FEDERAL COURT
(Before the Honourable Mr. Justice O'Reilly)

VANCOUVER, B.C.
June 22, 2016

T-2506-14

BETWEEN:

ANIZ ALANI,

APPLICANT;

AND:

PRIME MINISTER OF CANADA,
THE GOVERNOR GENERAL OF CANADA AND
QUEEN'S PRIVY COUNCIL FOR CANADA,

RESPONDENT.

Mr. A. Alani, Appearing on his own behalf;

Mr. J. Brongers,
Mr. O. Pulleyblank, Appearing for the Respondents.

INDEX

PAGE

SUBMISSIONS BY MR. ALANI.....3

SUBMISSIONS BY MR. BRONGERS.....78, 108

SUBMISSIONS BY MR. PULLEYBLANK..... 80

(PROCEEDINGS COMMENCED AT 9:21 A.M.)

THE REGISTRAR: This special sitting of the Federal Court is now open. Presiding, the Honourable Mr. Justice O'Reilly.

Call T-2506-14 in the matter of Aniz Alani against the Prime Minister of Canada, the Governor General of Canada and the Queen's Privy Council for Canada. Appearing on his own behalf as applicant, Mr. Aniz Alani. Appearing on behalf of the respondents, Mr. Jan Brongers and Mr. Oliver Pulleyblank.

JUSTICE: Good morning, counsel. Please be seated.

I guess there are two things going on simultaneously, and I haven't seen anything in the materials that suggests a particular way of proceeding with those two things. We have your application, obviously, Mr. Alani, and we have the respondent's motion based on mootness.

I've given some thought to it and I've read the materials. It strikes me that the issue of mootness is pretty well wrapped up in the merits, and so judicial economy is one of the things one has to think about within mootness, but it strikes me in this case, judicial economy suggests that we should just proceed with the merits and embed the motion for mootness within your submissions. So that would involve beginning with you, Mr. Alani and then the respondent would both respond and present its motion on mootness, to which you would

then have a chance to reply and respond, and then a further reply on the motion.

Does that strike everyone as a reasonable way of proceeding? Mr. Alani, you first.

MR. ALANI: It does, Justice O'Reilly, and in case it helps further, judicial economy, I will endeavour to incorporate within my principal submissions anticipations response to the motion, so as to reduce the need for reply.

JUSTICE: Is that agreeable, Mr. --

MR. BRONGERS: We are content with that, thank you, Justice O'Reilly.

JUSTICE: Very well. Let's proceed then, Mr. Alani.

SUBMISSIONS BY MR. ALANI:

Good morning, Justice O'Reilly.

JUSTICE: Morning.

MR. ALANI: I try to begin each, each set of oral submissions with trying to capture in a simple word or phrase what the case is about, and as I think back on the course of this litigation and principally what it's about, I think at the end of the day what this is about is coherence.

The issues that I see as having to overcome in order to obtain the relief sought in the amended notice of application are six things. First, I must demonstrate that the declaration sought would appropriately describe the legal position. In other

words, that it's actually true that the Prime Minister has an obligation to advise the Governor General to summon a fit and qualified person to fill each Senate vacancy within a reasonable time after it happens.

Second, I must persuade the court, in order to succeed, that the declaration sought is an appropriate remedy.

Third, that the Federal Court has jurisdiction to issue the declaration.

Fourth, that the issue before the court is itself justiciable.

Fifth, that I have standing to seek the declaration sought.

And sixth, that there is a live controversy justifying the court issuing the declaration, which of course, is essentially the mootness issue.

I agree that many of these issues are very closely intertwined. There are common touch points throughout the issues. One cannot speak coherently of justifiability without addressing the appropriateness of the declaration as a particular remedy, and given the nature and scope of Canada's objections, one cannot fully address mootness or standing without addressing the other.

So my aim will be to address all of these issues globally by taking the court through the key materials before the court, including the affidavit evidence, the transcripts of cross-examination, as well

as the various pertinent authorities. And I'll try to weave them together to show why, in my submission, the declaration sought is fully supported by and coherent with the existing legal doctrine.

In terms of order, despite the order in which the court's judgment might eventually address these issues, I propose to begin my submissions with whether the declaration is substantively justified, because of course if I cannot persuade the court that there is a legally recognizable duty on the Prime Minister to fill Senate vacancies in a reasonable time, then the procedural obligations sort of fall by the way -- they're still important, but.

JUSTICE: Okay.

MR. ALANI: One of the things I'd like to address at the outset, and I'll return to this throughout my submissions, is the state of the pleadings. There is a -- there was a notice of application which was filed, I believe in December 8th, 2014, and with leave of the court there was an amended notice of application filed, I believe, in May of 2015.

Now, much has been made earlier in the proceedings, and indeed in Canada's written submissions, that the pleadings don't tell us very much about the factual background and they don't set out in great detail the basis for the argument or, you know, bringing all the pertinent issues to the court's attention. I must confess that perhaps with the benefit of hindsight and

the fullness of time, the pleadings could have been substantially longer. They could have been substantially more detailed. If I were being hyper formalistic about it, I might have set out with great particularity every single statement that any Prime Minister has made or these particular Prime Ministers have made, and every act or omission that in my submission gives rise to the controversy before the court.

My hope is that, bearing in mind principles of proportionality and Rule 3, that the court look at really what's the substance of this dispute, and I think it's clear. I don't think it comes as a surprise to the parties that what I've been after from the beginning is resolution from the courts as to the Constitutional interpretation as it pertains to the timeliness of filling Senate vacancies.

Whether that's manifested itself in a particular comment to the media or a more formal moratorium announced by the former Prime Minister, or the ongoing course of conduct of our existing Prime Minister, I think is really -- you know, if you follow that train of thought to its logical conclusion there would be several judicial reviews. One for every instance, and I didn't think it was worth bogging down the court in, you know, several motions to amended each time or to bring multiplicities of proceedings. And so the state of the pleadings is what it is, and I ask the court to take that as is.

I'll next move on to what I call the Constitutional logic, because at the end of the day the substantive declaration that I am seeking, while novel, I think bears itself out through very discreet, tangible, undisputed elements of the Constitution. In terms of where I'm at in my written representations, this generally tracks page 318 of the applicant's record.

JUSTICE: All right.

MR. ALANI: Beginning at paragraph 26 under the heading "Key Constitutional Features".

JUSTICE: Right.

MR. ALANI: And so I say there's a sort of syllogistic logic to the Constitution that goes like this. It begins with the text itself. Section 32 of the *Constitution Act, 1867*:

> "When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy."

A further premise is that the Senate itself shall be composed of 105 members. That's 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."

A further premise is section 22 of the *Constitution Act, 1867*, which I haven't reproduced in all it's expansive detail in my written representations, but

it essentially sets out the specific level of representation guaranteed, not only to each of the regions of the country, but further to the specific provinces and territories.

So section 21 tells us the Senate consists of 105 members. Section 22 tells us where each of those 105 members come from.

JUSTICE: Okay.

MR. ALANI: That's the written text. We add on to that where we seem to get a lot of controversy in this case, the Constitutional Convention that the Governor General will not fill vacancies other than on the advice of the Prime Minister. That is indeed a Constitutional convention, and we will -- we will have a lot of argument about the role of the courts in recognizing and enforcing Constitutional conventions.

I can say at this point, there's no need for this court to recognize that convention. The Supreme Court of Canada has already done it, including in the Senate Reform reference. It's binding on this court. We couldn't dispute it if we wanted to.

As I speak further, later on, with regards to justiciability, I say there's nothing preventing this court or any court from giving effect to constitutional convention for a number of reasons, which, as I say, I'll get onto. But that essentially is the logic of the Constitution.

We know it consists of 105 senators, with

specific representation for each province and territory. We know that the Governor General has a mandatory obligation, clear as day in section 32, to fill the vacancies when they happen, and the convention that that will only occur on the advice of the Prime Minister. And so I say by necessary implication, if the Prime Minister does not provide the advice following the principle of responsible government, that is taken as a background assumption of the Constitution, then the Constitution is incoherent. The puzzle doesn't fit together. You don't have the complete story.

In Canada's response to submissions, it's notable that although a lot of focus is given to procedural objections and talking about the proper role of the courts, there is virtually nothing to be said in response with respect to the interpretive exercise itself. In other words, there's no argument that I'm aware of, and certainly counsel can correct me if I've missed it, that section 32, for example, doesn't impose a mandatory obligation, at least on the Governor General.

So, I could take as given that the words have their plain meaning. "Shall" means "shall". It's imperative. It's not a discretion. It's a mandatory obligation. But if one were to look at other provisions in the *Constitution Act, 1867*, you would see that there are textual signals that suggest that the drafters had in mind different levels of obligation. There are some examples of "shall", some permissive "mays". Some

prohibitive “shall not’s”, and some presumptive provisions that say “shall subject to”. And I give examples of those, which I won’t repeat in my oral submissions. They’re beginning at paragraph 30 of my written representations.

There is a passage that I’ve reproduced, it’s at paragraph 34 of my written representations. It’s by F.A. Coons, who writes in 1965, and granted this is just his take, but I think it sums up quite pithably, what the text of the Constitution sets out to say. He says,

> "The maintenance to be sure of the specified number of members in the Senate was very carefully provided for by the wording of two sections of the *BNA Act*. In addition to section 24, which provides for the appointment of senators, section 32 says,
>
> > 'When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.'
>
> The reason that the Senate does not have a provisions similar to the one in force in the House of Commons regarding a time limit withint which vacancies must be filled is that the Constitution itself is so clear and plain upon the subject it distinctly says

that appointments shall, not may, be made when vacancies occur. This certainly does not mean the moment they occur, because that would be impracticable. The principle in interpreting directory words of this kind is that action must be taken within a reasonable time."

We have the benefit of a well-established body of jurisprudence that assists the court in interpreting the Constitution. We were reminded of this in the Senate Reform reference, which is referenced at paragraph 35 of my written representations, where the court tell us:

"The Constitution must be understood by reference to the Constitutional text itself, the historical context and previous judicial interpretations of constitutional meaning."

They say that Constitutional documents must be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic and historical context.

What's also emerged in the Constitutional interpretation jurisprudence is recognition of what's been called a *lex non scripta*. So we know that not all parts of the Constitution are set out in the text itself, but they're also recognized by the courts. For example, the foundational principles of the Constitution, which the court has described in the Manitoba language rights

reference, in the Quebec session reference, reminded us of again in the Quebec -- sorry, in the Senate Reform reference. Those foundational principles include federalism, democracy, protection of minorities and constitutionalism in the rule of law.

When this court tackles the interpretive exercise of figuring out what the inner play of constitutional provisions and convention means, I submit that the internal architecture and the foundational principles of the Constitution must also guide the court's interpretation. And I'll speak later on, as I go through, for example, some of the Senate transcripts, because this is an issue that's been debated for some time in Parliament, specifically about the pertinence of the principle of protection of minorities.

But as I see it, they all kind of -- in one way or another, shape the understanding of what the Constitution requires with regard to filling Senate vacancies in a timely way.

The key to the internal architecture, and this is -- I mean it's been talked about for some time by the courts, but it always kind of seems almost novel, I think, when it's brought up because it's rare that the internal architecture itself would ground a substantive right or legal outcome. But I think the philosophy and the doctrine behind it, as the Supreme Court tells us, is really fundamental to any interpretive exercise.

The Supreme Court tells us the

Constitution must be interpreted with the view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the Constitutional provisions are intended to interact with one another must inform our interpretation, understanding and application of the text.

And if there's one underlying principle or assumption to the Constitution that allows us to make the logical leap from the express text that places the legal obligation on the Governor General to the *de facto* obligation of the Prime Minister to provide the advice to the Governor General, it's in the principle of responsible government, which, as Professor Hogg has explained, is probably the most important non-federal characteristic of the Canadian Constitution.

Now, I'll walk through a few different paths one could take to implement the principle of responsible government. You could either do it by recognizing that it's simply part of the internal architecture of the Constitution, that it would be folly to interpret the Constitution with blinders up to the principle of responsible government. For example, because it was part of a convention.

One of the ways that's been argued in the past is that the principle of responsible government has a legal basis in that it's been incorporated -- it's been incorporated by reference in the preamble to the

Constitution Act, 1867 that Canada was to have a constitution similar in principle to that of the United Kingdom.

There's other textual signals within the Constitution itself that suggest responsible government was not just a convention, but something that was intended to be the guiding force behind any application and interpretation of the Constitution.

Section 11 of the *Constitution Act, 1867* establishes a Queen's Privy Council for Canada, whose function is to aid and advise in the government of Canada.

Now, if a responsible government had not practical meaning, and all these textual provisions that say the Governor General shall do this, the Governor General may do that, were intended to just vest the Governor General personally with whatever personal individual discretion that officeholder wanted, it would make no sense to establish the Queen's Privy Council under section 11.

There's another point on Constitutional interpretation that I don't think should be overlooked, and that also comes from the Senate Reform reference. I won't take you to it, but it's at page 373 of the first volume of my book of authorities, at paragraph 23. The court, citing the succession reference, points out that the Constitution of Canada is a comprehensive set of rules and principles, and that it provides an exhaustive

legal framework for our system of government.

Of course, the court's not talking about the *Constitution Acts* being an exhaustive framework, but the Constitution viewed more holistically as incorporating certain statutes enumerated in schedules. But also these underlying assumptions: The constitutional common law that emerges every time judges interpret what the Constitution means and develop the Constitutional common law in that way. It's also this idea of internal architecture, the unwritten principles.

And so what I take from that point is if the Constitution is suppose to be an exhaustive framework, then the Constitution must have an answer to the question before the courts, which is what happens if the Prime Minister does not provide the advice to the Governor General?

As I understand the nature of Canada's objections, the answer to that question is not for the courts to decide because it involves purely political matters that are non-justiciable.

I say, that cannot be the case because the Constitution establishes a Senate, again with 105 members, with specific representation for each province and territory, but the gap in the text of the Constitution is how that advice gets provided. And if the Supreme Court tell us that the Constitution is an exhaustive legal framework, then we have to look to the Constitutional common law, in other words judicial

decisions, to tell us how to fill that gap.

I suggest the way to do that is to issue a declaration confirming that following the logic of the Constitution and the syllogism I provided, that it only makes sense because of necessary implication, that the Prime Minister himself or herself has an obligation to provide that advice to the Governor General within a reasonable time.

The alternative is if the court accepts Canada's objection that the question before the court is non-justiciable and that it's only left to the political arena to resolve this uncertainty. The practical effect of that is that even though everyone knows that it's the Prime Minister whose role it is to provide this advice, in other words that the Senators get appointed essentially by the Prime Minister rather than hyperformalistically by the Governor General, the Prime Minister would be completely beyond the reach of the law if he or she neglected to or deliberately refrained from providing that advice.

And I'm going to merge into the common touch points with justifiability here, but I think a practical question the court needs to ask itself is, you know, would it be such a bad thing, or at least what are the disadvantages if this type of decision were exclusively outside the realm of the courts and it could only be resolved by political actors.

Because of course, as with most

conventions, it is understood that they're sort of self-enforcing. That you should never need to go to the courts, because they're recognized as being binding on political actors and if political actors choose not to follow the requirements of a particular convention, then they face the political consequences for it.

The problem that presents with respect to the Senate, established as it is by the Constitution, is that it allows for the possibility that the political actors choose not to comply with the Constitution. In other words, it allows the political elite to not quite unilaterally, but without following the amending formulas certainly, effectively change what the Constitution requires by simply doing indirectly what they can't do directly.

Now, one might say in response, well if the political actors are willing to take the political risk of what objectively might be described as unconstitutional behaviour, then why not just let that play out in the political arena? If people don't want to vote for a particular political candidate or party because they feel that party is espousing and following unconstitutional courses of behaviour then so be it, let that be decided at the ballet box.

That of course is allowing the possibility that the majority, assuming that they are all fully informed and have actually turned their minds and done the Constitutional interpretative exercise that

I'm asking this court to do today, that that allows the majority of Canadians at the ballot box to decided that were not going to follow a particular provision of the Constitution. Of course that's not what the amending formula says. So it allows a majority to do an end run around the amending formula as well.

JUSTICE: I guess what you're saying indirectly, Mr. Alani, is that for example the Senate could become moribund just through the absence of action on the part of the Prime Minister.

MR. ALANI: It could taken to a extreme if there were just an indefinite moratorium on Senate appointments. And there is a bare quorum of 15, at which point I think no one can disagree that there would be a clear Constitutional crisis. I say, you know, the Constitution doesn't say, as long as there's sixteen plus senators we're good. It says 105, and again section 22 makes it very clear B.C. gets a certain number of senators not whatever proportion of that the Prime Minister feels giving effect to on any particular day.

So, yes it could become moribund as you put it, Justice O'Reilly, but I say anything short of 105 demands some sort of accountability and justification for not filling in a timely way.

JUSTICE: Thank you.

MR. ALANI: So turning to justiciability, and this tracks generally my arguments

beginning at paragraph 62 of my written representations. I've just presented kind of an alternative thought experiment of well what if we leave the political area? Reasonable people can disagree about whether that's a good policy idea. I think as the courts have reminded us, we have a judiciary for a reason. And the rule of law in our Constitution require courts to engage in judicial review of executive decisions when they conflict with the Constitution.

No doubt there's a political aspect to who gets appointed a senator but whether the Prime Minister had an obligation to cause appointments to be made at all or within a reasonable time, I submit is well suited to the courts interpretive role. This is the type of interpretive exercise that the courts have undertaken time and time again with respect to matters that were clearly political.

Justice O'Reilly, as you well know in the case of *Khadr*, the government of Canada was called upon, challenged on whether not seeking the repatriation of Omar Khadr was a violation of section 7 of the *Charter*. And this court held that it was and that was upheld by the Federal Court of Appeal, and ultimately by the Supreme Court of Canada. I think that case is highly instructive because it's a clear example of the delicate balance that can be drawn between the court's sphere of responsibility and the executive's appropriate bailiwick as well.

Now I understand that at the Court of First Instance it was -- that a declaration was issued specifically requiring the Prime Minister to seek repatriation, which is a very practical outcome. It's ultimately what happened. The Supreme Court of Canada, of course as this court well knows, in apparent deference to the executive wanted to leave it to the executive to craft a more appropriate remedy. Of course at the end of the day exactly what was ordered at first instance is what happened and Omar Khadr is back on Canadian soil as a result.

So one of the things that I need to persuade the court is that the declaration as proposed is a practical remedy. And I say that it is. Now there are alternative formulations of this declaration that could be granted, could have been requested. At the end of the day the amended notice of application asks the court to issue whatever relief it deems just. I've proposed in the pleadings that the declaration simply set out that the Prime Minister had the obligation to provide the advice within a reasonable time after a vacancy happens.

The question that's been asked on the motion to strike is: Well, what happens then? That provides us no practical relief because, well, what happens if, you know, the Prime Minister ignores it? Or what happens if there is a disagreement about what constitutes a reasonable time?

And of course Justice Rothstein in a speech he gave to the, I believe it was the American Bar Association – I won't take you to it, but it's cited in the materials – he talks about that the court grappled with in the *Khadr* case. And how the court was very alive to the possibility that in the face of its slightly watered down declaration, the Prime Minister might simply refuse to comply with it.

Of course in that scenario you would have a showdown, hypothetically, between the courts and the executive. I suggest to you you have that potential showdown in every case where the courts issue relief against the Crown.

So as I say the declaration suggests that it be stated with respect to a reasonable time. What does a reasonable time mean? Well, as in *Khadr,* at least following the Supreme Court of Canada's judgment that's an issue to be dealt with, a bridge to be crossed when we get to it, I suppose.

But there are several ways it could play out. And one of them takes the form of a statute, a Bill that was introduced and passed by the Senate back around 2008, I believe, when there were an accumulation of vacancies. And Senator Moore introduced a Bill that basically mirrored or it mirrored the time limit for filling a bi-election, I believe, in the House of Commons to the time to fill a vacancy in the Senate. I believe it was 180 days. So that was debated in the

Senate. It was passed in the Senate, and it died in the -- it died on the order paper in the House of Commons.

So one of the ways in which the dialogue between the courts and the legislatures and the executive could materialize is that parliament itself, in the face of this court's judgment, and whatever reasoning and principles are apparent in its judgment, could draft a Bill that, you know, allowed them to hold the pen and set the parameters on what reasonable time is. And that’s exactly what happened with the *Clarity Act* following the Quebec succession reference. Supreme Court of Canada didn’t say, “here’s how you’re going to figure out whether you have a clear questions?” that’s up for the political actors to decided and that’s exactly what happened. And it hasn’t been tested, thankfully I suppose, but at least, you know, no one can say that the courts had the last word. Parliament was able to step in and exercise its jurisdiction as well.

