Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

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

Respondents

AFFIDAVIT OF ANIZ ALANI

I, Aniz Alani, barrister and solicitor, of the City of Vancouver in the Province of British Columbia, AFFIRM THAT:

1. I am the Applicant in this proceeding and as such have personal knowledge of the facts and matters hereinafter deposed to, save and except where same are stated to be made on information and belief, and, where so stated, I verily believe them to be true.

2. On April 23, 2015, I appeared at the hearing of the Respondents' motion to strike the application for judicial review in this proceeding before the Honourable Justice Harrington. At the hearing, counsel for the Respondents in the course of oral submissions identified certain factual questions that were not addressed by the current state of the pleadings or in evidence before the Court.

3. A copy of a certified transcript of the hearing of the Respondents' motion to strike is attached as Exhibit "**A**" to this Affidavit.

A. STATUS OF APPLICANT

4. I have been a citizen and resident of Canada since my birth.

5. I am ordinarily resident and own property in Vancouver, British Columbia.

6. I am a lawyer by profession.

7. I am eligible to vote in federal elections in Canada.

8. I am acting on my own behalf in this proceeding. I was not asked by any person, company or organization to commence this proceeding, and my conduct of this litigation has been without expectation of fee or reward. I do not take instructions regarding the conduct of this proceeding from any person or organization.

9. I am not currently, nor to the best of my recollection have I ever been, a member of or donor to any political party in Canada.

B. MY INTEREST IN THE PROCEEDING

10. On Friday, December 5, 2014, I became aware of media reports that the Prime Minister of Canada made a public statement in Markham, Ontario on Thursday, December 4, 2014 indicating that he did not intend to name more Senators to fill existing vacancies in the Senate.

11. Attached as Exhibit "**B**" to this Affidavit is a copy of an article published in the Toronto Star on December 4, 2014 and printed for the purposes of attaching to this Affidavit on June 19, 2015. To the best of my recollection, the attached copy is substantially similar to the version I remember reading for the first time on December 5, 2014.

12. Prior to December 5, 2014, to the best of my recollection, I was not aware that 16 vacancies had accumulated in the Senate, nor did I know that the Prime Minister had indicated any intention not to effect the appointment of Senators as vacancies arose.

13. Upon my review of the media coverage of the Prime Minister's statements, and after having conducted some initial research into the status and history of the vacancies in the Senate, I formed the view that the Prime Minister's apparent refusal to appoint Senators was a violation of the Constitution of Canada.

14. I was also concerned that a political solution would not materialize to remedy what I understood to be an ongoing violation of the Constitution of Canada.

15. On or about December 3, 2007, I took the Barristers' and Solicitors' Oath upon my call to the Bar of British Columbia and admission as a solicitor of the Supreme Court, in which I pledged, among other things, to "uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and of the Province of British Columbia."

16. I consider it my professional obligation as a lawyer and my responsibility as a citizen of Canada to promote respect for the rule of law.

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

18. In making this determination, I considered the time periods set out in the *Federal Courts Rules* for the various procedural steps required in the course of an application for judicial review, the fees payable to the Court under the Tariff, and whether my own knowledge, capacity, time and interest were sufficient to conduct the proceeding through to a determination on its merits.

19. Before the Notice of Application was filed, having noted that the Prime Minister had stated that he was not receiving many calls from Canadians asking him to name more Senators, I wrote to the Prime Minister by e-mail on December 8, 2014 urging him "…to perform the function entrusted to [him] under Canada's Constitution by recommending for appointment to the Senate such persons as [he] consider[ed] appropriate having regard to the qualifications set out in the Constitution Act, 1867."

20. Attached as Exhibit "**C**" to this Affidavit is a copy of an e-mail thread

containing my e-mail message to the Prime Minister of December 8, 2014 and a follow-up message of May 16, 2015 requesting acknowledgment. As of June 22, 2015, I have not received any response to either of these communications.

C. LEGAL UNCERTAINTY REGARDING THE PRIME MINISTER'S NON-APPOINTMENT OF SENATORS

21. It is my understanding and belief that there exists uncertainty and disagreement within Canada as to whether it is constitutionally permissible for the Prime Minister to delay, postpone, or refuse to effect the appointment of Senators to fill vacancies in the Senate by recommending appointments to the Governor General. My understanding and belief is based in part on the fact of statements made in the published reports and articles referenced in paragraphs 22 to 32 below.

22. Attached as Exhibit "**D**" to this Affidavit is a copy of an article published in the Toronto Star on November 14, 2013 entitled "Let Canadian Senate die of attrition", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

23. Attached as Exhibit "**E**" to this Affidavit is a copy of an article published on Looniepolitics.com on December 23, 2013 entitled "Vacant senate seats breaking Confederation's promises", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

24. Attached as Exhibit "**F**" to this Affidavit is a copy of an article published by CBC News on July 8, 2014 entitled "Stephen Harper under pressure to fill Senate vacancies", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

25. Attached as Exhibit "**G**" to this Affidavit is a copy of an article published by CBC News on July 10, 2014 entitled "Is Stephen Harper obliged to fill empty Senate seats", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

26. Attached as Exhibit "**H**" to this Affidavit is a copy of an article published by CBC News on July 12, 2014 entitled "Brad Wall says Senate 'atrophy is not a bad

end game'", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

27. Attached as Exhibit "**I**" to this Affidavit is a copy of an article published by Macleans on July 16, 2014 entitled "Brazen populism can't kill the Senate", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

28. Attached as Exhibit "**J**" to this Affidavit is a copy of an article published by Winnipeg Free Press on March 27, 2015 entitled "Abolition by stealth", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

29. Attached as Exhibit "**K**" to this Affidavit is a copy of an article published by National Post on April 24, 2015 entitled "The Canadian Senate – the dinner guest who won't go home", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

30. Attached as Exhibit "**L**" to this Affidavit is a copy of an article published by The Globe and Mail on May 21, 2015 entitled "Stephen Harper's game of Senate appointment make-believe will end", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

31. Attached as Exhibit "**M**" to this Affidavit is a copy of an article published by Blacklock's Reporter on June 2, 2015 entitled "Feds Appeal Senate Lawsuit", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

32. Attached as Exhibit "**N**" to this Affidavit is a copy of an article published by Ottawa Sun on June 14, 2015 entitled "Canada's war on the Senate? Just say no.", which I retrieved and printed for the purposes of attaching to this Affidavit on June 19, 2015.

D. PUBLIC INTEREST IN THE ISSUES RAISED IN THE APPLICATION

33. It is my belief that the issues raised in the application have attracted public attention on a national scale.

34. My belief is based on the fact that this litigation proceeding has been the subject of media coverage that includes the following publicly available publications

and broadcasts of which I am aware as of the date on which this affidavit was made:

a. CBC News, December 15, 2014: “Stephen Harper’s unappointed Senate seats unconstitutional, Vancouver lawyer says”.

b. CBC Radio One, The Early Edition, December 15, 2014.

c. CKNW 980 Radio (Vancouver), The Drex Live Show, December 15, 2014.

d. Le Devoir, December 16, 2014: <<Le Sénat encore devant les tribunaux>>, by Hélène Buzzetti.

e. Le Devoir, December 17, 2014: <<Abolir le Sénat une retraite à la fois?>> by Hélène Buzzetti.

f. CBA National Magazine, January 29, 2015: “Filling Senate Vacancies” by Justin Ling.

g. Canadian Lawyer Magazine, March 2, 2015: “Taking on the Big Guns” by Richard Foot.

h. Le Devoir, March 21, 2015: “Nominations au Sénat: Ottawa demande de rejeter la cause” by Hélène Buzzetti.

i. Canadian Press, April 9, 2015: “PM’s Refusal to Fill Senate Vacancies Challenged Amid Duffy Trial” by Joan Bryden.

j. Canadian Press, April 13, 2015: “Outrage spurs calls for reform, abolition of Senate but easier said than done” by Joan Bryden.

k. CBC Radio One, As It Happens, April 21, 2015.

l. CBC News, April 23, 2015: “Prime Minister Stephen Harper sued by B.C. lawyer for not filling senate seats” by Greg Rasmussen.

m. Canadian Press, May 21, 2015: “Court case to fill Senate vacancies pushes forward” by Joan Bryden.

n. The Globe and Mail, May 21, 2015: “Stephen Harper’s game of Senate appointment make-believe will end” by Campbell Clark.

o. La Presse, May 21, 2015: “Nominations au Sénat: la Cour fédérale accepte d’entendre un recours” by Hugo de Grandpré.

p. Agence QMI, May 22, 2015: “Nominations au Sénat: le gouvernement devra s’expliquer en cour”.

q. Maclean’s On the Hill (Podcast), May 22, 2015.

r. Radio-Canada Midi express,May 22, 2015: “Un avocat de Vancouver demande au premier ministre de nommer de nouveaux sénateurs”.

s. Blacklock’s Reporter, May 22, 2015: “Sues to Fill Senate Vacancies” by Dale Smith.

t. CBC Power and Politics, May 22, 2015: “Off the Radar: Court case on

Senate appointments gets green light".

u. Canadian Press, June 1, 2015: "Feds appeal judge's refusal to dismiss court case on Senate vacancies" by Joan Bryden.

v. Blacklock's Reporter, June 2, 2015: "Feds appeal Senate lawsuit" by Dale Smith.

w. Lawyers Weekly Canada, June 12, 2015 issue: "Novel lawsuit could reverberate beyond Senate to bench choices" by Cristin Schmitz.

x. Maclean's, June 9, 2015: "Is this the end of the Senate as we know it?" by Aaron Wherry.

35. I have declined a number of requests for television and radio interviews regarding this proceeding.

E. GENERAL

36. By letter dated December 27, 2014, I wrote to the attorneys general for all provinces and territories to provide notice of a potential question of general importance raised in the within proceeding and to request that they advise if they intended to seek leave to intervene in the proceeding. A copy of my letter, excluding the copy of the Notice of Application enclosed therewith, is attached as Exhibit "**O**" to this Affidavit.

37. On April 27, 2015, I wrote to counsel for the Respondents requesting, on a with prejudice basis, that the Governor in Council refer certain questions raised in this proceeding to the Supreme Court of Canada in exchange for a discontinuance of the proceeding without costs to any party. A copy of my letter is attached as Exhibit "**P**" to this Affidavit.

38. By letter dated April 29, 2015, a copy of which is attached as Exhibit "**Q**" to this Affidavit, counsel for the Respondents advised that the Respondents did not accept my offer to resolve the application on the terms that I had proposed.

39. By letter dated June 11, 2015, I wrote again to the attorneys general for all provinces and territories to provide notice of a constitutional question. In my letter, a copy of which is attached as Exhibit "**R**" to this Affidavit excluding enclosures to the

letter, I asked the attorneys general to advise if they intended to intervene in the proceeding or submit a related reference question to their respective courts.

40. Attached as Exhibit "**S**" to this Affidavit is a copy of correspondence from counsel for the Respondents to the Court dated June 15, 2015 advising that no material would be transmitted to either the Registry or the Applicant pursuant to Rule 318.

Affirmed before me at Vancouver, British Columbia on June _____, 2015.

_____	_____
Commissioner for Taking Affidavits for British Columbia	Aniz Alani

FEDERAL COURT OF CANADA
(BEFORE THE HONOURABLE MR. JUSTICE HARRINGTON)

VANCOUVER, B.C.
APRIL 23, 2015

T-2506-14

BETWEEN:

ANIZ ALANI,

APPLICANT;
(RESPONDENT)

AND:

THE PRIME MINISTER OF CANADA
AND THE GOVERNOR GENERAL OF CANADA,

RESPONDENTS.
(MOVING PARTY)

MOTION

Mr. A. Alani, Appearing On His Own Behalf;

Mr. J. Brongers,
Mr. O. Pulleyblank, Appearing For The Respondents.

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Vancouver, B.C

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FEDERAL COURT
(Before The Honourable Mr. Justice Harrington)

VANCOUVER, B.C.

April 23, 2015

T-2506-14

BETWEEN:

ANIZ ALANI,

APPLICANT;

AND:

THE PRIME MINISTER OF CANADA
AND THE GOVERNER GENERAL OF CANADA,

RESPONDENTS.

Mr. A. Alani, Appearing on His Own Behalf;

Mr. J. Brongers,
Mr. O. Pulleyblank, Appearing for the Respondent;

1 (PROCEEDINGS COMMENCED AT 9:18 A.M.)
2 THE REGISTRAR: This general sitting of
3 the Federal Court at Vancouver is now open. The
4 honourable Mr. Justice Harrington is presiding. Before
5 the court file number T-2506-14 between Aniz Alani and
6 the prime minister of Canada and the governor general of
7 Canada. Appearing on behalf of the applicant is Mr.
8 Aniz Alani, himself, and appearing on behalf of the
9 respondent, Mr. Jan Brongers and Mr. Oliver Pulleyblank.
10 JUSTICE: Good morning.
11 MR. BRONGERS: Good morning.
12 JUSTICE: Just a few preliminary
13 points. The -- both sides have referred to this
14 announcement of the prime minister but I have not see it
15 and I think the context might be important because we
16 had the *Smith* matter, the man on death row in Alberta
17 and Minister Toews saying that government was no longer
18 going to support -- make representations against the
19 death penalty and that was struck down by Mr. Justice
20 Barnes.
21 So do we have anything about this --
22 where this announcement comes from?
23 MR. BRONGERS: Well, Justice
24 Harrington, since this is a motion to strike and no
25 evidence is admissible on it we have to take the
26 pleadings as true --
27 JUSTICE: Yes.
28 MR. BRONGERS: -- as Mr. Alani has

1 sent them out. It's our position that it's not relevant
2 what the prime minister's actual position is with
3 respect to filling Senate vacancies.
4 I certainly can confirm that there was a
5 media scrum, apparently, on December 4th, which was
6 reported in the Toronto Star, which Mr. Alani has
7 attached to an affidavit the report of that.
8 JUSTICE: Is that in my record here?
9 MR. BRONGERS: No, Mr. Alani has
10 served us with his affidavit in support of the
11 application, even though we advised him that it was not
12 necessary to do so given that we had brought this motion
13 to strike. We had indicated to him that logically he
14 should wait to see how this motion is adjudicated but he
15 insisted on providing us with an affidavit. Not one
16 sworn by him personally but by a friend.
17 JUSTICE: All right.
18 MR. BRONGERS: And it attaches this
19 article from the Toronto Star which quotes the prime
20 minister responding to a question about Senate vacancies
21 and the prime minister indicating that while he's aware
22 of the fact that there are vacancies, that at this point
23 in time the Senate is continuing to function properly,
24 and that's essentially what it says.
25 I mean we can read the article for the
26 court but it is not in evidence.
27 JUSTICE: All right.
28 MR. BRONGERS: And our position with

1 respect to the motion is that at the end of the day,
2 it's not relevant.
3 JUSTICE: Now you mentioned about a
4 functioning Senate. You know, if you took this to the
5 N^{th} degree, all political parties could say, "Well, we're
6 never going to fill the vacancy, so over time there will
7 be no senators left." So here we have a bicameral
8 legislature, according to our constitution, and nobody
9 is in one house.
10 Another -- the Supreme Court now,
11 according to the Supreme Court has some sort of quasi-
12 constitutional status as a result of the *Constitution*
13 *Act* of 1982. So there are nine positions there. One
14 will become vacant, I guess, at the end of this year.
15 And then others. And so suppose they're not filled, so
16 we end up with no one in the Supreme Court. Surely
17 there must come a point in time where somebody has to do
18 something.
19 Now another point I'm surprised at,
20 nobody has cited to me what I consider the key cases on
21 declaratory judgments. There's the decision of the
22 *Manitoba Métis* of the Supreme Court just in the last two
23 years, and more important there's a decision of *Lebar v.*
24 *Canada* 1989 and I will give you each a copy and Mr.
25 Justice MacGuigan goes through the history of
26 declaratory judgments starting with the *Dyson* case in
27 England. And I will leave that for your consideration
28 at the moment.

