Court File No.: A-265-15

FEDERAL COURT OF APPEAL

BETWEEN:

THE PRIME MINISTER OF CANADA and THE GOVERNOR GENERAL OF CANADA

Appellants

and

ANIZ ALANI

Respondent

APPELLANTS' MEMORANDUM OF FACT AND LAW

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INDEX

OVERVIEW

1. In Canada's system of government, by constitutional convention the determination of when and who should be appointed by the Governor General to fill a Senate vacancy is made by the Prime Minister. As with all constitutional conventions, these political determinations are not subject to judicial review by the courts. Political disagreements with the timing or other aspects of Prime ministerial actions with respect to Senate appointments are to be resolved in the political realm, not by the judiciary.

2. Mr. Alani disagrees with the Prime Minister on the timing of Senate appointments. He has brought an application for judicial review before the Federal Court to declare that the Prime Minister "must" appoint Senators within a "reasonable" period of time after a vacancy occurs. In so doing, he seeks to have the Federal Court enter the legislative and political arena by enforcing a constitutional convention, a matter that is neither justiciable nor within the statutory jurisdiction of the Federal Court.

3. Rather than allowing Mr. Alani's application simply to proceed down the path of expensive and futile litigation, Canada responded with a motion to strike. The legal issues of justiciability and jurisdiction arose clearly from Mr. Alani's notice of application and did not require affidavit evidence in order to be determined. However, the Federal Court motions judge chose not to fully consider the legal merits of Canada's motion and dismissed it, deferring consideration of the issues of justiciability and jurisdiction to the applications judge.

4. In doing so, the motions judge committed two errors of law. First, he incorrectly proceeded on the basis that questions of law should not be decided on a preliminary motion. Second, he did not read Mr. Alani's notice of application holistically and practically in order to gain a realistic appreciation of its essential character. These errors led the motions judge to conclude that "it is arguable at this stage" that Mr. Alani might be raising a case of statutory interpretation, failing to recognize that Mr. Alani's application clearly relates only to a matter of constitutional convention that cannot be reviewed by the Federal Court.

5. This appeal is about an improper attempt by an individual to use the courts for the political purpose of enforcing a constitutional convention by means of a private reference. More broadly, however,

it is about the proper role of a motion to strike in the judicial review context. It is about embracing what the Supreme Court of Canada describes as a necessary "culture shift" away from presuming that all matters must proceed to a full hearing, when they can fairly and more economically be resolved by a preliminary motion. Ultimately, it is about ensuring that limited judicial resources are used most effectively in a way that promotes and protects access to justice.

PART I - STATEMENT OF FACTS

6. On December 8, 2014, Mr. Alani filed a notice of application for judicial review in the Federal Court against the Prime Minister and Governor General of Canada (collectively referenced as "Canada") seeking 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". The notice was almost entirely devoid of factual particulars, including any explanation of who Mr. Alani is, what interest he has in the matter of Senate appointments, or what prejudice Senate vacancies have caused for him. Indeed, the only factual allegation advanced in his notice was that "[t]here are currently 16 Vacancies in the Senate".[1]

7. On January 15, 2015, Canada filed a notice of motion to strike and dismiss Mr. Alani's application on the grounds that it is not justiciable and is outside the jurisdiction of the Federal Court.[2] By direction of the Chief Justice, Canada's motion was heard on April 23, 2015.[3]

8. On May 21, 2015, the Federal Court (Harrington J.) dismissed Canada's motion to strike, finding that it is not "plain and obvious" that Mr. Alani's application has no chance of success.[4] While Mr. Alani had requested that he be awarded costs in any event of the cause payable forthwith to sanction Canada for having brought the motion to strike, this request was denied. Instead, the Court found that "serious issues were raised" by Canada on the motion to strike, and simply ordered costs in the cause.[5]

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[1] Appeal Book, Tab 4, pp. 25 – 29.
[2] Appeal Book, Tab 5, pp. 30 – 32.
[3] Appeal Book, Tab 8, p. 42.
[4] Appeal Book, Tab 3, para. 3.
[5] Appeal Book, Tab 3, paras. 10, 41.