So that’s one thing that could happen. If parliament says silent on it, as with the *Khadr* case, if the government didn’t act, obviously there’s the potential for further litigation. Now I understand the government sees that potential need for further litigation as a reason not to issue the declaration in the first place, because that’s not a practical outcome. I say that’s the sort of reasonable step-by-step incremental approach that respects the respected spheres of influence between the courts and parliament and the

executive. If the court wants to go further and issue a declaration that the Prime Minister must fill the vacancies within 180 days or 60 days or whatever, that's fine with me. I don't know what the right answer to that is. And I'm not suggesting the court is particularly well suited to defining that framework, but I think it's important that the court resolve the uncertainty that exists with respect to whether this is obligation to fill it in a timely way at all.

And there is absolutely uncertainty to this day as to whether the Prime Minister's, we'll call it discretion, over the timing of Senate appointment is something that is untrammeled or whether it is subject to any known bounds. The courts have not ruled on that. We know former Prime Minister Harper issued numerous public statements purporting that the Prime Minister of Canada had the sole authority to decided whether to appoint or not appoint. Government today will say, "He's not the Prime Minister any more so don't worry about it," and that's fine and good if you only care about these Constitutional problems when they're closer to being a crisis point. But the fact of the matter is we've got two major political parties in the country that are in principle opposed to Senate appointments at all. And a Prime Minister of the day who, while he has stated an intention to fill vacancies, I suggest hasn't exhibited the behaviour that suggests that he recognized it's a Constitutional obligation to do so in a prompt

way.

There have been seven Senators appointed, there's no dispute about that. And perhaps when I speak more directly to mootness we can -- well, sorry I'll just do it now.

There's the Order in Council in Canada's affidavit material that established the independent advisory panel for Senate appointments. And that is at Exhibit E of Canada's motion record, it's the affidavit of Lyse Cantin.

JUSTICE: All right.

MR. ALANI: So Exhibit E of that affidavit is the Order in Council itself and then there is a schedule that appears as Exhibit F. And it's that schedule to the Order in Council that establishes the mandate of the independent advisory board for Senate appointments and the terms and conditions for the appointment of members.

JUSTICE: All right.

MR. ALANI: I won't go through all the provision in detail, but at a high level I think it's fair to say that the intention here is that there is going to be some permanent federal members and then ad hoc provincial representative that will consider each vacancy. In section 2(4) of the schedule it says:

> "The provincial members must participate only in deliberations relating to existing and anticipated Senate vacancies in their

1 respective province or territory."
2 Section 3 sets out the terms of
3 individual members, and then Section 6 talks about the
4 recommendation process itself. But in terms of
5 timelines, the only timeline that I'm aware of besides
6 the terms of individual members is the time within which
7 the advisory board must provide a report following each
8 set of recommendations.
9 In fact, what I think is instructive is,
10 if you look at Section 3(4) of the schedule, it says:
11 "The advisory board is to be convened at the
12 discretion and on the request of the Prime
13 Minister, who may establish, revise, or
14 extend any of the timelines set out in this
15 mandate."
16 So even though you've got an Order in
17 Council that purports to clothe in legal machinery the
18 establishment of this advisory board, and it does, in
19 terms of the timeliness of when it's going to be
20 convened to make recommendations, is entirely at the
21 discretion of the Prime Minister. And if you were to
22 just look at the Order in Council, you would think the
23 Prime Minister has untrammeled discretion over when that
24 occurs.
25 Now, when the Prime Minister initially
26 established this advisory board and made the first round
27 of appointments, there was of course a press release,
28 and that's included in the Cantin affidavit as well, at

Exhibit G. And when the committee -- sorry, when the advisory board made its recommendations, there was an announcement of that, that the Prime Minister was recommending seven appointments.

So we've had the seven appointments, which we always knew was going to be this first transitional round of appointments for Manitoba, Ontario, and Quebec. But aside from statements in press releases, we have nothing telling us when the government intends to make the further appointments needed to recommend filling the 19 vacancies that still remain.

There is, as far as I know, been no press release. There is certainly nothing in the evidence before the court to suggest that the Prime Minister has appointed the provincial representatives without whom the advisory board can't even meet to consider nominations for any of the 19 existing vacancies. So as it stands today, as far as this -- as far as I'm aware, and as far as the evidence before this court suggests, the Prime Minister is doing nothing to fill the remaining 19 vacancies. There is no group of people sitting in a room considering how those appointments are going to be filled. And so we have no indication at all that those 19 vacancies are going to be filled any time soon.

Now, I don't purport to say that it's unreasonable that this new innovative process takes some time. I mean, one option was obviously for the Prime

Minister on Day One or Day Thirty to just make a round of appointments. Now, he's, to his credit, come up with a new process, and I don't think it's unreasonable that they've done that incrementally. I think the problem that still remains is it seems to be the position of the government of Canada, certainly in this litigation, that there is nothing constraining the Prime Minister's discretion to stretch that process out as long as he wants. And that, in a nutshell, is why this case cannot be moot.

At this point, I think it would be helpful to review some of the debate, the exchanges, that took place, particularly like in the Senate committees when the Bill I mentioned previously was up for debate. Because I think there are some exchanges reflected in those transcripts that not only illustrates the fundamental uncertainty about whether this obligation exists, but I think it also grapples with some of the -- you know, the practical problems posed by accumulated Senate vacancies.

So if I could take the court to my book of authorities, and this is at my second volume. I'll start at about page 716.

JUSTICE: Seven sixteen, did you say?

MR. ALANI: Seven sixteen.

JUSTICE: All right. I'm there.

MR. ALANI: So in the bottom left-hand page, this is going back to the effect of Senate

vacancies on the constitutional principle of protection of minorities. And Senator Joyal, towards the end of the page, is talking about the *Secession Reference*. And he says:

> "I want to take it to another level. In the *Secession Reference*, the Supreme Court clearly stated that there are four fundamental principles enshrined in the Constitution. There is constitutionalism and the rule of law; there is democracy in reference to the decision I mentioned earlier, in the preamble to the Constitution. There is federalism. And then there is protection of minority rights."

And he goes on in the next paragraph to say:

> "The protection of minority rights is enshrined in the Senate's structure by the distribution of seats. As you know, the distribution of seats in the Senate is not on the basis of representation by population, as it is in the House of Commons. In other words, smaller provinces are over-represented in the Senate, and some provinces are not represented well enough in the Senate."

In the next paragraph, he says:

> "If regions where minorities are concentrated are not represented in the Senate because of depletion, are we not in breach of another

1 constitutional principle, which is the
2 protection of minority rights and their voice
3 in the legislative process as it is
4 structured in the present Constitution?"
5 Of course, Senator Moore, who is the
6 sponsor of the Bill, you know, repeats his view that
7 this is absolutely irresponsible and contrary to the
8 Constitution. This, again, is against the backdrop at
9 the time of a Prime Minister who actively said he wasn't
10 going to appoint any more Senators, because there wasn't
11 political pressure or demand from the public to do so.
12 But later in this exchange, they're also
13 talking about what the constitutional remedy would be.
14 In other words, what's the fix to the problem they found
15 themselves with? Senator Moore asks, "What is the
16 constitutional remedy?"
17 "SENATOR JOYAL: Yes. How can we force the
18 Prime Minister to make recommendations to the
19 Governor General to appoint Senators to a
20 level such that those principles could be
21 satisfied?"
22 And they go on to talk about the
23 convention of the Governor General having responsibility
24 under the Constitution to fill the vacancies; the text
25 of the Constitution. Then they go on and they do this
26 in several places in the transcripts. They kind of talk
27 about this doomsday scenario where, but for court
28 intervention, the Governor General at some point is

1 going to have to figure out on his or her own whether
2 to, you know, pull the nuclear option, and either
3 dismiss the Prime Minister or fill the vacancies without
4 advice. And I suggest that that is not an optimal
5 scenario, and one of the outcomes that the
6 parliamentarians discuss is, if there were a court
7 decision, that could help inform the Governor General as
8 to at what point it's become unconstitutional, or not.
9 So while I described earlier one scenario
10 following the issuance of the requested declaration,
11 that Parliament steps in and clarify what an acceptable
12 reasonable timeline is. You know, failing that, and
13 failing further litigation, I guess the other outcome is
14 the Governor General, who is a party to this litigation,
15 of course, would have the benefit of the court's
16 interpretation and could use that to make a more
17 informed decision about how to exercise the powers of
18 the Governor General.
19 Which I think most people would agree is
20 a more legitimate exercise, if it ever had to come to
21 that, of the Governor General's powers than just
22 deciding in a room without any input, certainly from the
23 judiciary whose job it is to interpret the Constitution,
24 that would be a much more legitimate exercise of power
25 with the court's input.
26 And in terms of timeliness, I'll just
27 point out to the court, on page 719 of this book of
28 authorities, there is a discussion about how they come

up with 180 days. Senator Andreychuk in the penultimate paragraph on page 719 asks:

> "Why did you pick 180 days? The Constitution in this area was crafted, and I think our Constitution was ingeniously crafted, to give this wide discretion to a Prime Minister. It was there for a reason. It was not there by accident."

And then Senator Andreychuk suggests that this legislation which fettered the Prime Minister's discretion to 180 days, and asks why that's fair. Senator Moore, on the next page, acknowledges that and says:

> "Regardless of what political stripe the person holding the office of Prime Minister may be, it's still a denial of the constitutional right of the Canadian citizen to have timely and proper representation in each House of Parliament. I chose 180 days to be consistent with…"

and then he references the *Parliament of Canada Act* for filling by-elections. He says:

> "Obviously a bit of breathing period after the actual vacancy is required, hence the 11th day for the House of Commons by-elections."

But that was the basis of his thinking in proposing that time period.

So, there may be no obviously correct answer as to what the time period should be. And maybe it's not a fixed period of time. Maybe it's -- you know, a polycentric issue where you look at a number of factors. And as I get to the cross-examination transcript of Professor Manfredi, I'll touch on what some of those factors might be.

JUSTICE: All right.

MR. ALANI: My point is that there must be a constitutional limit to when -- how long those vacancies can be left unfilled.

At page 724 and 725, it's the highlighted section. There is discussion in the Senate committee about a province seeking a Reference opinion from their Court of Appeal on the obligation to fill seats in the Senate. And over onto the next page, there is, you know, a somewhat academic discussion of various ways in which the issue could be brought before the court, which I won't go into detail. But I think it's noteworthy that parliamentarians themselves have engaged in these discussions and have specifically contemplated the court taking a role in informing the issue.

And since I've just referred to this hypothetical possibility of provinces seeking a Reference, I believe this is reflected in the materials, I of course have invited the provinces -- I've given notice of the proceeding twice to all of the provincial Attorneys General, so that they certainly have notice of

this proceeding. I've invited them, if they're interested, to apply for -- to intervene. None of them have done so. And I have asked each of them to let me know if they were planning to bring their own provincial Reference. Of course, none of them have.

I understand the respondent's response to that is, well, that just means -- you know, I'm putting words in their mouth, but frankly, no one cares. The provinces have better uses of their time and resources than to seek the court's opinion on this. And that may well be.

I think it's pertinent to standing, because one of the things the court needs to consider is whether there is an alternate reasonable and effective way of bringing the issue to resolution certainly before the courts. And so I think the court can take as a given that the provinces are aware of the issue, have been invited to bring their own Reference, and none of them have done so.

JUSTICE: Okay.

MR. ALANI: So, one of the issues I'll be talking about more robustly in my discussion of standing generally is, you know, where else is this going to come from?

Subject to the court's preference, I think I'd next turn to addressing the issue of jurisdiction.

JUSTICE: Mm-hmm.

MR. ALANI: And that tracks my argument at -- beginning at page 329 of my record.

JUSTICE: Please continue.

MR. ALANI: So, I think the parties are *ad idem* on the fact that under Section 18.1, in order for the Federal Court, as a statutory court, to have jurisdiction, the application must engage a federal Board, Commission, or other tribunal. And the definition of a federal Board, Commission, or other tribunal in turn turns on whether there is a body, person, or persons having, exercising, or purporting to exercise jurisdiction or powers conferred -- and I've taken some words out, but by or under an order made pursuant to a prerogative of the Crown.

Sorry. One of the ways that the Federal Court would obviously have jurisdiction, if there was an *Act* of Parliament that set out the Prime Minister's jurisdiction. And I concede there is none. There is no statute that says the Prime Minister must appoint these Senators. And so I say the advice-giving role falls under the prerogative power.

And I recognize that that is a seemingly tough hill to climb, if for no other reason than because there is no case law that recognizes the Prime Minister's advice-giving role as being an incident of the Crown prerogative.

Before I go into the detail of why I say the Prime Minister's advice is provided pursuant to a

prerogative of the Crown, I think it's worth reflecting, you know, at a level of principle the purpose of the Federal Court in the first place, which of course is to provide a national unified judicial review court for -- to review all federal executive decision-making. That was clearly the intent of the Federal Court, and the Supreme Court in *TeleZone* makes that clear.

At paragraph 73 of my submissions, I reference -- I reproduce the Supreme Court's comments in *TeleZone*. Paragraph 73 again:

> "The enactment of the *Federal Court Act* 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."

And in terms of what an application for judicial review is, in principle, the court says that under the *Federal Courts Act* it combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with the claim for one of the kinds of relief listed in Section 18(1). It is only this procedure that is in the exclusive jurisdiction of the Federal Court.

And so I say at paragraph 74 that the Prime Minister's role as a federal Board, Commission, or other tribunal in the context of providing advice to the Governor General on filling Senate vacancies is exactly

consistent with Parliament's intent to give the Federal Court exclusive jurisdiction to review federal decisions having a large national impact. If the Federal Court doesn't have jurisdiction, leaving aside all the other procedural objections, then of course the practical outcome is that the Section 96 courts would have jurisdiction. And at the end of the day, if the court interprets the case law and the *Federal Courts Act* to say that that's the result, and that's the results, I suggest that that result is inconsistent with the purpose and intent of the Federal Court's creation in the first place.

So, turning to how this is an exercise of the Crown's prerogative, at paragraph 76 I refer to an article by Professor Mark Walters. And I will take you to that, because it's really kind of a rare example of a kind of doctrinal examination of what the Crown prerogative means in relation to providing advice to the Crown.

This is in my second book of authorities, and it's at page -- and if I could take the court specifically to page 628.

JUSTICE: All right.

MR. ALANI: Sorry, just beginning at the end of page 627. After reviewing the *Black* case, the *Conrad Black* case, Professor Walters describes a theory of constitutionally relevant Ministerial advice, and he says:

"We must go behind the written text of the Constitution of Canada to common-law context for guidance."

He points to the establishment of the Privy Council in Section 11, which I've already mentioned. He says:

"That doesn't exist in the air, but rather exists against a historical narrative that helps us to understand its role within modern Canadian Constitution."

He says:

"The legal status of the Privy Council derives originally from the feudal origins of the English *Constitution*. The legal relationship between a feudal lord and his tenements was based on the relationship of tenure. Tenants who held land from the lord owed various incident services and duties, one of which was attending the lord's manorial court to give counsel. The common law came to see it as incident to the manner that the lord held the right to hold an assembly or court of his tenants for this purpose.

The right of the mediaeval king as lord paramount to gather his tenants-in-chief in a *curia Regis*, or royal court, may be seen as this legal right writ large. As Dicey states in his study of the Privy Council:

'The interchange of advice between the King and his nobles was an inherent part of every feudal monarchy; something demanded of nobles as a show of submission and allegiance to their sovereign lord.'"

He goes on to show the evolution of that feudal *curia Regis* to the current Privy Council. He says:

"It follows that the act of attending upon the Crown to give advice in the Privy Council was not in itself a power or a right, but better described in law as either as a privilege derived from the Crown's prerogative act of summoning the advisor, or more accurately as a form of common-law duty."

So in Professor Walters's account, if you go back historically to feudal times, you see the evolution of the common law itself, a prerogative right of feudal lords to summon advisors, which has translated today to a common-law duty on Ministers to provide advice.

The word "privilege", I suppose -- sorry, not "privilege" but the word "prerogative" gets thrown around a lot. But it hasn't really been clearly described, I think, in the case law. So we know from specific examples of what it includes. So we know, for example, from *Khadr* that the prerogative powers include

the conduct of foreign affairs. And we know from *Black* that it includes the awarding of honours. But it's described, kind of writ large, as just the residue of all Crown authority.

I think a good description of that is in my supplemental book of authorities at page 7. So, this is an excerpt from A. V. Dicey which of course is, you know, the grandfather of constitutional law, who is referenced by the Supreme Court of Canada in the *Patriation Reference*. And Dicey says, when he is talking about, you know, what is -- what are constitutional conventions and how do they relate to the prerogative, he describes at the bottom of page 7, that:

> "They all, on close examination, possess a common quality or property. They are all, or at least at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown or of the Ministers as servants of the Crown, ought to be exercised."

He's talking about constitutional conventions. And on the next page, on the second side of the page, he says:

> "The discretionary powers of the government mean every kind of action which can legally be taken by the Crown or by its servants without the necessity for applying to Parliament for new statutory authority."

He goes on to say:

"The doing of all these things lies legally at any rate within the discretion of the Crown. They belong therefore to the discretionary authority of government."

And you'll see in the heading towards the side of the page, he's talking about constitutional conventions as being mainly rules for governing the exercise of the prerogative.

On to the next page, this is page 8 of my supplemental book of authorities.

JUSTICE: Yes.

MR. ALANI: The highlighted passage. Dicey says:

"The mode in which such discretion is to be exercised is or may or be more or less clearly defined by the *Act* itself, and is often so closely limited as in reality to become the subject of legal decision, and thus pass from the domain of constitutional morality into that of law, properly so-called. The discretionary authority of the Crown originates generally not in an *Act* of Parliament but in the prerogative, a term which has caused more perplexity to students than any other expression referring to the *Constitution*. The prerogative appears to be both historically and as a matter of actual fact, nothing less than the residue of

1 discretionary or arbitrary authority which at
2 any given time is legally left in the hands
3 of the Crown."
4 On page 10, Dicey says:
5 "Since, however, by far the most numerous and
6 important of our constitutional
7 understandings refer at bottom to the
8 exercise of the prerogative, it will conduce
9 to brevity and clearness if we treat the
10 conventions of the *Constitution* as rules or
11 customs determining the mode in which the
12 discretionary power of the executive, or in
13 technical language, the prerogative ought –
14 that is, is expected by the nation – to be
15 employed."
16 So Dicey, from whom Canada imports much of its
17 understanding of constitutional conventions generally,
18 saw conventions as rules constraining the exercise of the
19 prerogative.
20 That acknowledgement is coherent with
21 what Professor Walters is describing in his account of
22 Ministers having a common-law or a prerogative duty to
23 provide advice. Because of course we're talking about
24 the convention of responsible government. Put that back
25 to Section 2 of the *Federal Courts Act*, which is talking
26 about the jurisdiction of the court, as being framed in
27 either the exercise of an *Act* of Parliament or a
28 prerogative, it all makes sense that the role of the

Prime Minister providing advice as part of the system of responsible government is all part and parcel of the Crown prerogative. The Governor General has the legal and formal power to make the appointments, but by convention the Governor General is only going to do so on the advice of the Prime Minister. And so when the Prime Minister -- the Prime Minister in providing that advice is giving effect to the Crown prerogative.

With respect to standing, there are a number of points that the government makes in its submissions. And I think it's useful to look at the leading authority, which is cited throughout Canada's representations, which is the *Downtown Eastside Sex Workers* case at tab 6. Sorry, tab 6 of the respondent's authorities. And what the court is obviously talking about here is trying to understand the underlying principles as to why we have a law outstanding and why there's this procedural gate that allows the court to decided, you know, basically how to stop the flood gates from having a whole bunch of litigants coming in and bringing cases. The court says:

> "…it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter."

So it's clearly recognized that limitations are needed so that

> "…courts do not become hopelessly

1 overburdened with marginal or redundant
2 cases…"
3 and that a law of standing is needed:
4 "…to screen out the mere 'busybody' litigant,
5 to ensure that courts have the benefit of
6 contending points of view of those most
7 directly affected and to ensure that courts
8 play their proper role within our democratic
9 system of government."
10 That's at the first paragraph of the decision.
11 And what I'll do next is go through the
12 three facts that the court identifies as being ones the
13 courts must consider. At paragraph 3 of the decision
14 the courts asking, we've got these three factors and an
15 issue in the appeal is whether those three factors are
16 to be treated as a rigid checklist or simply as
17 considerations to be taken into account and weighed in
18 the exercising of judicial discretion. And the court
19 emphatically concludes that it's the latter approach
20 that's correct, that you look at these factors and you
21 determine whether they militate to a result that serves
22 the underlying purposes of the law of standing.
23 And so I will just take the court through
24 sections of the judgment where they talk about these
25 individual factors and make my submissions on why I
26 ought to be granted public interest standing in this
27 case.
28 The first is at paragraph 26 of the

decision. And there the court is talking about scarce judicial resources as being a factor that's:

> "…not concerned with the convenience or workload of judges, but with the effective operation of the court system as a whole."

In my submission in order for this factor to apply in this case, the fact alone that this case was brought would presumably need to have some identifiable undue impact on the operation of the Federal Court. It's been case managed. Deadlines have been followed. Orders have been compiled with. And excluding the two days set aside for the hearing of the application itself, this application has given rise to an unsuccessful motion to strike, an unsuccessful appeal of that dismissal of the motion to strike, and my unsuccessful motion to abridge the time limits.