1 And this a motion to strike, so we're
2 talking about Rule 221. We're talking about it being
3 plain and obvious that there is no case to answer, that
4 the plaintiff should be driven from the judgment seat
5 now and I don't even have to a conclusion on the balance
6 of probabilities that the plaintiff will succeed. All I
7 have to do is determine that the plaintiff has overcome
8 the bar, that there is some kernel, some case to answer.
9 So we're on the same page.
10 MR. BRONGERS: I understand the
11 court's concerns and I will be addressing them in my
12 submissions.
13 JUSTICE: Okay, well, let's go.
14 **SUMBISSIONS BY MR. BRONGERS:**
15 MR. BRONGERS: Thank you, Justice
16 Harrington.
17 So yes, this is a motion to strike an
18 application for judicial review brought by Mr. Aniz
19 Alani in respect of an alleged decision of the prime
20 minister not to advise the governor general to fill
21 existing vacancies in the Senate and the application
22 names two respondents, the prime minister and the
23 governor general but only seeks declaratory relief in
24 respect of the prime minister.
25 JUSTICE: Yes.
26 MR. BRONGERS: And specifically Mr.
27 Alani is asking for a two-fold declaration which we can
28 summarize as follows. First that the prime minister

1 must advise the governor general to summon qualified
2 persons to the Senate within a reasonable time after a
3 vacancy occurs; and secondly that the deliberate failure
4 to do so is unconstitutional and unlawful.
5 On behalf of the prime minister and the
6 governor general, the Attorney General of Canada now
7 moves to strike this application on the basis that it is
8 clearly bereft of any possibility of success.
9 And this is so because the application is
10 an attempt to judicially review the manner in which the
11 prime minister advises the governor general on Senate
12 appointments, which is a political matter of pure
13 constitutional convention that is not justiciable. And
14 furthermore, even if such advice were the proper subject
15 of judicial review, it would be beyond the statutory
16 jurisdiction of the Federal Court to do so and so as
17 such this is one of those exceptional cases that does
18 warrant being dismissed summarily on a motion to strike.
19 JUSTICE: Oh, is this on the basis
20 that the constitution is not a law of Canada?
21 MR. BRONGERS: No.
22 JUSTICE: All right.
23 MR. BRONGERS: The four issues that I
24 will be addressing in my presentation this morning are:
25 First the suitability of a motion to strike to
26 adjudicate the application; secondly, the justiciability
27 of the application; third, the jurisdiction of the
28 Federal Court to hear this application; and fourth, the

1 amendments proposed by Mr. Alani to cure the defects in
2 his application.
3 But beginning with the factual
4 background. This is a motion to strike and the
5 discussion of the background is necessarily limited by
6 the principle that I referenced earlier that the facts,
7 as stated in the notice of application, are taken to be
8 true. The parties are not permitted to lead evidence
9 either in support of or in response to such motions and
10 that principle has been respected by the parties here
11 today.
12 So as such, the adjudication of this
13 motion is going to turn on a careful consideration of
14 the precise wording of the notice of application as
15 drafted by Mr. Alani. But before doing that, I would
16 like to briefly highlight the guidance provided by the
17 Federal Court of Appeal in the *J.P. Morgan* case, which
18 is at our book of authorities at tab 5, in which Mr.
19 Justice Stratas discussed in some detail the practice
20 and procedure that applies to notices of application for
21 judicial review and also motions to strike them.
22 And in particular he sets out what the
23 obligations are on the applicant in terms of preparing
24 his or her pleading. And if we could just turn to
25 paragraphs 38 and following.
26 Page 18.
27 JUSTICE: Yes.
28 MR. BRONGERS: The highlighted portion

1 there indicates the pleading requirements of a notice of
2 application. Justice Stratas notes that:
3 "A notice of application for judicial review
4 must have a precise statement of the relief
5 sought and a complete and concise statement
6 of the grounds intended to be argued."
7 He says that:
8 "A complete statement of grounds means all
9 the legal bases and material facts that, if
10 taken as true, will support the granting of
11 relief sought."
12 And he says:
13 "A concise statement of grounds must include
14 the material facts necessary to show that the
15 court can and should grant the relief
16 sought."
17 There's also paragraph 42 to 45 which explains what the
18 grounds should contain. He says that:
19 "While the grounds should be concise, they
20 should not be bald. Applicants who have some
21 evidence to support a ground can state the
22 ground with some particularity. Applicants
23 without any evidence who are just fishing for
24 something cannot."
25 And then at paragraph 43:
26 "Thus, for example, it is not enough to say
27 that an administrative decision-maker abuse
28 their discretion. Applicant must go further

1 and say what the discretion was and how it
2 was abused."
3 And finally paragraph 45:
4 "It is an abuse of process to start
5 proceedings and make entirely unsupported
6 allegations in the hope that something will
7 later turn up."
8 And the final paragraph I'd like to direct the court's
9 attention to is 63.
10 JUSTICE: 63?
11 MR. BRONGERS: Yes, please, My Lord.
12 JUSTICE: Yes.
13 MR. BRONGERS: Paragraph 63 at the
14 second sentence:
15 "In drafting the grounds in support of their
16 notices of application, applicants should
17 plead the reasons why the court has
18 jurisdiction. After all the court's
19 jurisdiction is statutory. The court must
20 have jurisdiction to entertain the
21 application and grant the relief sought."
22 So keeping in mind the applicant's
23 obligation to set out in his notice of application all
24 of the material facts and legal bases that would ground
25 the prayer for relief, and while these grounds should be
26 concise, they should not be bald and should be stated
27 with some particularity.
28 Let's look at the grounds that are set

1 out in Mr. Alani's notice of application, and that's at
2 tab 2 of the respondent's motion record, the thin green
3 volume.
4 JUSTICE: Yes.
5 MR. BRONGERS: Now, if we turn to page
6 7 where the grounds of the application are set out,
7 starting halfway down the page. There are only five
8 grounds. Four of them are assertions of law. And only
9 one is a factual assertion and that's at paragraph 3.
10 It contains eight words. It says, "There are currently
11 16 vacancies in the Senate." And that's it. That's the
12 only fact that is alleged in support of this
13 application. There are no others.
14 JUSTICE: Well, no, there is the fact
15 right at the outset that the prime minister made this
16 announcement. That's a fact.
17 MR. BRONGERS: That's describing the
18 decision that's being targeted.
19 JUSTICE: Yeah, yeah.
20 MR. BRONGERS: In our submission
21 Justice Stratas would say that that would need to be
22 particularized in the grounds.
23 JUSTICE: Surely you are not saying
24 that you have to -- because it's in the first sentence
25 it's no good, it has to come down under the grounds and
26 this is a fatal error?
27 MR. BRONGERS: We're saying that their
28 needs to be more than just these eight words "There are

1 currently 16 vacancies in the Senate." The notice
2 doesn't even tell us who the applicant is. All we know
3 is his name, Mr. Aniz Alani and the only reason we know
4 that is because it's in the style of cause.
5 It doesn't tell us where he's ordinarily
6 resident. It doesn't tell us what his profession is or
7 even whether he has the right to vote.
8 It doesn't explain what particular
9 interest Mr. Alani has in Senate vacancies, whether he's
10 acting on his own behalf or on behalf of a public
11 interest group. Doesn't say how and when Mr. Alani
12 personally came to learn of the decision of the prime
13 minister that he now wants the court to review.
14 But most significantly it doesn't say
15 what impact this alleged decision has had on Mr. Alani.
16 There's no mention that he suffered any prejudice from
17 these vacancies in the Senate in terms of either his
18 personal integrity or his economic situation, his
19 physical or emotional wellbeing, his democratic rights
20 or indeed any other right or expectation that he might
21 have.
22 JUSTICE: But if I were to agree with
23 you and dismiss on those grounds, what would prevent him
24 from taking a fresh application.
25 MR. BRONGERS: There is more to the
26 motion to strike --
27 JUSTICE: I hope so.
28 MR. BRONGERS: -- than that issue.

1 JUSTICE: Because this is very
2 procedural and we have our Rule 55, we can cure defects.
3 Amell and Brunell [phonetic], 1977, procedure is the
4 mistress of law, not the other way around.
5 MR. BRONGERS: True. But as Justice
6 Stratas says the burden is on the applicant to properly
7 plead and not just put forward bald pleadings. That it
8 has to explain why the court can grant the relief, so --
9 JUSTICE: A lot of public interest
10 cases, going back in the '70s, about who has standings.
11 Are you saying -- I would think any Canadian citizen
12 probably would have standing.
13 MR. BRONGERS: And again if --
14 JUSTICE: Are you saying that we don't
15 know if Mr. Alani --
16 MR. BRONGERS: A non-citizen presumably
17 would not have standing. We don't know what Mr. Alani's
18 interest is in this particular issue. And we aren't
19 raising standing on the motion to strike because this is
20 just about justiciability and jurisdiction, and at the
21 end of the day it doesn't matter. But it is important
22 for the court to have a full picture of what we are
23 addressing here and also with respect to the question of
24 whether it was appropriate for the prime minister to
25 respond to this by way of a motion to strike as opposed
26 to waiting until the hearing. It is important to see
27 what is alleged here, what we are dealing with.
28 The court asked the question at the

1 outset, "What is the decision here?" and it is not
2 clearly set out in the notice of application what Mr.
3 Alani's understanding is of that, whether he contacted
4 the prime minister to ask that Senate vacancies be
5 filled, whether he's been lobbying for this; we just, we
6 don't know.
7 And the application does not provide
8 particulars of the decision that's being challenged,
9 which we're not told anything about the circumstance
10 surrounding that communication or the context in which
11 it was made. Again I can advise the court that we now
12 have received this affidavit from Mr. Alani which has
13 the *Toronto Star* article but that's all we really know
14 about the alleged decision. So again, the only fact
15 that the court has to go on is there are currently 16
16 vacancies in the Senate. And what's also very relevant
17 about this notice of application, Justice Harrington, is
18 the question of what evidence is going to be led in
19 support of it. Under the rules there is also a
20 requirement to indicate what material will support the
21 application, and the only evidence — and this is on page
22 8 — that Mr. Alani indicates here that he plans to
23 tender is the material that he hopes to get from the
24 prime minister through a Rule 317 request.
25 And according to this notice he doesn't
26 even intend to file his own affidavit. He simply is
27 going to, apparently, hope that the Rule 317 request
28 will turn up some factual evidence that he can use to

1 support his claim, which is a practice that was frowned
2 upon by Mr. Justice Stratas in the *J.P. Morgan* decision.
3 Now while the application is very light
4 on facts, it does set out some legal grounds as the
5 ostensible basis for the declaration that Mr. Alani is
6 seeking. And that is set out, of course -- well, we can
7 see that the declaration sought is at paragraphs -- or
8 is at pages 6 and 7. Again, the first part of the
9 declaration sought is that the prime minister must
10 advise the governor general to summon a qualified person
11 to the Senate within a reasonable time. And two, that
12 the deliberate failure to advise the governor general to
13 summon a fit and qualified person to fill the vacancy
14 within a reasonable time is -- and I will summarize a
15 little here. First of all he says it would be contrary
16 to section 22 and 32 of the *Constitution Act*. Those are
17 the provisions that relate to the regional composition
18 of the Senate and the governor general's power to fill
19 Senate vacancies. Secondly, it says it would be a
20 breach of the five underlying Constitutional imperatives
21 identified by the Supreme Court in the *Quebec succession*
22 reference. And finally he says it would be unlawful
23 absent an amendment to the Constitution.
24 So essentially, as we understand it, Mr.
25 Alani’s theory is that these declarations are warranted
26 because by constitutional convention, and Mr. Alani
27 concedes in his application that the power to advise the
28 governor general on Senate appointments is a matter of

1 constitutional convention. These appointments are made
2 on the advice of the prime minister, and by not
3 recommending appointments to the Senate to fill the
4 vacancies the prime minister is some how allowing the
5 Senate's membership to fall below it's full complement
6 of 105 members. And that this somehow amounts to a
7 change to the Senate which cannot be done without
8 undertaking constitutional reform.
9 Now, what's also interesting about the
10 declaration is that there's no request being made in
11 terms of what a reasonable time would be. It's just
12 simply asked in that vague formulation leaving it -- I'm
13 not sure how the subject of that declaration would be
14 able to interpret what a reasonable time would be but
15 that's the request that's being made. No suggestion is
16 indicated in the material of whether it should be six
17 months, two years, et cetera.
18 And also what is significant is that
19 while the governor general is named as a respondent, no
20 relief is being sought against him nor is there an
21 allegation that the governor general ought to be
22 unilaterally naming senators in the absence of advice
23 from the prime minister.
24 So that's the notice of application. And
25 it was issued last December and the prime minister and
26 the governor general have responded with a motion to
27 strike with the two-fold grounds of justiciability and
28 jurisdiction being the reasons we say that this

1 application is bound to be dismissed.
2 Now it was served on January 15th. It
3 also contained a request that the motion be heard on a
4 special hearing day given its anticipated length, which
5 Mr. Alani initially resisted. He wanted the motion to
6 be dealt with in writing. Eventually the Chief Justice
7 dismissed that objection and indeed ordered that this
8 hearing take place today in advance of an ultimate
9 hearing on the merits.
10 And there are three other procedural
11 aspects that should be mentioned to the court so that it
12 has a complete picture of the background to this motion.
13 And the first is that by bring this motion on
14 jurisdiction and justiciability grounds the respondents
15 have objected to producing a tribunal record under rule
16 317 of the Federal Courts Rules. It's our position that
17 given that this matter is not justiciable and outside of
18 the court's jurisdiction that Mr. Alani is not entitled
19 to use the court's power of compulsion to get document
20 production.
21 Now this has been of some concern to Mr.
22 Alani, perhaps understandably given his apparent plan to
23 ground his application almost exclusively on documents
24 that he might get pursuant to the Rule 317 request. But
25 we have assured Mr. Alani that if this motion is
26 dismissed we will, of course, discuss with him proposing
27 a reasonable schedule to the court in terms of the
28 remaining pre-trial steps, and that would include the