PART II – POINTS IN ISSUE

9. The issue on appeal is whether the Federal Court erred in refusing to dismiss Mr. Alani's application for judicial review on a motion to strike because either:
    a) the application is not justiciable; or
    b) the application is not within the jurisdiction of the Federal Court.

10. The Federal Court did so err. It is plain and obvious that Mr. Alani's application for judicial review constitutes an attempt by an individual to bring a private reference in respect of a constitutional convention, a purely political matter that is not justiciable. It is also plain and obvious that Mr. Alani does not seek judicial review in respect of an exercise of statutory or prerogative authority by a federal official, and his application is accordingly outside of the Federal Court's jurisdiction.

PART III - SUBMISSIONS

Standard of Review

11. Though the decision to grant or refuse a motion to strike is discretionary, a reviewing court is entitled to substitute its own discretion for that of the lower court if the appellate court finds that the lower court judge:

    a) has given insufficient weight to relevant factors;

    b) has proceeded on a wrong principle of law; or

    c) has seriously misapprehended the facts.

    Further, a reviewing court may overturn a lower court judge on a motion to strike if an obvious injustice would otherwise result.[6]

Motions to Strike Applications for Judicial Review: An Important Tool in Appropriate Cases

12. Prior to addressing the specific errors committed by the motions judge in the case at bar, consideration is warranted of the broader issue of the adjudicative principles that ought to be applied to motions to strike judicial review applications in the Federal Court.

13. While the *Federal Courts Rules* do not expressly contain a provision allowing for motions to strike applications, it has been well established since the Federal Court of Appeal's 1994 decision in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*[7] that the Federal Court has this power in cases where the application is so clearly improper as to be bereft of any possibility of success.

14. More recently, in the 2013 *Canada v. JP Morgan Asset Management (Canada) Inc.* appeal, this Court had occasion to reiterate the procedural and substantive principles that apply to motions to strike applications for judicial review.[8] Writing for a unanimous panel, Stratas J.A. stated that: "[t]here must be a 'show stopper' or a 'knockout punch' – an obvious, fatal flaw striking at the root

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[6] *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374, at para. 15.
[7] *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* (1994), [1995] 1 F.C.R. 588, 176 N.R. 48 (C.A.).
[8] *Canada v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 ("*JP Morgan*").

of this Court's power to entertain the application" in order for such motions to be allowed.[9] Mr. Justice Stratas also listed the following three categories of obvious, fatal flaws that warrant the striking of a notice of application:

a) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
b) 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
c) the Federal Court cannot grant the relief sought.[10]

15. Also worth noting is the Federal Court of Appeal's caution in *JP Morgan* that when considering a motion to strike, "the Court must read the notice of application with a view to understanding the real essence of the application", and that "[t]he Court must gain a 'realistic appreciation' of the application's 'essential character' by reading it holistically and practically without fastening onto matters of form".[11]

16. The endorsement in *JP Morgan* of the use of motions to strike where an obvious fatal flaw exists anticipates and is consistent with the recent direction of the Supreme Court of Canada that encourages the robust use of interlocutory procedure to ensure efficient disposition of disputes. In *Hryniak v. Mauldin,* the Supreme Court dealt with an appeal arising from a summary judgment motion and wrote that there must be a "culture shift" by both litigants and the courts away from a presumption that all matters must proceed to a full hearing:

> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.[12]

The Supreme Court recognized that summary judgment rules provide "one such opportunity" to shift the culture, but they are far from the only pre-trial procedure that can provide fair and just

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[9] *Ibid,* at para. 47.
[10] *Ibid,* at para. 66.
[11] *Ibid,* at paras. 49-50.
[12] *Hryniak v. Mauldin,* 2014 SCC 7.

adjudication.[13] When there is no dispute as to the facts and questions of law can be answered without a full hearing, motions to strike can provide similar benefits and ultimately promote access to justice.

17. As is set out in further detail below, Mr. Alani's application contains all three obvious, fatal flaws identified by this Court in *JP Morgan* as warranting being dismissed on a motion to strike: (1) it fails to state a cognizable administrative law claim that can be brought in the Federal Court, (2) it purports to advance a claim that the Federal Court is not able to deal with because of a legal principle (non-justiciability), and (3) it seeks declaratory relief of a nature that cannot be granted to private individuals by the Federal Court.

