask you to consider whether the threat of being required to personally fund the government's defence of a public interest test case is consistent with your commitment to leading an open, transparent and accountable government.

An Alternative to Further Public Expense

Finally, although I'm prepared to follow through with the court case scheduled to be heard this June – the evidence and main argument having already been prepared and filed before the election took place – I respect your commitment to prudence in the handling of public funds. I am not rigidly attached to the idea of litigation for the sake of litigation, even though as a lawyer interested in the development of the law I would be very interested to see these constitutional issues addressed. I offer what I'm certain will be a less expensive alternative.

If your government is willing to firmly commit itself to the path it has proposed for filling Senate vacancies by establishing clear, measurable timelines for implementation that demonstrate an appropriate regard for the promise of regional representation reflected in the Constitution, I would accept that it's unnecessary to engage the court process further at this time.

Rather than incurring further public expense in seeking a court decision, the legal arguments and evidence already developed could be kept "shelf ready" for a future challenge if and when a Prime Minister appears unwilling to fulfill his or her obligations regarding the Senate within a reasonable time.

As for the time and expenses I've already incurred, any modest amount your government is prepared to contribute to partially offset these, as token acknowledgment of the public interest served by raising this issue, would be accepted without objection.

Tell Us Where You Stand

I appreciate that you and your government have a busy and ambitious agenda to implement in the months and years ahead. I also realize that, absent the obligation to respond to the ongoing court challenge, the issue of Senate vacancies may not be one that your government feels strong public pressure to address.

Nevertheless, I urge you, in the interests of openness and transparency, to be clear with Canadians about your intentions and where you stand as Prime Minister, either in solidarity or in contrast to your predecessor from whom these issues were inherited:

1. If you agree with Mr. Harper's position that it's good public policy to defer to the Prime Minister's sole discretion to determine if and when Senate vacancies are filled, explain why.
2. If you disagree, say so and do something about it. Make clear the criteria by which you consider yourself accountable. Better yet, make yourself (and your successors) accountable through clear and transparent legislation.
3. If you remain opposed to the ongoing constitutional challenge to unfilled Senate vacancies, consider withdrawing your government's demand to recover its legal costs.

4. As an alternative to incurring further litigation costs at public expense, consider setting clear timelines for filling Senate vacancies so that a court decision isn't required.

Thank you for your time and consideration.

Sincerely,



Aniz Alani

cc: Messrs. Jan Brongers and Oliver Pulleyblank
Department of Justice Canada, B.C. Regional Office