1 whole --
2 JUSTICE: That's down the line. I
3 mean we have -- the Rules provide for how disagreements
4 about what was before the decision maker can be
5 resolved.
6 MR. BRONGERS: Yes.
7 JUSTICE: There may have been nothing.
8 I don't know.
9 MR. BRONGERS: That's possible, but I
10 thought it was --
11 JUSTICE: That seemed to be Mr.
12 Justice Barnes take on Minister Toews decision not to
13 come to the aid of Mr. Smith on death row in Montana.
14 MR. BRONGERS: This is again, just to
15 give the court a complete picture, and again
16 particularly to address any allegations regarding the
17 propriety of bringing a motion to strike in these
18 circumstances.
19 JUSTICE: All right.
20 MR. BRONGERS: The second procedural
21 aspect worth mentioning is that a case management
22 conference was conducted by Prothonotary Lafrenière on
23 February 16th. This was convened on Mr. Alani's request
24 and it dealt with three issues. First of all Mr. Alani
25 asked that this motion be postponed and rescheduled to
26 be heard at the outset of an eventual hearing on the
27 merits. That request was denied by the Prothonotary who
28 indicated that he was not willing to overturn the Chief

1 Justice's direction.
2 Secondly Mr. Alani indicated that he was
3 going to be preparing amendments to his notice of
4 application and requesting immunity from an adverse cost
5 award. And Prothonotary Lafrenière ordered that those
6 submissions be included in Mr. Alani's responding record
7 here today. Which he has done.
8 And the third point that was dealt with
9 on the case management conference is again Mr. Alani
10 raised this matter of the Rule 317 request and the
11 respondent's Rule 318 objection. As well as the fact
12 that he's now interested in the possibility of a dispute
13 resolution conference to deal with this case.
14 Prothonotary Lafrenière ordered that those issues should
15 be dealt with after the motion to strike is adjudicated.
16 JUSTICE: Off the top of my head it's
17 hard to see how this could be resolved in a conference.
18 MR. BRONGERS: And the final --
19 JUSTICE: Either the prime minister is
20 in violation of the law or he is not.
21 MR. BRONGERS: It would be an
22 interesting mediation.
23 JUSTICE: Yes.
24 MR. BRONGERS: And the final procedural
25 matter that I would like to mention, as I actually
26 alluded to earlier, Mr. Alani has provided us with one
27 affidavit in support of the application. It is not
28 sworn by him personally, it is sworn by an individual

1 who identifies himself as a friend and colleague of the
2 applicant. It contains no substantive allegations, it
3 simply attaches three publicly available documents that
4 Mr. Alani could have attached to his own affidavit, but
5 is perhaps concerned about the possibility of cross-
6 examination, we don't know.
7 JUSTICE: Or could have quoted them at
8 length in the notice of application, I suppose.
9 MR. BRONGERS: Correct. What these
10 three documents are, two of them are print-outs from the
11 Parliament of Canada website which indicates the history
12 of the Senate vacancies throughout Canadian history,
13 which is sort of interesting only in that it indicates
14 that it's not unusual or unprecedented to have vacancies
15 around the current number. But that's publicly
16 available information, it doesn't tell us any more about
17 the nature or the background of this application.
18 And the other document is this *Toronto*
19 *Star* article. And again the reason I mention it, it's
20 obviously can't be taken into account on the motion to
21 strike, but again so the court understands no reason has
22 been given to us by Mr. Alani for us to reconsider the
23 motion to strike or the propriety of going forward with
24 this because we really have been given no indication
25 that Mr. Alani had anything else in support of his
26 application.
27 JUSTICE: Is there anything in terms
28 of constitution convention or otherwise that provides

1 for a quorum in the Senate?
2 MR. BRONGERS: Yes. There is a section
3 in the *Constitution Act* which provides that the quorum
4 is fifteen. My friend has the number somewhere -- Mr.
5 Alani probably knows it by heart.
6 JUSTICE: All right.
7 MR. BRONGERS: The quorum is fifteen.
8 JUSTICE: Somewhere in the
9 Constitution.
10 MR. BRONGERS: It's in the *Constitution*
11 *Act of 1867*. It's around section 35 I believe.
12 JUSTICE: All right.
13 MR. BRONGERS: In any event that
14 completes my submissions regarding the background.
15 Unless the court has any questions I will move on to the
16 legal submissions.
17 So I will begin by briefly touching on
18 the principles applicable to a motion to strike. They
19 are set out in written argument at paragraphs 12 to 21
20 of our factum and I don't intend to go through them in
21 any detail. I am just going to note that the leading
22 authority that deals with the Federal Court's power to
23 dismiss application for judicial review on a motion to
24 strike, not withstanding as the court indicated at the
25 outset, a lack of an express provision in the Federal
26 Courts rules, is now the *J.P. Morgan* decision of the
27 Federal Court of Appeal which I referenced earlier.
28 So that's again at tab 5 of our --

1 JUSTICE: Yes.
2 MR. BRONGERS: -- revised book of
3 authorities. And it confirms the proposition that was
4 first established by the Federal Court of Appeal in the
5 1994 *David Bull* case that the court does have an
6 inherent jurisdiction to strike applications.
7 But what's helpful about *J.P. Morgan* is
8 that it also sets out some further guidance on the
9 principles that the Federal Court should apply when
10 adjudicating motions to strike applications.
11 And if I could ask the court to turn to
12 paragraph 47 of the *J.P. Morgan* case where it indicates
13 that the court will strike a notice of application for
14 judicial review only where it is, "so clearly improper
15 as to be bereft of any possibility of success." And
16 then rather colourfully the court says that:
17 "There must be showstopper or a knockout
18 punch, an obvious fatal flaw striking at the
19 route of the court's power to entertain the
20 application."
21 Well, paraphrasing Mr. Justice Stratas,
22 in our submission there is such a showstopper,
23 specifically a one-two knockout punch of justiciability
24 and jurisdiction which are key threshold issues which
25 are completely dispositive of this application and which
26 can be dealt with in the absence of any affidavit
27 evidence.
28 And indeed we submit that it's clear from

1 the notices of application that this case raises a
2 purely political issue and no matter what factual
3 background ultimately surrounds the question of why
4 there are vacancies or why they haven't been filled more
5 quickly, at the end of the day this is a political
6 matter of constitutional convention, which lacks a
7 justiciable legal component. No legal yardstick that
8 the court could apply in terms of deciding whether these
9 political decisions are reasonable or correct, or
10 proper, or not. And furthermore, it is an issue that is
11 outside of the federal court's statutory jurisdiction
12 with respect to judicial review.
13 JUSTICE: Well, on the first point,
14 suppose we were getting down to the quorum. Would that
15 be a situation in which the court could intervene?
16 MR. BRONGERS: If the --
17 JUSTICE: We are a long way, and I see
18 the allegations where we are at about 80 senators, 85,
19 whatever it is. We are a long way from 15.
20 MR. BRONGERS: Right.
21 JUSTICE: But just hypothetically
22 suppose we were getting down to 15 or below?
23 MR. BRONGERS: And I will of course
24 have to preface the answer with that is indeed a
25 hypothetical --
26 JUSTICE: A hypothetical question.
27 MR. BRONGERS: And it's very unlikely
28 that that would occur, because of course, the government

1 of the day would no longer be able to pass its
2 legislation without a functioning Senate. But as I will
3 get into later, the Supreme Court has instructed us, in
4 the patriation reference, that in situations where there
5 are breaches of constitutional conventions, the only
6 remedy is political. The courts do not have a role in
7 policing breaches of constitutional conventions.
8 JUSTICE: All right.
9 MR. BRONGERS: The only other point --
10 JUSTICE: I could make declarations.
11 This is why I mention *LeBar*, a very important case I
12 think.
13 MR. BRONGERS: Yes.
14 JUSTICE: And at some point we'll take
15 a recess so you can take a look at that if you are not
16 familiar with it, but it is, to my mind, a very, very
17 important decision.
18 MR. BRONGERS: I certainly will,
19 Justice Harrington. In terms of the declaration point,
20 we were going to refer to the *Assiniboine v. Meeches*
21 case, which does indeed indicate that these days,
22 declaratory relief given by the court, pursuant to
23 litigation brought by a private citizen against a public
24 official, is effectively mandatory. And in fact,
25 contempt proceedings can be brought. And we are -- so
26 we agree --
27 JUSTICE: That is interesting. LeBar
28 says no contempt. I guess your case is post-LeBar?

1 MR. BRONGERS: It is, yes. And that
2 is why what is being asked for here would amount to an
3 enforceable declaration that if the prime minister were
4 to not abide by it, or Mr. Alani came to the conclusion
5 a few years from now, that there has been an
6 unreasonable length of time in the filling of vacancies,
7 in theory, armed with that declaration, Mr. Alani could
8 go to the court, asking for a contempt order against the
9 prime minister. So, that's why we say that what is
10 being asked for here is not just merely a declaration or
11 a reference opinion, what is being asked for is coercive
12 relief that would compel the prime minister to comply
13 with the constitutional convention.
14 JUSTICE: All right.
15 MR. BRONGERS: The only other point
16 I'd like to make on the propriety of responding to Mr.
17 Alani's application with an immediate motion to strike,
18 rather than waiting until a final hearing, which is an
19 approach which we say has already been implicitly
20 approved by the Chief Justice with his scheduling order,
21 and by Prothonotary Lafrenière and his refusal to
22 overturn it is that we are acting in accordance with the
23 Supreme Court's recent guidance in the *Hryniak* case,
24 which this court is no doubt familiar with. This was a
25 decision where the Supreme Court, Madam Justice
26 Karakastanis indicated that litigators and courts should
27 embrace a culture shift to use proportional procedural
28 mechanisms to deal with cases, as opposed to always

1 reverting to the default of a full-blown trial. And of
2 course, that was a motion for summary judgment case, but
3 in our submission, the same principle applies here with
4 respect to an application that is clearly bereft of any
5 possibility of success.
6 Neither the courts nor the parties are
7 served if a case that has no possibility of success is
8 allowed to go down the path of futile litigation when
9 that is something that could be dealt with at the outset
10 on a motion to strike.
11 So, those are my submissions with respect
12 to motion to strike. As you said, Justice Harrington, I
13 will now move to the heart of matter which is the
14 question of justiciability.
15 JUSTICE: Yes?
16 MR. BRONGERS: A very clear
17 explanation of justiciability can be found in the *Conrad*
18 *Black* decision of the Ontario Court of Appeal, which is
19 at Tab 3 of the respondent's book of authorities,
20 specifically at paragraph 50.
21 JUSTICE: Tab 3.
22 MR. BRONGERS: This of course is the
23 somewhat notorious case that arose in the late 1990s
24 when Conrad Black who was then a Canadian citizen
25 decided to sue the prime minister in respect of his
26 alleged advice to the Queen with respect to his proposed
27 appointment to the House of Lords, which the prime
28 minister opposed on the basis of the long-standing

1 Canadian policy that Canadian citizens ought not to hold
2 noble titles.
3 Now, the prime minister responded to this
4 lawsuit with a motion to strike on justiciability and
5 jurisdiction grounds, not unlike the response to Mr.
6 Alani's lawsuit today. And the motion was heard by the
7 then Chief Justice of the Ontario Superior Court, Chief
8 Justice Lasage, and he disagreed with the jurisdiction
9 argument. Courts are generally not keen to find they
10 don't have jurisdiction. But he agreed with the
11 justiciability argument, and struck out Mr. Black's
12 lawsuit, on the basis that that advice was an exercise
13 of the Crown prerogative over honours, which is a purely
14 political matter, without a legal component. It is not
15 possible to apply a legal yardstick as to whether it is
16 good to have an honour, or a right to an honour. Mr.
17 Black appealed, but his appeal was dismissed. And Mr.
18 Justice Laskin, the Ontario Court of Appeal decision,
19 explains justiciability succinctly at paragraph 50 here.
20 "At the core of the subject matter tests is a
21 notion of justiciability. The notion of
22 justiciability is concerned with the
23 appropriateness of courts deciding a
24 particular issue, or instead deferring to
25 other decision-making institutions like
26 Parliament."
27 And he cites some Supreme Court cases in support.
28 "Only those exercise of the prerogative that

1 are justiciable are reviewable. The court
2 must decide whether the question is purely
3 political in nature, and should therefore be
4 determined in another forum, or whether it
5 has a sufficient legal component to warrant
6 the intervention of the judicial branch."
7 JUSTICE: Of course, that could be
8 distinguishable. I can see that was purely political,
9 but here we are dealing with the Constitution which is a
10 legal document and *LeBar*, no man is above the law.
11 MR. BRONGERS: Mm-hmm. We are --
12 JUSTICE: And that seems to be the
13 basis of the argument that no one, including the prime
14 minister, can flaunt the law. And if the constitution
15 says the governor general shall appoint when there is a
16 vacancy, combining that with the convention that the
17 governor general will only do so on the advice of the
18 prime minister, it falls upon the prime minister. I'm
19 not saying I agree, I am just saying that is the
20 argument. It falls upon the prime minister within a
21 reasonable time — how one defines that, I don't know —
22 to make recommendations to the governor general.
23 MR. BRONGERS: And as we will see,
24 again, the Supreme Court in the patriation reference
25 indicated that in those scenarios where there is a
26 breach of a constitutional convention, and the examples
27 given in that case are a situation where the governor
28 general refuses to give royal assent to a Bill passed by

1 Parliament. The other example is given, what if the
2 government of the day is defeated at an election, and
3 refuses to relinquish power to the victorious
4 opposition? And the Supreme Court explains in that
5 case, that were those scenarios to happen -- and of
6 course, they are unlikely, because political actors
7 generally do comply with constitutional conventions.
8 But, if they were to occur, the remedy would not lie in
9 the courts, they would be political. And for the
10 example of the government that refuses to resign, the
11 suggested answer by the Supreme Court is that of course
12 the governor general would invite the leader of the
13 opposition to form the government. And if we had a
14 recalcitrant governor general who refuses to sign a bill
15 because he or she disapproves of what Parliament did,
16 then the governor general would be replaced. So. But
17 again, they are very clear that the courts will not
18 interfere with those political questions.
19 JUSTICE: All right.
20 MR. BRONGERS: Now, there are two
21 other helpful cases that deal with the definition of
22 justiciability. One is the *Hupacasath First Nation*
23 case, recent decision of the Federal Court of Appeal.
24 This is in Mr. Alani's book of authorities at tab 8. If
25 you look at paragraph 62 --
26 JUSTICE: So, I don't have tabs here,
27 do you have a page number?
28 MR. BRONGERS: Sure. Well it starts