18. However, the motions judge decided to take an overly narrow view of how he could resolve disputed questions of law on a motion to strike, needlessly deferring them to the hearing of the merits of the application. In particular, Mr. Justice Harrington apparently felt bound to follow the following remarks of Moulton LJ in *Dyson v. Attorney General*,[14] a decision rendered over 100 years ago by the Court of Appeal of England and Wales:

> Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers.[15]

19. In modern day Canada, however, it is well established that questions of law, even those of a complex nature, can be resolved on a motion to strike. For example, the Supreme Court of Canada addressed whether the Crown owes a tort law duty of care to consumers and tobacco companies,[16] and whether a *Charter* claim can be brought in respect of nuclear weapon testing.[17] Examples of the Federal Court of Appeal dealing conclusively with contested legal questions arising from motions to strike include *Merchant Law Group v. Canada Revenue Agency*,[18] *Adventure Tours Inc. v. St. John's Port Authority*,[19] and *Sargenat v. Al-Saleh*.[20] Provincial appellate courts have

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[13] *Ibid*, at para. 3.
[14] *Dyson v Attorney-General*, [1911] 1 KB 410 (C.A.).
[15] *Ibid*, at pp. 418-19.
[16] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42.
[17] *Operation Dismantle v. The Queen*, [1985] 1 SCR 441.
[18] *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184.
[19] *Adventure Tours Inc. v. St. John's Port Authority*, 2011 FCA 198.
[20] *Sargenat v. Al-Saleh*, 2014 FCA 302.

addressed the legal question of the justiciability of lawsuits brought in Ontario to challenge exercises of the Crown prerogative[21] and in Alberta to challenge Senate appointments[22], both appeals brought from motions to strike.

20. Further, the motions judge in the case at bar did not read Mr. Alani's application as a whole to determine its essential character, namely, an attempt to bring a private reference regarding a constitutional convention that is neither justiciable nor within the Federal Court's jurisdiction. By failing to decide the case when it was appropriate to do so on the motion before him, the motions judge has hampered the speedy and economic resolution of this dispute contrary to the culture shift promoted by the Supreme Court of Canada in *Hryniak v. Mauldin*.

Justiciability: Mr. Alani's Application is Non-Justiciable

21. The Federal Court motions judge erred in failing to strike Mr. Alani's application for judicial review on the ground that it raises no justiciable issue. In particular, the Court was wrong to find that Mr. Alani's case might arguably be one of statutory interpretation. Rather, the relief sought plainly centres on a matter of constitutional convention governed solely by "rules" that are enforced through political, not legal, means. Granting the declaration sought would amount to impermissible judicial enforcement of a constitutional convention.

This is not a case of statutory interpretation

22. The motions judge found that Mr. Alani's case "is based upon section 32 of the *Constitution Act, 1867*"[23] and that it is "arguable at this stage that we are only left with the interpretation of a statute, albeit a very important one".[24] The Court then concluded "[i]f this is merely a matter of interpreting a statute, and it is not plain and obvious that it is not, then certainly the matter is justiciable".[25] However, a careful reading of Mr. Alani's application holistically and practically to gain a realistic appreciation of its essential character (as this Court said is required in *JP Morgan*) leads inexorably to the conclusion that this is not a case of statutory interpretation.

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[21] *Black v. Canada* (2001), 54 O.R. (3d) 215(C.A.) (*"Black"*).
[22] *Brown v. Alberta,* 1999 ABCA 256.
[23] Appeal Book Tab 3, at para. 20.
[24] Appeal Book Tab 3, at para 27.
[25] Appeal Book Tab 3, at para. 35.

23. When the notice of application is read as a whole, particularly in light of the relief sought and the alleged "decision" at issue, it is plain that Mr. Alani's case is not based upon s. 32 of the *Constitution Act, 1867*. Rather, his case is based on the constitutional convention whereby the Governor General will act on the advice of the Prime Minister in making Senate appointments. Reference to s. 32 of the *Constitution Act, 1867* may be necessary in order to understand Mr. Alani's case, but interpreting this provision does not form part of its "essential character".