All of these were dealt with according to the rules with the assistance of case management and they were promptly adjudicated. If this case has hopelessly overburdened the Federal Court or if it spawned an unnecessary proliferation of marginal redundant cases, I must say that the court has not shown any outward pressure or signs of buckling under it.

At paragraph 27 the court discusses a concern about "mere busybodies" requiring the court to consider whether granting standing would:

> "…undermine the decision not to sue by those with a personal stake in the case."

In other words I kind of think of it as, you know, a negligence law. If you start to perform a rescue, other people rely on that and stay off to the side, so if you screw up you're going to be found negligent.

I think what the court is politely trying to say in this section of the judgment is that we shouldn’t let applicants bring challenges for fear that they might drop the ball by negligently prosecuting the case, disappointing others who had a legitimate expectation that if they had brought the challenge themselves they could have done a better job and gotten, you know, what some might describe as the right judicial outcome.

And so in order to decide whether that concern is a relevant factor in this case, I ask the court, who, other than me, would have a sufficiently specific and factually established complaint? Who out there decided not to bring the same or substantively similar constitutional challenge because they read about this case and said, "Don’t worry, it's been taken care of." Now if there were any evidence before this court that that hypothetical person is out there or organization is out there and they relied on the existence of this case, didn’t bother applying for intervener status but just relied on me, then it would be another story. But as counsel for the respondents brought out in cross-examination on my transcript, there's no other organization out there that's dedicated

to the cause of filling Senate vacancies.

If this were a concern I'd suggest it's a risk mitigated in a few ways. One is that throughout the litigation I have tried to be as transparent as possible about the conduct of the litigation. Copies of all filed court materials including the written arguments, affidavits, cross-examination transcript, have all been promptly posted on a website for free so anyone who wanted to take a look could. If someone was concerned that I was doing a disservice to the position, the position that I take with the courts, they could have sought intervenor status or brought their own application. I guess the provinces could have also done the same, they have not.

I think it's also very relevant to look at the specific questions asked by Canada in cross-examination and referenced in their written submissions if only because by looking at those questions it gives you an idea of what in Canada's mind a proper non-busybody litigant, what characteristics that person would have. They make a point repeatedly of pointing out from my cross-examination that I'm not personally seeking a Senate appointment. And the question I ask the court is whether the court insist that in order to bring this application an individual must personally be gunning for a Senate appointment or lobbying on behalf of someone else who is.

Does an applicant really have to have

first appeared as a witness before a Senate committee or sought the specific support of a senator for a particular cause in order to challenge the failure to fill Senate vacancies?

With respect to my concession that the failure to fill Senate vacancies -- I'm not raising a charter violation, I ask whether the alleged constitutional violation in question has to specifically emanate from the charter itself as if noncompliance with the text of the *Constitution Act, 1867* is somehow less pertinent.

And lastly, I ask the court to consider whether it serves any useful purpose to require an individual applicant to have suffered financial harm or physiological trauma before the court will consider whether the constitution is being violated. And if you take the questions that came out on cross-examination on my affidavit and you look at Canada's submissions, you'd be left with the impression that as far as the government of Canada is concerned unless you meet one or more of those requirements you have no business challenging the Prime Minister's non-filling of Senate vacancies.

I submit that at the end of the day there is one question the court should be asking itself, and the Supreme Court points out this in paragraph 29 of the *Downtown Eastside*. And the principal question I suggest is, is the court able to depend on the parties to

present the evidence and relevant arguments fully and skillfully. Obviously in *Downtown Eastside* the Supreme Court granted public interest standing, but the plaintiffs there were represented by top constitutional lawyers in the country. I'm no Joe Arvay, I easily concede that.

And I'll be the first to admit that there is more preparation, more authorities I could have cited, more arguments I could have developed in order to establish the position that I set before the court. At the end of the day I think the question under the standing heading is is there enough? Is the court going to be forced to make a decision without the benefit of enough skillful argument or without having brought the relevant materials and fact before the court?

And I think at that point, without repeating my written submissions the next logical place I think to go is the factual evidence before the court in the form of the Manfredi affidavit. I don’t imagine I will be more than about really an hour subject court's questions.

JUSTICE: I see.

MR. ALANI: So I'm in your hands as to whether you want to time the break accordingly.

JUSTICE: Yes. I think we should take a break now, Mr. Alani. So we'll take ten minutes, please.

MR. ALANI: Thank you.

(PROCEEDINGS ADJOURNED FOR A BREAK AT 10:47 A.M.)
(PROCEEDINGS RESUMED PURSUANT TO BREAK AT 11:01 A.M.)
JUSTICE: Mr. Alani?
MR. ALANI: Justice O'Reilly, before I continue, just as a housekeeping check-in, in terms of timing, as I mentioned before the break, I don't imagine I'll be more than about an hour, of course, subject to the court's questions.
And I understand from speaking with counsel for the respondents that, again, subject to questions from the court, we may therefore be able to end today.
JUSTICE: Right.
MR. ALANI: Subject to, you know, what happens between now and the end of the day. I'm going to premise that all on the assumption that I'm very deliberately not repeating what's in my written argument, in part because obviously one of the benefits of written argument is, you have a lot of time to sit down and collect your thoughts and write things down, and part of me feels, in addition to being repetitive, I would find a way of making less clear in my oral submissions what I have attempted to set out in my written submissions. So, there is certainly nothing in my written argument that I don't stand on.
JUSTICE: No.
MR. ALANI: There is no position I abdicate. So in reliance of you having read the

materials, I will not repeat them.

JUSTICE: Certainly, yes. That's fair enough.

MR. ALANI: So with the time that I have left, what I'd like to do is speak briefly about conventions. Because a major objection, as I understand it, is that what makes this case non-justiciable is the involvement of constitutional convention. So I'll speak to that.

I'm then going to talk about the -- I'm going to go through Professor Manfredi's affidavit and cross-examination and then I would conclude by speaking to costs, unless you'd like me to save that for reply.

So, with respect to conventions, as I understand the objection to justiciability is rooted in the Supreme Court's comments in the *Patriation Reference*, again, incorporating portions of Dicey's writings. That imports a world-view from the 19th century where constitutional conventions were seen as being in a sort of water-tight compartment distinct from the law. So you have the law, which could be enforced by the courts, and you had constitutional conventions, which is its own sphere of morality.

And what I argue in my written representations is, since the 19th century, and indeed even since the *Patriation Reference*, the court's thinking on the role of convention, I think, has evolved to a point where we can think of them at least in

certain cases as being part of the *lex non scripta* of the *Constitution*. Certainly I'm not suggesting that every constitutional convention out there is one that can or even ought to be enforced by the courts. For example, I'm not suggesting that, you know, the convention around having a specific regional representation on Cabinet or on the Supreme Court of Canada is of a type of convention that should be enforced by the courts.

But there are certainly conventions recognized in the academic literature as being fundamental conventions, and responsible government is one of those fundamental conventions. Such that it's not just a fundamental convention, but I submit it's risen to the point where it can be recognized as one of those basic assumptions underlying the *Constitution*.

So whether the court sees itself as recognizing and enforcing a convention, or giving effect to the preamble to the *Constitution Act*, or recognizing the import of Section 11, which establishes the Privy Council, or drawing on unwritten principles, or simply giving effect to the internal architecture, you all get to the same place. And I suggest that's no accident. It's, you know, in law, all paths should lead to the same coherent result.

The experience of the courts in dealing with conventions I think bears this out. And one of the authorities I'd like to go to is in my supplemental book

of authorities. It's the Marshall text.

JUSTICE: Mm-hmm.

MR. ALANI: I begin at page 36 of my supplemental book.

JUSTICE: All right.

MR. ALANI: And there is a section here where Marshall talks about conventions and the courts. And there is a highlighted passage on page 13 of the Marshall text where he writes:

> "Nevertheless, the way in which courts do take notice of conventions and in certain senses give legal effect to or derive legal consequences from conventions needs some analysis. Convention recognition may be classified under several separate heads."

He goes on in the rest of -- there's a highlighted passage towards the end of the page where he recognizes that:

> "…some conventions (especially those of responsible government) may be incorporated by name or reference into a constitutional instrument, as British conventions or the rules of British Parliamentary privilege were in some Commonwealth constitutions."

Then he specifically gives the example of the *British North America Act*, declaring Canada being

> "…federally united 'with a constitution similar in principle to that of the United

1 Kingdom,' thus importing by reference a
2 number of Parliamentary conventions."
3 And then on page 37, Marshall goes on to
4 acknowledge that:
5 "Thirdly, conventions may be the subject of
6 inquiry in the course of statutory
7 construction."
8 And on page 15, he kind of summarizes a number of
9 examples of where the courts weren't, he says,
10 necessarily applying or enforcing conventions in the
11 sense of treating them as direct sources of law distinct
12 from legislative enactment or previous common-law
13 decisions. He says:
14 "It might be said here that the courts were
15 applying law, not convention, and that the
16 notice taken of the conventions merely helped
17 to clarify what the existing law was in
18 various ways. For example:
19 (1) by being a part of the material that was
20 enacted into law.
21 (2) by helping to elucidate the background
22 against which legislation took place, thus
23 providing guidance as to the intention of the
24 legislature where the meaning of the statute
25 had come into question.
26 (3) by constituting a practice or set of
27 facts that fell under an existing legal
28 doctrine."

So, I submit that what Marshall is talking about there is really using conventions as sort of social facts; as examples of the assumptions that make up the internal architecture of the *Constitution*. In other words, go ahead and, as courts have done, use conventions or at least some of them, like responsible government, as providing the context you need in order to interpret the textual provisions of the *Constitution*. Because if you don't do that, your interpretation of the *Constitution Act, 1867* provisions on the appointment of Senators is going to be an interpretation that candidly makes no sense to any Canadian.

I'd also like to address what I understand to be an objection to -- what would happen if the courts plainly gave effect to the constitutional conventions like the one that the Governor General won't appoint senators other than on the advice of the Prime Minister. Dicey would have said that the whole point of conventions is that they maintain their flexibility. They can adapt if the political morality changes, and if you crystallize those conventions into a common-law decision, then you've got a problem.

My answer to that is, that the common law itself, including the constitutional common law, is by design an adaptable -- I'd argue a nimble methodology in itself.

If you accept today the convention, as the Supreme Court of Canada has confirmed, that the

Governor General will not appoint Senators other than the advice of the Prime Minister, and you issue a decision in 2016 that takes into account that convention, that social fact, that assumption of today's *Constitution*, and let's say that convention changes over decades or generations, so that in some future case, you know, it's no longer the case that that's the convention. Maybe 50 years from now under the framework for constitutional conventions, the Governor General appoints on some other basis -- a roll of the dice, whatever.

Then someone bringing a court case 50 years from now, as with any other, you know, exercise in the common law, the court would have to reflect on whether the convention reflected in your judgment still makes sense 50 years from now. And you know, when courts apply *stare decisis* they do that all the time, to see whether the facts that informed a precedent still make sense in the current day. It happened in *Bedford*, it happened in *Carter*. Courts change even the interpretation of the *Constitution* in light of changing social norms.

So I say it's not problematic that the convention of responsible government might be crystallized, at least temporarily, in the form of the court's judgment, by issuing the requested declaration.

On page 38 of the Marshall text, Marshall goes on to talk about the force and purpose of

conventions. And he specifically discusses the impact of a non-legal rule or convention that's declared to exist by a court of law. He says:

> "Does that declaration in any sense change the character or increase the obligation or binding nature of the convention? The answer would seem to be that it does not. Insofar as a convention defines duties or obligations, they remain morally and politically, but not legally, binding. Nevertheless, in one way a court decision may decisively change the situation since politicians' doubts about what ought to be done may stem not from uncertainty about whether duty-imposing conventions are morally binding, but from disagreement as to whether a particular convention does or does not exist."

And so he points out that courts, in their decisions, may be accepted as decisively settling a political argument about the existence of a conventional rule. Fortunately for us, there is absolutely no disagreement about what the political rule is insofar as the convention. And the only convention that's at stake is that the Governor General only appoint Senators on the advice of the Prime Minister.

And that distraction of conventions, and what the relevant conventions are in this case, is a

segue to the Professor Manfredi affidavit.

So just before I take you through some aspects of the Manfredi affidavit, I do want to make this general point. From Justice Harrington's decision on the motion to strike, keeping in mind that by design there could not be any evidence before the motions judge, had to take the pleadings as true, and so Justice Harrington was left in the unfortunate position of having to speculate as to what the evidence at the application on its merits might look like. And without the benefit of seeing what any of that evidence might look like, Justice Harrington contemplated that before the court might be some evidence as to whether there is a constitutional convention that imposes a time limit on when the Prime Minister must appoint Senate vacancies.

Now, it wasn’t within the scope of the motion to strike to get into the legal argument about why that could not be the case, that you could not have a constitutional convention that expands discretion, rather than limiting it. And I won't take the court through, you know, all the academic commentary that makes it perfectly clear. It is a constraint on prerogative, it is not an expansion on the powers in the constitutional text.

But without the benefit of that argument, and without being able to see what the evidence might look like, Justice Harrington speculated that the court would have evidence on what constitutional conventions

had formed.

Now, it being my position, as I've just mentioned, that no constitutional convention can give the Prime Minister more time to fill Senate vacancies than the constitution itself permits, I did not lead any expert evidence to that point. I think that is just a matter of legal argument.

The respondents, however, did tender an expert report from Professor Manfredi, and so against the backdrop of what I've just said, the primary submission I want to make with respect to Professor Manfredi's affidavit is that it is absolutely irrelevant to the outcome of this case.

What Professor Manfredi sought out to do, was to look at the historical record of how long it had generally taken to fill particular Senate vacancies since confederation. And of course he concludes that there is no particular time frame, and he concludes therefore that it has been up to the Prime Ministers. I am probably being unfair in summarizing that bottom-line conclusion but that was his approach.

Of course what I say is it really doesn't matter whether since 1867 Prime Ministers took zero days or 180 days, or 365 days. My contention, based on the constitutional logic and syllogism I described this morning is that the constitution itself imposes a standard of reasonableness. Whether that standard has been violated now by the previous Prime Minister or by

every Prime Minister going back to confederation would not change the fact that it is unconstitutional today. You don't erode a constitutional obligation simply by not following it for a really long time. You amend it through the amending formula, otherwise the constitution is what the constitution is.

And so with that preamble, I will go into why -- I'll point out what I think are some deficiencies in Professor Manfredi's analysis itself, and why the court should have pause when considering it, but I don't want that to distract from my principal submission which is that it doesn't matter what he says about past practice, it is up for the court to decide what the constitutional requirement is.

So, to start with, I'll mostly be going through the transcript of the cross-examination. I can refer back to the specific paragraphs of the affidavit, but I think it would probably be more efficient if I stuck to the transcript.

So, this is in my, the applicant's record, and I am going to start at page 245.

JUSTICE: All right.

MR. ALANI: And the first question I'll point out is question 6 where I ask about his areas of expertise, and he repeats from his affidavit that his areas of scholarly expertise are within political science, public law, Canadian politics, constitutionalism and judicial politics. And a theme I

am going to be coming back to is that as a preliminary matter, Professor Manfredi's expertise is -- I question his expertise based on some of his responses to the questions. But that's what he says his areas of expertise are.

At page 249, question 27, this is where we are going through his methodology. Sorry, it is not his methodology, some of the particular conclusions he identifies from his analysis of the historical data. At question 27 he confirms that half of all vacancies in the sample were filled in 213 days or less.

Sorry, I should go back and just remind the court what this methodology was.

What he basically did is took printouts from the parliamentary website, showing when each -- when there were changes to the standings in the Senate. So, when someone was appointed, when each senator since Confederation had died, resigned, retired, whatever, and then what he did is he took every fourth name on the list, and found out when, how long it took to fill that particular vacancy. So, one of his observations at question 27 was half of all vacancies in the sample were filled in 213 days or less, and then at question 28, at 49.1 percent of vacancies in the sample were filled in 200 days or less. Question 30, in terms of relativity, more vacancies were filled in 100 days than in any other 100-day increment.

Question 35, this is on page 251, this is

recalling an opinion Professor Manfredi gave, I believe in the *Senate Reform Reference*, and I put to him that it was his opinion that:

> "The essential function of the Senate is to supplement the legal guarantee of autonomy provided to the provinces by the *Constitution Act 1867* through a national political institution whose basis of representation is equality of sub-national units and whose purpose is to protect their interest through independent action."

That was Professor Manfredi's opinion of the Senate's essential functions, and at question 36 he confirms that that remains his opinion today as being one of the Senate's essential functions.

Question 39, this spans pages 252 and 253. I put to him straight from his affidavit, one of his quotes:

> "It is generally accepted by Canadian political scientists, that Constitutional conventions are non-legal rules that impose limits on how public office holders exercise their legal powers under the Constitution."

which he confirms that he accepts. I point that only because it goes to my overall point that even as Professor Manfredi confirms, conventions impose limits on the exercise of power.

On page 254, question 43, and this really

goes to Professor Manfredi's level of expertise, and his ability to even provide assistance to the court as an expert in the areas he points out. I ask at question 43:

"Q Is there a convention that a Minister without a seat in parliament must obtain a seat?

A I'm not sure.

Q You don't dispute that such a convention may exist?"

And the objection is:

"The witness answered the question. The witness says he doesn't know."

I go on at question 45 to ask:

"Q Sir, are you aware of a convention that permits the governor general to properly refuse the Prime Minister's advice for a fresh election within a period after a general election?

A I am not aware of such convention."

Question 46:

"Q Are you aware of a convention that any particular province be represented in cabinet?

A I am not aware that that is a convention."

Question 47 follows, and follows -- Professor Manfredi confirms that one of the areas in

which he says he is an expert is public law and constitutionalism, and so at question 49:

"Q If there were an existing convention that related to constitutionalism, you would expect, given your expertise to be aware of it?

A I would hope that I would be."

Further on in the transcript I'll come back to examples where Professor Manfredi acknowledges that those conventions may exist because they have been recognized by other academics.

Beginning at question 62, on page 258, I go through some questions questioning the methodology.

At question 61, we reference back to the Supreme Court of Canada's opinion in the *Quebec Veto Reference* that:

"Q '…recognition by the actors in the precedence is not only an essential element of conventions, it is the most important element.' Do you agree with that statement?

A That is what the Supreme Court declared, yes."

Question 62 we refer to paragraph 12 of his affidavit where Professor Manfredi deposes that one of the requirements for establishing constitutional conventions is determining whether the precedence establish a clear rule that Prime Minister has explicitly recognized and by which they consider

themselves bound. But, as we bring out in the cross-examination, because Professor Manfredi only look at the historical raw data, he didn't consider any statements made by Prime Ministers. You know, it was a flawed methodology to begin with. Even if there was a convention to be found, he fails to approach it in a way that even conforms to the established test for recognizing a convention.

On page 265, so this is continuing just from -- on his, on Professor Manfredi's CV he references a book review he published regarding Professor Andrew Heard's 1991 text on Canadian constitutional conventions, and at question 92, I put to Professor Manfredi that in his book review he stated:

> "Q …'Heard's argument that court should abandon legal formalism in order to give judicial recognition and force to the informal constitutional norms, based on political agreement that had superceded formal constitutional rules is in general, sound.'
>
> A If you say I wrote that, that's what I wrote almost 25 years ago.
>
> Q Does that remain your opinion today?
>
> A I would have to -- I can't -- I can't say that I specifically changed it."

So, it seems that to the extent Professor Manfredi is an expert in constitutional conventions, he

agrees with the logic of Professor Andrew Heard that that court should abandon this sort of legal formalism.

And again, not wanting to distract from my point that this entire exercise was kind of a fools errand in a way, because you can't possibly find a convention that would override what is in the *Constitution*, at least in terms of granting the Prime Minister more power, there are I think some gaps in his analysis that the court should note in determining how much weight to give it.

At questions 200 -- at pages 270-271, beginning at question 113, this is referring to a footnote in Professor Manfredi's affidavit where he acknowledges that there was an outlier, there was just an obvious outlier in his sample set. And he hypothesizes that that outlier resulted from when Prime Minister Mulroney appointed eight additional senators under section 26 of the *Constitution Act* in 1990. He answers:

> "A That was speculation, I was trying to understand why that outlier would exist, yes."

And then he restates a data table that excludes that single hand-picked outlier. But I put to him in question 115:

> "Q Did you otherwise account for the impact of the other seven additional senators?
> A While this wasn’t really about

accounting for the other seven additional senators, this was just trying to understand why would that particular vacancy have taken so long to have been filled."

So he's done this sample set, he's recognized one particular result seems horribly outlandish. He's going to manually create another table that accounts for that. His hypothesis is that outlier exists because of these eight additional senators, but he doesn't go back to think about, "Well, what about the seven other outliers, might that have affected my analysis?"