1 at page 200, but the paragraph that I would like the
2 court to look at is at page 220.
3 JUSTICE: Okay, just a second now, let
4 me get this. Page 220.
5 MR. BRONGERS: Yes, at paragraph 62.
6 This isn't highlighted by Mr. Alani, so it's above the
7 highlighting. Paragraph 62.
8 "Justiciability, sometimes called the
9 political questions objection, concerns the
10 appropriateness and ability of a court to
11 deal with an issue before it. Some questions
12 are so political that courts are incapable or
13 unsuited to deal with them, or should not
14 deal with them in light of the time-honoured
15 demarcation of power between the courts and
16 the other branches of government."
17 And after remarking that the source of
18 the government power is not determinative of whether
19 government action is justiciable, Justice Stratus then
20 goes on to answer the question, "So what is, or is not
21 justiciable" at paragraph 65 of the next page.
22 JUSTICE: Yes.
23 MR. BRONGERS: So, "What is or is not
24 justiciable", well:
25 "In judicial review, courts are in the
26 business of enforcing the rule of law. One
27 aspect of which is executive accountability
28 to legal authority, and protecting

1 individuals from arbitrary executive action.
2 Usually when a judicial review of executive
3 action is brought, the courts are
4 institutionally capable of assessing whether
5 or not the executive has acted reasonably,
6 i.e. within a range of acceptability and
7 defensibility, and that assessment is the
8 proper role of the courts within the
9 contitutional separation of powers."
10 Mr. Alani stops his highlighting there, but if we keep
11 going:
12 "In rare cases however, exercises of
13 executive power are suffused with
14 ideological, political, cultural, social,
15 moral, and historical concerns of a sort not
16 at all amenable to the judicial process or
17 suitable for judicial analysis. In those
18 rare cases, assessing whether the executive
19 has acted within a range of acceptability and
20 defensibility is beyond the courts ken or
21 capability, taking courts beyond their proper
22 role within the separation of powers."
23 And then he gives us an example, a court
24 reviewing a wartime general's strategic decision on
25 whether to deploy troops in a particular way.
26 And finally, we also have the decision of
27 Mr. Justice Rennie who until a few weeks ago was of this
28 court, now of the Federal Court of Appeal, in the *Rocco*

1 *Galati* case, which bears some similarities to the case
2 at bar. And it is at tab 8 of our book of authorities.
3 This was an application for judicial
4 review directed primarily at the governor general's
5 granting of royal assent to legislation, an action which
6 again, in accordance with constitutional convention, the
7 governor general always grants royal assent to a bill
8 that is passed by Parliament no matter what the governor
9 general's personal views are of that bill. And as I
10 said, in our view, Mr. Galati's attempt to use the
11 courts to review this action bears some significant
12 parallels to what Mr. Alani is apparently trying to have
13 the courts do here.
14 And Justice Rennie had the following to
15 say about justiciability at paragraph 33. Paragraph 33,
16 the highlighted portion:
17 "Each of the branches of Canada's government,
18 the legislature, the executive, and the
19 judiciary play a discrete role. All three
20 branches of government must be sensitive to
21 the separation of function within Canada's
22 constitutional matrix so as not to
23 inappropriately intrude into the spheres
24 reserved to the other branches. No branch
25 should overstep its bounds, and each must
26 show proper deference for the legitimate
27 sphere of activity of the other. This
28 relationship between the branches of

1 government arising as it does from the
2 evolution of the Westminster model, is
3 fundamental to Parliamentary democracy and
4 the rule of law. Justiciability is one of
5 the legal devices or doctrines by which the
6 courts give effect to this principle."
7 Now, given these definitions of
8 justiciability, it is plain that what Mr. Alani's
9 application gives rise to is a serious issue of
10 justiciability. He is asking the courts to review the
11 manner in which the prime minister performs his role in
12 the Senate appointment process. And so that raises the
13 question of is this a legal question, or is it a
14 political question that is better dealt with by the
15 legislative or the executive branches of government.
16 And in order to answer this question, the nature of
17 prime ministerial advice on Senate appointments has to
18 be examined, which I'll turn to now.
19 Fortunately this isn't a controversial
20 question, it was discussed recently by the Supreme Court
21 in the Senate reform reference; also by the Quebec Court
22 of Appeal in its Senate reform reference. And both
23 courts effectively held that while, as the courts just
24 said, that the governor general does have this formal
25 authority to appoint senators under the constitution, by
26 constitutional convention, this authority is only
27 exercised on the basis of advice given by the prime
28 minister. And if we could just look at this Senate

1 reform reference at tab 21, paragraph 50 which is on
2 page 735.
3 JUSTICE: Tab 20. Just a second now.
4 So tab 21, paragraph number?
5 MR. BRONGERS: Paragraph number 50.
6 It's the highlighted portion.
7 JUSTICE: Yes.
8 MR. BRONGERS: The court simply sites
9 the texts from the *Constitution Act* which set out that
10 formal appointment is done by the governor general but
11 then in practice constructional convention requires the
12 governor general to follow the recommendations of the
13 prime minister of Canada when filling Senate vacancies.
14 And the same point is made by the Quebec Court of
15 Appeal. I will not read the paragraphs but it is
16 paragraphs 52 and 53 of the Quebec Senate Reform
17 Reference. That is at tab 17.
18 So there is no doubt that prime
19 ministerial advice on Senate appointments is not a
20 exercise of statutory authority by the prime minister,
21 there is no act of Parliament which sets this out. And
22 it is also not an exercise or the Crown prerogative
23 although I understand that Mr. Alani has a different
24 view on that, and I will address that point in a few
25 moments. But in our submission it is absolutely clear
26 from the Supreme Court's recent Senate Reform Reference
27 that the prime minister's role as advice giver in
28 respect of Senate appointments is a matter of

1 constitutional convention only.
2 And so that bring up the question of what
3 is a constitutional convention? And in preparing for
4 today I was brought back to my first year of
5 constitutional law class where we actually spent the
6 first six weeks dealing with only one case, the 1981
7 *Patriation References* of the Supreme Court of Canada. I
8 didn't understand why Professor Dematral felt that there
9 was, he should spend so much time on just one case. But
10 I a glad I did, because it is the leading case that
11 deals with constitutional conventions.
12 The court, of course, knows this is the
13 famous reference where a number of provincial
14 governments asked the Supreme Court to opine on then
15 constitutionality of the government's plan to repatriate
16 the constitution and adopt an entrenched charter of
17 rights. And it had to delve into an extended discussion
18 of constitutional conventions in order to address the
19 second question that was referred to it, and that is
20 whether there was a convention that amendments to the
21 constitution can only be made with the consent of a
22 substantial number of the provinces. And while the
23 judges split 6 to 3 in answering the question itself,
24 the majority found that there was such a convention.
25 All 9 agreed on how to define constitutional convention.
26 So it really is the key case for adjudication of this
27 motion here today.
28 And the -- I'll just find the case. It

1 is of course at tab 20. So what the court essentially
2 said — and these are my own words — was that
3 constitutional conventions are that that informal part
4 of the constitution that which while they are understood
5 to be binding to the officials to whom they apply, they
6 will not be enforced by the courts if they are breached.
7 And that can be found at page 883 of the judgment.
8 JUSTICE: Yes.
9 MR. BRONGERS: Where the six-judge
10 majority wrote -- this is the highlighted portion on the
11 left, that it respectfully adopts the definition of the
12 Chief Justice of Manitoba with respect to conventions.
13 And essentially saying that it is somewhere between the
14 usage or custom on one hand, on a constitutional law on
15 the other. And there is generally agreement that if one
16 sought to fix that position with greater precision, it
17 would place a convention nearer to law than to usage or
18 custom. There is also general agreement that a
19 convention is a rule which is regarded as obligatory by
20 the officials to whom it applies. There is a general
21 agreement, at least of the weight of the authority, that
22 the sanction for breach of the convention will be
23 political rather than legal. And this definition
24 actually follows a lengthy discussion of the non-
25 enforceability of constitutional conventions, which
26 starts at page 880 if we go back three pages.
27 JUSTICE: Yes.
28 MR. BRONGERS: Beginning with the

1 third full paragraph on page 880. It's highlighted:
2 "The conventional rules of the constitution
3 present one striking particularity. In
4 contradistinction to the laws of the
5 constitution, they are not enforced by the
6 courts. One reason for this situation is
7 that unlike common law rules, conventions are
8 not judge-made rules. They are not based on
9 judicial precedents but on precedents
10 established by the institutions of government
11 themselves. Nor are they in the nature of
12 statutory commands which it is the function
13 and duty of the courts to obey and enforce.
14 Furthermore, to enforce them would mean to
15 administer some formal sanction when they are
16 breached, but the legal system from which
17 they are distinct does not contemplate formal
18 sanctions for their breach."
19 And the 6-judge majority then goes on to
20 discuss those two examples that I provided to the court
21 earlier about cases where there might be a breach of a
22 constitutional convention. The government that refuses
23 to resign after losing at the poles, and the governor
24 general who refuses to give assent to bills. And the
25 court explains at page 882. At then bottom of the page,
26 the two last paragraphs:
27 "The conflict between conventional and law
28 which prevents the courts from enforcing

1 conventions also prevents conventions from
2 crystallizing into laws unless it be by
3 statutory adoption. It is because the
4 sanctions of convention rest with
5 institutions of government other than the
6 courts, such as the governor general of the
7 lieutenant governor, or the House of
8 Parliament, or with public opinion and
9 ultimately with the electorate, that it is
10 generally said that they are political."
11 Now the 3-judge minority is even clearer
12 on this point. And that's at pages 852 - 853. And I
13 will just read the second highlighted paragraph which is
14 at page 853.
15 "As it has been pointed out by the majority,
16 a fundamental difference between the legal,
17 that is the statutory and common law rules of
18 the constitution, and the conventional rules
19 is that while a breach of the legal rules,
20 whether statutory or common law in nature has
21 a legal consequence in that it will be
22 restrained by the courts, no such sanction
23 exists for breach of non-observance of the
24 conventional rules. The observance of
25 constitutional convention depends upon the
26 acceptance of the obligation of conformance
27 by the actors deemed to be found thereby.
28 When this consideration is insufficient to

1 compel observance, no court may enforce the
2 convention by legal action. The sanction for
3 non-observance of a convention is political
4 in the disregard of the convention may lead
5 to political defeat, to loss of office, or to
6 other political consequences, but it will not
7 engage the attentions of the courts which are
8 limited to matter of law alone."
9 And so accordingly, as the minority
10 judges went on to explain:
11 "The courts can do no more than recognize the
12 existence of conventions,"
13 And here I am quoting from the bottom:
14 "The answer whether affirmative or negative
15 can have to legal effect, and acts performed
16 or done in conformance with the law, even
17 through in direct contradiction of well-
18 established conventions, will not be enjoined
19 or set aside by the courts."
20 Now, while the patriation reference ought
21 to suffice as binding authority for the proposition that
22 constitutional conventions, including the naming of
23 senators, cannot be enforced by the courts, it has been
24 restated by the Supreme Court on at least three other
25 cases. First there is the 1991 *Osborne* decision. This
26 is at tab 14. I will not read from it, but that is the
27 decision which dealt with a Charter challenge to a
28 federal law prohibiting political activities by public

1 servants. And the specific quote is at page 87, the
2 fourth paragraph.
3 The second is the 1998 *Quebec Secession*
4 *Reference* which is at tab 22 of our authorities at
5 paragraph 98 on page 270. And finally, in 2001 there
6 was the *Ontario English Catholic Teacher's Association*
7 case which was a challenge to provincial legislation
8 amending the manner in which schools are funded. That's
9 at tab 12. And at paragraph 63 and 64 of 514, the point
10 is again made that "constitutional conventions are not
11 enforced by the courts." So this has never been
12 revisited by the Supreme Court of Canada since its very
13 comprehensive discussion of constitutional conventions
14 in the 1981 *Patriation Reference.*
15 And just for good measure, the federal
16 court of appeal has also spoken about this principle in
17 the *Pelletier* case.
18 JUSTICE: Yes.
19 MR. BRONGERS: Which was a 2008 case
20 dealing with a challenge with the then president of VIA
21 Rail to his firing. It is at tab 16 of our book of
22 authorities. And that's at paragraphs 18 and 19 is the
23 relevant quote. Perhaps the most directly on point in
24 the context of this case is the Quebec court of appeals'
25 recent decision in the *Quebec Senate Reform Reference*,
26 which is at tab 17. And I will actually read from that
27 one. Just at paragraphs 58 and 59.
28 JUSTICE: All right.

1 MR. BRONGERS: "Moreover to
2 assimilate an amendment of the powers of the
3 prime minister with those of the governor
4 general for the purpose of paragraph 41 of
5 the *Constitution Act,* that is the amending
6 formula, would limit Parliament's powers
7 because for the constitutional convention.
8 Such a limitation does not exist or at a
9 minimum does not concern the courts. On the
10 contrary constitutional conventions are not
11 justiciable, contrary to the text of the
12 constitution which by its nature is
13 susceptible of evolution."
14 One other judgment worth mentioning is
15 the decision rendered last year by the Ontario Superior
16 Court in the case called *Kujan v. Canada* which is at tab
17 10. And I will read from this one.
18 This was a decision that came out last
19 year, it's an Ontario Superior Court decision, a
20 judgment of Madam Justice Ferguson. Mr. Kujan had
21 brought an action seeking a declaration that the advice
22 of the prime minister to the governor general to
23 prorogue Parliament in 2008 was unconstitutional. And
24 here again the attorney general responded with a motion
25 to strike, which was allowed on a number of grounds
26 including that the action dealt with alleged breaches of
27 constitutional convention, which is a matter of respect
28 in which the court cannot grant a legal remedy. If we

1 can just look at paragraphs 12 to 15:
2 "Conventions are rules of the constitution
3 that are not enforced by the courts. There
4 are many aspects of the Canadian
5 Parliamentary system and indeed of the
6 Canadian government which were governed by
7 matters of convention. Convention is not
8 enforceable in the court. Breaches of
9 conventions are not enforceable in the
10 Courts. Professor Hogg describes his
11 principle as follows,"
12 And cites the *Ontario English Catholic Teachers*
13 *Association* where the Supreme Court held that:
14 "The remedy for breach of a constitutional
15 convention must be found outside the courts
16 if a remedy is found at all."
17 And finally:
18 "The courts cannot grand a legal remedy for
19 breach of convention as stated by the Supreme
20 Court of Canada in the patriation reference.
21 Sanctions of conventions rest with
22 institutions of government other than the
23 courts."
24 And finally:
25 "The tendering of the prime minister's advice
26 and the exercise of the governor general's
27 powers in relation to prorogation is entirely
28 a matter of constitutional convention."

