Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA and
THE GOVERNOR GENERAL OF CANADA

Respondents

RESPONDENTS' MOTION RECORD

Aniz Alani
[redacted]
Tel: 604-600-1156

Applicant

William F. Pentney
Deputy Attorney General of Canada
Per: Jan Brongers/Oliver Pulleyblank
Department of Justice
B.C. Regional Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Tel: 604-666-0110
Fax: 604-666-1585

Solicitor for the Respondents

INDEX

1. Notice of Motion of the Attorney General of Canada filed January 15, 2015
2. Notice of Application filed December 8, 2014.
3. Order of the Chief Justice and Direction of the Chief Justice dated January 29, 2015.
4. Written representations of the Respondent dated February 13, 2015.

Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

Aniz ALANI

Applicant

and

THE PRIME MINISTER OF CANADA and THE GOVERNOR GENERAL OF CANADA

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT the Respondents will make a motion to the Court on a special hearing date to be set by the Judicial Administration pursuant to Rule 35(2)(b) as it is likely to be lengthy. The estimated duration of the motion is ½ day (up to 4 hours) and the Respondents request that it be heard in Vancouver, British Columbia..

THE MOTION IS FOR the following relief:

(a) an order striking out the Applicant's notice of application;

(b) an order dismissing the Applicant's application;

(c) costs of this motion payable by the Applicant to the Respondents fixed in the amount of $1,000.00; or

(d) such further and other relief as the Court deems just.

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THE GROUNDS FOR THE MOTION ARE:

(a) the Applicant has sought judicial review of an alleged "decision" of the Prime Minister "not to advise the Governor General to summon fit and qualified Persons to fill existing Vacancies in the Senate";

(b) in the context of this judicial review, the Applicant seeks declaratory relief to the effect 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", and that the alleged "deliberate failure" to do so is unlawful;

(c) as the Applicant properly concedes in his notice of application, advice by the Prime Minister regarding appointments to the Senate is a matter of constitutional convention;

(d) the Applicant's application is fundamentally flawed because it constitutes a request to a Court to legally enforce a constitutional convention, a matter that is not justiciable;

(e) in addition, because the Prime Minister is not a "federal board, commission or other tribunal" as defined by s. 2 of the *Federal Courts Act* when he provides advice to the Governor General regarding Senate appointments, the Federal Court has no jurisdiction to conduct judicial review in respect of such advice;

(f) accordingly, the Applicant's application for judicial review is so clearly improper as to be bereft of any possibility of success, and therefore deserves to be struck out and dismissed summarily by means of a preliminary motion;

(g) the *Federal Courts Act,* in particular ss. 2, 18 and 18.1;

(h) the *Federal Courts Rules,* in particular Rules 3, 4 and 221;

(i) such further and other grounds as the Respondents may suggest and which may be accepted by the Court.

3

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) None.

Date: January 15, 2015

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

Solicitor for the Respondents

TO: **Aniz Alani**

[redacted]

Applicant

Service of a true copy hereof admitted this 10th day of DEC 20 14

Per: (Chad Dew)
Solicitors for the ATTORNEY GENERAL OF CANADA

Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA and
THE GOVERNOR GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the Federal Court in Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of *the Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: ORIGINAL SIGNED BY
LINDA LABERGE
REGISTRY OFFICER

Issued by: _____
(Registry Officer)

Address of local office: Federal Court
Courts Administration Service
P.O. Box 11065, 3rd Floor
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO:

THE PRIME MINISTER OF CANADA
80 Wellington Street
Ottawa, ON K1A 0A2

THE GOVERNOR GENERAL OF CANADA
1 Sussex Drive
Ottawa, ON K1A 0A1

ATTORNEY GENERAL OF CANADA
284 Wellington St.
Ottawa, ON K1A 0H8

DEPARTMENT OF JUSTICE CANADA
British Columbia Regional Office
900 - 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of the decision of the Prime Minister, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified Persons to fill existing Vacancies in the Senate.

THE APPLICANT makes application for:

1) A declaration that:

   a) 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.

   b) the deliberate failure to advise the Governor General to summon a fit and qualified Person to fill a Vacancy in the Senate within a reasonable time after the Vacancy happens

      i) is contrary to section 32 of the *Constitution Act, 1867*;

      ii) is contrary to section 22 of the *Constitution Act, 1867*

         (1) to the extent the Vacancies when considered in the aggregate deny a province or territory of the proportion of regional representation set out in section 22 of the *Constitution Act, 1867*, and

         (2) to the extent that a Vacancy deprives a province or territory of the minimum number of representatives in the Senate set out in section 22 of the *Constitution Act, 1867*;

      iii) undermines and breaches the principles of

         (1) federalism,

         (2) democracy,

(3) constitutionalism,

(4) the rule of law, and

(5) the protection of minorities,

and underlying constitutional imperatives, as enunciated by the Supreme Court of Canada in *the Quebec Secession Reference*; and

iv) is unlawful absent an amendment to the Constitution of Canada according to the constitutional formula as set out in section 41 of the *Constitution Act, 1982*;

2) An Order for costs of this application on a basis that this Honourable Court deems just; and

3) Such further or other relief as this Honourable Court deems just.