And then the next section of what I suggest are shortcomings in his approach begin at page 273 of the transcript. And so the overall theme of these questions is when you just look at the raw data, the black and white number of days it took to fill a vacancy, you lose a lot of context. And what these questions are aimed at eliciting is that none of that context was taken into account in reaching his conclusions.

For example, beginning in question 121 -- or sorry, question 124:

"Q Did your analysis account for the impact the caretaker convention might have had on the timing of Senate appointments?

A I didn't calculate that specifically."

Q But you agree that a delay in filling

Senate vacancies might be explained in part by the caretaker convention?

A If one were to go through and deduct all of those periods you might get some slight changes in the analysis, yes."

At question 130, this is on page 275, these are questions relating to -- in professor Manfredi's affidavit he cites some statements by former Prime Minister Mulroney. Prime Minister Mulroney is suggesting to the then Prime Minister that there should be a moratorium on Senate appointments until certain changes have been made. And Professor Manfredi argues in his affidavit that the fact that Prime Minister Mulroney made these statements is evidence that no convention exists prohibiting a moratorium on Senate appointments.

However, at question 131 he acknowledges that he did not consult with Mr. Mulroney before making his affidavit. He was relying exclusively on his reported statements. At question 136 he acknowledges that Mr. Mulroney had been out of office for approximately 22 years when he made the statement. Question 138 I ask:

"Q Do you agree that when Mr. Mulroney made these statements he likely wouldn’t have had the benefit of the same advice about conventions he would have had when he was sitting Prime Minister?

A I don’t know to whom he spoke before he made those statements."

And most importantly question 139:

"Q In your opinion, when Mr. Mulroney made these statements would he have been considered a relevant political actor would could have been bound by convention himself?

A At the moment he made the statement?

Q Correct.

A No."

Moving to page 284, I'm just going to go through a number of factors each of which professor Manfredi acknowledges he didn’t adjust for to take into context, but I also refer to these possible factors that might, either in the context of the court's judgment or in any subsequent elucidation of what constitutes a reasonable framework, might guide what a reasonable time is to fill a particular vacancy.

JUSTICE: Okay.

MR. ALANI: So for example, at question 161:

"Q For example, there's no adjustment for the caretaker convention?

A That's correct."

Question 162:

"Q Was there any adjustment made to account for the time taken to fill vacancies from Quebec, for example, where a senator must be

from a particular district?

A No, there wasn’t.

Q Did you adjust for the reason a vacancy arose, for example, an unexpected death as opposed to an anticipated mandatory retirement?"

A I did no do that, no.

Q Did you account for the relative standings of the political parties within the Senate at the time the vacancy arose?

A No, I did not.

Q Did you account for whether the Prime Minister in office at the time the vacancy arose was relatively new to the job rather than a longer term incumbent?

A Not specifically but I think the covering across time probably captures that to some degree."

There's no adjustment for improvements in the speed of communication since Confederation. There's no accounting for whether there were constitutional reforms being actively negotiated while Senate vacancies were left unfilled. It doesn't take into account whether a Prime Minister's preferred appointee was unavailable to take office before a specific date. I imagine that's a probably a relevant factor in filling judicial vacancies, for example, if you have to wrap up a partnership or something before you can take off. The

same might apply to senators.

Question 169:

"Q Does it account for the size of the population of the province from which the Senate vacancy arose?

A Only in a sense that the sample is roughly proportionate to the number of Senators appointed in each of the provinces and territories."

Question 171:

"Q Did it account for differences in the time taken to fill vacancies between periods when Canada was engaged in war versus peace time?

A It didn’t make any specific account for it, no.

Q Did it account for the number of recently appointed Senators who, let's say, were in the early stages of being absorbed into their new role? Did your analysis look at whether the time it took to fill the vacancies … might have been affected by how many other appointees had been made in the recent past?

A No."

And a simple point at questions 175 and follows is that Professor Manfredi confirms in reaching his conclusions about what conventions may or may not

have been formed, he did not consult with any Governor General or any Prime Minister who would have been bound by the conventions themselves.

It's not a substantial point, but at page 294 -- I won't take you through the whole round of questioning, but Professor Manfredi does acknowledge that his list suffered from data entry and reading errors. In other words, it came out in cross-examination that when you actually look at some of the pairs, just by inadvertence they were -- you know, a vacancy filled in New Brunswick actually arose from a vacancy in Ontario, so the data's just wrong.

But again, at the end of the day, my position is it doesn't matter because it wouldn’t have mattered what he found, at the end of the day, you can't constitutionally justify prolonged Senate vacancies because historically that's how its been done.

And just because I'd said I'd come back to it, at page 303, question 245 at the end of the page:

> "Q Earlier I asked you about whether there was a convention that permits the Governor General to properly refuse the Prime Minister's advice for a fresh election within a period after a general election, and you stated that you were not aware of such a convention."

And then I go on to quote Professor Heard's most recent text on Constitutional Conventions

where he writes:

"'A general rule prohibits the granting of elections to a government within a relatively short but undetermined length of time after it has already been granted an election.'

Do you agree that such a rule exists?

A Well, that's what Professor Heard -- I would defer for the moment to Professor Heard's statement, but I would have to look at it more closely to determine whether I agreed or not."

And question 246 I remind him about the questions on what I suggested was a convention that a particular province be represented in Cabinet, and then I had understood Mr. Manfredi to answer that he was not aware of any such convention. And I refer him to Professor Heard's text on the point. And at question 246 his answer:

"A Again, I would defer to Professor Heard on that point until I did further research to determine whether I agreed or disagreed."

And then finally, question 247 I put to him Professor Heard's description of the rules on provincial representation in Cabinet, which again Professor Manfredi at question 248 describes as sounding historically accurate to him and he would defer to Professor Heard until he could would find contrary evidence.

All this to say that if the government is relying on Professor Manfredi as their expert on constitutionalism and constitutional conventions, I'd say it's open to the court just by -- I mean first of all, anyone could have done the same analysis, it's just a matter of arithmetic. That doesn't require an opinion expert to weigh in on. So you don’t need to rely on him for that and you shouldn’t penalize me for not having tendered an expert report for something which I suggest was open to the court to infer from my controversial facts.

But also to the extent the court is otherwise asked to rely on Professor Manfredi's conclusions about what conventions exist and don’t, I say to the court that Professor Manfredi himself in cross-examination does not appear to be aware of key constitutional conventions and only acknowledges the possibility they exist when another academic is specifically cited on the point. So that's all I have to say about Professor Manfredi's affidavit.

JUSTICE: Okay.

MR. ALANI: The final comments I'd make are simply with respect to costs.

JUSTICE: All right.

MR. ALANI: Since I believe the application record was perfected, the Supreme Court of Canada issued its decision in *Caron*, which I've cited in my response materials on mootness, and the -- there's

just a -- the reason I refer to that is that was an example where the Supreme Court of Canada recognized that even though the applicant in a constitutional challenge was unsuccessful, the court says -- this is at page 11 of the Authorities. I'll just -- I'll read out the reference, it's pretty short.

It's paragraph 110 of the *Caron* decision. The court says:

> "While costs typically follow the outcome of the case, this Court has the discretion, in appropriate circumstances, to award costs on appeal and in the courts below regardless of the outcome."

And they reference specific provisions of the *Supreme Court Act*.

> "Here, we would exercise our discretion to depart from the normal practice: Despite their lack of success, we would award Mr. Caron and Mr. Boutet their costs on a party and party basis. This case clearly raises issues of considerable public interest, a fact this Court has already recognized."

And at paragraph 112 – I won't go through it – the court references earlier case law where the court has departed from the ordinary rule where an unsuccessful party gets costs when raising an issue of public interest in the context of constitutional litigation.

So the conclusion at paragraph 114:

"While the resolution of the present appeals is not in the appellants' favour, this litigation has nevertheless served an important public function."

I suppose I may be jinxing myself by beginning my costs submissions in the event that I am unsuccessful, but there you have it. Although the reference there is grounded in the *Supreme Court Act* itself, I suggest it's open to the court under the factors under Rule 400 to also issue costs if I'm unsuccessful.

In terms of -- first of all, I say if I'm successful, there is still the issue of costs for the motion to strike which Justice Harrington directed be in the cause. There was the unsuccessful motion to abridge time limits which Justice Gagne specifically said costs would not be rewarded referencing the reasonable way in which the litigation had been conducted. And the costs in the appeal to the Federal Court of Appeal from the motion to strike have already been disposed of.

So when you look at the tariff items there's basically the motion to strike, and then the main application, and of course the mootness motion. Just by my back of the envelope math I looked at it most on the midpoint of column three, first on the proposition that this is just an ordinary run-of-the-mill case, and I also looked at it at the high end of

column four taking into account the Federal Court of Appeal's comment in January that this case raised complex and important issues.

So I get about 80 units mid-column of three, and 166 units on the high end of four that deliberately excludes counsel fees recognizing that the case law is -- doesn't award those to self-represented litigants. Adding in relatively nominal disbursements of about $1,860, I get just over 13,000 costs in disbursements at the midrange of column three and just over $25,000 at the high end of column four.

And just to put those figures in context relative to other cases, is the court may be aware in the case of *Galati v. the Prime Minister*, I've believe Justice Zinn awarded the applicants a lump-sum fixed a $5,000, which if nothing else was upheld by the Court of Appeal in the result. And the court will recall that that $5,000 was attributable to filing the application for judicial review and then of course, you know, the thing became moot as soon as it was referred to the Supreme Court of Canada. So I suppose proportionately I hope I'm not overreaching in those requests.

Bearing in mind that although I have approached the court and the respondents throughout this litigation, not to seek adverse costs in case I'm unsuccessful, that has never been taken off the table. So I remain exposed to that risk, which I submit ought to be reflected in any eventual costs award. And in

terms of whether the litigation has been conducted reasonably or, you know, whether I brought unnecessary motions or otherwise burdened the court through the conduct of litigation, I will simply let the court record stand for itself in that regard.

So just to conclude on costs, because I know I threw out a lot of numbers, I would seek in any event of the course at the court's discretion an amount between 13,000 and 25,000 dollars depending on the court's assessment of the complexity of the case. And if nothing else -- if unsuccessful, to not award the costs against the applicant.

JUSTICE: I think I've got that, Mr. Alani, thank you.

MR. ALANI: Barring any further questions those are my submissions.

JUSTICE: None for the moment. Thank you very much.

Mr. Brongers, what do you propose? Would it be more convenient for us to break, resume say at 1:30 to hear from you?

MR. BRONGERS: Yes, that would be perfect, Justice O'Reilly.

JUSTICE: Very well, let's do that.

MR. ALANI: Thank you very much.

(PROCEEDINGS ADJOURNED FOR A BREAK AT 11:53 A.M.)

(PROCEEDINGS RESUMED PURSUANT TO BREAK AT 1:29 P.M.)

JUSTICE: Good afternoon, everyone.

MR. BRONGERS: Good afternoon.

JUSTICE: Mr. Brongers, are you ready?

MR. BRONGERS: Thank you, Justice O'Reilly. I guess the first step I'd like to pass up a compendium I've prepared with respect to the (inaudible) I'll be referring to. Three copies for the court. I've already given a copy to Mr. Alani.

JUSTICE: Thank you.

SUBMISSIONS BY MR. BRONGERS:

Now, in our factum which was written one month prior to last October's federal election we said that there were four reasons why this application should be dismissed. Now there are five.

First, Mr. Alani's case is moot, there is no longer any moratorium on Senate appointments. Seven new senators were recently named and the Government of Canada has committed to filling the remaining vacancies before the end of this year. By any objective measure, Mr. Alani has won his war and there is no principled reason that he should be permitted to continue to do battle.

Second, Mr. Alani lacks standing. He had no direct interest in Senate vacancies, an issue he was not even aware of three days prior to starting his lawsuit, and he has not led any evidence that would justify granting him public interest standing.

Third, Mr. Alani's case is not justiciable. He has brought what amounts to a request

for a private reference on the scope and extent of the constitutional convention whereby the Prime Minister provides advice to the Governor General on Senate appointments. And this is a purely political question that cannot be the subject of an application for judicial review.

Fourth, 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. The court cannot review purely political exercises of constitutional conventional authority.

And last but not least, Mr. Alani's demand for a declaration from the court is substantively unjustified in any event. There's no evidence before the court of the existence of a constitutional convention that the Prime Minister must advise the Governor General on Senate appointments within a certain time period. And furthermore, since Prime Ministers necessarily will give such advice when they feel it is reasonable to do so, the particular form of the declaration requested by Mr. Alani is one that would have no practical utility in any event.

Now, these five objections to Mr. Alani's lawsuit are not conjunctive. Anyone of them taken alone would justify dismissing this application. Or to put it anther way, only if the court finds that all five of

these objections are without merit can it issue Mr. Alani the declaration that he is seeking. But in this case, however, theses objections are all well-founded and we therefore ask respectively that Mr. Alani's application be dismissed.

Now, in terms of the structure of our submissions today we will be dealing with the five objections in turn. We will begin with mootness, which will be addressed by my colleague Mr. Pulleyblank, after which I will speak to the other four objections. Thank you.

JUSTICE: Thank you, Mr. Brongers.

Mr. Pulleyblank? (inaudible)

SUBMISSIONS BY MR. PULLEYBLANK:

MR. PULLEYBLANK: Thank you very much. I will focus today of responding to Mr. Alani's submissions, primarily those made in writing on the mootness issue and also those further comments he made this morning with regard to mootness. I will not take the court though my written representations on mootness but will highlight key points.

JUSTICE: All right.

MR. PULLEYBLANK: I will begin my submissions with a brief overview and then we'll proceed to a *Borowski* analysis.

There is no longer a moratorium on Senate appointments, therefore this judicial review application which asks the court to review a statement alleged to

have announced the previous Prime Minister's moratorium on Senate appointments is moot.

And Mr. Alani tries to avoid this conclusion not by arguing that a now-spent moratorium is now in fact still a live controversy, rather he asserts in his written argument that in fact this never was about the moratorium in the first place. He says that this is actually a review of a course of conduct dating back to Confederation which -- and asked the court to offer an opinion on a legal issue: Does the Prime Minister have a duty to recommend Senate appointees in a reasonable time?

This is just not an accurate characterization of the matter that's before the court. Rather, as is clear from a review of each of Mr. Alani's notice of application, his written representations, and his affidavit material, this case is about the now spent moratorium of the previous government. Furthermore, if this court were to characterize the case as Mr. Alani proposes it would ask only for this court's opinion on a question of law, does this duty exist in the Constitution. That's a reference on a point of law not a judicial review application and in fact this court has already cautioned Mr. Alani against converting this judicial review application into a private reference on a point of law.

To put it simply the controversy for mootness purposes must have practical consequences.

Simply a legal issue will not suffice to be the controversy that will allow a case to survive a mootness objection. The controversy at issue in this case is the legality of the Prime Minister's moratorium on Senate appointments that is now passed and that controversy has ended.

It is not sufficient to simply point to an outstanding legal issue as that would be available in most if not all moot cases. There would be a legal question still out there. What is needed is a live controversy that provides a context for the court to analyze a legal issue, justifies expending judicial resources, allows the court to remain within it's proper limits of it's judicial function as well.

So before moving onto the test I will note that earlier today Mr. Alani seemed to have asked the court to allow him to resile from his pleadings, suggesting that it wouldn't have been reasonable for him to have amended a pleading or to have brought a new judicial review application when the facts changed. However the respondent, of course, must know what it's responding to.

Mr. Alani also went on to say that the fact that the respondent had not put forward evidence showing what steps are currently being taken by the new government to accomplish the appointments of the outstanding vacancies could lead to an inference that nothing's being done. Well, we can't put forward

evidence if we don't know what the case is that's being put forward. That's why pleadings are important and that's why although not technically a pleading, a notice of application combined with the affidavit in support is read, is relied on by respondents and cannot be -- we cannot be expected to respond to a moving target.

So the leading case on mootness is, of course, the Supreme Canada's decision in *Borowski*. That case involved a challenge to a provision of the *Criminal Code* that would allow therapeutic abortions and the abortion provisions were at large were struck down. Mr. Borowski, not happy with that result at a all sought to continue his challenge because he raised the issue does a child in womb have protected Charter rights.

I'll take more about the result of that case but the mootness analysis set out in that case is still the leading statement on the law and I have provided this court's recent reasons in *Harvan v. Canada*, which is a decision of Justice Diner that sets out a very succinct summary of the mootness analysis. I have that at tab 6 of the respondent's motion record on mootness, volume 2.

JUSTICE: All right.

MR. PULLEYBLANK: And I will take the court to paragraph 7, which is a concise summary of the *Borowski* analysis. The court says:

> "The test for mootness comprises a two-step analysis. The first step asks whether the

1 court's decision would have any practical
2 effect on solving a live controversy between
3 the parties and the court should consider
4 whether the issues have become academic and
5 whether the dispute has disappeared, in which
6 case the proceedings are moot.
7 If the first step of the test is met the
8 second step is not withstanding the fact the
9 matter is moot, that the court must consider
10 whether to none-the-less exercise it's
11 discretion to decide the case.
12 And the court's exercise of discretion
13 in the second step should be guided by three
14 policy rationales, which are as follows:
15 The presence of an adversarial context, the
16 concern for judicial economy and the
17 consideration of whether the court would be
18 encroaching upon the legislative sphere
19 rather than fulfilling it's role as the
20 adjudicative branch of government."
21 So that's the framework that I will be following in this
22 mootness analysis.
23 JUSTICE: All right.
24 MR. PULLEYBLANK: But the first step,
25 the most important step in many ways in the mootness
26 analysis is to carefully characterize the controversy
27 that's before the court. Often times the answer becomes
28 self evident when the controversy is properly

1 characterized as to whether or not that controversy
2 remains live.
3 And the respondent says that the only
4 characterization of the controversy in this case that's
5 possible is that this is a challenge to a decision by
6 Prime Minister Harper to impose a moratorium on Senate
7 appointments. The moratorium is the controversy at
8 issue.
9 I do pause to note that there is some
10 disagreement between the parties as to when a moratorium
11 is imposed on Senate appointments. There's no
12 controversy in a moratorium eventually was and the
13 disagreement as to the date has no bearing on the
14 mootness analysis.
15 As my colleague alluded to and as is set
16 out in paragraphs 15 through 29 of our written
17 representations on mootness, the moratorium has ended.
18 A new process for the selection of Senate appointees has
19 been created. Seven new senators have been appointed
20 and the government has announced an intention to fill
21 the remaining inherited vacancies within the year. The
22 applicant admits in his written representations on
23 mootness that the moratorium has ended.
24 Now today the applicant did not – at
25 least to my hearing – offer a submission on precisely
26 how he would characterize the controversy for mootness
27 purposes. However -- so as I don't misstate or
28 misrepresent his position I will take the court to where

he does so in his responding motion record on mootness.

JUSTICE: Fine.

MR. PULLEYBLANK: Volume 1 of 2 has his written representations at the second tab. And I would refer the court first to paragraph 5 where the applicant writes:

"In an effort to challenge the constitutional validity of an ongoing course of conduct the applicant commenced the present judicial review proceeding.

Regrettably, in retrospect, the notice of application referred to the Prime Minister's statement as communicating a decision not to appoint senators. In fact the reference statement was merely emblematic of a course of conduct that has been continued by many, if not most, Prime Ministers since confederation."

So we understand the judicial review application is now being proposed to be characterized as a review of a course of conduct by many if not most Prime Ministers dating back to the founding of this country.

There is more discussion, perhaps, of how Mr. Alani would characterize the controversy at paragraph 32 of his written representations on mootness and this is where he observes:

"Viewed holistically and practically this

application was never about asking the court to rule on the legality of a specific statement made by a particular Prime Minister or the precise intentions of a Prime Minister at an isolated moment in time.

Rather the *raison d'être* of the application has consistently been to determine whether the Prime Minister has a recognizable obligations under Canada's constitution to provide timely advice for the Governor General in order to allow a fit and qualified person to be summoned to the Senate within a reasonable time after a vacancy occurs therein."

Now the respondent says that this characterization cannot be accepted for two reasons.

It's not accurate. It does not describe the case as it's been plead, argued and the affidavit evidence offered in support.

And second, if that is how this case is characterized it is an impermissible attempt to bring a private reference on a point of law.

On the first point, to demonstrate the inconsistency between this characterization and how the case has been put forward, I will take the court to the amended notice of application, Mr. Alani's affidavit and, as well, the written representations.

So I'd ask the court to turn up first the

applicant's record. At Tab 2 we'll find the amended notice of application. This was amended with leave of Justice Harrington in a decision I will come to as well on this point. And I asked the court at page 5 to note -- the matter starts:

> "This is an application for judicial review in respect of the decision of the Prime Minister as communicated publicly on December 4th, 2014 not to advise the Governor General to summon fit and qualified persons to fill existing vacancies in the Senate."

It goes on at paragraph 13 of the amended notice of application. To draw this point out further. Mr. Alani submits:

> "The failure to summon a fit and qualified person to fill a vacancy in the Senate within a reasonable time after the vacancy happens undermines and breaches Sections 21, 22, and 32 of the *Constitution Act 1867* and the principles of federalism, democracy, constitutionalism and the Rule of Law and the protection of minorities as annunciated by the Supreme Court."