1 JUSTICE: If I understand the proposed
2 amendments, Mr. Alani no longer seeks that this court
3 order the prime minister. He's just looking for
4 declarations.
5 MR. BRONGERS: Indeed that is the
6 state of the current application as well and as I will
7 develop in a moment by reference to that *Assiniboine*
8 case that I was referencing earlier --
9 JUSTICE: Yes.
10 MR. BRONGERS: -- a request for a
11 declaration given that they are expected to be obeyed
12 when sought in the context of private litigation brought
13 by a citizen against a public official, would amount to
14 coercive enforcement.
15 JUSTICE: All right.
16 MR. BRONGERS: So to summarize then,
17 the bottom line is that constitutional conversions are
18 not enforced by the courts. Sanctions for their breach
19 can't be imposed by the courts. All the court can do in
20 appropriate circumstances such as a reference which is
21 brought by the government for a non-binding, non-
22 enforceable opinion, is to opine on the existence of a
23 convention, as was done in the patriation reference.
24 But courts cannot compel public officials to act in a
25 particular manner if the request for relief is based
26 solely on the allegation that a constitutional
27 convention is not being respected.
28 JUSTICE: As opposed to other

1 circumstances. Often in the immigration context someone
2 has applied for permanent residence and the application
3 is several years old and at some point they say, "Look,
4 you've had enough time to study this, you have to reach
5 your decision," and we, in certain circumstances, will
6 order that official to render a decision. Not what the
7 decision should be, whether the person should be granted
8 permanent resident status or not but make your decision
9 within the next six months or whatever it might be.
10 MR. BRONGERS: A mandamus application.
11 JUSTICE: Yes, exactly.
12 MR. BRONGERS: Done pursuant to
13 statutory authority and statutory obligations.
14 JUSTICE: Yes.
15 MR. BRONGERS: Not a political matter.
16 A legal matter of whether this individual is entitled.
17 JUSTICE: It's a legal matter, yeah.
18 MR. BRONGERS: And the difference is
19 here that the timing of the advice given by the prime
20 minister to the governor general on naming senators is a
21 purely political matter. There is no statute that can
22 be turned to to indicate what is a reasonable length of
23 time and what is an unreasonable length of time.
24 So the sanction for that for those who
25 are not pleased with the amount of Senate vacancies is a
26 political one. It is an electoral one. It is to put
27 political pressure on the government. But the courts
28 cannot deal with those situations.

1 So given that the prime minister's advice
2 is a matter of constitutional convention, these
3 conventions can't be enforced by the courts and breaches
4 of conventions can't be sanctioned by the courts is Mr.
5 Alani's application justiciable? Well, again, because
6 he is a private citizen who is not entitled to seek a
7 private reference from the court, the answer is clearly
8 no.
9 JUSTICE: Mm-hmm.
10 MR. BRONGERS: And indeed, earlier we
11 went through Mr. Alani's notice of application and the
12 relief he's seeking. The prime minister must advise the
13 governor general to summon a qualified person and if he
14 doesn't, he's acting unlawfully.
15 There is only one reasonable way of
16 reading this and that is that it has been spurred by Mr.
17 Alani's personal view that it's somehow unacceptable for
18 there to be vacancies in the Senate and he wants the
19 Federal Court to do something about that.
20 But this again would amount to enforcing
21 a convention and that's because — and now I'm going to
22 get to the *Assiniboine* case that I mentioned earlier —
23 declaratory relief given by the Federal Court further to
24 private litigation is coercive. It will be complied
25 with even in the absence of an express power of
26 coercion. And that is set out in the *Assiniboine v.*
27 *Meeches* case which is at tab 2.
28 Mr. Justice Mainville wrote this --

1 JUSTICE: Oh this is Mr. Justice
2 Mainville for himself. It is not the Court of Appeal.
3 It is not three judges of the Court of Appeal. And I
4 imagine his case is being heard -- oh, it is heard
5 tomorrow, I think, in the Supreme Court.
6 MR. BRONGERS: I'm not sure if that
7 will impugn the wisdom of what Justice Mainville writes
8 here, particularly since he relies on Supreme Court of
9 Canada authority for his views. But the key passages
10 are paragraphs 12 to 15. Such -- page 5.
11 JUSTICE: Yeah, let me just get here.
12 MR. BRONGERS: "Such a declaratory
13 judgment is binding and has legal effect. A
14 declaration differs from other judicial
15 orders in that it declares what the law is
16 without ordering any specific action or
17 sanction against a party. Ordinarily, such
18 declarations are not enforceable through
19 traditional means. However, since the issues
20 which are determined by a declaration set out
21 in a judgment because *res judicata* between
22 the parties, compliance with the declaration
23 is nevertheless expected, and it is required
24 in appropriate circumstances.
25 Declaratory relief is particularly
26 useful when the subject of the relief is a
27 public body or public official entrusted with
28 public responsibilities, because it can be

1 assumed that such bodies and officials will,
2 without coercion, comply with the law as
3 declared by the judiciary. Hence the
4 inability of a declaration to sustain,
5 without more, an execution process should not
6 be seen as an inadequacy of declaratory
7 orders against public bodies and public
8 officials."
9 JUSTICE: And here we go with *LeBar*.
10 MR. BRONGERS: Ah, *LeBar* is mentioned.
11 My apologies.
12 JUSTICE: Good.
13 MR. BRONGERS: "…the proposition is
14 the public bodies and their officials must
15 obey the law is a fundamental aspect of the
16 principle of rule of law, which is enshrined
17 in the Constitution of Canada by the preamble
18 to the *Canadian Charter of Rights*…. Thus, a
19 public body or public officials subject to a
20 declaratory order is bound by that order and
21 has a duty to comply with it. If the public
22 body or official has doubts concerning a
23 judicial declaration, the rule of law
24 requires that body or official to pursue the
25 matter through the legal system. The rule of
26 law can mean no less."
27 And here's the Supreme Court case.
28 "As further noted in *Doucet-Boudreau v Nova*

1 *Scotia*…the assumption underlying the choice
2 of a declaratory order as a remedy is that
3 governments and public bodies subject to that
4 order will comply with the declaration
5 promptly and fully. However, should this not
6 be the case, the Supreme Court of Canada has
7 laid to rest any doubt about the availability
8 of contempt proceedings in appropriate cases
9 in the event that public bodies or officials
10 do not comply with such an order. As noted by
11 Iacobucci and Arbour JJ…of *Doucet-Boudreau*:
12 'Our colleagues LeBel and Deschamps JJ
13 suggest that the reporting order in this
14 case is not called for since any
15 violation of the simple declaratory
16 remedy could be dealt with in contempt
17 proceedings against the Crown. We do
18 not doubt that contempt proceedings may
19 be available in appropriate cases.'"
20 And that's why, as I said earlier, if
21 this court were to issue such a declaration and Mr.
22 Alani was not pleased with the amount of time that had
23 passed for a Senate vacancy, there would be nothing
24 stopping him from bringing a contempt proceeding against
25 the prime minister.
26 So clearly what is being asked for is the
27 enforcement of a constitutional convention, which is
28 contrary to the well-established Canadian legal

1 principle that such conventions cannot be enforced.
2 And it's not just because it's a
3 constitutional convention, it's also because of the
4 political nature of what is being asked here. Timing of
5 Senate appointments is an inherently political matter
6 and a declaration of the type sought by Mr. Alani would
7 amount to a court dictating to the prime minister how
8 and when to perform this political role of advising the
9 governor general to appoint senators or at a minimum it
10 would amount to a fettering of the prime minister's
11 political discretion in giving such advice.
12 So the declaration is also contrary to
13 the well-established principle that purely political
14 matters which lack a legal component are not judiciable.
15 Now the order being sought by Mr. Alani
16 is unprecedented. He cannot point to authority for
17 this. We not aware of any cases in which such an order
18 has been granted. If the court were to do so, however,
19 this would give rise to a slippery slope concern similar
20 to the one that was identified by Justice Rennie in the
21 *Rocco Galati* case and remember *Rocco Galati*, that's at
22 tab 8.
23 JUSTICE: Yes.
24 MR. BRONGERS: This is the case where
25 Mr. Galati was challenging the fact that the governor
26 general had given assent to legislation which Mr. Galati
27 felt was unconstitutional and the court dismissed the
28 application on the grounds of justiciability and

1 jurisdiction. And the court in dealing with the
2 slippery slope argument -- this is at paragraphs 36 or
3 -- just paragraph 36. Justice Rennie identified the
4 problem with the court deciding to deal or effectively
5 judicially review the legislative process of Parliament.
6 He said:
7 "On the theory advanced, the judiciary would
8 adjudicate on the constitutionality of
9 proposed legislation before it became law.
10 That line, once crossed, would have no limit.
11 If the decision to grant royal assent was
12 justiciable, so too would the decision to
13 introduce legislation, to introduce a bill in
14 the Senate as opposed to the House or to
15 evoke closure. No principled line would
16 limit the reach of judicial scrutiny into the
17 legislative process. A similar caution was
18 expressed in *Reference Re Canada Assistance*
19 *Plan* in which Justice Sopinka writing for the
20 court concluded that…"
21 And he quotes at the next page:
22 "Parliamentary government would be paralyzed
23 if the doctrine of legitimate expectations
24 could be applied to prevent the government
25 from introducing legislation in Parliament.
26 A restraint on the executive in the
27 introduction of legislation is a fetter on
28 the sovereignty of Parliament itself."

1 And these remarks could be paraphrased in
2 the context of the present case to say a restraint on
3 the executive in the naming of senators — senators are,
4 of course, a component part of Parliament — is a fetter
5 on the sovereignty of Parliament itself.
6 JUSTICE: It would be -- I think -- if
7 I am not mistaken, the strengthening of the C*itizenship*
8 *Act* is being challenged in the court. I mean there are
9 other ways. Maybe Mr. Galati had the wrong route, but
10 still the courts can declare whether or not that statute
11 is constitution.
12 MR. BRONGERS: Yes, it can be --
13 JUSTICE: He was way ahead of himself.
14 MR. BRONGERS: Or behind by going
15 after the royal assent.
16 JUSTICE: Well, anyway, I think it was
17 maybe the wrong choice.
18 MR. BRONGERS: Yes.
19 JUSTICE: The wrong way of going about
20 it.
21 MR. BRONGERS: Yes.
22 JUSTICE: Now the point, and I am
23 caught on this *Doucet-Boudreau* decision. I did not
24 appreciate this contempt.
25 In this *LeBar* that I have given you, at
26 page 5, the third paragraph to the bottom it is said:
27 "Elusive as it is as a concept, the rule of
28 law must, in all events, mean the law is

1 supreme and that officials of the government
2 have no options to disobey it. It would be
3 unthinkable under the rule of law to assume
4 that a process of enforcement is required to
5 ensure that the government and its officials
6 will faithfully discharge their obligations
7 under the law. That the government must and
8 will obey the law is a first principle of our
9 constitution."
10 So there, now maybe that is what Mr.
11 Justice Mainville is saying and he doubts about
12 compelling, obeying and contempt. So I will have to
13 mull over *Doucet-Boudreau*.
14 MR. BRONGERS: Our understand is that,
15 again, if it's a private citizen who is bringing a
16 judicial review application against a public official
17 and the court doesn't issue *mandamus* but issues a
18 declaration, what is the instruction being given by the
19 Supreme Court in *Doucet-Boudreau* and by Justice
20 Mainville, I believe — I haven't read this case to the
21 end but certainly that paragraph appears to be
22 consistent with it — is that there is such an
23 expectation that the public officials will comply with
24 it --
25 JUSTICE: That's right.
26 MR. BRONGERS: -- that it would be
27 unthinkable.
28 JUSTICE: That they would not.

1 MR. BRONGERS: So that means it is
2 coercive relief. So when Mr. Alani says, "Oh, no, no
3 I'm just asking for a reference here. I just want the
4 court's opinion on what's being done by the prime
5 minister here," that would not be the effect of a
6 declaration in this case. It would be treated as
7 binding. It is a request for enforcement of a
8 constitutional convention.
9 JUSTICE: I think the Federal Court's
10 jurisdiction in terms of references is limited in
11 Section 18 or 18.1 where a federal board or tribunal may
12 ask the court for an opinion.
13 MR. BRONGERS: Correct.
14 JUSTICE: And --
15 MR. BRONGERS: Private citizens cannot
16 ask the court for non-binding opinions.
17 JUSTICE: Well. Because I recently
18 rendered a decision with respect to access to
19 information, the Information Commissioner against the
20 Attorney General, and one issue, although it really
21 didn't percolate through the merits, was the Information
22 Commissioner only makes recommendations. She cannot --
23 she does not have a decision-making power but they could
24 have gotten to the court another route and the Attorney
25 General dropped that particular argument by the time we
26 got to the merits.
27 But you're right, that was a federal
28 board or tribunal seeking an opinion from the court. It

1 was not a private citizen. All right.
2 MR. BRONGERS: So again, the concern,
3 of course, is this application is about timing of Senate
4 appointments. But if the court decides to deal with it,
5 finds it's justiciable and issues declaratory relief,
6 which is effectively enforceable. There is then no
7 principled reason for the court to then refuse to decide
8 the next challenge to the -- for example to the actual
9 appointment of a senator. If an individual doesn't like
10 the fact that Mr. X is appointed to the Senate, then
11 based on the precedent here, there would be no reason
12 why that individual could not go to the Federal Court
13 and say "I want to judicially review the naming of Mr.
14 X."
15 Similarly there will be no reason why an
16 application couldn't be made to compel the prime
17 minister to advise the governor general to name a
18 particular individual to the Senate.
19 And that brings us --
20 JUSTICE: I cannot see that. That
21 would be the court naming a senator.
22 MR. BRONGERS: And that brings us to
23 the case of *Bert Brown v. Alberta* where that was
24 attempted.
25 JUSTICE: Okay, well, just before we
26 get there, certainly if someone were appointed who is
27 less than 35 years of age, someone was appointed who did
28 not have $4,000 of property in the province. Maybe even

1 there could be an issue of where this particular senator
2 resided, I don't know. But I could see certain
3 situations -- well look at Mr. Justice Nadon in the
4 appointment to the Supreme Court.
5 MR. BRONGERS: Which was a reference.
6 JUSTICE: He was a reference.
7 MR. BRONGERS: Yes.
8 JUSTICE: But Mr. Galati got involved
9 in that one, too.
10 MR. BRONGERS: And it never proceeded.
11 It was --
12 JUSTICE: It never proceeded in the
13 Federal Court, and it eventually went away, but he was
14 given standing in the Supreme Court.
15 MR. BRONGERS: To provide --
16 JUSTICE: And he has standing tomorrow
17 as well.
18 MR. BRONGERS: Yes, that's correct.
19 On yet another reference.
20 JUSTICE: Yes.
21 MR. BRONGERS: But --
22 JUSTICE: All right. So, where are
23 you taking me?
24 MR. BRONGERS: To *Brown v. Alberta*,
25 which is a surprisingly similar case to what we are
26 dealing with today. It's at tab 4 of our book of
27 authorities.
28 JUSTICE: Yes.