THE GROUNDS for the application are:

1) Section 32 of the *Constitution Act, 1867* provides:

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

2) Section 21 of the *Constitution Act, 1867* provides that "[t]he Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators."

3) There are currently 16 Vacancies in the Senate.

4) By constitutional convention, appointments to the Senate are made on the advice of the Prime Minister.

5) The Prime Minister's decision not to recommend appointments to the Senate to fill the Vacancies reflects an impermissible attempt to make changes to the Senate

without undertaking the constitutional reforms required in light of the amending formula set out in the *Constitution Act, 1982* as interpreted by the Supreme Court of Canada in the *Senate Reform Reference*.

6) Such further and other grounds as the applicant may identify and this Honourable Court may consider.

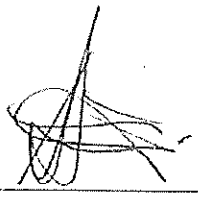
THIS APPLICATION will be supported by the following material:

1) The record before the Prime Minister of Canada in determining when, if at all, to fill each of the currently existing Vacancies in the Senate; and

2) Such further and other material as the applicant may advise and this Honourable Court may allow.

THE APPLICANT REQUESTS the Prime Minister of Canada to send a certified copy of the record of all materials placed before and considered by the Prime Minister of Canada in making the decision not to advise the Governor General to fill the currently existing Vacancies to the applicant and to the Registry.

Dated at Vancouver, British Columbia this 8th day of December, 2014.



ANIZ ALANI, on his own behalf
[redacted]
Tel: (604) 600-1156
E-Mail: senate.vacancies@anizalani.com

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on / and dated

DEC - 8 2014

LINDA LABERGE

Winnipeg Local Office
400 - 363 Broadway
Winnipeg, Manitoba
R3C 3N9

Bureau local de Winnipeg
400 - 363, Broadway
Winnipeg (Manitoba)
R3C 3N9

Federal Court  Cour fédérale

Date: 20150129

Docket: T-2506-14

Ottawa, Ontario, January 29, 2015

PRESENT: The Chief Justice

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA AND THE GOVERNOR GENERAL OF CANADA

Respondents

ORDER

PURSUANT to Rules 47 and 384 of the *Federal Courts Rules*;

IT IS HEREBY ORDERED THAT:

1. This proceeding shall continue as a specially managed proceeding.

2. Pursuant to Rule 383, Prothonotary Roger R. Lafrenière is assigned as Case Management Judge in this matter.

"Paul S. Crampton"
Chief Justice

Federal Court Cour fédérale

Ottawa, Ontario
K1A 0H9

January 30, 2015

Dear Sir/Madam:

RE: ANIZ ALANI v. THE PRIME MINISTER OF CANADA et al
Court File No: T-2506-14

This is to advise you of the Chief Justice direction, dated January 29, 2015:

"The Respondents' motion (document #13) to strike will be made returnable before this Court at the Pacific Centre – 3rd floor, 701 Georgia Street West, in the City of Vancouver, British Columbia, on Thursday, April 23, 2015 at 9:30 in the forenoon for a duration of four (4) hours.

The respondents' motion record will be served and filed no later than February 20, 2015.

The applicant's responding motion record will be served and filed no later than March 20, 2015."

Yours truly,

Lise Lafrance
Registry Assistant

Court File No.: T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

APPLICANT

and

THE PRIME MINISTER OF CANADA and THE GOVERNOR GENERAL OF CANADA

RESPONDENTS

WRITTEN REPRESENTATIONS OF THE RESPONDENTS

Department of Justice
Regional Director General's Office
900 - 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Solicitor for the Respondents

Jan Brongers and Oliver Pulleyblank, Counsel

[redacted]

The Applicant, in person

Aniz Alani, in person

OVERVIEW

1. By constitutional convention, the Prime Minister of Canada advises the Governor General on appointments to the Senate. In this application for judicial review, the applicant, Aniz Alani, asks this Court to make declarations mandating when such advice must be provided.

2. The application is fundamentally flawed because it asks this Court to enforce a constitutional convention. Constitutional conventions are political rules of conduct that are established over time by political precedents and are recognized by political actors. There is no law, statutory or otherwise, directing that the Prime Minister advise on Senate appointments. Rather, this advice is provided pursuant to constitutional convention. The Supreme Court has made clear that constitutional conventions possess a "striking peculiarity" in contradistinction to laws: they are not enforced by the courts. Conventions may evolve over time, and any consequence for departure from a convention lies in the political realm. As the courts cannot enforce a constitutional convention, this application raises no justiciable issue.