24. Indeed, the Prime Minister is not mentioned in s. 32, which bestows the power to make Senate appointments exclusively upon the Governor General. The Prime Minister's advisory role in Senate appointments exists only by virtue of the constitutional convention. This constitutional convention is the bridge that connects s. 32 to the Prime Minister.

25. Simply put, Mr. Alani cannot seek a declaration that the Prime Minister "must" provide advice on Senate appointments without invoking, and asking the Federal Court to give legal effect to, a constitutional convention.

26. While it is true that he has chosen to formally name the Governor General as a party to his judicial review application, Mr. Alani's notice of application does not seek any relief against or impugn the conduct of the Governor General. Mr. Alani explained at the hearing of the motion to strike that this is a deliberate choice he has made, regardless of the impact it may have on adjudication of whether his case is justiciable:

> MR. ALANI: "The *Constitution* could have spelled out, you know: "We really mean the prime minister is going to be the one appointing Senators," but as, Justice Harrington, you just pointed out, the Preamble incorporates by reference a constitution similar in principle to the United Kingdom. The drafters of the constitution knew about all of these conventions. I think it would be surprising if, you know, the constitution - - the express provisions were ever intended to be interpreted other than against the backdrop of those conventions.
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> What would that look like, by the way? Some people have asked me, "Why don't you just seek a declaration that the governor general has got to appoint these people or, you know, seek *mandamus* against the governor general? Then you could do away with all this convention argument." I couldn't possibly be asking the court to enforce a convention, or involving these allegedly non-justiciable conventions, if I just cut to the chase and asked that the governor general be the subject of the declaration. It would probably, in my view, get rid of the convention argument but it would be a cure that's worse than the disease.

> I mean, I don't think it's right. I don't think that the proper answer is that the governor general should be directed by the court to appoint these senators, even though section 32 and section 24 refer to the governor general, and not the prime minister. As the court knows, the prime minister is not referenced at all in the Constitution, except I think in respect of a constitutional conference that was supposed to happen after 1982. The Prime Minister doesn't exist, according to the Constitution.
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> As I say in my written representations, I've chosen not to focus on this artificial construct that's - - that a limited view of just what's in the *Constitution Act, 1867.* I do, as the Supreme Court of Canada suggests, look at how things operate in practice. I'm not asking for an order that the governor general be directed to do this because I think that the Constitution needs to be read in light of the conventions, rather than despite that conventions exist." [Emphasis added][26]

27. This passage is revealing, not only because it explains why Mr. Alani has not sought declaratory relief against the Governor General, but also because Mr. Alani effectively admits that his case would be one of "statutory interpretation" only if judicial interpretation of the provisions of the Constitution of Canada involves the application of constitutional conventions. Plainly, it does not. Rather, the provisions of the Constitution contain legal rules and powers that are to be interpreted and applied by the courts as plainly written, regardless of whether doing may arguably run counter to the constitutional conventions of the day. It would be entirely improper to base an interpretation of the legal effect of the Constitution on what result a political convention might suggest.

28. The Supreme Court of Canada made clear that conventional rules do not dictate how the law of the Constitution will be interpreted and applied in *Re Resolution to Amend the Constitution* ("*Patriation Reference*"), where the Court observed:

> 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. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.[27]

29. This point was also illustrated by the decision of the Ontario Court of Appeal in *Singh v. Canada*, a case involving a challenge to the appointment of eight Senators pursuant to s. 26 of the

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[26] Appeal Book, Tab 10, at pp. 203-204.

[27] *Re Resolution to Amend the Constitution,* [1981] 1 S.C.R. 753 ("*Patriation Reference*").

Constitution Act, 1867.[28] Section 26 of the *Constitution Act, 1867* provides the Queen with the power, on the recommendation of the Governor General, to direct that four or eight members be added to the Senate, upon which the Governor General may summon additional Senators accordingly. The appellants in that case argued that s. 26 had to be read in light of what they said was a constitutional convention that, when considering a request under s. 26, the Queen would act on the advice of her British Ministers, or at least completely independent of the advice of her Canadian Ministers. The Court rejected this proposition, finding:

> It is not necessary to make a finding on whether such a convention exists because, even if it did, it would be unenforceable by the courts. The courts cannot enforce a constitutional convention which does not conform to the law. The courts may only enforce the law. This principle was articulated by a majority of the Supreme Court of Canada in [the *Patriation Reference*]
>
> [...]
>
> Section 26 does not limit the Queen's exercise of the power it confers by forbidding the Queen from taking the advice of her Canadian ministers. This court cannot impose a limit which is not contained in the Constitution.[29]

To interpret and apply the legal provisions of the Constitution based on what constitutional conventions require, as the Mr. Alani suggested, would be to change the law to make it conform to convention and to impose a limit that is not contained in the law of the Constitution.