1 MR. BRONGERS: This is a case that
2 arose out of Alberta in the late 1990s. It was brought
3 by an individual, Mr. Bert Brown, who was a leader of
4 the Triple E Senate movement. The court will probably
5 remember, there was a time when there was a political
6 movement that the Senate should be "Triple E", which
7 stands for "elected, equal, and effective".
8 "Elected," meaning of course that
9 Senators should be voted for by the general public, just
10 like the Members of the House of Commons.
11 JUSTICE: Yes.
12 MR. BRONGERS: "Equal" in the sense
13 that each province would send the same number of
14 Senators to Ottawa, as the states do in the United
15 States.
16 JUSTICE: Very American, yes.
17 MR. BRONGERS: Yes. And "Effective"
18 in the sense that the Senate would actually have the
19 power to pass and block legislation as opposed to what
20 it does now, and that's, of course, it defers to the
21 House of Commons. So --
22 JUSTICE: That would have been a good
23 deal for Prince Edward Island.
24 MR. BRONGERS: It certainly would. I
25 think they already have a pretty good deal. They're
26 over-represented, when their Senators aren't suspended.
27 So, in any event, Mr. Brown -- he
28 actually was "elected" under Alberta's *Senatorial*

1 *Selection Act*, which is a provincial statute that
2 provides for provincial elections in Alberta that are
3 designed to choose individuals that then the provincial
4 government of Alberta will propose to the federal
5 government to then name to the Senate when vacancies
6 arise in Alberta.
7 JUSTICE: Yes.
8 MR. BRONGERS: And that statute's
9 still on the books. Back in the 1990s, the government
10 of the day was not actually naming these individuals who
11 had been elected, including Mr. Brown. So what Mr.
12 Brown did is, he sued. He went to the Alberta Court of
13 Queen's Bench in order to put political pressure on the
14 federal government, seeking -- and he sought a
15 declaration, a declaration that the provisions of the
16 *Constitution Act* that relate to Senate appointments were
17 unconstitutional and could only be constitutional if
18 they provided for Senate appointments in a manner that
19 is consistent with this Alberta *Senatorial Selection*
20 *Act*.
21 Now, the government of Canada responded
22 to this lawsuit by bringing a motion to strike, as it
23 has done in this case. The Court of Queen's Bench
24 allowed the motion, and an appeal to the Alberta Court
25 of Appeal was dismissed.
26 Now, the basis for striking it out is
27 explained at paragraph 9. Essentially, it was because
28 the issue Mr. Brown's application was raising was

1 political, not legal. So paragraph 9, the Court of
2 Appeal wrote:
3 "The chambers judge found that the underlying
4 purpose of the appellant's application was to
5 bring public attention to the issue of
6 Senatorial selection and to put public and
7 political pressure on the governor general to
8 appoint to the Senate a person elected under
9 the *Senatorial Selection Act*. She concluded
10 that in light of this purpose, it would not
11 be appropriate for the court to intervene,
12 because there was no justiciable or legal
13 issue, that is, no rights of the parties
14 would be affected. On this basis, the
15 originating notice of motion was struck out.
16 On appeal, the Alberta Court of Appeal
17 affirmed that decision and the *ratio* of its decision is
18 set out at paragraphs 24 and 25. 24:
19 "The remedy he seeks from the court is an
20 order declaring the senators appointed from
21 Alberta must be appointed…"
22 again, similar language to what Mr. Alani is using.
23 "…in a manner consistent with the processes
24 of the *Senatorial Selection Act*. This claim,
25 however, does not stand unqualified. He
26 asserts that the procedure must be followed
27 for an appointment to be consistent with
28 democratic principles. In other words, the

appellant does not ask the court to declare that appointments made inconsistently with the *Senatorial Selection Act* are unconstitutional. Rather, he requests that the court declare that any such appointments would be undemocratic. In essence, he is asking the court to be an arbiter of the democratic character of senatorial appointment. He wants the court to look at the appointment process and make a statement on whether or not the process is democratic. In order for the court to be able to make such a statement, it must have jurisdiction to do so. It will have jurisdiction only where there is a legal issue.

We agree with the Crown that the appellant seeks to invoke the democratic principle, *per se*, divorced of its interpretive role and devoid of legal issues, simply because a declaratory order from the Court would, in his view, 'have considerable persuasive effect, and it would confer democratic legitimacy on the *Senatorial Selection Act*.' We do not view the Supreme Court's statements in the *Quebec Secession Reference* as modifying the existing jurisprudence on what constitutes a legal issue. Accordingly, we cannot find that the

1 appellant's originating notice, as it is
2 presently structured, raises a legal issue as
3 required by the existing law."
4 And these remarks are wholly applicable
5 to Mr. Alani's application. His apparent disagreement
6 with the prime minister regarding the acceptable number
7 of Senate vacancies, and the speed by which they should
8 be filled, are political questions, not legal questions.
9 They should be debated in the political arena, and not
10 before a court of law.
11 And just as the Alberta courts dealt with
12 Mr. Brown's application by striking it out pursuant to a
13 preliminary motion, Mr. Alani's application warrants
14 being struck as well.
15 Now, Mr. Alani has a number of arguments
16 in relation to justiciability, which if the court allows
17 me to, I will address quickly now. First of all, Mr.
18 Alani says -- he points to a number of cases in which he
19 says that the courts have dealt with matters of
20 constitutional convention. And he is, of course,
21 correct that such cases do exist. But none of these
22 cases are examples of where constitutional conventions
23 were actually enforced. And they can essentially be
24 categorized under three headings.
25 First of all, there are the references.
26 Mr. Alani points to the Supreme Court's *Patriation*
27 *Reference*, the Supreme Court's *Quebec Secession*
28 *Reference*, and even the 1928 *Persons* case from the

1 Judicial Committee of the Privy Council.
2 JUSTICE: Yes.
3 MR. BRONGERS: Which was also a
4 reference. All three were references, requests by the
5 government for non-binding opinions, and therefore --
6 JUSTICE: There to find out that women
7 were persons.
8 MR. BRONGERS: Yes. A very important
9 case. But nevertheless, not an example of a decision
10 where a constitutional convention was enforced.
11 And secondly, Mr. Alani mentions two
12 cases in which constitutional conventions were raised,
13 but the court found that no actual convention exists.
14 And actually the courts went further. They did
15 determine whether a convention existed, but they both
16 expressly noted that even if a convention had existed --
17 sorry. The courts found that no convention existed, and
18 then went on to say that even if there was one, it would
19 not be enforceable by the court in any event.
20 And the first one is the 2001 *Ontario*
21 *English Catholic Teachers' Association* case. That's a
22 Supreme Court judgment which I mentioned earlier.
23 JUSTICE: Yes.
24 MR. BRONGERS: And again, paragraphs
25 63 and 64 clearly say that conventions are not
26 justiciable.
27 The second one is the *Conacher* matter. I
28 think I'm pronouncing that right, C-O-N-A-C-H-E-R.

1 JUSTICE: Yes.
2 MR. BRONGERS: This was a judicial
3 review of the prime minister's 2008 decision to dissolve
4 Parliament and call a general election.
5 JUSTICE: Yes.
6 MR. BRONGERS: Which Mr. Conacher said
7 was contrary to the new fixed election legislation. So
8 really the primary issue was one of statutory
9 interpretation. But one of the questions that had been
10 raised was whether this statute, Section 56.1 of the
11 *Canada Elections Act*, created a new constitutional
12 convention which somehow changed the prime minister's
13 discretion in terms of when to advise the governor
14 general to dissolve Parliament.
15 And the Federal Court, Mr. Justice Shore
16 -- this is at tab 6 of our book of authorities. He
17 found that the prime minister's decision was not
18 justiciable, at paragraph 69. And then he went on to
19 find that there was no such new convention, at paragraph
20 70. And finally Justice Shore noted at paragraph 72
21 that the courts must exercise extreme caution when
22 deciding whether conventions even exist. Because while
23 courts have not imposed sanctions in respect of a
24 breach, opinions given by courts on conventions carry
25 great weight. And the Federal Court of Appeal affirmed
26 this decision without great discussion. Just at
27 paragraph 12 the Court of Appeal says that the finding
28 that there was no such new convention was supported by

1 the evidence. So again, not an example of a case where
2 a court has enforced a constitutional convention.
3 And finally, Mr. Alani mentions three
4 cases in which he says courts give effect to conventions
5 where necessary to explain state action. That's at
6 paragraph 41 of his *factum*. But clearly by "give
7 effect" he can't mean that courts compel state action in
8 respect of conventions. He mentions the *Galati* case,
9 which we've already spoken about, which is actually
10 again a clear precedent for the opposite proposition,
11 the non-justiciability of political actions done
12 pursuant to constitutional convention.
13 The other two cases that Mr. Alani
14 mentions are the *Arsenault* and the *Blakey* case, two
15 Supreme Court of Canada decisions that pre-dated the
16 *Patriation Reference*. *Arsenault* was a criminal law case
17 where the issue was whether the definition of bribing a
18 Member of Parliament in the *Criminal Code* encompasses
19 Ministers of the Crown. So, nothing to do with
20 enforcing a convention. *Blakey*, the court may remember
21 that's a Supreme Court's case where it had to decide
22 whether the provisions in Bill 101, which prescribed
23 unilingual French legislation for the Quebec National
24 Assembly, the question there was whether that was
25 contrary to Section 133 of the *Constitution Act*.
26 If you go through those two cases, you
27 won't even find the word "convention" anywhere
28 discussed. So, again, these are not precedents that

1 stand for the proposition that the court can, in fact,
2 enforce constitutional conventions.
3 So that's Mr. Alani's first line of
4 argument on justiciability. The second one, Mr. Alani
5 argues, presumably in the alternative, that if
6 constitutional conventions aren't justiciable today,
7 then this matter should still be heard by the court so
8 that the principle can be reconsidered. And he seems to
9 base this primarily on views expressed by some academics
10 in legal writing: a law professor at Queens by the name
11 of Professor Walters, and a political science professor
12 at our local Simon Fraser University, Professor Heard,
13 who do seem to advocate that the courts should be more
14 inclined to enforce constitutional conventions.
15 And while Mr. Alani doesn't use these
16 words in his factum, it appears that what he's
17 essentially arguing is that he's bringing forward a
18 "novel claim", which, while it may be contrary to
19 binding precedent, should not be struck so that those
20 precedents can be overturned.
21 Now, interestingly, earlier this month,
22 the Federal Court of Appeal had an opportunity to
23 discuss the test that should be used in addressing this
24 novel claim defence to a motion to strike. And this is
25 the case of *Paradis Honey Limited v. Canada*.
26 JUSTICE: Yes, I read that last week.
27 MR. BRONGERS: It's at tab 15 of our
28 book of authorities.

1 JUSTICE: Yes.
2 MR. BRONGERS: So, since the court
3 read it last week, the court knows, of course, this was
4 a proposed class action by beekeepers against the
5 government of Canada --
6 JUSTICE: Yes.
7 MR. BRONGERS: -- in which they were
8 seeking to advance a novel theory of Crown liability.
9 The Federal Court actually struck out the case on the
10 basis that it doesn't disclose a reasonable cause of
11 action, because of a lack of duty of care. But then the
12 Federal Court of Appeal overturned the decision on the
13 motion to strike, albeit it was a split two-to-one
14 decision.
15 JUSTICE: Yes.
16 MR. BRONGERS: With Justice Stratas
17 writing for the majority with the support of Justice
18 Nadon; Justice Pelletier writing in dissent.
19 Essentially, Justice Stratas felt that
20 this was one of those novel claims that did deserve to
21 go forward. And he sets out a test for this, at
22 paragraphs 117 and 118.
23 JUSTICE: Yes.
24 MR. BRONGERS: 117:
25 "When courts consider a novel claim, they
26 must keep in mind a line. On one side of the
27 line is a claim founded upon a responsible,
28 incremental extension of legal doctrine

1 achieved through accepted pathways of legal
2 reasoning. On the other is a claim divorced
3 from doctrine, spun from settled
4 preconceptions, ideological visions or
5 freestanding opinions about what is just,
6 appropriate, and right. The former is the
7 stuff of legal contestation in the courts;
8 the latter is the stuff of public debate and
9 the politicians we elect."
10 Paragraph 118:
11 "In my view, monetary relief based on public
12 law principles qualifies as the sort of novel
13 claim that should not be struck on a motion
14 to strike. It falls on the appropriate side
15 of the line. As we shall see, it is a
16 responsible, incremental change to the common
17 law founded upon legal doctrine and achieved
18 through accepted pathways of legal reasoning.
19 It does not throw into doubt the outcomes of
20 previous cases, but rather offers better
21 explanations for them, leading us to a more
22 understandable, more coherent law of
23 liability for public authorities."
24 However, Mr. Alani's application clearly
25 falls on the other side of the line. To assert, as Mr.
26 Alani does, that the Federal Court should now entertain
27 claims for declaratory relief that would direct the
28 prime minister how to appoint senators would not be a

1 "responsible incremental change to the common law", it
2 would be a monumental change. It would throw into doubt
3 the outcomes of previous cases, including the Supreme
4 Court of Canada's *Patriation Reference* in 1981.
5 It is spun from, and quoting Justice
6 Stratas, "ideological visions or freestanding opinions
7 about what is just, appropriate, and right," namely a
8 different vision about what the appropriate role of
9 courts is vis-à-vis the executive and the legislature,
10 from the one that has been well-established in Canada
11 since Confederation.
12 So in our submission, this is not one of
13 those novel claims that deserves to proceed at the
14 Federal Court level.
15 JUSTICE: It was also founded in
16 negligence, and there has been a great deal of
17 jurisprudence over the last 20, 25 years about -- a lot
18 of it comes from maritime law, about stipulations for
19 the benefit of the third party, and incremental changes,
20 and claims in tort for pure economic loss, and so on.
21 MR. BRONGERS: Mm-hmm.
22 JUSTICE: And the Supreme Court has
23 said there is this line, we can have incremental changes
24 or not. But that was negligence. You're not -- we're
25 not talking about negligence at all in this particular
26 matter. We're talking about a constitutional
27 conventional, constitutional obligation. The
28 constitution.