3. Further, the application suffers from a separate and equally fatal flaw: the Federal Court's lack of jurisdiction to conduct judicial review over this matter. That jurisdiction is limited to reviewing the acts and omissions of "federal boards, commissions, or other tribunals", defined by the *Federal Courts Act* as bodies or persons exercising statutory or prerogative powers. When the Prime Minister gives advice on Senate appointments, he is not a federal board, commission or tribunal exercising either type of power and therefore, even if this matter were justiciable (which is denied), it could not be considered by the Federal Court.

4. As this application raises no justiciable issue and seeks relief that is outside the jurisdiction of this Court, the respondents ask that the application be struck and dismissed now, at the earliest possible opportunity.

PART I - STATEMENT OF FACTS

5. On December 8th, 2014, Mr. Alani commenced an application for judicial review pursuant to s. 18 of the *Federal Courts Act* with respect to an allegation that the Prime Minister made a decision not to advise the Governor General to summon fit and qualified persons to fill existing vacancies in the Senate.[1]

6. Though Mr. Alani has named both the Governor General and the Prime Minister of Canada as respondents to this application, Mr. Alani has not alleged that the Governor General has made any decision, nor does he seek relief as against the Governor General.

7. In his notice of application, Mr. Alani seeks two declarations: 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, and that the deliberate failure to advise the Governor General to do so (1) is contrary to 32 of the *Constitution Act, 1867,* (2) is in certain defined circumstances contrary to s. 22 of the *Constitution Act, 1867*, (3) undermines and breaches the principles of democracy, federalism, constitutionalism, the rule of law, the protection of minorities, and underlying constitutional imperatives, and (4) is unlawful absent an amendment to the Constitution of Canada.

8. On January 15, 2015, the respondents filed the present motion to strike, requesting that the Court summarily dismiss this application in its entirety.[2] By direction of the Chief Justice dated January 29, 2015, the motion has been made returnable on April 23, 2015.[3]

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[1] Notice of Application, dated December 8, 2014, Applicants Record ("AR"), Tab 2, Page 4 ("Notice of Application").
[2] Notice of Motion, dated January 15, 2015, AR Tab 1, Page 1.
[3] Direction (Crampton C.J.), dated January 29, 2015 AR Tab 3, Page 11.

PART II - ISSUES

9. The sole issue before this Court on the motion to strike is whether the application should be struck out and dismissed on the ground that it is bereft of any possibility of success.

10. It is the respondents' position that the notice of application should be struck on the grounds that Mr. Alani is asking this Court to make a declaration without a justiciable legal component. Specifically, notwithstanding binding authority establishing that constitutional conventions are not enforced by the courts, Mr. Alani desires to seize this Court with a request that it judicially enforce the constitutional convention that the Prime Minister will advise the Governor General on Senate appointments. How and when the Prime Minister chooses to provide advice based on this convention is beyond the scope of judicial review, and is a matter for which accountability lies in the political, not judicial, realm.

11. Furthermore the respondents say that the Prime Minister acting in this capacity is not a federal board, commission, or other tribunal, and therefore this matter is outside the jurisdiction of this Court under s. 18 of the *Federal Courts Act.*

PART III - SUBMISSIONS

General Principles Applicable to a Motion to Strike

12. It is well established that the Federal Court has the power to strike out and dismiss an application for judicial review by way of a preliminary motion if the application is so clearly improper as to be bereft of any possibility of success.[4]

13. While a high threshold must be cleared to succeed on a motion to strike an application for judicial review, this does not mean that such a motion can be defeated merely by an assertion that a complicated legal question is at issue. A case may raise contentious legal issues, yet still suffer from an obvious fatal flaw rending the matter bereft of any possibility of success regardless of what evidence could theoretically be tendered. For example, matters such as the justiciability of a particular exercise of prerogative power, and a challenge to a Cabinet decision on *Charter* grounds, have been adjudicated through the procedural vehicle of a motion to strike.[5]

14. Moreover, the Supreme Court of Canada has recently stressed the value of resolving matters through preliminary motions that can fairly be decided without a full hearing.[6] Early resolution of disputes can promote access to justice and provide proportionate, timely and cost- effective justice for all parties. Indeed, neither the parties nor the Court are served when an application that is clearly not justiciable nor within the Court's jurisdiction is allowed to proceed down the path of expensive and futile litigation.

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[4] *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* (1994), [1995] 1 FCR 588, 58 C.P.R. (3d) 209 (F.C.A.); *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.* 2013 FCA 250 at paras. 47 – 48 (*"JP Morgan"*); *Federal Courts Rules,* Rule 3, 4 and 221.