And I apologize, I meant to bring the court as well to paragraph 12:

> "The Prime Minister's decision not to recommend appointments to the Senate to fill the vacancies reflects an impermissible

1 attempt to make changes to the Senate without
2 undertaking the constitutional reforms
3 required in light of the amending formula set
4 out in the *Constitution Act 1982* as
5 interpreted by the Supreme Court of Canada in
6 the Senate Reform reference. "
7 Now it's clear this is about a moratorium
8 that will lead to a fundamental change in the Senate if
9 it is maintained, not a course of conduct that most
10 Prime Ministers have engaged in. That's not a way to
11 try to amend the Constitution by acting with as much
12 dispatch perhaps as Mr. Alani submits is maybe
13 necessary.
14 Further the notice of application does
15 include a Rule 317 request for the material that was
16 before the Prime Minister and the Queen's Privy Council
17 of Canada in making the decision not to advise the
18 Governor General to fill the currently existing
19 vacancies.
20 Again, that is not consistent with an
21 ongoing course of conduct to request that specific
22 material under Rule 317. And it is of note that the
23 applicant did not challenge any specific vacancy for
24 having been left open for an unreasonable amount of
25 time.
26 I would turn next to the applicant's
27 affidavit, which is at the next tab in the application
28 record, which again underscores that this is a challenge

to a decision to impose a moratorium on Senate appointments and at page 12 at paragraph 17 Mr. Alani explains the impetus behind bringing this judicial review. He writes:

> "Having reviewed the *Federal Court's Act* and the I determined that an appropriate *Federal Court Rules* means of attempting to resolve the apparent inconsistency between the Prime Minister's stated intention not to appoint senators in the absence of the government's inability to pass legislation through the Senate and what I understood to be legal requirements under the Constitution of Canada was to seek declaratory relief in the Federal Court by way of judicial review."

So it's the inconsistency between a moratorium until the government can't pass legislation that he says is what he was seeking to review.

The next place I will take the court is the memorandum of fact and law, which is at tab 5 of the applicant's record.

JUSTICE: I don't have tabs so --

MR. PULLEYBLANK: Oh, I apologize. Page 308 is where it begins.

JUSTICE: Okay, thank you.

MR. PULLEYBLANK: And to underscore that this case is a judicial review challenging a moratorium on Senate appointments, I could not -- it

could not be more clear than it is set out at paragraph 1 of the memorandum of fact and law.

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

It’s not the only place in the memorandum of fact and law, of course, that the fact that this is a challenge to a moratorium on Senate appointments is made abundantly clear. But I would direct the court to several places just because it shows that if it’s not a moratorium that he’s challenging, that -- really, this has always been about a different thing, a course of conduct. It calls into question, are these arguments to arguments that he stands upon. There’s a problem with re-characterizing it at this stage.

So I take the court first to paragraph 50, which is at page 323.

JUSTICE: All right.

MR. PULLEYBLANK: And this is the conclusion of where he sets out his argument on there being a duty to make these appointments, and he says,

> "Whatever reasonableness may require in a particular case…”

So setting aside the reasonableness issue, to paraphrase,

> "…it is antithetical to the rule of law for a Prime Minister to deliberately refrain from providing the advice necessary to fill Senate vacancies because of personal dissatisfaction with the Senate polictical embarrassment or a desire to apply pressure to a political actors to affect constitutional reform."

Then moving on, at paragraph 52, under the heading, "The Senate Appointments Moratorium Exists Against a Backdrop of Uncertainty" he writes,

> "The fact that Senate vacancies exist and remain unfilled is not unprecedented. However, the Prime Minister is the first to state openly as a matter of policy that he does not intend to fill vacancies."

And finally I would direct the court to paragraph 62, which again shows that Mr. Alani doesn't just raise this issue against a backdrop of the moratorium, but he rather relies on the moratorium as a component of his argument. At paragraph 62 under the justiciability issue, he writes, in the second sentence:

> "While there is a political aspect to Senate appointments, whether the Prime Minister is obliged to cause appointments to be made at all is a legal question well suited to the court's interpretive role."

1 So again, that’s -- he’s not saying what justiciability
2 -- it’s the timing issue per se, it’s the "must the
3 Prime Minister make appointments" issue.
4 Mr. Alani offered no explanation today as
5 to how the fact he now says the case was never about a
6 moratorium changes these submissions. So that’s an
7 outstanding question that we simply don’t have
8 submissions on.
9 So in short, the respondent’s position is
10 that to say that the case is really about a course of
11 conduct continued by many Prime Ministers is simply not
12 accurate. But crucially, it’s also a characterization
13 of this case is something that’s already come before
14 this court and been considered and ruled on by Justice
15 Harrington in the application to strike.
16 So I’ll take the court there now. This
17 is in the respondent’s motion record, Volume 2, where I
18 had you turn up the *Harvan* case. At tab 1 we have the
19 reasons of Justice Harrington --
20 JUSTICE: All right.
21 MR. PULLYBLANK: -- in the motion.
22 This was a motion both to strike the pleadings brought
23 by the respondents, and Mr. Alani had a motion heard at
24 the same time to amend his pleadings.
25 Now, Justice Harrington did indeed refuse
26 to strike the motion of application, and in his reasons
27 he made clear that he understood the case to be a
28 challenge to the decision not to fill existing

vacancies. Paragraph 1 of the decision reads:

> " Last December, Prime Minister Harper is said to have publicly communicated his decision not to advise the Governor General to fill existing vacancies in the Senate. Mr. Alani, a Vancouver lawyer, considers this 'decision' illegal. He has applied for judicial review thereof. He seeks various declarations, the main one being that the Prime Minister must call upon the Governor General to appoint his nominees to the Senate within a reasonable time after a vacancy occurs. He does not ask that the Prime Minister be so ordered."

Now, Justice Harrington then, in the context of his ruling, made clear that the spectre of a moratorium on Senate appointments resulting in a round about means of abolishing the Senate was an important part of his analysis.

I'll turn the court to paragraph 36 where Justice Harrington observes:

> "Without a doubt there is a political aspect to Senate appointments. From time to time the Senate, or some Senators, may be a source of embarrassment to the government, to the House of Commons as a whole, and indeed, to many Canadians. However, I know of no law which provides that one may not do what one

is otherwise obliged to do simply because it would be embarrassing. The Supreme Court made it perfectly clear in the *Reference re Senate Reform* that significant changes to the Senate, including its abolishment, require a formal constitutional amendment."

Justice Harrington was clearly concerned with the prospect of the moratorium being an indirect way to abolish the Senate, and that was a factor in his reasoning in dismissing the motion to strike.

Crucially, though, Justice Harrington then went on to consider Mr. Alani's motion to amend his pleadings. One of the amendments that Mr. Alani sought was to remove the reference to a decision of the Prime Minister from his notice of application. Justice Harrington declined to make that amendment for reasons that are very pertinent to what's before this court now.

At paragraph 45, Justice Harrington observes:

"However, he…",

Mr. Alani,

"…wishes to delete his reference to the Prime Minister making a decision. He rather seeks a declaration with respect to the Prime Minister's failure, refusal or unreasonable delay, or alternatively the Queen's Privy Council acting on his recommendation to advise the Governor General to fill existing

1 vacancies in the Senate. This is not
2 acceptable.
3 The whole basis on which this
4 application has proceeded is that it is a
5 judicial review of a decision. If those
6 assertions are deleted, the application would
7 look like a reference. Only federal boards
8 and tribunals and the Attorney General of
9 Canada may refer matters to the Court.
10 Mr. Alani cannot."
11 The spectre of a private reference, if we
12 move away from judicial review, the decision identified
13 in the notice of application was raised here and is, we
14 say, very much a problem if this court were to accept
15 the re-characterization proposed by Mr. Alani.
16 So, not only then is this case properly
17 characterized as a review of a decision of the previous
18 Prime Minister imposing moratorium, this court has
19 already ruled that it must be so viewed in order to not
20 be an impermissible private reference.
21 Therefore, we say again that the only way
22 this case can be characterized is the controversy is the
23 moratorium on Senate appointments that is now passed.
24 And while the respondents deny the moratorium ever had
25 an effect on Mr. Alani for the reasons that will be
26 addressed in our standing representations, it is plain
27 the now spent moratorium has absolutely no practical
28 effect. And that is the question in mootness: Is there

a live controversy that has a practical affect on the parties?

This court has already considered a case where there was a moratorium that was spent, and a mootness objection was raised, and I'll take the court to that case briefly. It's a case called *Swartz Hospitality Group* and it's at tab 10 of the same volume that I was just taking the court through, the second volume of the respondents motion record.

JUSTICE: All right.

MR. PULLYBLANK: A decision of Justice Gibson. And this was a case involving an application to compel the Minister of Canadian Heritage to review a redevelopment proposal within a national park. After the redevelopment proposal was submitted, a one-year moratorium on new development was put into place. The applicant brought a judicial review alleging, among other things, that that moratorium was illegal or invalid.

By the time the review application was heard the moratorium had long since ended, and the salient passage is set out at paragraphs 27 and 28 by Justice Gibson, writing:

> "I have earlier determined that the moratorium was a one-year development moratorium on commercial accommodation facilities outside park communities. It was related to the establishment of a panel to

1 recommend within the term of the moratorium
2 the principles to guide the nature scale and
3 rate of future development outside park
4 communities. The one-year moratorium has now
5 long since expired."
6 And then just skipping ahead to
7 paragraph 28:
8 "In all of the circumstances, I conclude that
9 there remains no live controversy regarding
10 the moratorium between the parties that are
11 before the court. I further conclude that no
12 purpose whatsoever would be served by
13 examining at any length whether or not the
14 moratorium was invalid or unlawful or of no
15 force and effect as it purported to relate to
16 the Storm Mountain Lodge redevelopment
17 proposal."
18 So, the simple point to take is that this
19 court's already said, if the moratorium's ended, review
20 of the legality of that moratorium is moot.
21 And indeed, Mr. Alani makes no effort in
22 his written representations to refute the respondent's
23 submission that review of the last Prime Minister's
24 moratorium is now moot. Instead he admits the
25 moratorium is no longer in effect.
26 So that brings us to the respondent's
27 second point. If this case could be characterized as
28 Mr. Alani proposes, it would be an obvious and

impermissible attempt to bring a private reference on a point of law. Mr. Alani's contention seems to be that he is concerned with the legal issue, not a decision. However, you can't simply bring a judicial review of the legal issue. This point was made by the Supreme Court of Canada in *Borowski*, in a passage I'll actually conclude my submissions by bringing the court to.

And of course, it also was made quite clear by Justice Harrington in the passage I already brought this court to. The applicant's assertion that there is a legal issue that's outstanding with regard to whether there's a duty on the Prime Minister to make recommendations in a reasonable time, that's unremarkable. That's almost always the case. There's going to be some legal issue that's going to be outstanding in a case that a mootness objection is raised in relation to.

Indeed, in *Borowski*, the issue of whether unborn -- an infant in the womb possesses *Charter* rights was described by the court as being of great public importance. Yet the court declined to hear it in the absence of a live controversy within which to frame the issue.

Consideration of the legal issue is not relevant at the first stage of the *Barowski* analysis. That's looking for a controversy. Where it comes in is in the second stage. Should the court exercise it's discretion to hear the case, notwithstanding its

mootness. And that's to where I will turn now.

To briefly review three factors that are identified in *Borowski* that govern this issue: Concern for judicial economy – I apologize: The presence of an adversarial context, concern for a judicial economy and consideration of whether the court would be encroaching upon the legislative sphere rather than fulfilling it's role as the adjudicative branch of government.

And the respondent has set out submissions on each memorandum of fact and law. I won't go through those in detail, but I will respond to Mr. Alani's submissions in his written representations on the point.

JUSTICE: All right.

MR. PULLYBLANK: Just to overview the applicant's -- or the respondents' position broadly, though, the respondent says there never was a proper adversarial context in this case for the reasons that will be outlined in the standing argument. And it is noteworthy that Mr. Alani does not claim private interest standing in this case, as he would have had he actually had a stake in the outcome.

On the second factor, in *Borowski* they outlined three circumstances where hearing a moot case could be an efficient use of judicial resources. That's set out at paragraph 61 and 64 of the representations on mootness. But broadly speaking, the court looked at: Will there be a practical effect on the rights of the

parties? And we say no, again for the same reason as not an adversarial context.

This is not a matter that is recurring, but of a brief duration. Indeed, if it was a brief duration, then Mr. Alani's objection wouldn't be raised presumably.

And there is no social cost in leaving this matter undecided. And I will expand on those last two points in relation to Mr. Alani's arguments specifically.

Finally, this case asks the court to depart from its ordinary role of pronouncing judgments on live controversies, and it does so in an area where courts are to tread especially carefully, constitutional conventions. That's getting at the third *Borowski* factor.

But now as I alluded to responding to Mr. Alani's submissions that he made in his written representations, they are detailed at paragraph 36 of his written representations, and I propose to go through these one by one.

The first argument Mr. Alani raises is that the parties have already provided the court with as a complete a record as we'll likely ever exist on which to adjudicate the constitutionality of prolonged Senate vacancies. However, the Supreme Court in *Borowski* has already rejected a proposition that a party can simply point to the quality of a record to defeat a mootness

application. Indeed, appellate proceedings would presumably never be declared moot if there was just a question of whether there was an existing record.

I will refer the court to the decision in *Borowski*, which is again at tab 4 of the respondents' second volume of their responding motion record. And specifically at the page 363 of the SCR printout.

At the bottom, it's not a highlighted portion but at the bottom on the left-hand side at 363 of the SCR there is a passage under the heading "Exercise of Discretion".

> "The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears."

Further on this point, while it is true that the respondents put forward expert evidence on historical record concerning the timing of recommendations, Mr. Alani did not put forward evidence. My colleague will be going through the value of that

evidence and so we disagree with the proposition that as a good a record as could possibly exist was put forward.

And furthermore, Mr. Alani, both this morning and in his written argument, took issue with Canada failing to put forward evidence on their reasonableness of the timing of the current government's actions on Senate appointments. We didn't know that that was at issue in Mr. Alani's view until receiving his responding mootness record. But however, if indeed that is relevant at all, then we cannot say that is a complete a record as can be put forward.

So the second argument Mr. Alani raises on the discretion issue is that -- back at paragraph 36 of his representations, neither the executive nor legislative branches of government have availed the opportunity to clarify whether and when the Prime Minister must recommend appointments to the Governor General to fill Senate vacancies. However, non-action by the legislature or the executive does not expand this court's proper judicial role. An individual concerned with a lack of a law or a regulation on an issue cannot use this court as leverage to pressure the executive or the legislature into acting.

The third argument that Mr. Alani raises is that judicial economy militates in favour of resolving the issue raised in this application rather than awaiting a fresh application. But as discussed in *Borowski*, it's not enough to merely say, "We're already

here, we might as well decide the matter." *Borowski* set out three circumstances where judicial economy is served by hearing matters that are moot. I went through those earlier and they're set out in our written representations. Simply avoiding having to wait for a new not moot application is not a factor that goes to judicial economy.

And further, on the judicial economy point, it is worth remembering the form of the declaration that's sought here. He simply asks for a declaration that the Prime Minister must advise the Governor General to summon a qualified person to the Senate within a reasonable time. There's no evidence or arguments as to what that reasonable time would be. There's no allegation that this particular vacancy has been open for too long. So presumably we're to leave those for subsequent applications.

The fact that granting the relief sought here would have no immediate practical effect, but rather would simply lead to more applications, is a factor that shows that judicial economy would not be served by hearing the moot issue.

Fourth, Mr. Alani argues that whether the Prime Minister has an obligation to provide the advice necessary in order for the Governor General to summon a fit and qualified person to the Senate within a reasonable time after a vacancy happens therein, is an important question that might independently evade review

by the court.

Now, for the justifiability arguments that my colleague will raise, we do take the position that this is a question that rightly does evade review by the court. That is not to say, though, that justifiability issue could not be decided in a case that was brought in a not moot situation by an individual with standing, in a court that had the proper jurisdiction. There's nothing about the question that makes it inherently evasive of review. It's not the type of brief but recurring issue that the Supreme Court identified in *Borowski* as being especially susceptible to evading review.

And finally Mr. Alani asserts there's a social cost to leaving a matter undecided. He does not expand on what that social cost is though. His evidence on cross-examination was that he personally had suffered no cost from the Senate vacancies. Instead he treats in his written representations as self-evident that there will be a social cost in any case where there is an apprehension of unconstitutional activity. This argument is flawed in that if accepted, it would apply to any case where there's an argument that the Constitution mandated or prohibited some conduct.

Certainly Mr. Borowski could have availed himself of this argument if you could simply point to a social cost in the sense that there's an outstanding Constitutional question. And to the contrary, the

Supreme Court of Canada in *Borowski* made very clear that the fact that there's an outstanding Constitutional issue is not enough to allow a case to continue, notwithstanding its being moot. And I'll bring you to that passage now. That's what I will conclude on, as I alluded to at the outset.

JUSTICE: All right.

MR. PULLYBLANK: I'll take the court to page 365 of *Borowski*. Again, that's at tab 4 of the respondent's authorities. And starting at the first new paragraph, the court writes:

> "Even if I were disposed in favour of the appellant in respect to the first two factors which I have canvassed…"

Just a comment, that is if the court had found on the other two factors that they weighed towards exercising discretion notwithstanding it being moot, the court says:

> "…I would decline to exercise a discretion in favour of deciding this appeal on the basis of the third factor."

So, just a comment. The court sees this as sufficiently important, it even outweighs the other factors.

> "One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application

of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the *Canadian Charter of Rights and Freedoms* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference. Indeed, he is not seeking to have decided the same question that was the subject of his action."

I pause to say, that's the same facts we have here. Mr. Alani is now saying, I'm not talking about the moratorium any more.

"That question related to the validity of s. 251 of the *Criminal Code* . He now wishes to ask a question that relates to the Canadian Charter of Rights and Freedoms alone."

And I pause again. Substituting the *Constitution Act, 1867*, and it's the same factual scenario we have here.

"This is not a request to decide a moot question but to decide a different, abstract question. To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible

decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court."

So to conclude my submissions, the respondents say that this matter is moot. The matter is properly characterized as a challenge to the last government's moratorium on Senate appointments. That moratorium is ended, and with it ended any controversy between the parties, if indeed there was a live controversy in the first place. To exercise the court's discretion to hear the matter, notwithstanding its mootness, would be to permit the applicant to bring a private reference on a Constitutional issue, something the Supreme Court of Canada has warned against, and this court has already ruled cannot be done by Mr. Alani.

Subject to any questions, those are the submissions on mootness.

JUSTICE: No, I have no questions. Thank you, Mr. Pullyblank. Mr. Brongers?

SUBMISSIONS BY MR. BRONGERS:

Thank you, Justice O'Reilly.

So I'll turn to the second issue, and that's standing.

JUSTICE: Yes.

MR. BRONGERS: No one is allowed to bring a lawsuit unless they have the standing to do so, either directly or on the basis of a discretionary grant

by the court of public interest standing. Now, in the case of applications for judicial review, the doctrine of direct standing has been codified in section 18.1 of the *Federal Courts Act*. It provides that these types of applications can be brought by anyone who is directly affected by the matter in respect of which relief is sought.

And that concept was explained by the Federal Court of Appeal in the *League for Human Rights of B'Nai Brith* case, which is at tab 1 of our compendium of authorities. I won't read from it. But effectively what Justice Stratas said is that to be directly affected it has -- the matter has to affect a person's legal rights, impose legal obligations on them or prejudicially affect them in some way.

Now, there's no dispute that Mr. Alani is not directly affected by the matter of the timing of Senate appointments. His notice of application, his supporting affidavit and his memorandum of fact and law don't mention any impact or prejudice that Senate vacancies may have had upon him or his legal rights. And as Mr. Alani pointed out during cross-examination, just to cover off the point, he admitted that some of the potential indicia of direct impact were not present in this case. For example, the fact that he's not personally interested in becoming a Senator, it's not lobbied on behalf of others who may want to become Senators, and as he has never asked anything of the

Senate.

Now, Mr. Alani disparaged those questions on the basis that, saying well if that's really the test, then no one could ever challenge decisions to the Senate. But Mr. Alani misrepresents our argument. Those factors and those questions were simply being asked in order to make it clear that Mr. Alani doesn't have a direct interest. It's a different question as to whether Mr. Alani should be given a discretionary public interest grant. But we just wanted to make absolutely clear that this is not a case where the applicant has a direct interest in this case. So whether Mr. Alani can proceed with this stands or falls on this court's discretionary decision whether to grant him public interest standing.

And that's an important question, and Mr. Alani made the point himself rather colourfully, I thought. If Mr. Alani is granted public interest standing and is thereby permitted to obtain a judgment in relation to his case, on behalf of not just himself, but on behalf of the entire Canadian public, this would create a situation that any judgment rendered by this court, even if it doesn't formally meet the conditions for issue estoppel, would nevertheless potentially deter others who may have a genuine direct interest in Senate appointments, or a justifiable claim of public interest standing from bringing forward their claims in the future.