1 MR. BRONGERS: Right. The outcome of
2 this case is not of assistance in terms of adjudicating
3 the motion. But the test is now the one set by the
4 Federal Court of Appeal or at least by a majority. And
5 in our submission again, what is being proposed here is
6 so radical, so revolutionary, the notion that the courts
7 would then act as an arbiter of what is a reasonable
8 amount of time for a Senate vacancy to go unfilled.
9 JUSTICE: Yes. But in *Paradis Honey*,
10 I mean, there was -- it's the standard 220(1) rule, not
11 plain and obvious. So it's going forward. It certainly
12 doesn't mean that on the merits --
13 MR. BRONGERS: Correct.
14 JUSTICE: -- that they're going to
15 succeed.
16 MR. BRONGERS: That's right. And so,
17 it makes --
18 JUSTICE: But you're saying Mr. Alani
19 shouldn't get that far.
20 MR. BRONGERS: Exactly. Because in
21 this case, the bar that he is facing is one that doesn't
22 depend on evidence. It doesn't depend on the background
23 facts. This is an issue that is simply not justiciable.
24 And the only other point I would like to
25 stress, which again from our perspective makes it
26 absolutely clear that what is being brought forward to
27 the court is a political question, is the way the
28 declaratory relief has been framed. A request that the

1 declaration simply be that there must be an appointment
2 made within a reasonable time, well, that demonstrates
3 right there that this is a political question.
4 Reasonable people can differ on what a reasonable amount
5 of time would be for a Senate vacancy to go unfilled.
6 Some might say it's six months. Some might say two
7 years. Some might say it depends on the total number of
8 Senators, or what province the vacancy is arising for.
9 Others might say that, so long as the
10 Senate has a quorum of over 15, then it is reasonable,
11 potentially, to not fill the vacancy.
12 JUSTICE: Some might say it's
13 unreasonable to appoint somebody this week, for example.
14 MR. BRONGERS: Correct. But that
15 would be a political opinion. It would not be an
16 assertion of law. And so that is why this application
17 is not justiciable, and should be dismissed now.
18 That concludes my submissions on
19 justiciability. I am prepared to move on to --
20 JUSTICE: Do you want to tell me why I
21 don't have jurisdiction in any event?
22 MR. BRONGERS: That's correct.
23 JUSTICE: Is that the next step?
24 MR. BRONGERS: Which is an issue, of
25 course, that the court would only have to deal with, if
26 the court disagrees with our submissions on
27 justiciability.
28 JUSTICE: Well, I think maybe this is

1 the appropriate time to have a morning break of ten
2 minutes.
3 MR. BRONGERS: Thank you, Justice
4 Harrington.
5 (PROCEEDINGS ADJOURNED AT 11:01 A.M.)
6 (PROCEEDINGS RESUMED AT 11:09 A.M.)
7 **SUBMISSIONS BY MR. BRONGERS, Continued:**
8 JUSTICE: A point that's rattling
9 around in my head -- Mr. Justice Rennie, I believe, was
10 the one who -- and others, that the Constitution was not
11 a law of Canada within the meaning of the *Federal Courts*
12 *Act*. And I think the Court of Appeal recently took him
13 to task on that point. So you might refresh my memory
14 on that point.
15 MR. BRONGERS: Yes. In our
16 submission, it's actually not relevant to the
17 jurisdiction argument. But you are correct that in a
18 decision called -- it has to do with the Ambassador
19 Bridge.
20 JUSTICE: Yes, that's the one.
21 MR. BRONGERS: Mr. Alani prepared a
22 supplemental book of authorities, this very thin piece
23 of paper. It's called *Canadian Transit Company v. the*
24 *City of Windsor.*
25 JUSTICE: That's the one, yes. Yes.
26 MR. BRONGERS: And yes, it does
27 contain a discussion of whether the *Constitution Act,*
28 *1867* is a law of Canada for the purposes of Section 101

1 of the *Constitution Act*.
2 JUSTICE: Yes.
3 MR. BRONGERS: When the court is
4 dealing with the famous *ITO v. Miida Electronics* test of
5 whether there is a nourishment of jurisdiction.
6 The reason we submit it's not of
7 assistance to adjudicating this case is because the
8 underlying proceeding here wasn't a judicial review
9 brought under Section 18 of the *Federal Courts Act*. It
10 was a very unique proceeding brought under Section 23 of
11 the *Federal Courts Act* which gives the Federal Court
12 concurrent jurisdiction over matters between subject and
13 subject in relation to interprovincial undertakings.
14 JUSTICE: Mm-hmm.
15 MR. BRONGERS: And so the court had
16 its statutory jurisdiction --
17 JUSTICE: Ah.
18 MR. BRONGERS: -- from Section 23.
19 JUSTICE: No, no. Not quite. Because
20 that was the famous *Quebec North Shore* case. That was
21 interprovincial work or undertaking.
22 MR. BRONGERS: Right.
23 JUSTICE: And there was no -- they
24 said there was no federal law to administer. But here,
25 there is an *Act*.
26 MR. BRONGERS: Yes.
27 JUSTICE: That is mentioned in here,
28 which I think distinguishes it from *Quebec North Shore*.

1 It was a federal class of subject. There was actual and
2 existing federal law, in that case a statute, and the
3 jurisdiction was confided to the Federal Court.
4 MR. BRONGERS: You're right, Justice
5 Harrington.
6 JUSTICE: Yes.
7 MR. BRONGERS: *An Act to incorporate*
8 *the Canadian Transit Company* from 1921.
9 JUSTICE: Yes.
10 MR. BRONGERS: That's right. So.
11 But our argument here with respect to
12 jurisdiction is based entirely on Section 18 of the
13 *Federal Courts Act*, which, as the court knows very well,
14 of course, is the source of statutory authority for
15 conducting judicial review. But it is not a plenary
16 jurisdiction. It has limits. The limit is defined in
17 Section 18 by reference to this notion of federal
18 boards, commissions, or other tribunals, which of course
19 is given a very broad definition. One reads that and
20 one first thinks, "Oh, you can only really go after the
21 Human Rights Tribunal or something like that." But no,
22 it's broader than that. The definition of "federal
23 board, commission or other tribunal" is set out at
24 Section 2, and it says, "Any body, person, or persons
25 having, exercising, or purporting to exercise
26 jurisdiction or powers conferred by or under an Act of
27 Parliament, or by or under an order made pursuant to a
28 prerogative of the Crown," and then there's some

1 exceptions after that, like the Tax Court of Canada.
2 What this means, of course, is that not
3 every act or omission of a public official is subject to
4 judicial review by the Federal Court.
5 JUSTICE: No. But certainly one is
6 not immune from a judicial review because one is a
7 minister of the Crown.
8 MR. BRONGERS: Correct.
9 JUSTICE: We're are called upon
10 frequently -- I'd hate to be a Minister of Fisheries and
11 Oceans. It seems no matter how they allocate licences
12 and so on, somebody is very unhappy and is going to seek
13 judicial review.
14 MR. BRONGERS: Correct. In those
15 cases, of course, the Minister is acting pursuant to a
16 statute.
17 JUSTICE: Yes.
18 MR. BRONGERS: And so what this means,
19 again, is that the conduct complained of must have as
20 its source authority grounded in either a statute or a
21 Crown prerogative power. There are acts that public
22 officials perform that do not involve exercise of
23 statutory authority or of Crown prerogative power.
24 And to give a very simple example, let's
25 say someone takes issue with the prime minister's
26 personal decision to go on vacation in British Columbia.
27 Somebody feels that the prime minister shouldn't be
28 taking time away from his official duties, or if he

1 does, he should limit his holiday to Ottawa, so he's
2 close.
3 That is a personal decision of the prime
4 minister, albeit it impacts on his public role. But he
5 is not making that decision on the basis of a statutory
6 power nor is he exercising a Crown prerogative. So that
7 is not judicially reviewable.
8 In this case, the conduct that Mr. Alani
9 takes issue, of course, is the admittedly more weighty
10 political matter of the manner in which the prime
11 minister is providing advice on Senate appointments to
12 the governor general. But as we just discussed at
13 length, such advice is given as a matter of
14 constitutional convention. It is not given pursuant to
15 an Act of Parliament, and nor is it an exercise of the
16 Crown prerogative. So what that means, of course, is
17 that even if the court is not convinced that this matter
18 is not justiciable, that it must nevertheless be struck
19 on jurisdictional grounds.
20 Now, Mr. Alani makes three arguments in
21 respect of the jurisdictional issue that we'd like to
22 respond to. The first one is that while Mr. Alani does
23 accept that the prime minister's advice is not provided
24 pursuant to an Act of Parliament, he says that the
25 advice does amount to an exercise of the Crown
26 prerogative.
27 But in this regard, he's mistaken. There
28 is not now nor has there ever been a Crown prerogative

1 to name Canadian senators. And we'll look at Professor
2 Hogg's clear definition of what a Crown prerogative is
3 to start. And it's at paragraph 45 of our factum.
4 It's at page 27 of the respondents'
5 motion record. Professor Hogg writes:
6 "The royal prerogative consists of the powers
7 and privileges accorded by the common law to
8 the Crown. Dicey described it as the residue
9 of discretionary or arbitrary authority,
10 which in any given time is left in the hands
11 of the Crown. The prerogative is a branch of
12 the common law because it is the decisions of
13 the courts which have determined its
14 existence and extent."
15 But appointments to the Canadian Senate have never been a
16 matter of Crown prerogative because the Senate was
17 created by the *Constitution Act, 1867*. And the power to
18 name Senators in that constitutional instrument was first
19 given to the governor general by Sections 24 and 32 of
20 that document.
21 So the power to name Senators wasn't
22 accorded by the common law to the Crown, as it was not
23 some court decision that determined its existence and
24 extent. The power came into being by the passage by the
25 U.K. Parliament of the *British North America Act* in
26 1867, which is now, of course, the *Constitution Act,*
27 *1867*. So the power to name Senators isn't an incident
28 of Crown prerogative. It is conferred expressly by the

1 *Constitution Act, 1867*.
2 So when the prime minister exercises his
3 conventional role as advisor to the governor general,
4 when making appointments to the Senate, he's obviously
5 not exercising a Crown prerogative either. This role
6 doesn't find its root in the — and I'm using Hogg's
7 definition — the powers and privileges accorded by the
8 common law to the Crown. It finds its root in the
9 *Constitution Act, 1867*. And perhaps the best way of
10 describing the prime minister's role in the Senate
11 appointment is that it is a limit imposed by
12 constitutional convention on the governor general's
13 power to name Senators under the *Constitution Act, 1867*.
14 So, prime ministerial advice on Senate
15 appointments is not an exercise of the Crown
16 prerogative. Now, Mr. Alani suggests in his *factum*, I
17 think it's at paragraph 81, he quotes an article written
18 by a Queens law professor, Professor Walters, and an
19 Ontario Court of Appeal decision from 1943 in which he
20 says stand for the proposition that all advice to the
21 governor general from members of the Cabinet, including
22 the prime minister, is an exercise of the prerogative
23 power. Mr. Alani, of course, will refer to this
24 himself, but on our reading of the article or this
25 decision of the Ontario Court of Appeal, neither of them
26 actually contain language to that effect.
27 But more importantly, Cabinet's authority
28 to advise the governor general was also not accorded by

1 the common law to the Crown. And there isn't some court
2 decision we can point to which determined the existence
3 and the extent of Cabinet's authority to advise the
4 governor general. Again, it was the *Constitution Act*,
5 Section 11, which creates the Cabinet, and explains its
6 role. And so it is this constitutional statute that is
7 in fact the general source of authority for the Cabinet
8 to advise the governor general, and not the Crown
9 prerogative.
10 Now, Mr. Alani has a second
11 jurisdictional argument, though. He says that -- well,
12 even if it's not a direct exercise of the prerogative,
13 it's an exercise of a prerogative pursuant to an order
14 made under the prerogative. And he references these
15 minutes in Council, or minutes of Council, that were
16 issued between 1896 and 1935 by various Canadian
17 administrations, starting with the government of Sir
18 Charles Tupper, continued with prime minister Laurier,
19 and then Borden, Meighen, Bennett, and the last one was
20 King. We've had a hard time finding all of these
21 minutes in Council, but we found a few of them, and have
22 attached them --
23 JUSTICE: Yes.
24 MR. BRONGERS: -- to our book of
25 authorities. What these minutes of Council do is, they
26 record that the Cabinet of the day decided that it would
27 be the prime minister who would provide advice to the
28 governor general on Senate appointments, as opposed to

1 the Cabinet as a whole, or some other Minister, such as
2 the Minister of Justice, for example. And they are
3 mentioned in the *Quebec Senate Reference*, which I'd like
4 to go to right now, at tab 17 of our authorities.
5 So, volume 2, tab 17 of the respondent's
6 authorities. Paragraphs 52 and 53. On page 13.
7 JUSTICE: Just a second, now. 52 and
8 53.
9 MR. BRONGERS: They are highlighted.
10 JUSTICE: I'm having trouble finding
11 this. Oh, here we go. Yes.
12 MR. BRONGERS: Thank you, Justice. So
13 at paragraph 52, the Quebec Court of Appeal wrote:
14 "Pursuant to Section 24 of the *Constitution*
15 *Act, 1867*, the governor general summons
16 persons to the Senate on behalf of the Queen.
17 In fact, however, the constitutional
18 conventions of the day are to the effect that
19 the governor general's power can only be
20 exercised on the advice of the prime minister
21 of Canada, a practice that was recognized in
22 the minutes of the Privy Council of Canada
23 from July 13th, 1896 to October 25th, 1935."
24 So, as noted by the Quebec Court of Appeal, these minutes
25 are nothing more than a recognition of the constitutional
26 convention as it was understood when they were drafted.
27 They are not orders made pursuant to a prerogative of the
28 Crown.

1 And finally, Mr. Alani says that even if
2 the Federal Court lacks jurisdiction over his
3 application because it doesn't fit within Section 18 of
4 the *Federal Courts Act*, he says that this court should
5 take jurisdiction under Section 17 of the *Federal Courts*
6 *Act*.
7 JUSTICE: Yes.
8 MR. BRONGERS: Which is the provision
9 that says:
10 "Except as otherwise provided in this *Act* or
11 any other *Act* of Parliament, the Federal
12 Court has concurrent original jurisdiction in
13 all cases in which relief is claimed against
14 the Crown."
15 JUSTICE: Yes.
16 MR. BRONGERS: So it's the general
17 provision giving the court jurisdiction over lawsuits
18 against the Crown.
19 The short answer to this argument is that
20 Section 17 is of no assistance to Mr. Alani, since this
21 general jurisdictional provision has to be read in light
22 of Section 18, which is the specific jurisdictional
23 provision that relates to judicial review jurisdiction
24 of the court. And in our submission, Section 18 would
25 effectively be rendered redundant if the limits that it
26 establishes on judicial review, and not just in terms of
27 the limit by reference to federal boards, commission, or
28 other tribunals, but also the 30-day limitation period,

1 for example, if that -- by which applications for
2 judicial review have to be brought, those would be
3 rendered nugatory if someone who is caught by those
4 limits on the judicial review jurisdiction could then
5 say, "Oh, well, I'll just bring an action for
6 declaratory relief under Section 17 of the *Federal*
7 *Courts Act*."
8 JUSTICE: Well, how do you deal with
9 cases like *TeleZone*? There had -- it had been the view
10 of the Federal Court of Appeal that before you could
11 take an action in damages, you had to go through the
12 judicial review process. And the Supreme Court said no,
13 that was a waste of judicial economy and so on.
14 MR. BRONGERS: Yes.
15 JUSTICE: So if you could take an
16 action in damages under 17 without going -- arising from
17 a decision of a federal board or tribunal, why couldn't
18 you seek a declaration under Section 17?
19 MR. BRONGERS: Well, that type of
20 action, of course, would be simply an action for
21 damages, as I understand it. In order to bring a
22 Section 17 action for damages and get around the
23 judicial review limitations in Section 18, essentially
24 the party has to agree not to want any -- well,
25 declaratory or coercive relief. I mean, the classic
26 example is a disappointed bidder on a tender contract.
27 JUSTICE: Oh, we've seen plenty of
28 those.