[5] *Black v. Canada* (2001), 54 O.R. (3d) 215, 199 DLR (4th) 228 (C.A.), aff'g (2000), 47 O.R. (3d) 532, 43 C.P.C. (4th) 53 (S.C.); *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. See also *Kujan v. Canada,* (Ont. S.C. unreported, 2014 ONSC 966, Feb. 11, 2014, Ferguson J.).

[6] *Hryniak v. Mauldin*, 2014 SCC 7, at para. 60.

15. The Federal Court of Appeal set out in *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.* ("*JP Morgan*") three "obvious, fatal flaw[s] warranting the striking out of a notice of application" for judicial review in Federal Court:

(1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;

(2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the Federal Courts Act or some other legal principle; or

(3) the Federal Court cannot grant the relief sought.[7]

16. With regard to the first category listed in *JP Morgan,* the Court explained that to state a cognizable administrative law claim the application must satisfy two requirements. First, judicial review must be available under the *Federal Courts Act.* An application for judicial review in Federal Court may only be brought against a "federal board, commission or other tribunal", as defined in the *Act.* To meet that statutory definition, there must be an Act of Parliament or exercise of Crown prerogative underlying the action under review.[8] Additionally, the application must state a ground of review that is known to administrative law or that could be recognized in administrative law.[9]

17. The second *JP Morgan* category says that, even if a cognizable administrative law claim is made out, there may be a legal principle barring litigation of the matter in Federal Court.[10]

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[7] *JP Morgan, supra,* at para 66.
[8] *Air Canada v. Toronto Port Authority*, 2011 FCA 347, at para. 48.
[9] *JP Morgan*, *supra*, at paras. 68 - 70.
[10] *JP Morgan, supra*, at para. 84.

18. The final category listed in *JP Morgan* recognizes that even if a cognizable administrative law claim not otherwise barred is brought, there may be an inability for the Federal Court to grant the remedy sought. If a notice of application seeks only remedies that cannot be granted, it is to be struck.[11]

19. The claim in this case suffers from two fundamental defects. First, the claim raises no justiciable issue as it seeks to enforce a constitutional convention, which is inherently incapable of court enforcement. This flaw could justify striking the claim under any or all of the *JP Morgan* categories: (1) there is no cognizable administrative law claim; (2) there is a legal principle that bars litigation of this matter; and (3) the Federal Court is unable to grant the relief sought.

20. Second, the application purports to seek judicial review over a matter that is not within the Federal Court's statutory jurisdiction, which is limited to oversight of conduct by a "federal board, commission or other tribunal". As the alleged decision of the Prime Minister in the case at bar does not fall within the statutory definition of a "federal board, commission or other tribunal", it is not one that can be judicially reviewed in the Federal Court in any event.

21. The respondents will address these flaws in turn.

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[11] *JP Morgan, supra*, at paras. 92-95.

A. NO JUSTICIABLE ISSUE

The Prime Minister Advises on Senate Appointments by Constitutional Convention

22. Formal power to appoint Senators lies with the Governor General under ss. 24 and 32 of the *Constitution Act, 1867*. Those provisions read:

> 24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.
>
> 32. 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.

23. While formal power to appoint Senators vests in the Governor General, by constitutional convention such appointments are made on the advice of the Prime Minister.[12]

24. This is candidly and properly acknowledged by Mr. Alani, who writes in his Notice of Application for Judicial Review that: "[b]y constitutional convention, appointments to the Senate are made on the advice of the Prime Minister".[13]

25. The Prime Minister's role as advice-giver with respect to Senate appointments exists solely as a result of constitutional convention; it is not mandated by any statute of Parliament, nor set out as such in any constitutional document.

---

[12] *Reference re Senate Reform*, 2014 SCC 32, at para. 50.
[13] Notice of Application, at Applicant's Record, Tab 2, p. 7.

Constitutional Conventions are Not Enforced by the Courts

26. Constitutional conventions are rules respecting the operation of the Constitution that possess a unique feature: they are not judicially enforceable. Professor Hogg defines constitutional conventions in the following manner:

> Conventions are rules of the constitution that are not enforced by the law courts. Because they are not enforced by the law courts, they are best regarded as non-legal rules... What conventions do is prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad legal power, or even prescribe that a legal power shall not be exercised at all.[14]

27. The nature of constitutional conventions was described in the following terms by Chief Justice Friedman of the Manitoba Court of Appeal, in a passage later quoted with approval by the Supreme Court of Canada:

> What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and Judges who have contributed to that literature, the essential features of a convention may be set forth with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that "a convention is a rule which is regarded as obligatory by the officials to whom it applies". Hogg, Constitutional Law of Canada (1977), p. 9. There is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal.[15]

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[14] Peter Hogg, Q.C. *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2007), at 1.10 (*"Constitutional Law of Canada"*).