30. In other words, the constitutional powers of the Governor General are not to be interpreted, as a matter of law, by the Court "in light of" constitutional conventions; they are to be construed and applied by the Court in *spite* of those conventions. To conclude otherwise is to transform constitutional conventions into constitutional law through judicial interpretation; something the Supreme Court has held is beyond the role of the courts.

31. Accordingly, the Federal Court motions judge erred in finding that it is arguable that this is a case of statutory interpretation. Rather, the "essential character" of this case is the constitutional convention whereby the Governor General will only summon Senators upon the advice of the Prime Minister. This convention is not relevant to proper judicial interpretation of the Constitution

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[28] *Singh v. Canada* (1991), 3 O.R. (3d) 429 (C.A.).
[29] *Ibid,* at 435-436.

in these circumstances. The Court cannot declare that the Prime Minister "must" provide advice on the naming of Senators without giving legal effect and enforcement to a convention.

Constitutional conventions carry political, not legal, sanction

32. The proper forum for Mr. Alani, or indeed any interested individual, to take issue with the timing of the Prime Minister's advice on Senate appointments is the political arena, not the law courts. As set out by the Supreme Court of Canada, "the remedy for breach of a constitutional convention must be found outside the courts, if a remedy is to be found at all".[30]

33. Similarly, as set out in the *Patriation Reference,* by a majority of the Court:

> 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.[31]

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

> As has been pointed out by the majority, a fundamental difference between the legal, that is the statutory and common law rules of the constitution, and the conventional rules is that, while a breach of the legal rules, whether of statutory or common law nature, has a legal consequence in that it will be restrained by the courts, no such sanction exists for breach or non-observance of the conventional rules. The observance of constitutional conventions depends upon the acceptance of the obligation of conformance by the actors deemed to be bound thereby. When this consideration is insufficient to compel observance no court may enforce the convention by legal action. The sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences, but it will not engage the attention of the courts which are limited to matters of law alone. Courts, however, may recognize the existence of conventions and that is what is asked of us in answering the questions. The answer, whether affirmative or negative however, can have no legal effect, and acts performed or done in conformance with the law, even though in direct contradiction of well-established conventions, will not be enjoined or set aside by the courts.[32]

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[30] *Ontario English Catholic Teachers' Association v. Ontario (Attorney General),* 2001 SCC 15, at para. 63.

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

[32] *Patriation Reference, supra*, at S.C.R. 853.

35. The political nature of Senate appointments was also pointed out by the Federal Court in *Samson v. Canada* (1998), 165 D.L.R. (4th) 342, where the Court observed:

> [6] The Governor General's constitutional power to appoint qualified persons to the Senate is also purely political in nature. In practice, the Governor General exercises his power of appointment on the advice and recommendation of the Governor-in-Council. In the event that the Governor-in-Council makes a recommendation which ignores the pending election to be held in Alberta under the provisions of the provincial Senatorial Selection Act, it proceeds at its own political peril. However, that is a purely political decision to be made by politicians, without the interference or intervention of the Court.[33]

36. Just as it is inappropriate to try to use the courts to enforce a convention, it is also inappropriate to use the courts as a tool to assert political pressure in relation to a convention. This point was made by the Alberta Court of Appeal in *Brown v. Alberta, supra,* where the applicant sought a declaration "because a declaratory order from the Court would, in [the applicant's] view, have considerable persuasive effect".[34] The Court upheld the striking of the application on the grounds the Court did not have jurisdiction to grant the declaration in the absence of a legal issue.[35]

37. If Mr. Alani feels that the timing of Senate appointments is problematic, he is free to campaign to endeavour to put political pressure on the Prime Minister to make recommendations. However, he is not entitled to use the courts to enforce a convention, nor is he entitled to use the courts as an instrument to create political pressure.