And later we'll be discussing a couple of these cases. One is the *Brown* case. The court may have read that --

JUSTICE: Yes.

MR. BRONGERS: -- in preparing for the Alberta case, where Mr. Brown was actually someone who is directly impacted by governmental policy on Senate appointments, and he had direct standing. And again, if this court makes a ruling on behalf of the entire Canadian public as to what is the scope and extent of the convention and whether the Prime Minister has an enforceable duty to name Senators within a certain time, well that effectively creates *res judicata* for everybody else.

So this is -- and this is an important point and an important issue that the court has to deal with.

Now, while granting public interest standing is a discretionary decision, the Supreme Court of Canada has set out the principles according to which such discretion should be exercised. And Mr. Alani correctly pointed the court to the *Downtown Eastside Sex Workers* case which is at tab 2 of our compendium.

And at that case the court said at paragraph 37, said that the motions judge considering an application for discretion to grant public interest standing, is supposed to conduct a purpose of analysis of three interrelated considerations:

1) Whether the case raises a serious judicable issue;

2) Whether the applicant has a real stake or a genuine interest in the issue; and

3) Whether the application is a reasonable and effective way to bring the matter before the court.

Now, the burden of demonstrating an entitlement to public interest standing lies entirely on the applicant. So in other words it was up to Mr. Alani to lead the evidence he needed to show that he meets the necessary criteria. He doesn’t benefit from any presumption that he should be given public interest standing, which the Government of Canada then has to rebut.

Now, somewhat surprisingly though, Mr. Alani has not expressly led any evidence in support of his request for public interest standing other than some correspondence to the federal, provincial, and territorial governments which he referred to, in which he invited them to bring references to their respective courts on the question that intrigues him, namely whether there is any constitutional requirement imposed on the Prime Minister to name senators, and if so whether there is a requirement that that has to be done within a certain period of time.

Now, as Mr. Alani explained, none of these governments have acceded to Mr. Alani's

1 invitation, so the says that that is proof that he now
2 deserves public interest standing to proceed with his
3 lawsuit since no one else seems interested in doing so.
4 Now, in our submission the simple fact that no
5 government is currently interested in expending the time
6 and money on a formal reference dealing with the timing
7 of Senate appointments in no way justifies granting Mr.
8 Alani standing to effective seize the court of a private
9 reference on that question.
10 It can't be the case that an individual
11 can simply ask the government to bring a reference on an
12 issue that he or she finds interesting and then should
13 the government say no, then use that fact as a basis to
14 claim public interest standing to bring their own
15 private reference. And that's essentially Mr. Alani's
16 only argument on standing, and it is unfounded.
17 But more than that, a purposive weighing
18 of the three interrelated considerations identified by
19 the Supreme Court in the *Downtown Eastside* case shows
20 that Mr. Alani falls well short of justifying his demand
21 to be given standing as a public interest litigant, and
22 I'd like to briefly go through the three considerations.
23 So beginning with the first one which is
24 whether Mr. Alani's application raises a justiciable
25 issue. Well, the answer to that is clearly no, and that
26 is because the timing of prime ministerial advice on
27 appointments is a purely political matter of
28 constitutional convention. Now, this of course has

always been Canada's primary objection to this lawsuit, one that will be raised even if Mr. Alani was a Mr. Brown who had a direct interest in raising these question. But as such I'd prefer, if I may, to deal with the justiciability issue in a few minutes when I completed the submissions on standing, but that's consideration number one.

The second consideration to be taken into account when deciding whether to grant public interest standing by a court is whether the applicant has a real stake or a genuine interest in the subject matter. And the evidence before the court demonstrates that while Mr. Alani may have an academic curiosity about the timing of Senate appointments, he does not have a real stake or a genuine interest in these issues as those terms are understood from the case law, which I will take the court to in a moment.

According to this case law for a person or an organization to satisfy this consideration they have to show strong engagement and familiarity with the issue in question. Their interests can't simply be temporary or contingent. And as can be seen by looking at the case law the court scrutinizes this factor carefully in order to properly allocate judicial resources and to screen out the mere -- and the term the jurisprudence uses is "busybody".

And a good example of this is the *Downtown Eastside* case which as I said before is at tab

2 of our compendium.

JUSTICE: Okay.

MR. BRONGERS: At paragraphs 58 and 59 of the judgment which I will read from. If the court could -- if I could ask the court to go to those paragraphs.

JUSTICE: All right.

MR. BRONGERS: It's at page 23.

JUSTICE: I have it, thank you.

MR. BRONGERS: Thank you, Justice. Here the court looked at the evidence that had been tendered by the plaintiff, Downtown Eastside Society, and by an individual plaintiff, a Ms. Kiselbach, in support of their request for public interest standing to bring a constitutional challenge in respect of Canada's prostitution laws. And the court wrote at paragraph 58 and 59:

> "As the respondents point out, the Society is no busybody and has proven to have a strong engagement with the issue. It has considerable experience with the sex workers in the Downtown Eastside of Vancouver and it is familiar with their interests. It is a registered non-profit organization that is run by and for current and former sex workers who live and/or work in this neighbourhood of Vancouver. Its mandate is based upon the vision and the needs of street-based sex

1 workers and its objects include working
2 toward better health and safety for sex
3 workers, working against all forms of
4 violence against sex workers and lobby for
5 policy and legal changes that will improve
6 the lives and working conditions of the sex
7 workers.
8 From Sheryl Kiselbach's affidavit, it's
9 clear that she is deeply engaged with the
10 issues raised. Not only does she claim that
11 the prostitution laws have directly and
12 significantly affected her for 30 years, but
13 also she notes that she is now employed as a
14 violence prevention coordinator."
15 So a good example of the type of evidence that is
16 needed.
17 Another example is at the following tab,
18 tab 3, which is the *Canadian Federation of Students*
19 case.
20 JUSTICE: All right.
21 MR. BRONGERS: This is a 2008 decision
22 rendered by Mr. Justice O'Keefe of this court. And at
23 paragraph 36 of this case, which, again, I'll ask the
24 court to look at, the court explained why it had decided
25 to grant public interest standing to the Canadian
26 Federation of Students to seek judicial review of a
27 decision that did not impact them directly. It was a
28 decision by the Natural Sciences and Engineering

Research Council of Canada not to investigate a research misconduct complaint that had been brought against the University of Toronto. And I've highlighted the entirety of paragraph 36, but I'd just like to look at the second half, beginning at:

> "The applicant's corporate objectives include advancing students' interests and the applicant has demonstrated that its members' interests include ensuring the integrity of academic instutitions, and protecting those who speak out against research misconduct. Furthermore, the applicant has demonstrated a past record of active involvement in these issues. As stated in the applicant's supporting affidavit of Ms. Regnier…"

So, affidavit evidence filed.

> "…the applicant organization has in the past publicly supported researchers who have spoke out in defence of research integrity, lobbied for legislation and policies to protect whistleblowers and supported publicly funded research. In my opinion, the organization has demonstrated a sufficient degree of involvement in the issues such that it is an appropriate body to institute this proceeding."

Now, in review of Mr. Alani's affidavit, and the transcript of his cross-examination, reveal a

sharp contrast between the level of engagement of the Downtown Eastside Sex Workers' Society, Ms. Kiselbach, and the Canadian Students' Federation in respect of the issues that were the subject of their lawsuits, and Mr. Alani's level of engagement with Senate issues.

And I won't read directly from Mr. Alani's affidavit, or the extracts from the transcripts. But I do want to emphasize that in our *factum*, at footnote 37, which is found within paragraph 39, we have listed the specific paragraphs and line numbers that deal with Mr. Alani's lack of experience and engagement with the issues that he wishes the court to rule upon. And in particular, Mr. Alani has never been engaged with any formal organization involved with Senate reform or Senate appointment issues, and he admits that he has no expertise in the Senate as an institution or with respect to constitutional issues in relation to the Senate.

Now, it's true that Mr. Alani has been to law school. He was called to the British Columbia Bar in 2007. He was a civil litigator in private practice for one year before he became an in-house counsel with a provincial Crown corporation in 2009. But he frankly and candidly admitted on cross-examination that he has no real expertise or experience with constitutional or public advocacy law, either acting on his own behalf or more importantly advocating on behalf of others.

But most significantly, however, there is

the undisputed fact that just three days before filing the notice of application Mr. Alani did not even know that vacancies had accumulated in the Senate. He first learned about this issue on December 5th, 2014 by reading an article in the *Toronto Star* that he had come across on Twitter, and that had reported some comments that the former Prime Minister had made about Senate vacancies. And then just three days later he filed his notice of application for judicial review in this court.

And in fact there is a feature article that was done on Mr. Alani's lawsuit by a journalist who writes for the Canadian Bar Association national magazine, and it's at pages 175 and 176 of our application record. And it contains the following statement, the substance of which Mr. Alani doesn't dispute. It said:

> "Alani, who serves as in-house counsel for a BC Crown corporation, is launching the case on his own behalf. He admits he did it on a bit of whim, recalling that he saw the issue crop up on Twitter one morning."

Now, with all due respect, a person who starts a lawsuit regarding a political issue that doesn't affect them directly and in respect of which one is not ever aware of three days before, can't be said to have a real stake or a genuine interest in the resolution of that issue.

Now, Mr. Alani's situation also stands in

1 sharp contrast with that of Rocco Galati, the well-known
2 Toronto lawyer who has brought a number of public-
3 interest constitutional law challenges in recent years,
4 and the person who, according to what Mr. Alani told the
5 journalist who writes in the *Canadian Lawyer* magazine,
6 was an inspiration to him in terms of bringing this
7 lawsuit. And that article, which the court likely has
8 already read, is at page 173 of our record.
9 Now, we have included in our compendium
10 at tab 4 the *Rocco Galati* case. And this was a 2015
11 judgment of Mr. Justice Rennie when he was still of this
12 court. It was a judicial review of the Governor
13 General's decision to grant royal assent to the
14 *Strengthening Canadian Citizenship Act*. And in that
15 case, Mr. Galati sought and was granted public interest
16 standing. And I'd just like to highlight for the court
17 paragraph 26, which is at pages 11 and 12.
18 JUSTICE: All right.
19 MR. BRONGERS: And if I may read,
20 starting from the second sentence.
21 "It is clear from the affidavits filed by Mr.
22 Galati and the Centre…"
23 the Constitutional Rights Centre.
24 "…that the applicants have been and are
25 currently engaged with a variety of
26 constitutional challenges consistent with the
27 Centre's mandate to challenge state action or
28 laws which may, in their opinion, be

unconstitutional. They point to their petition to the Governor General that he refrain from granting assent as evidence of their genuine interest and their pursuit of recourse other than litigation."

Mr. Alani, on the other hand, is not a member of any constitutional advocacy group, does not have a track record of bringing constitutional challenges on his own behalf or others, but furthermore, unlike Mr. Galati, who refrained from litigating until he first wrote to the Governor General to petition him that he withhold royal assent -- well, Mr. Alani did the opposite of that. Mr. Alani submitted his lawsuit for filing on December 8th, 2014 and then only afterwards did he e-mail the Prime Minister later that day to communicate his concerns about the Prime Minister's comments to the media on Senate vacancies.

Now, according to the *Galati* judgment, this kind of conduct, starting a lawsuit before even making an attempt to pursue recourses other than litigation, is not consistent with the conduct that one would expect from someone with a real stake, or a genuine interest in the subject matter of that lawsuit. Rather, it's consistent with someone who simply wants to bring a lawsuit.

So as such, Mr. Alani has not satisfied the second consideration of the public interest standing test either.

And that leaves the third consideration, which is whether Mr. Alani's lawsuit is a reasonable and effective way of bringing the underlying issues to court. As I said earlier, this is the only aspect of the test on which Mr. Alani has made any representations. Again, he argues that because none of the governments have brought a Reference, it's then necessary for him to be able to proceed with his case in order for the question to come before the courts. And we've already submitted in our submission that the mere fact that no current government is bringing a Reference doesn't, on its own, justify a granting of public interest standing.

But that's not the only aspect of the reasonable and effective way consideration. There is also the matter of whether the applicant has the technical capacity to reasonably and effectively advocate on behalf of the public interest.

And that point was made by the Supreme Court in the *Downtown Eastside* case. So I will be asking the court to go back to tab 2 --

JUSTICE: All right.

MR. BRONGERS: -- of the compendium. If the court could please turn to paragraph 51 on page 21.

JUSTICE: Yes.

MR. BRONGERS: And the first bullet point there that's highlighted says:

"The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise, and whether the issue will be presented in a sufficiently concrete and well developed factual setting."

Now, in the *Downtown Eastside* case, the society presented affidavit evidence showing that it was a well-organized association with considerable expertise in the subject matter of that case. They were represented by experienced lawyers, as Mr. Alani mentioned, Joe Arvay, who together with our clients would be able to provide the court with a concrete factual background and advocate on behalf of those most directly affected by the legislation in issue.

Now, with all due respect to Mr. Alani, who of course is representing himself, he has not shown that he has the requisite capacity to reasonably and effectively advocate on behalf of the public's interest in the legal issues raised by this case. And we submit that this was shown initially by the fact that Mr. Alani chose to prepare his original notice of application based just on some "initial research into the status and history of the vacancies in the Senate." That wording is taken from paragraph 13 of his affidavit. Research apparently conducted during that three-day period before the application was brought. And also shown by the

application itself, which Mr. Alani candidly admits did not contain as many particulars as upon reflection as he would have liked to have put forward, and of course Justice Harrington commented on that in his decision as well.

But, in our submission, Mr. Alani's lack of capacity to advocate on behalf of the public was shown most clearly by the fact that he did not provide the court with any proof regarding the existence and scope of the constitutional convention that he put in issue. And we'll be talking about that later when we get to the substance of this case, and Professor Manfredi's affidavit. But it is beyond dispute that Mr. Alani did not himself lead his own evidence with respect to the existence and scope of the constitutional convention, which was surprising when Justice Harrington did say in his judgment that the court will expect and will be in need of such evidence. And Justice Harrington said that at paragraphs 23 and 24 of his judgment.

Instead, Mr. Alani left it to the government of Canada to engage a political scientist to prepare an expert report on the scope of the constitutional convention that Mr. Alani put in issue.

Now, until this morning, we did not really know why Mr. Alani didn't obtain his own expert report for this case. He seems to explain that it is not necessary, that the court doesn't need any evidence,

and we'll deal with that later when we get to the substance. But, obviously we understand why Mr. Alani didn't hire an expert. It's not an easy thing to do to hire an expert in a specialized domain like constitutional conventions. Not everyone has access to political scientists, particularly not the average self-represented litigant. And it is also not cheap. You need to have sufficient financial resources to do that. And it is evident that for Mr. Alani, understandably, the cost of this litigation is a concern to him. He doesn't claim impecuniosity, but he has asked the court for effectively costs immunity. And in fact, he referred to himself in one of these newspaper articles, the one in the *Canadian Lawyer* that I referenced earlier on page 172, rather sympathetically actually, he said,

> "I am just a guy with a credit card and some vacation time."

But what all this shows is that Mr. Alani's judicial review application when we use the term as defined by the jurisprudence is not a reasonable and effective way of bringing the issues of this case before the court. And when I say this of course, I don't mean to disparage in any way, Mr. Alani's conduct of this case, from a professional or an ethical perspective. To the contrary, Mr. Alani's actions and his communications with me and with my colleague Mr. Pulleyblank have always been courteous, respectful and in keeping with the highest standards of the legal profession, of which

Mr. Alani is a member. Indeed, if every self-represented litigant dealt with the Department of Justice the way Mr. Alani has, our jobs would be much, much easier, and I thank him for that.

But, simply because Mr. Alani is a member of our law society, who does have good knowledge of the procedural rules of this court, which is always scrupulously complied with, does not mean that a court can overlook the fact that he is still a single self-represented individual who has not shown that he has both the resources and the expertise needed to justify granting him standing, not on his own behalf, but on behalf to the entire Canadian public in relation to the issues raise by this case. So, in our submission, Mr. Alani has not met his burden to demonstrate that he has the requisite standing and that this case can and should be dismissed on that basis alone.

Now, unless the court has any questions about standing, I'll move to justiciability?

JUSTICE: Please do.

MR. BRONGERS: Thank you, Justice O'Reilly.

It's our position that Mr. Alani's lawsuit is not justiciable. It is not justiciable because the only matter it challenges is the matter in which the Prime Minister gives advice to the Governor General on Senate appointments. Now, this advice is purely political in nature, and it's given pursuant to a

1 constitutional convention. Now, if the court were to
2 conduct a judicial review of prime ministerial advice on
3 Senate appointments, it would run afoul of two important
4 legal principles.
5 The first one is the notion that the
6 courts do not enforce constitutional conventions. The
7 second one is the notion that the courts do not deal
8 with inherently political questions, whether they arise
9 pursuant to statute prerogative or a constitutional
10 convention. If they don't have a sufficient legal
11 component to justify judicial interference with the
12 executive or legislative branches of government, the
13 court will not deal with purely political questions.
14 So, I will address these two notions
15 after just briefly confirming with the court that there
16 is no dispute that the nature of the prime ministerial
17 advice on Senate appointments that's in issue here, is a
18 matter of constitutional convention. That is conceded
19 by Mr. Alani. And of course if the court is in need of
20 any authority for that, fortunately the Supreme Court in
21 the *Senate Reform Reference* confirmed that just a couple
22 of years ago. We have included the *Senate Reform*
23 *Reference* at tab 6 of our compendium, and the relevant
24 paragraph is paragraph 50.
25 Now, what are constitutional conventions?
26 Well, Professor Hogg defines them, and his definition is
27 at tab 8 of our compendium. If the court could turn to
28 page 1-22.1, which I guess is the last page we've

included, or the second to last I should say.

JUSTICE: All right.

MR. BRONGERS: Very succinctly, Professor Hogg defines conventions as "the rules of the *Constitution* that are not enforced by the law courts." But Professor Hogg of course, eminent academic that he is, doesn't write binding authority. For that we have to turn to the Supreme Court of Canada which wrote what is still the leading case that addresses this question in 1981, and that of course is the *Patriation Reference,* which is at tab 9 of our compendium.

Now, in this case, the Supreme Court was asked by several provincial governments to opine on the constitutionality of the federal government's plan to patriate the *Constitution*. And it had to discuss constitutional conventions at some length because one of the questions that had been referred to it was whether there is a convention that amendments to the constitution can only be made with the significant consent of the provinces. While the judges split six to three on the question itself, with the majority finding that there was such a convention, all nine agreed on how to define constitutional conventions and their nature.

The court essentially said that conventions are that informal part of the constitution which while understood to be effectively binding by the officials to whom they apply, will still not be enforced by the courts if they are breached. And that can be

distilled from what's written at, first of all, page 883 of the judgment. The majority wrote at the third paragraph that I've highlighted there, "What is a constitutional convention?" And then goes on to respectfully adopt the definition of the convention given by the learned Chief Justice of Manitoba, and I won't read from that definition.

But, a clearer definition is actually found a couple of pages earlier at page 880, and I will read from this extract. And again, this is the majority of the court writing here. The highlighted portion of the third paragraph reads:

> "The conventional rules of the constitution present one striking peculiarity. In contra-distinction to the laws of the constitution, they are not in force by the courts. One reason for this situation is that unlike common-law rules, conventions are not judge-made rules. They are not based on judicial precedence but on precedence established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct, does not contemplate formal

sanctions for their breach."

Now, the six-judge majority then goes on to explain at pages 881 and 882 about what would happen if a public official were to breach a convention. And the Supreme Court gives two very illustrative examples.

First of all, the case of where a Governor General might refuse to give royal assent to a bill passed by Parliament, and the second example the court gives is where the government has been defeated in an election, but refuses to relinquish power. And in both cases, the court explains because these are breaches of convention, they are clearly unconstitutional acts as that term is defined.

But they still would not be sanctioned by the courts. Instead, the remedy lies elsewhere. In the first case, the Supreme Court suggests that there would likely be a political crisis. The first case, remember is the Governor General who refuses to sign the bill into law. There would be likely a political crisis that would lead to a removal from office of the Governor General. And in the second case, which is where you have the party in power refusing to relinquish the reins of government to the victorious opposition. In that case, the Supreme Court says that the remedy would lie with the Governor General who would be justified in dismissing the ministry and calling on the opposition to form the government.

But, in neither case would the courts be

able to do anything about this. And the court explains that at page 882. If we just look -- I've highlighted the entire page, but I'll read from the passage beginning at the third paragraph, it says "This conflict."

JUSTICE: Yes.

MR. BRONGERS:

> "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. 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."

Now, the three-judge minority opinion is even clearer on this point if we go back to page 853.

JUSTICE: Right.

MR. BRONGERS: And I'd just like to read -- I've highlighted a large paragraph, but I'll begin about two-thirds of the way down.

JUSTICE: Mm-hmm.

MR. BRONGERS: Actually, sorry, no, I will start off from the beginning.