[15] *Reference re: Amendment of Constitution of Canada* (1981), 117 D.L.R. (3d) 1, [1981] 2 W.W.R. 193 (M.B.C.A.) at D.L.R. 13 – 14; *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ("Patriation Reference") at S.C.R. 883.

28. Though constitutional conventions may be "nearer to law than to usage or custom", the Supreme Court has made clear that conventions possess a distinguishing feature as compared to laws: conventions cannot be enforced by the courts. This "striking peculiarity" was set out by the Court in the following manner:

> The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced 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 precedents but on precedents 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.[16]

29. In reasons dissenting on a separate point, Laskin C.J. and Estey and McIntyre JJ. concurred with the majority regarding the striking peculiarity that conventions are not enforceable by the courts.

> As has been pointed out by the majority, a fundamental difference between the legal, that is the statutory and common law rules of the constitution, and the conventional rules is that, while a breach of the legal rules, whether of statutory or common law nature, has a legal consequence in that it will be restrained by the courts, no such sanction exists for breach or non-observance of the conventional rules. The observance of constitutional conventions depends upon the acceptance of the obligation of conformance by the actors deemed to be bound thereby. When this consideration is insufficient to compel observance no court may enforce the convention by legal action. The sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences, but it will not engage the attention of the courts which are limited to matters of law alone. Courts, however, may recognize the existence of conventions and that is what is asked of us in answering the questions. The answer, whether affirmative or negative however, can have no legal effect, and acts performed or done in conformance with the law, even though in direct contradiction of well-established conventions, will not be enjoined or set aside by the courts.[17]

---

[16] *Patriation Reference*, at S.C.R. 880; emphasis added.
[17] *Patriation Reference, supra*, at S.C.R. 853. emphasis added.

30. While the Supreme Court of Canada's pronouncement regarding the non-justiciability of constitutional conventions set out in the *Patriation Reference* constitutes unassailable binding authority for this proposition, it has been re-stated subsequently by various courts in numerous decisions.[18]

Constitutional Conventions Do Not Become Rules of Law Unless Adopted by Statute

31. A constitutional convention can become a rule of law only through statutory adoption. This was made clear by the Supreme Court of Canada in the *Patriation Reference*:

> Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules.
>
> [...]
>
> This conflict between convention and law which prevents the courts from enforcing conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption.[19]

32. The point was reiterated by the Court in *Osborne v. Canada,* a case considering the constitutionality of legislation implementing the constitutional convention regarding political neutrality of the public service:

> ...while conventions form part of the Constitution of this country in the broader political sense, i.e., the democratic principles underlying our political system and the elements which constitute the relationships between the various levels and organs of government, they are not enforceable in a court of law unless they are incorporated into legislation.[20]

---

[18] See *e.g. Pelletier v. Canada (Attorney General)*, 2008 FCA 1, at para. 19; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, at para. 64; *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 98.
Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, at S.C.R. 87 (*"Osborne"*).
[19] *Patriation Reference*, *supra* at S.C.R. 880-881, emphasis added.
[20] *Osborne, supra*, at S.C.R. 87. Emphasis added.

33. Unless and until a statute is passed that gives the force of law to a constitutional convention, there can be no legal sanction for its breach. Political, rather than legal, consequences may follow departure from a convention:

> 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.[21]

34. Simply put, there is no statute that requires the Prime Minister to advise on Senate appointments, nor is there a statute that establishes any constraints on how and when such advice is to be given.

Cabinet Recognition of a Convention Does Not Amount to Statutory Adoption

35. While the convention that the Prime Minister will provide advice on Senate appointments has not been adopted by statute, it has been recognized in a series of Minutes of Council adopted by various administrations between 1896 and 1935. However, these Minutes of Council merely set out conclusions of Cabinet. They do not have the effect of giving the convention statutory force, or otherwise affect the rule that a constitutional convention is not justiciable.

36. A Minute of Council is distinct from an Order-in-Council. The distinction between a Minute of Council and an Order-in-Council was set out by Canada's first Prime Minister, Sir John A. Macdonald, in a letter to Governor General Lord Dufferin dated February 17, 1873. In that letter Prime Minister Macdonald wrote:

> I think the time has arrived when the form of the Orders-in-Council should be modified, and a new practice introduced. I shall bring the matter up in Council and then take Your Excellency's pleasure on it before reducing it to writing. My idea is to have two descriptions of papers:
>
> I. Orders-in-Council and 2nd, Minutes of Council. In adopting the first (or O.C.'s) the Governor-General should be present, or supposed to be present. The 2nd, or Minutes of Council, will be merely conclusions of the Cabinet,

[21] *Patriation Reference, supra,* at S.C.R. 882 – 883.