Granting the relief sought would amount to enforcement of a constitutional convention

38. Mr. Alani's notice of application seeks a declaration that "the Prime Minister of Canada must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate".[36]

39. As the Prime Minister's authority to advise on Senate appointments arises pursuant to a constitutional convention, to say that the Prime Minister "must" provide such advice, at any particular time or at all, is to enforce the convention as it exists at a point in time. There is no legal basis to impose a duty on the Prime Minister in particular to provide advice. The fundamental nature of conventions is that they may change over time, and for the courts to impose a judicial

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[33] *Samson v. Canada* (1998), 165 D.L.R. (4th) 342, 155 F.T.R. 137 (T.D.).
[34] *Brown, supra,* at para. 25.
[35] *Ibid,* at para. 24.
[36] Appeal Book, Tab 4, Page 27.

imperative on the exercise of the Prime Minister's traditional advice-giving role would be to interfere judicially with the scope and potential evolution of a political rule.

40. Nor is it an answer that, as the motions judge noted, Mr. Alani "only seeks a declaration".[37] Non-justiciable matters do not become justiciable simply because declaratory rather than expressly mandatory relief is sought. As set out the *Patriation Reference,* "non-observance of a convention... will not engage the attention of the courts which are limited to matters of law alone."[38] Granting any relief as the result of an alleged breach of a convention, declaratory or otherwise, is to engage the attention of the Court in an attempt to give the convention legal effect.

41. Further, when declaratory relief is granted against the Crown, it is not simply optional guidance offered by the Court. Indeed, unlike the situation where the Governor General declined to follow the Prime Minister's advice on Senate appointments, there may be legal consequences if declaratory relief is not observed by government officials. As this Court recently stated:

> [15] As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62, [2003] 3 S.C.R. 3, ("*Doucet-Boudreau*") at par. 62, the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully. However, should this not be the case, the Supreme Court of Canada has laid to rest any doubt about the availability of contempt proceedings in appropriate cases in the event that public bodies or officials do not comply with such an order. As noted by Iacobucci and Arbour JJ. at par. 67 of *Doucet-Boudreau*: "[o]ur colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases" (emphasis added).[39]

42. It is therefore incorrect to suggest that to make a declaration that a public official must follow a particular constitutional convention is anything other than enforcement of that convention. Judicial review cannot be sought in respect of "duties" that can only be said to exist on the basis of a constitutional convention.

43. In sum, Mr. Alani's application for judicial review in respect of the timing of Senate appointments is plainly and obviously non-justiciable. The Federal Court's refusal to dismiss it further to

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[37] Appeal Book, Tab 3, para. 34.
[38] *Patriation Reference, supra,* at S.C.R. 853.
[39] *Assiniboine v. Meeches,* 2013 FCA 114.

Canada's motion to strike stands in stark conflict with that of the Alberta Court of Queen's Bench (affirmed by the Alberta Court of Appeal) in the indistinguishable case of *Brown v. Alberta* which also involved an application for declaratory relief regarding the Prime Minister's advice on Senate appointments. The motions judge was wrong to allow Mr. Alani's application to proceed and thereby force the parties to needlessly expend resources on defending this forlorn application on the merits.

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

44. Mr. Alani's notice of application indicates that he is seeking 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".[40] He asks for 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."[41]

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

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

46. Mr. Alani candidly admitted at the hearing of the motion to strike that there is no "Act of Parliament" engaged in his judicial review, stating:

> MR. ALANI: "I agree with [counsel for Canada's] characterization of my position in that I'm not saying that the jurisdiction of the prime minister or the governor general arises by an Act of Parliament and so the only option left to me is to persuade the court that there is a prerogative power invoked."42

47. While this Court recently found that the *Constitution Act, 1867* is a "Law of Canada" for the purposes of s. 101 of that Act, it does not follow that the *Constitution Act, 1867* is an "Act of

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[40] Appeal Book, Tab 4, at p. 27.
[41] *Ibid.*
[42] Appeal Book, Tab 10, at p. 191.

Parliament" for the purposes of the *Federal Courts Act*'s definition of "federal board, commission or other tribunal".[43] The *Constitution Act, 1867* was an act of the imperial parliament, not the Parliament of Canada.