1 "As has been pointed out by the majority, a
2 fundamental difference between the legal,
3 that is the statutory and common law rules of
4 the constitution, and the conventional rules
5 is that, while a breach of the legal rules,
6 whether a statutory or common law nature, has
7 a legal consequence in that it will be
8 restrained by the courts, no such sanction
9 exists for breach or non-observance of the
10 conventional rules. The observance of
11 constitutional conventions depends upon the
12 acceptance of the obligation of conformance
13 by the actors deemed to be bound thereby.
14 When this consideration is insufficient to
15 compel observance, no court may enforce the
16 convention by legal action. The sanction for
17 non-observance of a convention is political
18 in that disregard of a convention may lead to
19 political defeat, to loss of office, or to
20 other political consequences, but it will not
21 engage the attention of the courts which are
22 limited to matters of law alone. Courts,
23 however, may recognize the existence of
24 conventions, and that is what is asked of us
25 in answering the questions."
26 Remember, this was a reference, it wasn't a private
27 citizen bringing the case forward.
28 JUSTICE: Yeah.

MR. BRONGERS: "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 the well-established conventions, will not be enjoined or set aside by the courts."

Now, while the *Patriation Reference* ought to suffice as binding authority for the proposition that constitutional conventions can't be enforced by the courts, it has been restated by the Supreme Court in at least three other cases, which I won't read from, but I'll provide the cites.

The first, which is at tab 10, is the 1991 *Osborn* decision, which dealt with a charter challenge to a federal law prohibiting political activities by public servants. Paragraph 33 is the relevant passage.

Tab 11 we have the 1998 *Quebec Secession Reference*. Paragraph 98. And then third, at tab 12, we have the *Ontario English Catholic Teachers Association* case from 2001. That was a challenge to provincial legislation amending the manner in which schools were funded in Ontario, paragraphs 63 and 64, and a final authority is the Quebec Court of Appeal Senate Reform Reference, tab 7, paragraphs 58 to 59.

So to summarize, the bottom line is that constitutional conventions are not enforceable by the

courts and sanctions for their breach cannot be imposed by the courts. All the courts can do, in appropriate circumstances such as a reference proceeding instituted by the government, is to opine on the existence of a constitutional convention as was done in the *Patriation Reference*.

The courts cannot issue relief that would actually compel public officials to act in a particular manner if the request for relief is based solely on an allegation that a constitutional convention is not being respected.

So that's the first aspect of justiciability or non-justiciability. But there is also the fact that we are dealing here with an inherently political question. Prime Ministerial advice to the Governor General on Senate appointments is obviously a pure matter of constitutional convention, and constitutional conventions can't be enforced by the courts. But also it is subject to what they call the political questions objection doctrine, which was first discussed -- or not first, but it was discussed most recently by the Federal Court of Appeal in the *Hupacasath* case, a decision of Justice Stratas, which is at tab 13, and Justice Stratas gives a very clear definition of the political questions objection at paragraph 62. He writes,

> "Justiciability, sometimes called the political questions objection, concerns the

1 appropriateness and ability of a court to
2 deal with the issue before it. Some
3 questions are so political the courts are
4 incapable or unsuited to deal with them, or
5 should not deal with them in light of the
6 time-honoured demarcation of powers between
7 the courts and the other branches of
8 government."
9 Now, after remarking of the source of the
10 government power, be it statutory or prerogative, is not
11 determinative of whether government action is
12 justiciable Mr. Justice Stratas then goes on at
13 paragraph 65 to says,
14 "So what is or is not justiciable?"
15 And then at 66 he gives a good answer:
16 "In judicial review, courts are in the
17 business of enforcing the rule of law, one
18 aspect of which is executive accountability
19 to legal authorities, and protecting
20 individuals from arbitrary executive action.
21 Usually when a judicial review of executive
22 action is brought, the courts are
23 institutionally capable of assessing whether
24 or not the executive has acted reasonably,
25 i.e. within a range of acceptability and
26 defensabilty and that assessment is the
27 proper role of the courts within the
28 constitutional separation of powers. In rare

1 cases, however…"
2 and we say that this case, Mr. Alani's case is one of
3 them,
4 "…exercises of executive power are suffused
5 with ideological, political, cultural,
6 social, moral and historical concerns of a
7 sort not at all amenable to the judicial
8 process or suitable for judicial analysis.
9 In those rare cases assessing whether the
10 executive has acted within a range of
11 acceptability and defensability is beyond the
12 court's ken or capability, taking courts
13 byond their proper role within the separation
14 of powers."
15 Now, another clear explanation of this
16 notion of justiciability, and I won't read from it, but
17 it's at the next tab, tab 14. It's the *Conrad Black*
18 decision. Where the issue there was the justiciability
19 of the Prime Minister's exercise of his prerogative in
20 respect of honours. And at paragraph 50 is where
21 Justice Laskin summarizes the doctrine there.
22 JUSTICE: Okay.
23 MR. BRONGERS: And finally, also worth
24 mentioning is the *Galati* case, which we already looked
25 at before, at tab 4, at Mr. Justice Rennie's judgment.
26 Again, this was the case that dealt with a judicial
27 review in respect of the Governor General's decision to
28 act in accordance with constitutional convention, and

that is to sign into bill a law which Mr. Galati felt was unconstitutional, and Justice Rennie at paragraph 33 explains the importance of the non-justiciability rule in relation to the division of powers between the various branches of government, and that no branch should overstep its bounds, and each show proper deference for legitimate sphere or activity of others.

And the justiciability doctrine, of course, is all about the judiciary in these purely political questions restraining from interfering with the exercise of purely political power.

So the only other cases I'd like to bring the court's attention to on this issue are the two Senate appointment cases that we are aware of. They're obviously on point. There were two, two judgments, one at the Federal Court Trial Division and another of the Alberta Court of Appeal, in which the direct question at issue was whether the court can enjoin the government with respect to its Senate appointment policies.

The first one is the *Samson* case.

JUSTICE: Yes.

MR. BRONGERS: This is at tab 15 of our compendium.

JUSTICE: All right.

MR. BRONGERS: *Samson* was a 1998 decision of the Federal Court. It's an application for an interlocutory injunction brought by four individuals and the Reform Party of Alberta, who wanted an order

restraining the Governor General from appointing any senator from Alberta unless that person had been elected under Alberta *Senatorial Selection Act*, and Madam Justice McGillis dismissed the motion essentially on justiciability grounds, finding that the applicant had not set out a serious issue. And she wrote a paragraph 6, which I will read from:

> "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."

We assume this is a typo, because it's generally recognized that it's the Prime Minister personally, but in any event.

> "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."

And then at paragraph 9 on the next page.

JUSTICE: All right.

MR. BRONGERS: The court wrote:

"In my opinion, the applicants' claim in this matter is political, and not legal, in nature. As a result, the relief which the applicants seek in their application may only be attained in the political arena by means of a constitutional amendment. I have therefore concluded that the applicants have failed to establish that the case raises a serious issue to be tried. In the circumstances, it is unnecessary for me to address the other two branches of the test."

The test being the interlocutory injunction test. So that's *Samson*.

And the second case that I'd like to draw the court's attention to is the *Brown* case, which I mentioned Mr. Brown earlier. Mr. Brown was an individual who had been elected under this Alberta *Senatorial Selection Act*. The case is at tab 16, and what happened in that case is that at the time it was the Liberal government, I believe Paul Martin, who -- no, 1998, it would be a Chrétien decision. Had decided not to -- not to appoint from Alberta senators that had been named -- or had been elected under this *Alberta Senate Selection Act*. And so Mr. Brown, who clearly had direct standing, brought an application for declaratory relief before the Alberta Court of Queen's Bench, and he was looking for a declaration to the effect that the appointments that were proposed would be

unconstitutional.

Now, the Government of Canada responded to the lawsuit by bringing a motion to strike. The Court of Queen's Bench allowed the motion and an appeal to the Alberta Court of Appeal was dismissed. Now, the basis for striking out Mr. Brown's application was its lack of justiciability. And the issue -- because the issue raised was political, not legal, and that was explained at paragraph 9 of the judgment:

> "The chambers judge found that the underlying purpose of the appellant's application was to bring public attention to the issue of senatorial selection and to put public and political pressure on the Governor General to appoint to the Senate a person elected under the *Senatorial Selection Act*. She concluded that in light of this purpose, it would not be appropriate for the court to intervene because there was no justiciable or legal issue, that is, no rights of the parties would be affected. On this basis, the originating notice of motion was struck out."

Now, the Alberta Court of Appeal found that the chambers judge was right to do so, and the key finding was at paragraph 24 and 25.

> "[24] The remedy he [Mr. Brown] seeks from the court is an order declaring that senators appointed from Alberta must be appointed in

the manner consistent with the processes of the *Senatorial Selection Act*."

So sort of similar to Mr. Alani, looking for a declaration that the Prime Minister must give legal advice on Senate appointments within a certain time.

"This claim, however, does not stand unqualified. He asserts that this procedure must be followed for an appointment to be consistent with democratic principles. In other words, the appellant does not ask the court to declare that appointments made inconsistently with the *Senatorial Selection Act* are unconstitutional. Rather he requests that the court declare that any such appointments will be undemocratic. In essence he's asking the court to be aribter of the democratic character of senatorial appointment. He wants the courts to look at the appointment process and to make a statement on whether or not the process is democratic. In order for the court to be able to make such a statement, it must have jurisdiction to do so. It will have jurisdiction only where there is a legal issue.

We agree with the Crown that the appellant seeks to invoke the democratic principle per se, divorced of its

interpretive role and devoid of legal issues simply because the declaratory order from the court would, in his view, have considerable persuasive effect and it would confer democratic legitimacy on the *Senatorial Selection Act*. We do not view the Supreme Court's statement in the *Quebec Succession Reference* as modifying the existing jurisprudence on what constitutes a legal issue. Accordingly, we cannot find that the appellant's originating notice, as it is presently structured, raises a legal issue as required by the existing law."

So in our submission there really can be no doubt that just like the applications in *Samson* and *Brown*, Mr. Alani's application for declaratory relief in relation to Senate appointments is political, not legal in nature and as such is non-justiciable.

I'll just be another five minutes on justiciability, and perhaps that would be a good time to take the afternoon break.

JUSTICE: Good idea.

MR. BRONGERS: Thank you, Justice O'Reilly.

So, just to respond then. That is our position with justiciability. As we understand Mr. Alani's response to the justiciability argument, he essentially is advancing two, two novel arguments as to

1 why, notwithstanding the *Patriation Reference* and all of
2 this other clear jurisprudence that was discussed, that
3 constitutional conventions like the one relating to the
4 Prime Minister's role on Senate appointments ought to be
5 justiciable, and it would be precedent setting if the
6 court were to find that.
7 First of all, Mr. Alani argues that even
8 if the court can't enforce a constitutional convention,
9 it should be open to the court to at least issue
10 declaratory relief when they are breached. In other
11 words, he says since he's just looking for a declaration
12 against the Prime Minister, not a mandamus order, his
13 judicial review ought to be justiciable.
14 Now, our response to this argument we set
15 out at paragraphs 55 to 57 of our factum, and
16 effectively the jurisprudence has gotten to the point
17 where it's now clear that when declaratory relief is
18 granted against the Crown, the Crown can't just treat
19 that as optional guidance. And as this court stated --
20 sorry, not this court, but the Federal Court of Appeal
21 stated in the *Assinboine v. Meeches* case, which is at
22 tab 17 of our book of authorities, relying on the
23 Supreme Court of Canada's decision in *Doucet-Boudreau* –
24 the actual passage is at paragraph 15 – the court wrote:
25 "…the assumption underlying the choice of a
26 declaratory order as a remedy is that
27 governments and public bodies subject to that
28 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:

> "Our 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.'…"

And indeed, Mr. Alani alluded to this, that is a concern of the government, of course, that in the event the court does issue the declaration as requested by Mr. Alani, that the Prime Minister must or shall give advice to the Governor General about Senate appointments within a reasonable time after a Senate vacancy occurs, well then Mr. Alani, or indeed anyone else, if this is done on a public interest standing basis, if there is concern over an appointment taking longer than four, five, six months, that person could then go back to this court and say, there has been contempt here, because there has not been an appointment

within a reasonable period of time.

So it is no answer to the justiciability argument to say that, well it’s merely declaratory relief. Declaratory relief against the Crown does effectively have binding import.

And furthermore, while it’s true that the government can bring a reference to seek a non-binding opinion on the existence and scope of a constitutional convention, as it did in the *Patriation Reference*, a private individual doesn’t have that power. There’s no statute – Mr. Alani hasn’t pointed to one and we’re not aware of one – which allows an individual to bring a private Reference to the Federal Court seeking an opinion on the constitutionality of the Prime Minister's policies on Senate appointments.

Now, the second novel basis that Mr. Alani raises for arguing that the constitutional convention in relation to the Prime Minister's Senate appointment power ought to be justiciable is because he says that it's allegedly necessary in order to uphold Canada's constitutional architecture. And that phrase, "constitutional architecture", of course, is taken from the *Senate Reform Reference*.

Now it's true that the *Senate Reform Reference* did provide the Supreme Court with the opportunity to recognize the role that a non-elected Senate plays in the fundamental structure of the Canadian constitutional framework. But it's not true

that the Supreme Court has now somehow made the Prime Minister's advice-giving role in relation to Senate appointments judicially reviewable by individual Canadians.

The Supreme Court in the *Senate Reform Reference* acknowledged the existence of a convention whereby the Governor General always acts on the Prime Minister's advice on Senate appointments, and the court of course implicitly assumed that that convention would continue to be followed when considering the practical effect of the proposed Senate reforms that were in issue on that *Reference*. But there is no language in the judgment which -- to the effect that the Supreme Court somehow has mandated that the Governor General now has to continue to follow the Prime Minister's advice, or that the Prime Minister has to continue providing the Governor General advice, failing which the court could then intervene at the behest of an individual citizen.

And interestingly, Mr. Alani's argument on this point is very similar to the one that Mr. Brown advanced before the Alberta Court of Appeal. He had said that another *Reference*, the 1988 *Quebec Secession Reference*, had somehow changed the law in order to render his case justiciable. But the Alberta Court of Appeal, as I just read to the court, rejected that argument.

So unless the court has any further questions about justiciability, this might be a good

time to take the afternoon break.

JUSTICE: Yes. Let's do that. So we'll take ten minutes, please, Mr. Brongers.

MR. BRONGERS: Thank you, Justice O'Reilly.

(PROCEEDINGS ADJOURNED FOR A BREAK AT 3:11 P.M.)

(PROCEEDINGS RESUMED PURSUANT TO BREAK AT 3:20 P.M.)

JUSTICE: Mr. Brongers?

MR. BRONGERS: Thank you, Justice O'Reilly.

JUSTICE: I think you have another issue to address.

MR. BRONGERS: Yes. A couple more.

JUSTICE: All right.

MR. BRONGERS: Sure, we're on number 4, we're almost there.

JUSTICE: Okay.

MR. BRONGERS: Jurisdiction is the next one, and fortunately the parties have narrowed that issue thanks to Mr. Alani's proper and candid concession that the only way that the Federal Court can have jurisdiction over his application is if the court concludes that the subject matter of his judicial review is the exercise of a Crown prerogative.

JUSTICE: Mm-hmm.

MR. BRONGERS: We all agree there is no statute in issue. So, in order to determine whether the Prime Minister's advice-giving role in respect of

Senate appointments is actually a Crown prerogative power, it's important to first of all ascertain what exactly a Crown prerogative is. And I'll go to Professor Hogg again for a definition, at tab 8 of our compendium at page 1-18.

JUSTICE: All right.

MR. BRONGERS: "The royal prerogative consists of the powers and privileges accorded by the common law to the Crown."

Dicey described it as:

"…the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown. The prerogative is a branch of the common law, because it is the decisions of the courts which have determined its existence and extent."

So you have to look at Court decisions, essentially, in order to find prerogative powers.

Appointments to the Canadian Senate, however, have never been a matter of Crown prerogative. The Senate was created by a statute, and not just any statute, a statute of the Parliament of the United Kingdom, the *British North America Act*, what we now call the *Constitution Act, 1867*. And the power to name senators was given to the Governor General, as Mr. Alani explained, by Sections 24 and 32 of that document.

Now, the power to name Senators was also

not "accorded by the common law to the Crown", to use Professor Hogg's words, as it was not some court decision which determined its existence and extent. And as such, it is not an incident of the Crown prerogative. Again, it is a power conferred upon the Governor General expressly by the *Constitution Act, 1867.*

Now, when the Prime Minister exercises his conventional role as advisor to the Governor General, when making appointments to the Senate, he is obviously not exercising a Crown prerogative either. All the Prime Minister is doing there is giving advice; advice that the Governor General is under no legal obligation to follow.

As we discussed earlier, if the Governor General were not to follow the Prime Minister's advice on a Senate appointment, or were to unilaterally name Senators without waiting for a Prime Minister to advise on who should be appointed, there would be no judicial recourse for the Prime Minister, the Prime Minister's nominee, the Attorney General, or anyone else. So as such, this advice cannot constitute an exercise of the Crown prerogative, because there's no power behind it. A prerogative power is subject to judicial enforcement, and this is just simply the giving of advice.

So therefore in our submission it is clear that Prime Ministerial advice to the Governor General is not an exercise of prerogative power, any more than it is an exercise of statutory power, and

1 therefore this matter falls outside of Section 18 of the
2 *Federal Courts Act*.
3 Now, Mr. Alani disagrees with this. He
4 has advanced two arguments, again novel, as to why his
5 case involves a prerogative power that ought to be
6 within the Federal Court's jurisdiction to review. His
7 first argument, which is set out at paragraphs 76 and 77
8 of his *factum*, and he reiterated it this morning orally
9 as well, is that the Governor General allegedly has a
10 Crown prerogative to summon and receive advice from the
11 Prime Minister. And he then concludes that that means
12 that the Prime Minister's advice is in turn an exercise
13 of the Crown prerogative. And he draws this from the
14 article written by the Queens law professor, Professor
15 Walters, in which he explains, as Mr. Alani said to the
16 court, that the Crown's prerogative or common law right
17 to summon advisors to gather in the Privy Council is
18 something that, in Professor Walters's opinion, is
19 something that should be incorporated into Canadian law
20 or recognized by Canadian law.
21 So as I read the article, it's more of an
22 aspirational statement of what the law should be, as
23 opposed to a reflection of what it actually is. But
24 there is a difficulty with the argument, and that's that
25 a Crown prerogative, again, it's a power. It's a power
26 by the Crown to actually do something. For example, to
27 take military action, or to conduct foreign affairs, or
28 to bestow an honour. But giving advice to the Crown on

how to exercise its power is not in and of itself a power, it's just advice. And it doesn't make sense to speak of the Crown having a prerogative power to do something while then saying that at the same time that there is a prerogative power held by a third party outside of the Crown to give advice to the Crown on how to exercise that power.

With all due respect to Mr. Alani, this argument in particular does seem to amount to a very strained attempt to force a square peg into a round hole.

Turning to Mr. Alani's second jurisdictional argument, he says at paragraphs 78 and 79 of his *factum*, and this is an argument that he did not repeat orally, but he did state that he is not abandoning any of the arguments he is making in his *factum*, he notes that there were minutes of Council issued approximately 100 years ago, and somehow says that this is evidence that prime ministerial advice on Senate appointments is made pursuant to the Crown prerogative.

Now, it's true that between 1896 and 1935 there were various minutes of Council issued by the governments of Charles Tupper, Sir Wilfred Laurier, Robert Borden, Arthur Meighen, R. B. Bennett, and finally Mackenzie King, some of which are in Mr. Alani's book of authorities at tabs 24, 25, and 26. These minutes of Council do record that the Cabinets of the

1 day decided that it would be the Prime Minister who
2 would provide the advice to the Governor General on
3 Senate appointments, as opposed to another Cabinet
4 Minister or a Cabinet as a whole. So they do exist.
5 But they are not evidence that the advice-giving role of
6 the Prime Minister is in fact the exercise of a
7 prerogative power.
8 And authority for this, that, though,
9 it's still simply a reflection of an exercise of a
10 constitutional convention, can be found at tab 7 of our
11 compendium. And this is the *Quebec Senate Reference*.
12 If I could ask the court to turn to paragraphs 52 and 53
13 of that judgment.
14 JUSTICE: All right.
15 MR. BRONGERS: The Quebec Court of
16 Appeal wrote:
17 "[52] Pursuant to Section 24 of the
18 *Constitution Act, 1867,* the Governor General
19 summons a person to the Senate on behalf of
20 the Queen.
21 [53] In fact, however, the constitutional
22 conventions of the day…"
23 not the prerogative,
24 "…constitutional conventions of the day are
25 to the effect that the Governor General's
26 power can only be exercised on the advice of
27 the Prime Minister of Canada, a practice that
28 was recognized in the minutes of the Privy

1 Council for Canada from July 13, 1896 to
2 October 25, 1935."
3 So we would submit again these minutes
4 are nothing more than a recognition of the
5 constitutional convention as it was understood when they
6 were drafted. They could change, of course. A future
7 government might decide that it would be a different
8 Cabinet Minister, perhaps, who would give advice. But
9 those minutes of Council documented how the convention
10 was understood back then. But these are not orders made
11 pursuant to a prerogative of the Crown.
12 So, unless the court has any questions,
13 that concludes our submissions on jurisdiction.
14 JUSTICE: All right.
15 MR. BRONGERS: And brings me to the
16 fifth and final issue in this case, the substantive
17 merits of Mr. Alani's request for declaratory relief.
18 And again, at the risk of stating the obvious, of
19 course, the court need not address these merits unless
20 it first finds that the case is not moot; Mr. Alani has
21 standing; the matter is justiciable; the matter is
22 within the jurisdiction of the Federal Court.
23 But in the event the court makes all four
24 of those findings, it's our position that Mr. Alani's
25 request for the specific declaration that he is seeking
26 should nevertheless be denied, as it's substantively
27 unjustified.
28 Now, the starting point for this analysis

is the cardinal principle that applies to declaratory relief. For the court to grant a declaration, not only must it be supported by the court's factual findings and its understanding of the law, but the declaration must have practical utility.