> and are submitted for your sanction, as advice tendered by your responsible advisers.[22]

37. The first of Minute of Council addressing Senate appointments was adopted by the government of Sir Charles Tupper in 1896. It provided:

> The Committee of the Privy Council, on the recommendation of the Honourable Sir Charles Tupper... submit the following memorandum regarding certain of the functions of the Prime Minister:
>
> [...]
>
> The following recommendations are the special prerogative of the Prime Minister:
>
> Dissolution and Convocation of Parliament
> Appointment of Privy Councillors,
> - Cabinet Ministers
> - Lieutenant Governors (including leaves of absence to)
> - Provincial Administrators
> - Speaker of the Senate
> - Chief Justices of all Courts
> - Senators
>
> [...]
>
> The Committee advise that this minute be issued under The Privy Seal, and that a certified copy thereof be attached, under the Great Seal of Canada, to the Commission of each Minister.[23]

Substantially similar Minutes of Council were adopted by Prime Ministers Laurier,[24] Borden, Meighen, Bennett,[25] and King[26].

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[22] Sir Joseph Pope, *Correspondence of Sir John Macdonald: Selections From the Correspondence of the Right Honourable Sir John Alexander Macdonald, G.C.B., First Prime Minister of the Dominion of Canada* (New York: Doubleday, Page & Co., 1921)., pp. 206-207.
[23] P.C. 1896 - 1853 (May 1, 1896).
[24] P.C. 1896 – 2710 (July 13, 1896).
[25] The respondent has yet to locate copies of the Minutes of Council adopted by Prime Ministers Borden, Meighen and Bennett.
[26] P.C. 1935 – 3374 (October 23, 1935).

38. Professor J.R. Mallory, in his text *The Structure of Canadian Government, Revised Edition,* addresses the Minutes of Council in the context of a discussion of the lack of a legal definition for the powers of the Prime Minister. Professor Mallory makes clear that the Minutes of Council are not statutory instruments prescribing the Prime Minister's powers, but rather merely reinforce the conventional powers of the Prime Minister:

> The office of the Prime Minister, the most important single office in the government, is, while not unknown to the law, entirely lacking in a legal definition of its powers. The notion that it is unknown to the law is a consequence of paying too much attention to the British constitution and not enough to our own… However, the law does not tell us what his powers are, although the powers and duties of his colleagues have some statutory definition. There is, indeed, a minute of council which defines some of his unique powers but this is by no means an exhaustive description and it is somewhat out of date in form. At best, this document can be regarded as a reinforcement of conventional powers.[27]

39. The Minutes of Council concerning Senate appointments are simply a recording of the conclusion of successive governments that it would be the Prime Minister who would provide advice on Senate appointments, as opposed to another Cabinet minister or Cabinet as a whole. Yet such Minutes of Council are not statutory instruments that give the convention force of law. Every new government remains free to decide what conventional practices it will continue, modify, or abandon, regardless of whether they have been recognized by previous cabinets.

40. Indeed, recognition of the convention by the relevant actors, far from being something unique that renders the convention justiciable, is essential to the very existence of the convention. As set out by the Supreme Court in the *Patriation Reference*:

> The very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and

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[27] J.R. Mallory, *The Structure of Canadian Government, Revised Edition* (Toronto: Gage Educational Publishing, 1984) at p. 77.

> to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement.[28]

41. That these Minutes of Council recognized the convention regarding Senate appointments, but did not make the convention justiciable, was made clear by the Quebec Court of Appeal in *Projet de loi fédéral relatif au Sénat (Re),* a provincial reference on Senate reform. The Court considered the convention in the context of rejecting an argument suggesting that a statute affecting the Prime Minister's practices prior to making a Senate recommendation would amount to an amendment in relation to the regal office. The Court first described the Minutes of Council recognizing the constitutional convention:

> [52] Pursuant to section 24 of the Constitution Act, 1867, the Governor General summons persons to the Senate on behalf of the Queen.
>
> [53] In fact, however, the constitutional conventions of the day are to the effect that the Governor General's power can only be exercised on the advice of the Prime Minister of Canada, a practice that was recognized in the minutes of the Privy Council for Canada from July 13, 1896 to October 25, 1935.[29]

42. The Court then went on to make clear that, notwithstanding the Minutes of Council, the convention was not justiciable. The Court stated that a Prime Minister's practices prior to making a recommendation are "matters of convention, precedent and the realities of politics". The Court went on to find that to "assimilate an amendment of the power of the Prime Minister with those of the Governor General… would limit Parliament's powers because of a constitutional convention. Such a limitation does not exist, or at a minimum, does not concern the courts". The Court then stated that: "[o]n the contrary, conventions are not justiciable", and concluded by quoting Professor Hogg's statement that "…conventions allow the

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[28] *Patriation Reference*, *supra*, at S.C.R. 774-5. See also *Re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at S.C.R. 816; *Conacher v. Canada*, 2009 FC 920 at para. 46, aff'd 2010 FCA 131.