48. The jurisdiction of the Federal Court to hear the application for judicial review therefore turns on whether the definition of "federal board, commission or other tribunal" can be interpreted so broadly as to include the Prime Minister's conventional role in advising on Senate appointments. This is a straightforward question of law that requires only that the Court consider what the Crown prerogative is and what a constitutional convention is. When those two legal concepts are defined, it becomes apparent that they are wholly distinct, and that the Prime Minister, in advising the Governor General on Senate appointments, does not exercise a power conferred by or under an order made pursuant to a prerogative of the Crown.

49. As has been noted above, constitutional conventions are unwritten rules of political behaviour that are unenforceable by the courts. Actions taken pursuant to a constitutional convention, including providing advice on Senate appointments, have no independent legal effect. If a Governor General were not to follow a Prime Minister's advice in respect of a Senatorial appointment and then were to choose to summon another person to the Senate instead, a court would have no authority to invalidate the Governor General's legal act. Professor Hogg explains as follows:

> Conventions are rules of the constitution that are not enforced by the law courts…
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> The Constitution Act, 1867, and many Canadian statutes, confer extensive powers on the Governor General or on the Governor General in Council, but a convention stipulates that the Governor General will exercise those powers only in accordance with the advice of cabinet or in some cases the Prime Minister…
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> … [This convention is] not enforceable in the courts. If the Governor General exercised one of his powers without (or in violation of) ministerial advice, the courts would not deny validity to his act.[44]

50. The Supreme Court in the *Patriation Reference* recognized that conventions, by their nature, cannot be judicially enforceable:

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

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[43] *Canadian Transit Co. v. Windsor (City),* 2015 FCA 88, at para. 49.

[44] Peter Hogg, *Constitutional Law of Canada, Loose-leaf,* (Toronto: Carswell, 2007), at 1-22.1 ("Hogg").

> detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement.[45]

51. The non-enforceability of conventions is important to their special place in the Canadian constitutional framework, as it allows conventions to evolve over time without the need to invoke official constitutional amendment. This point was made by the Quebec Court of Appeal:

> [58] Moreover, to assimilate an amendment of the powers of the Prime Minister with those of the Governor General for the purposes of paragraph 41(a) of the Constitution Act, 1982 would limit Parliament's powers because of a constitutional convention. Such a limitation does not exist, or at a minimum, does not concern the courts.
>
> [59] On the contrary, constitutional conventions are not justiciable, contrary to the text of the Constitution, which by its nature is susceptible of evolution, as Hogg, (supra, no. 1.10(e), p. 1-29) affirms:
>
> > [T]he conventions allow the law to adapt to changing political realities without the necessity for formal amendment.
>
> [60] If Parliament were precluded from amending a constitutional convention by the adoption of a statute, this would a fortiori imply that conventions could never be amended by the conduct of political actors. Such reasoning shows that subjecting constitutional conventions to the amending procedure is untenable.[46]

52. Exercises of the Crown prerogative, on the other hand, are independently legally binding and enforceable. The Crown prerogative is a source of legally enforceable power that exists outside of statute. It is described by Professor Hogg as "the powers and privilege accorded by the common law to the Crown".[47] Both the existence and exercise of a prerogative power can be judicially reviewed, though the exercise of a prerogative power is only justiciable if it affects the rights or legitimate expectations of an individual.[48]

53. The distinction is straightforward: while the Crown prerogative is a source of legally binding powers, Constitutional conventions are unenforceable rules. When the Prime Minister provides advice on Senate appointments, he does not act pursuant to a statute or a Crown prerogative. If he

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[45] *Patriation Reference,* at S.C.R. 774.
[46] *Project de loi fédéral relatif au Sénat (Re),* 2013 QCCA 1807.
[47] Hogg, *supra,* at 1-18.
[48] *Copello v. Canada (Minister of Foreign Affairs),* 2003 FCA 295 at paras. 16 – 21; *Black, supra,* at para 46.

did, his advice would have some legal effect. As it stands, the advice is only effective if the convention is observed that the recommendation will be followed. An appointment by the Governor General made contrary to the advice of the Prime Minister would be legally valid, although one certainly would expect significant political fallout from such an occurrence.