And authority for this proposition can be found most recently in the Supreme Court of Canada's decision in the *Daniels* case. As the court is likely aware, that was the recent decision dealing with declaratory relief in relation to the federal government's jurisdiction over Métis people and non-status Indians. At the time our *factum* was written, the case hadn't gone up to the Supreme Court yet, so we just cited the Federal Court of Appeal decision.

JUSTICE: All right.

MR. BRONGERS: Since then, the Supreme Court has rendered its decision in *Daniels* and, just to be complete, we have included it at tab 18 of the compendium.

JUSTICE: Okay.

MR. BRONGERS: And at paragraph 11, the court wrote:

> "The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution."

So many of the similar factors that we're looking at on the standing and justiciability test. But then it says:

> "A declaration can only be granted if it will have practical utility; that is, if it will settle a 'live controversy' between the parties."

So, let's turn now to whether the facts and the law would support the granting of a declaration on the basis proposed by Mr. Alani. And again, it's important to keep in mind, as my colleague Mr. Pulleyblank said, the specific declaration as pleaded that Mr. Alani is asking for. He wants 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.

As we've already discussed, the Constitution *Act* of 1867 says nothing about the Prime Minister's advice giving role on Senate appointments. Accordingly that instrument is of no assistance in determining whether prime ministerial inaction on Senate appointments somehow constitutes a breach of a constitutional rule. Instead the only possible source of a rule that we could go to if this matter is judiciable, that you could use as a yardstick to somehow evaluate the lawfulness of the Prime Minister's acts or omissions, would be in the domain of constitutional conventions.

1 So the question then becomes is there a
2 constitutional convention regarding the timing of prime
3 ministerial advice on Senate appointments? And if so,
4 on the facts of this case, was it breached and thereby
5 potentially justifying the issuance of the declaration
6 that Mr. Alani is looking for.
7 JUSTICE: All right.
8 MR. BRONGERS: Now because
9 constitutional conventions are not statutes whose
10 existence can be found in the statute books or
11 prerogative powers whose existence can be found in the
12 jurisprudence, judicial notice cannot be taken of the
13 existence of a constitutional convention unless perhaps
14 in the case where it already has been the subject of
15 judicial consideration. So for example in a reference.
16 Otherwise their existence must be proven through
17 evidence.
18 And in the case at bar there is no pre-
19 existing authority for the notion that there is a
20 constitutional convention that Senate vacancies must be
21 filled within a certain time period, either a fixed
22 temporal period or one that's defined by a reference to
23 an adjective like "reasonable".
24 And that's why Justice Harrington
25 correctly and reasonably noted in his judgment
26 dismissing Canada's motion to strike that this court
27 will be in need of evidence regarding the scope and
28 extent of the constitutional convention relating to

prime ministerial advice on Senate appointments. If we could just look at Justice Harrington's judgment briefly, it's at tab 5 of our compendium.

JUSTICE: All right.

MR. BRONGERS: At paragraph 23, it starts on page 6, at the bottom of page 6. Justice Harrington wrote:

> "Again, the timing question cannot be answered at this time as we do not know the actual scope of the constitutional convention. The respondents must provide proof thereof as indeed stated at page 888 of *Re: Resolution to Amend the Constitution*."

Patriation reference, and then he goes to cite the passage from the patriation reference which conveniently sets out the test that has to be applied by the court when it's determining whether a convention exists or not. And that's the famous *Jennings* test set out in the 1959 addition Jennings' *Law and the Constitution* book. And Jennings wrote:

> "We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of

1 no avail, unless it is perfectly certain that
2 the persons concerned regarded them as bound
3 by it."
4 And then the key at paragraph 24, Justice
5 Harrington writes:
6 "The parties…"
7 plural,
8 "…will have an opportunity to provide proof
9 of the existence and scope of any relevant
10 convention at the hearing of the application
11 on the merits."
12 Now Canada took this seriously and did so
13 be tendering the expert report of Professor Manfredi,
14 and that’s the only evidence that's before the court in
15 relation to the existence and scope of the
16 constitutional convention relating to the timing of the
17 giving of advice to the Governor General in relation to
18 Senate appointments.
19 Mr. Alani of course did not tender an
20 expert report nor does his own affidavit speak to this
21 either. He did not explain in his factum why he failed
22 to do this, and also he didn't take issue with -- in his
23 factum with Professor Manfredi's affidavit. So it came
24 as a bit of a surprise this morning when for the first
25 time Mr. Alani explained that he actually takes the
26 position that Professor Manfredi's affidavit is
27 irrelevant and, what's more, should be disregarded
28 because it's flawed. That's a new argument as far as

1 we're concerned.
2 He say, as I understand it, that the
3 affidavit is irrelevant because it doesn't matter how
4 long the Prime Ministers in the past have taken to name
5 senators since you can't justify a violation of the
6 constitution just because it's been done repeatedly in
7 the past, which is a bit of a logical leap that not
8 naming Senators quickly is a violation of the
9 constitution. But in any event it's his position that
10 it's irrelevant.
11 Well, we say it is relevant. According
12 to the Jennings test when you ascertaining whether a
13 constitutional convention exists one looks at the past.
14 You look at the precedents. So an affidavit setting out
15 the historical precedents with respect to a
16 constitutional convention is entirely relevant to an
17 application for judicial review in which it's alleged
18 that there's been a breach of the constitution through
19 the lack of respect of a constitutional convention.
20 So it would have been helpful if Mr.
21 Alani had set out in his factum that this was his
22 position and then we could have provided written
23 submission on it. But in any event we're on notice now
24 and our response to Mr. Alani's argument is as follows.
25 First of all, in order for Mr. Alani to
26 obtain the declaration he seeks the court need to be
27 satisfied, through evidence, that there is a
28 constitutional convention that Senate vacancies must be

filled within a certain time. Because otherwise if the court doesn't find that such a rule exists, there can then be no legal justification for the court to declare that the Prime Minister must provide advice on Senate vacancies to the Governor General within a reasonable time after a vacancy occurs. So that's our first response.

Secondly, in other cases where constitutional conventions have been put in issue, the parties have led evidence with respect to this. Professor Manfredi provided an expert report to the Supreme Court of Canada with respect to the *Senate Reform Reference* as one example.

The other example that I would like to point the court to, just because it happens to be in the compendium of authorities, is the *Ontario Teachers Association* case which at tab 12.

Now *Ontario English Catholic Teachers Association*, a Supreme Court of Canada decision. In that case the court, first of all, noted again the principle that constitutional conventions cannot be enforced. But it then went on to see whether – I guess in obiter – whether a constitutional convention had developed in the way that the appellant suggested it did. If we look at paragraph 66, which isn't highlighted in the version that you have Justice O'Reilly, I just looked at it over the lunch hour.

At paragraph 66, the court wrote:

"Even if this were the type of issue over which a constitutional convention could develop, which I believe it is not, there is no evidence of such a convention developing in Ontario."

So that indicated that this is not, as I think as Mr. Alani seems to suggest, the court could just deal as a question of law whether a constitutional convention exists, there had to be evidence. And again perhaps judicial notice could be taken in a particular case if it's already been decided by a court. But we're in unchartered waters here, the question of whether there's a constitutional convention of the Prime Minister has to give that advice within a certain time period after a vacancy occurs.

So we submit that Justice Harrington was right to tell the parties, please give the court some evidence that it can work with with respect to this.

And if the court on the other hand agrees with Mr. Alani that Professor Manfredi's affidavit somehow should be disregarded, well, given the lack of evidence from Mr. Alani, the court will then be left in an evidentiary vacuum meaning that the declaration he seeks can't be granted in any event. So in our submission it's as bit against his interest to argue against the once piece of evidence that the court does have with respect to the existence of this constitutional convention.

1 But we submit it's relevant and it
2 provides the only basis on which the court can fairly
3 answer the substantive questions posed by Mr. Alani, if
4 the court chooses to answer it.
5 And so Professor Manfredi's affidavit,
6 I'm sure the court has had a chance to read it already.
7 It's at tab 1 of our application record. We tried to
8 summarize its content at paragraphs 22 to 29 of our
9 factum, which I won't read from.
10 But briefly Professor Manfredi was asked
11 to opine on two questions: First whether there is a
12 constitutional convention in relation to the timing of
13 prime ministerial advice on Senate appointment, and if
14 so what's the scope of that; and secondly, whether there
15 is a constitutional convention that the Prime Minister
16 must advice the Governor General to summon a person to
17 fill a vacancy in the Senate within a fixed period of
18 time after a vacancy occurs.
19 He of course was not asked to opine on
20 the ultimate question of whether the court should issue
21 a declaration that the Prime Minister must advise the
22 Governor General on Senate appointment within a
23 reasonable time after a vacancy occurs, or on whether
24 Prime Minister Harper's actions were somehow contrary to
25 a convention as that would have run afoul of the
26 ultimate questions rule. But the affidavit does, we
27 think, quite properly assist the court with the
28 preliminary question of what is the scope and extent of

the convention relating to prime ministerial advice on Senate appointments in terms of their timing. Exactly the kind of help that Justice Harrington said the court will need.

And we submit that there's no dispute that Professor Manfredi is qualified to opine on these matters, he's a professor of political science at McGill University where he's been a member of the faculty since 1988. He's written extensively about public law, Canadian politics, constitutionalism, judicial politics. In 2010 he actually served on the Governor General's expert advisory committee, which interestingly was the committee that provided recommendations to the Prime Minister with respect to another appointment power that, by constitutional convention, is exercised on the advise of the Prime Minister, namely the power of the Queen of Canada to name the Governor General.

But last but not least this is not the first time Professor Manfredi has tendered expert evidence in relation to Senate issues. As I said before, in 2013 he prepared an expert opinion on the possible effects of proposed legislation that would have provided for elected senators and impose Senate term limits. And those opinions were tendered in both the Supreme Court Senate reference and the Quebec Court of Appeal Senate reform reference.

So for this expert opinion what Professor Manfredi did is he explained his understanding both of

what constitutional conventions are and how there existence is established. And on this latter point, establishing the existence of a convention, Professor Manfredi noted at paragraph 10 of his affidavit that it is the Jennings test that is to be applied. And then he proceeded to examine whether there is in fact a constitutional convention in Canada relating to the timing of prime ministerial advice on Senate appointments. And as Mr. Alani noted he did this by examining the historical patterns of Senate vacancies with an eye to verifying how long it generally takes to fill vacant Senate seats, and he found a very wide variation ranging from 0 to 3,870 days in terms of how long it takes to fill a vacancy. And he noted, interestingly of course, is that actually the Senate of Canada ordinarily functions with less than its 105 compliment of senators. It's actually exceptional that at any one time the court has all 105 names.

And this as a political phenomenon, interestingly enough, is not one that occurs uniquely with any of the political parties. Historically there's both been Liberal administrations where the Prime Minister has allowed Senate vacancies to accumulate and Conservative ones historically.

So ultimately what Professor Manfredi concluded on the basis of his historical statistical analysis is that no conventional rule has emerged governing how long a vacancy may be left open. Instead

Prime Ministers have a broad discretion in terms of the timing of their Senate appointments, they take as much time as they consider to be politically necessary. Although he also said that the evidence suggest that the Prime Ministers don't allow vacancies to remain unfilled indefinitely.

And he did indeed make also the interesting observation that Mr. Alani referenced with respect to Prime Minister, former Prime Minister Mulroney's comments to the media in which he suggested that Prime Minister Harper impose a moratorium on senate appointments. He made that suggestion before Prime Minister Harper actually formally imposed one. And the reason for that was Prime Minister Mulroney said it would be a good idea to do this until a Code of Conduct can be developed for the senators.

And Professor Manfredi observes that well logically if Prime Minister Mulroney having been in the position as one of these actors who made the precedents of naming senators felt that this was conventionally permissible to impose a moratorium, that's indicative again that there is no conventional rule that Prime Ministers are forbidden from imposing a temporary moratorium on Senate appointments.

Again, because this is what Professor Manfredi said, Prime Minister’s don’t allow vacancies to remain unfilled indefinitely. But even with Prime Minister Harper’s proposed moratorium, there were limits

he imposed on that. Saying that he wouldn't name senators until either the Senate is reformed or abolished, obviously. But also if it ever got to the point that the government could no longer pass legislation, he would resume appointing senators.

So there's never factually a case where there was a serious allegation of allowing the Senate to "wither on the vine", is the expression that's been used.

So in our respectful submission the court ought to come to the same conclusion as Professor Manfredi. That is that there is no constitutional convention in Canada that the Prime Minister must advise the Governor General to appoint a senator within a specific period of time following a vacancy. And it should be noted that there's actually some jurisprudential support for Professor Manfredi's opinion, and it can be found in the *Samson* case, which I discussed earlier. It's at tab 15.

JUSTICE: All right.

MR. BRONGERS: Again, this was the request for an interlocutory injunction to restraining the Governor General from appointing a senator from Alberta unless that was an elected senator, someone who had been elected under the provincial *Senatorial Selection Act*.

And Justice McGillis, at paragraph 5, writes about the wide discretion of the Governor General

enjoys concerning Senate appointments. She wrote:

> "[5] 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."

Now, we submit that it stands to reason that if there are no imperative time limits on the Governor General's power of appointment, there would be no imperative time limits on the Prime Minister's advice to the Governor General on how to exercise his or her power of appointment.

So given the lack -- sorry, given the lack of a constitutional convention that Senate

vacancies must be filled within a certain time period, we submit that the conclusion that must be reached is that the December 2014 comments of former Prime Minister Harper regarding the outstanding Senate vacancies, which are what is challenged here, and his lack of intention to immediately address these vacancies does not constitute a breach of any recognized constitutional convention. And what this means is that on the facts before the court Mr. Alani's application for judicial review should be dismissed and he should not be granted the declaration that he has requested.

Now, all of that being said, even if there was evidence of the existence of a constitutional convention that Senate vacancies cannot be permitted to remain unfilled beyond a certain period of time, which we deny, but assuming that evidence to that effect had been led, we say that the declaration that Mr. Alani is seeking still shouldn't be granted as it would be of no practical utility. And that's because he has deliberately refrained from asking the court for a declaration that there is a specific fixed temporal limit on how long a Senate seat can remain unfilled, such as one month, or six months, one year.

Instead he's asking for a general declaration that decisions on Senate appointments must be made within a "reasonable" time. And this was apparently a deliberate choice that he had made. And again, the article that I cited earlier with *Canadian*

Lawyer Magazine, he explained to the journalist, we can fight about the timeframe later.

Now, given that the timing of Prime Ministerial advice in respect of Senate appointments will necessarily be made in accordance with what the sitting Prime Minister feels is politically reasonable, we submit that this declaration would obviously not be of any assistance to anyone.

Now, we're not suggesting that Mr. Alani should then be permitted to request a different declaration, which would actually set a particular time limit. Indeed it was also a little troubling this morning that Mr. Alani advised the court again for the first time that even though he's not expressly asking for a specific time limit in his declaration, he would be "fine with it if the court were to issue a declaration with a time limit". And that's problematic from our perspective because as we note in our factum, again this isn't a reference, it's not a commission of inquiry, and the parties, including Canada, have not provided the court with the evidence that it might need to decide what an appropriate time limit would be.

And indeed, as Mr. Alani suggested, there's a lot of potential variables that would have to go into that calculation of what a reasonable time limit would be. If the Prime Minister's preferred appointee is not available, for example as one of them, in order to ensure gender balance it might take longer. There's

all sorts of reasons why appointments might not be made as quickly as some people might subjectively feel are reasonable.

So for the court to come up with a fixed yardstick of six months or twelve months would be an exceedingly difficult task, and again, we submit that to even contemplate the question actually illustrates why this case is not justiciable. It is such a political question as to how long it should take for the Prime Minister to fill a vacancy, that it's not something that easily could be the subject of a court declaration setting down a fixed time limit.

So to conclude on this issue then, there's no evidence that the former Prime Minister's comments in December of 2014, and the fact that he, like previous Prime Ministers, had allowed vacancies to accumulate constitute any breach of a constitutional rule, be it conventional or otherwise, and as such we submit that Mr. Alani's request for declaratory relief should be denied.

Unless the court has any questions, I'll turn briefly to the matter of costs.

JUSTICE: All right.

MR. BRONGERS: In our submission, we say that costs should follow the event, and that Mr. Alani should not be granted an immunity from a cost award in the event his application is dismissed.

In terms of the quantum of these costs,

we submit that if costs are awarded, that they should be determined following the ordinary assessment process. And again, Mr. Alani gave us no advance notice that he would be asking for an undefined lump sum cost award of between 13,000 and 25,000 dollars in any event of the cause, and he didn't provide us with any worksheets to show how this might be calculated. He made some vague references to what he thinks the tariff would justify. He also claims he's incurred some disbursements, but has not provided any proof in support of that.

And with all due respect, in our submission this just isn't an acceptable way to claim costs, particularly when the amounts in issue are in the five figures. If the court awards costs, they should be properly taxed, justified and assessed by whichever party is ultimately awarded them.

And finally, while we acknowledge that the court always has the discretion to award costs to an unsuccessful party or to grant them an effective immunity from costs in certain circumstances, including the notion that the litigation had been brought in the public interest, we submit that this is not a case that would justify such a costs immunity or an adverse costs award.

By filing this application Mr. Alani has created a situation where a not insignificant amount of public resources have had to be devoted to addressing his lawsuit, resources that could have been deployed

elsewhere, and this, of course, is what occurs whenever an individual chooses to start a lawsuit against the government. And it's well established that as such lawsuits turn out not to be meritorious, the unsuccessful party is then required to help offset the costs that his or her lawsuit has unnecessarily given rise to. And the rationale, of course, behind this rule, which applies to all litigation, is not just that involving the government, is both compensation and deterrence.

Now, as for Mr. Alani's claim that he is a public interest litigant, we submit that that rings a little hollow, both for the reasons that we've already set out in respect of our position on public interest standing, but also because Mr. Alani has led no evidence to show that there is in fact any significant demand by the public at large for a court ruling on Senate vacancies. And this is not a matter, we say, that the court can judicial notice of. And it was incumbent for Mr. Alani to provide that evidence, which he hasn't done. So again, in our submission, we say costs should simply follow the event.

So Justice O'Reilly, those are our formal submissions on the specific issues in this case, but if I may, I'd like to conclude with just one last general observation.

JUSTICE: All right.

MR. BRONGERS: Because this is a court

of law, this case will necessarily have to be decided on the basis of applicable legal principles, which in our submission must result in the dismissal of Mr. Alani's application. But it's important not to lose sight of the fact that as a practical matter, Mr. Alani's original concern with the prospect that vacant Senate seats were being left unfilled has been addressed. Not as a result of Mr. Alani's case, but rather through Canada's democratic electoral political system.

In October of last year the system resulted in the election of a government formed by the only major political party that expressed support for the notion of resuming appointments to the Senate, albeit using a new independent advisory body for doing so, and we submit that this is precisely how our Constitution envisages that disagreements with the government on policies relating to matters of convention, like Senate appointments, can and ought to be resolved. Not in the judicial arena, at the urging of a single individual, but rather in the political arena, where the collective will of all Canadians can be considered and reflected.

Thank you, Justice O'Reilly.

JUSTICE: Thank you, Mr. Brongers.

Mr. Alani, any reply?

MR. ALANI: Barring any further questions, I have nothing in reply, Justice O'Reilly.

JUSTICE: Thank you, sir. In that

circumstance, there's no need for a reply on the issue of mootness?

MR. ALANI: Correct.

JUSTICE: Well, you've given me a number of very interesting issues to consider. There is a convention that the court will decide a case within six months, and I certainly intend to issue a decision well within that timeframe, but thank you for your helpful submissions and the materials you've placed before me.

Thank you, Mr. Alani, Mr. Brongers, Mr. Pulleyblank.

THE REGISTRAR: The court is now concluded.

(PROCEEDINGS ADJOURNED AT 4:00 P.M.)