[29] *Projet de loi fédéral relatif au Sénat (Re)*, 2013 QCCA 1807.

law to adapt to changing political realities without the necessity for formal amendment".[30]

43. As set out above, only statutory adoption can render a constitutional convention justiciable. Recognition by the relevant actors of a convention in a Minute of Council does not change the essential nature of the Prime Minister's role in advising on Senate appointments as arising from constitutional convention.

Advice on Senate Appointments is Not Given Pursuant to the Crown Prerogative

44. Similarly, the Prime Minister's authority to advise on Senate appointments is not one that flows from a Crown prerogative. This is notwithstanding the fact that the above-referenced Minutes of Council describe the Prime Minister's recommendation power as a "prerogative of the Prime Minister". Rather, the recognition by Cabinet of the Prime Minister's role is wholly a consequence of constitutional convention, and one whose enforcement is consequently not justiciable.

45. The Crown prerogative is described by Professor Hogg in the following manner:

> 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.[31]

46. While some appointment powers arise as exercises of the Crown prerogative, the power to appoint Senators derives from ss. 24 and 32 of the *Constitution Act, 1867.* This power belongs to the Governor General as the Queen's representative, but the power to appoint Senators is not an incident of the Crown prerogative; rather, it is conferred expressly by the provisions of the Constitution.

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[30] *Ibid*, at paras. 57-59.
[31] *Constitutional Law of Canada, supra*, at 1.9.

47. So too, the Prime Minister's advisory role with regard to Senate appointments is not an exercise of a Crown prerogative, as it does not find its root in "the powers and privileges accorded by the common law to the Crown". To the contrary, it is a limit imposed by constitutional convention on the exercise of the legal powers accorded by the *Constitution Act, 1867* to the Crown as represented by the Governor General.

Mr. Alani Seeks to Enforce a Constitutional Convention

48. Mr. Alani's proceeding is a judicial review application plainly brought for the purpose of compelling the Prime Minister to provide certain advice to the Governor General in respect of Senate appointments. It is obviously not a "reference" proceeding that seeks an advisory opinion on the existence of a constitutional convention, a type of proceeding that cannot be instituted by a private citizen in any event. As such, Mr. Alani's application can only be characterized as an attempt to use the courts to enforce a constitutional convention.

49. A Federal Court declaration that the Prime Minister "must" provide certain advice pursuant to a constitutional convention would amount to enforcement of that convention. Furthermore, it is of no import that Mr. Alani has chosen to frame his request for relief as a "declaration" as opposed to a *mandamus* order. It is well established that declaratory relief issued by the Federal Court in respect of public officials will be complied with even in the absence of an express power of coercion.[32]

50. No less objectionable is Mr. Alani's request for a declaration that failure to adhere to the convention would be unlawful for various reasons. To find that it would be unlawful to fail to adhere to a convention would be to give the convention force of law absent statutory adoption of the convention. This is precisely the argument that the Supreme Court rejected in the *Patriation Reference,* finding that conventions do not crystallize into laws.[33]

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[32] *Assiniboine v. Meeches,* 2013 FCA 114, at paras. 12 - 17.
[33] *Patriation Reference, supra*, at S.C.R. 882.

51. As set out in the *Patriation Reference,* conventions are not akin to rules of the common law that find their roots in the judgment of the courts and evolve over time. Rather, a convention remains a convention unless and until it is adopted by statute. The Court distinguished conventions and rules of the common law in the following fashion:

> The attempted assimilation of the growth of a convention to the growth of the common law is misconceived. The latter is the product of judicial effort, based on justiciable issues which have attained legal formulation and are subject to modification and even reversal by the courts which gave them birth when acting within their role in the state in obedience to statutes or constitutional directives. No such parental role is played by the courts with respect to conventions.[34]

52. In sum, both declarations sought would, if granted, amount to impermissible judicial enforcement of a constitutional convention. As such, the Court should not entertain this legal proceeding which cannot possibly result in the issuance of any practical relief to which Mr. Alani could be entitled.

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[34] *Ibid*, at S.C.R. 775.

B. LACK OF JURISDICTION IN FEDERAL COURT

53. The notice of application is also bereft of any chance of success because it does not seek relief against a "federal board, commission, or other tribunal".

54. The Federal Court's judicial review jurisdiction is not inherent. It is statutory and prescribed entirely by s. 18 of the *Federal Courts Act* as follows:

> 18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.[35]

55. The phrase "federal board, commission or other tribunal" is defined in s. 2 of the *Federal Courts Act* as follows:

> "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.[36]

56. Accordingly, not every act or omission of a federal public official is subject to judicial review by the Federal Court. Generally speaking, the conduct must be of a kind authorized by a statute of Parliament or a Crown prerogative. Acts or

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[35] *Federal Courts Act,* RSC 1985, c. F-7, s. 18, emphasis added.
[36] *Ibid*, emphasis added.

omissions done pursuant a constitutional convention are not encompassed by the definition of "federal board, commission or other tribunal" and, as such, are not subject to judicial review by the Federal Court.