54. Furthermore, as prerogative powers are those historically afforded directly to the Crown, it makes no sense to suggest that giving non-binding advice on Senate appointments is an exercise of the Crown prerogative. The Crown need not give itself optional advice. Advice given pursuant to a constitutional convention may inform and, to the extent the convention is voluntarily observed, limit the exercise of power reserved for the Crown, but its roots lie neither in statute nor the Crown prerogative.

55. In sum, even if Mr. Alani's application for judicial review in respect of Prime Ministerial advice regarding Senate appointments were justiciable, which Canada denies, such advice is not given by a "federal board, commission or other tribunal". The application is therefore outside of the jurisdiction of the Federal Court in any event, and ought to be struck accordingly.

Conclusion

56. The Federal Court motions judge erred in law in finding that he could not decide disputes on questions of law in the context of a motion to strike. He erred in failing to consider the notice of application in its entirety, with a view to understanding its essential nature. These errors led the motions judge to fail to find that the application is plainly and obviously not justiciable, and that, in any case, it is outside of the Federal Court's statutory jurisdiction.

57. Canada asks this Court to intervene and strike the application for judicial review. In doing so, the Federal Court of Appeal will clearly endorse the notion that motions to strike ought to be used as a tool to resolve potentially complex yet ultimately forlorn judicial review applications, thereby promoting the efficient use of court and litigant resources, and ultimately access to justice.

PART IV - ORDER SOUGHT

58. The Appellants respectfully request the Court to issue the following order:

a) the appeal is allowed;

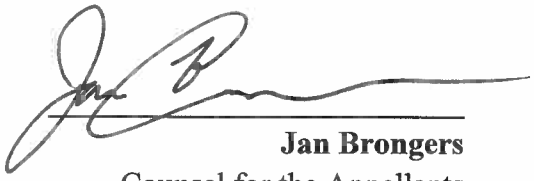
b) the order of the Federal Court in proceeding no. T-2506-14 dated May 21, 2015 is set aside;

c) the Appellants' motion to strike is allowed and the Respondent's notice of application is struck out in its entirety, without leave to amend; and

d) the Respondent's application for judicial review in Federal Court proceeding no. T-2506-14 is dismissed in its entirety, with costs in this Court and in the Federal Court below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 28th day of July, 2015.



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PART V - LIST OF AUTHORITIES

Case Law

1. *Adventure Tours Inc. v. St. John's Port Authority,* 2011 FCA 198.
2. *Apotex Inc. v. Canada (Governor in Council),* 2007 FCA 374.
3. *Assiniboine v. Meeches,* 2013 FCA 114.
4. *Black v. Canada* (2001), 54 O.R. (3d) 215 (C.A.).
5. *Brown v. Alberta,* 1999 ABCA 256.
6. *Canadian Transit Co. v. Windsor (City),* 2015 FCA 88.
7. *Copello v. Canada (Minister of Foreign Affairs),* 2003 FCA 295.
8. *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* (1994), [1995] 1 F.C.R. 588, 176 N.R. 48 (C.A.).
9. *Dyson v Attorney-General*, [1911] 1 K.B. 410 (C.A.).
10. *Hryniak v. Mauldin,* 2014 SCC 7.
11. *Merchant Law Group v. Canada Revenue Agency,* 2010 FCA 184.
12. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42.
13. *Ontario English Catholic Teachers' Association v. Ontario (Attorney General),* 2001 SCC 15.
14. *Operation Dismantle v. The Queen,* [1985] 1 S.C.R. 441.
15. *Project de loi fédéral relatif au Sénat (Re),* 2013 QCCA 1807.
16. *Re Resolution to Amend the Constitution,* [1981] 1 S.C.R. 753.
17. *Sargenat v. Al-Saleh,* 2014 FCA 302.
18. *Samson v. Canada* (1998), 165 D.L.R. (4th) 342, 155 F.T.R. 137 (T.D.).
19. *Singh v. Canada* (1991), 3 O.R. (3d) 429 (C.A.).

Secondary Sources

20. Peter Hogg, *Constitutional Law of Canada, Loose-leaf,* (Toronto: Carswell, 2007).