57. As explained above, when the Prime Minister provides advice on Senate appointments, he does so pursuant to constitutional convention. The Prime Minister does not provide such advice pursuant to an Act of Parliament or a prerogative of the Crown. Accordingly, the Prime Minister is not a "federal board, commission, or other tribunal" when performing this advice-giving function.

58. Furthermore, as noted above, while the applicant names the Governor General as a respondent, the applicant does not seek any relief as against the Governor General. In any event, the Governor General's power in relation to Senate appointments are not reviewable in Federal Court, as they do not derive from the Crown prerogative or from an Act of Parliament, but rather from the *Constitution Act, 1867.*[37]

59. In sum, even if the Prime Minister's advice in respect of Senate appointments was somehow justiciable and subject to judicial review (which is strongly denied), such review could not take place before the Federal Court in any event.

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[37] *Southam Inc. v. Canada (Attorney General)* (1990), 73 D.L.R. (4th) 289, [1990] 3 F.C. 465 (C.A.); *Galati v. His Excellency the Right Hounourable Governor General David Johnston,* 2015 FC 87, at para. 60; *Northern Telecom Canada Ltd. v. Communications Workers of Canada*, [1983] 1 S.C.R. 733 at 745.

PART IV - ORDER SOUGHT

60. The respondents respectfully request the Court to issue the following order:

(a) the respondents' motion to strike is allowed;

(b) the applicant's notice of application is struck out in its entirety, without leave to amend;

(c) the applicant's application is dismissed in its entirety; and

(d) costs of this motion are payable by the applicant to the respondents, fixed in the amount of $1,000.00.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 13th day of February, 2015.

fc **Jan Brongers**

Oliver Pulleyblank

Counsel for the Respondents

PART V - LIST OF AUTHORITIES

Case Law

1. *Air Canada v. Toronto Port Authority*, 2011 FCA 347
2. *Assiniboine v. Meeches,* 2013 FCA 114
3. *Black v. Canada* (2001), 54 O.R. (3d) 215, 199 DLR (4th) 228 (C.A.), aff'g (2000), 47 O.R. (3d) 532, 43 C.P.C. (4th) 53 (S.C.)
4. *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.* 2013 FCA 250
5. *Conacher v. Canada*, 2009 FC 920 at para. 46, aff'd 2010 FCA 131
6. *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* (1994), [1995] 1 FCR 588, 58 C.P.R. (3d) 209 (F.C.A.)
7. *Galati v. His Excellency the Right Hounourable Governor General David Johnston*, 2015 FC 87
8. *Hryniak v. Mauldin*, 2014 SCC 7
9. *Kujan v. Canada,* (Ont. S.C. unreported, 2014 ONSC 966, Feb. 11, 2014, Ferguson J.)
10. *Northern Telecom Canada Ltd. v. Communications Workers of Canada*, [1983] 1 S.C.R. 733
11. *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15
12. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441
13. *Osborne v. Canada (Treasury Board),* [1991] 2 S.C.R. 69
14. *Pelletier v. Canada (Attorney General)*, 2008 FCA 1
15. *Projet de loi fédéral relatif au Sénat (Re)*, 2013 QCCA 1807
16. *Re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793
17. *Reference re: Amendment of Constitution of Canada* (1981), 117 D.L.R. (3d) 1, [1981] 2 W.W.R. 193 (M.B.C.A.)

18. *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753

19. *Reference re Senate Reform*, 2014 SCC 32

20. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217

21. *Southam Inc. v. Canada (Attorney General)* (1990), 73 D.L.R. (4th) 289, [1990] 3 F.C. 465 (C.A.)

Secondary Sources

22. Peter Hogg, Q.C. *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2007), at 1.10

23. Sir Joseph Pope, *Correspondence of Sir John Macdonald: Selections From the Correspondence of the Right Honourable Sir John Alexander Macdonald, G.C.B., First Prime Minister of the Dominion of Canada* (New York: Doubleday, Page & Co., 1921)., pp. 206-207

24. J.R. Mallory, *The Structure of Canadian Government, Revised Edition* (Toronto: Gage Educational Publishing, 1984) at p. 77.

Statutes and Regulations

25. Federal Courts Rules, Rules 3, 4 and 221

26. Federal Courts Act, R.S.C. 1985, c. F-7, s. 18

Minutes of Council

27. P.C 1896 – 1853 (May 1, 1896)

28. P.C. 1896 – 2710 (July 13, 1896)

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