1 MR. BRONGERS: Yes, exactly.
2 JUSTICE: Yes.
3 MR. BRONGERS: So, somebody who says,
4 "Fine, I wasn't selected."
5 JUSTICE: Yes.
6 MR. BRONGERS: "But that's all right.
7 I'm not going to ask the court to force the government
8 to tear up the contract of my competitor…"
9 JUSTICE: Right.
10 MR. BRONGERS: "…and order it to me.
11 I just want cash."
12 JUSTICE: That's right.
13 MR. BRONGERS: And if you are willing
14 to frame your case that way, then it's no longer a
15 judicial review. It's an action for damages. And so --
16 JUSTICE: That's right. That's right.
17 MR. BRONGERS: So that's why, when
18 you're dealing with a judicial review application, which
19 is what this is – Mr. Alani, on the first paragraph of
20 his notice of application, says in capitalized letters,
21 "THIS IS AN APPLICATION FOR JUDICIAL REVIEW." And for
22 that to be heard by this court, it has to fall within
23 the jurisdiction provided to the court by Section 18.
24 It can't be shoehorned into the Federal Court's
25 jurisdiction by saying, "Well, even if it doesn't
26 technically comply with Section 18, I should still be
27 able to bring a JR under Section 17."
28 And as I said, if that were to be

1 accepted, that would lead to a number of absurdities. A
2 simple example might be -- the court's of course aware
3 that Section 18 provides a very, very limited *habeas*
4 *corpus* jurisdiction to the court.
5 JUSTICE: Yes.
6 MR. BRONGERS: Only with respect to
7 military members who are imprisoned overseas. However,
8 if Mr. Alani's proposed definition of Section 17 were to
9 be accepted, that would mean that even prisoners in
10 Canada who cannot bring a *habeas corpus* to the Federal
11 Court would be able to simply bring Section 17
12 declaratory relief, saying, "Well, it's an action
13 against the Crown."
14 No, it is effectively a type of judicial
15 review which Parliament has limited, and that limit has
16 to be respected.
17 JUSTICE: All right.
18 MR. BRONGERS: The final topic of my
19 legal submissions this morning relates to Mr. Alani's
20 proposed amendments to his application.
21 JUSTICE: Yes?
22 MR. BRONGERS: As we understand them,
23 this is a three-step argument that Mr. Alani is
24 presenting. He first of all has prepared a proposed
25 amended notice of application, which is in his motion
26 record.
27 JUSTICE: Yes.
28 MR. BRONGERS: At pages 37 to 43.

1 Which, in our submission, this is effectively a
2 concession that his original application suffers from
3 some drafting flaws. But instead of conceding that the
4 respondent's motion should -- to strike should be
5 allowed, and then leave to amend should be granted to
6 cure the defects, he still insists that the prime
7 minister's motion should be dismissed and that the court
8 should then go on to adjudicate and grant what is
9 effectively a cross-motion to amend his application.
10 And so that's step 1. Step 2, Mr. Alani
11 asks in the alternative if the proposed amended notice
12 of application is unacceptable to the court, that then
13 he should be granted leave to make amendments to the
14 requested relief by removing any references to the prime
15 minister's role in the appointment process. He has not,
16 however, provided us with another draft amended notice
17 of application where we could see what such a notice
18 would look like, if all the references to the prime
19 minister are taken out.
20 And finally, his third pitch is that if
21 that's not acceptable, that then his application should
22 be converted into an action for declaratory relief, and
23 that he should be given an opportunity to file a
24 statement of claim; although, once again, we haven't
25 seen what the draft statement of claim looks like.
26 But regardless of how Mr. Alani has
27 framed the relief that he's requesting here, the real
28 question, of course, is whether any of these proposed

1 amendments would cure the defects in terms of
2 justiciability and jurisdiction that we have identified
3 with respect to his existing notice of application. So,
4 in other words, if his proposed amendments are allowed,
5 would his application all of a sudden become justiciable
6 and within the Federal Court's jurisdiction?
7 But the answer is clearly no. And begin
8 -- let's begin with the actual proposed notice of
9 application that Mr. Alani has prepared.
10 JUSTICE: Yes?
11 MR. BRONGERS: As we understand it,
12 there appear to be six proposed changes to it. First of
13 all, Mr. Alani wants to add the Queen's Privy Council
14 for Canada as a respondent; the Cabinet. Second, Mr.
15 Alani wants to revise the description of the decision
16 that he's challenging. So if we go to page 39 --
17 JUSTICE: Yes?
18 MR. BRONGERS: -- we see, on the first
19 paragraph, that no longer is there any reference to a
20 decision of the prime minister communicated on December
21 4th, 2014, which of course is that *Toronto Star* article,
22 as we understand it. Rather, it now references just the
23 failure, refusal, or unreasonable delay of the prime
24 minister, or alternatively the Queen's Privy Council for
25 Canada acting on the recommendation of the prime
26 minister, to advise the governor general to summon fit
27 and qualified persons to fill existing vacancies in the
28 Senate. So that's the second change.

1 The third change is a simplification of
2 the declaration sought. It's now just a two-liner, a
3 declaration that a qualified person must be summoned to
4 the Senate within a reasonable time after a vacancy
5 happens in the Senate. There is no longer this long
6 reference to who must ensure this is done, or how it
7 must be done. So in other words, Mr. Alani is actually
8 asking for a declaration that's even more vague than the
9 one that was originally being sought.
10 And fourth, under "Grounds for the
11 Application", we see a few changes there. Mr. Alani
12 proposes to add a few details regarding the number,
13 duration, and geographical distribution of Senate
14 vacancies.
15 JUSTICE: Yes.
16 MR. BRONGERS: Under "The Grounds for
17 the Application", the fifth change there, we see that
18 Mr. Alani also proposes to move into this section a
19 number of the legal grounds that actually we used to see
20 in the "Declarations Sought", that have all been struck
21 out. But very interestingly, Mr. Alani has also removed
22 the paragraph which was in the original notice
23 containing the completely proper acknowledgement that by
24 constitutional convention it is the prime minister who
25 gives advice to the governor general. This is at
26 paragraph 11. Mr. Alani wants to take that out. I'm
27 not sure why, because of course one can't change the
28 underlying constitutional framework of an application by

1 refusing to acknowledge it in a pleading, but that's a
2 proposed change.
3 And finally, in terms of supporting
4 evidence, if we look at the last page, page 43, we see
5 that Mr. Alani has added, at paragraph 1 under the
6 supporting material, the affidavit of Ashley Morton,
7 sworn January 16th, 2015 and served. That's the
8 affidavit that we referenced earlier.
9 JUSTICE: Do I have that in here?
10 MR. BRONGERS: No, and again Mr. Alani
11 has quite properly not included, I think, in order to
12 respect the prohibition on filing affidavits.
13 JUSTICE: Yes.
14 MR. BRONGERS: But we have been served
15 with it, and we've described it to the court. It simply
16 adds the two printouts from the Parliament of Canada
17 website setting out the history of vacancies, and this
18 *Toronto Star* article from December 4th, 2014. There is
19 nothing substantive in that affidavit.
20 But simply put, none of these amendments
21 modify the fundamental character of this application for
22 judicial review so as to render it justiciable. To the
23 contrary, it remains an attempt to judicially review the
24 timing of Senate appointments, which is an inherently
25 political matter, and which is not amenable to judicial
26 review. Just adding the Privy Council as a respondent,
27 and removing this reference to Senate appointments being
28 a matter of constitutional convention, doesn't render

1 the application any more justiciable than the one
2 described in Mr. Alani's original notice.
3 So in our submission, Mr. Alani should
4 not be granted leave to amend his application in the
5 form he has proposed, since the amended application
6 remains non-justiciable.
7 Now, moving to Mr. Alani's alternative
8 request, that if this amendment is unacceptable, that he
9 should be given leave to craft one that removes all
10 references to the prime minister's role in the
11 appointment process. Our position is the same. It's
12 frankly inconceivable that this application would become
13 justiciable if the words "prime minister" were to be
14 removed, again assuming that Mr. Alani's concern remains
15 the fact that Senate vacancies are not being filled as
16 quickly as he would like.
17 Any application for a court order that
18 would force the executive branch to remedy this would
19 necessarily have to be directed at the prime minister.
20 Again, remember, in the Senate reform reference, the
21 Supreme Court has clearly said that in practice,
22 constitutional convention requires the governor general
23 to follow the recommendation of the prime minister of
24 Canada, not Cabinet -- the prime minister of Canada.
25 And that is a legal fact that simply cannot be modified
26 by changing the drafting of the notice of application.
27 So, in our submission, that type of a
28 proposed amendment, which we don't even know what it

1 would actually look like, since we don't have a draft
2 notice of application, would not cure the defects
3 either.
4 Finally, we have the request in the
5 alternative that if the court finds that the application
6 is justiciable, but does not engage the court's
7 jurisdiction under Section 18 of the *Federal Courts Act*,
8 then Mr. Alani would like leave to convert this into a
9 Section 17 action for declaratory relief. And he asks
10 for this relief under Section 18.4 of the *Federal Courts*
11 *Act*.
12 But Section 18.4 is not designed for this
13 type of a conversion. Section 18.4 of the *Federal*
14 *Courts Act* authorizes the court to convert an
15 application for judicial review into an action for
16 judicial review. It's designed to address the situation
17 where the procedural limitations on an application cause
18 prejudice to the parties in terms of proving their case
19 that they could then proceed by way of action so that
20 then they would have recourse to things like full
21 discovery with affidavits and documents --
22 JUSTICE: Yes.
23 MR. BRONGERS: -- viva voce evidence
24 being presented, et cetera. But it does not expand the
25 court's judicial review jurisdiction which is still
26 limited by section 18 providing that the jurisdiction is
27 limited to review of decisions of federal boards,
28 commissions or other tribunals. So accordingly we

1 submit that this request should be denied as well.
2 So for all of these reasons the
3 respondents respectfully request that the motion to
4 strike be allowed, that the notice of application be
5 struck out without leave to amend that the application
6 be dismissed and that a cost order be issued as well in
7 a fixed sum amount of $1,000. Unless the court has any
8 questions?
9 JUSTICE: Now, we prefer lump sums
10 costs, and I can certainly -- it's easy to calculate
11 that is we went by the tariff your costs would be a lot
12 more than $1,000. But you can ask for less as you are.
13 MR. BRONGERS: We are. It is a round
14 sum that we felt would be fair and appropriate. More
15 importantly we do feel costs should follow the cause. I
16 will wait for a reply to respond to what I anticipate
17 will be Mr. Alani's plea that he be given an adverse
18 cost immunity, and that it be the Crown that absorb the
19 costs of this litigation, even if the Crown is
20 successful. Thank you, Justice.
21 JUSTICE: Thank you very much. Mr.
22 Alani.
23 **SUBMISSIONS BY MR. ALANI:**
24 MR. ALANI: Good morning, Justice
25 Harrington. I would like to begin by describing
26 essentially what the case is about. In my view this is
27 fundamentally a case about the rule of law, which I
28 suppose makes this a motion about whether this case is

1 about the rule of law.
2 With respect to the justiciability of
3 constitutional conventions, it's about what federal
4 executive action is governed by and at the same time,
5 what federal executive action is immune from the rule of
6 law. With respect to jurisdiction, it's about where one
7 is supposed to go n they want to subject federal
8 executive action to the Rule of Law.
9 With respect to costs, it's about who
10 bears the financial risk of trying to enforce the Rule
11 of Law. I have set out, of course, my written
12 submissions on all of these points as well as the
13 request for leave to amend the notice of application and
14 I don't intend to repeat what is in my written
15 representations. I am sure Justice Harrington, you have
16 reviewed them --
17 JUSTICE: Yes.
18 MR. ALANI: -- and you are going to
19 refer to them at your convenience. There are, of
20 course, some points that Mr. Brongers raised this
21 morning that I will specifically address. And in
22 addition to doing that, just highlighting some of the
23 key points.
24 Mr. Brongers began by speaking to the
25 test for a motion to strike, and my preference would be
26 to first address generally the issues of justiciability,
27 then move on to jurisdiction and then address the test
28 for motion to strike at the end because, after all, we

1 are here.
2 JUSTICE: Mm-hmm.
3 MR. ALANI: So I will begin by
4 speaking with respect to justiciability and of course,
5 although I am not going to be repeating what is in my
6 submissions, just by way of flag posting, my written
7 submissions begin at paragraph 14 page 8 of my written
8 record.
9 I think first of all we need to address
10 what justiciability is and what it means when we say
11 something is non-justiciable. And in my submission, to
12 say something is non-justiciable is to say that, that
13 issues exists in a legal black hole. Law, like nature,
14 abhors a vacuum. So it is probably not surprising that
15 the Federal Court of Appeal as recently as January in
16 the HFN, Hupacasath First Nation case, said that "the
17 category of non-justiciable cases is very small indeed."
18 The respondents say that this application is non-
19 justiciable. In other words, that it is beyond the
20 purview of not just this court, but any court in this
21 country, because it requires the court to enforce the
22 constitutional convention that the governor general only
23 appoints Senators on the advise of the prime minister.
24 There is absolutely no dispute that this
25 convention exists. I've cited it in the notice of
26 application and despite Mr. Brongers' submissions,
27 although I removed it from a specific paragraph in my
28 amended notice of application, I have included it in

1 more detail in the proceeding paragraph. But I will
2 take you to that later.
3 So I cite it in the originating document.
4 The Supreme Court of Canada has declared that the
5 convention exists, and Mr. Brongers took you to
6 paragraph 50 of the Senate reform reference. I could
7 not dispute that the convention exists even if I wanted
8 to. The Supreme Court of Canada has unanimously said
9 last year, that by constitutional convention, these
10 Senate appointments will only occur on the advice of the
11 prime minister. And so at issue is what impact, if any,
12 does that convention have on the justiciability of the
13 application.
14 The respondents say that the convention
15 puts the claim exclusively in the political realm. They
16 say it is a -- it effectively makes it a ballot box
17 issue. That would essentially turn the
18 constitutionality of the prime minister's inaction into
19 an issue to be determined by voters at the ballot box.
20 The political issue. If you disagree with what the
21 prime minister has done, vote for someone else. I say
22 it has no impact whatsoever on the court's ability to
23 hear and determine the judicial review application or
24 even to grant the declaration sought. At most, the only
25 impact that this convention has is that the court may
26 not subsequently be able to issue some sort of mandatory
27 order compelling the prime minister under the pain of
28 penalty under the court's contempt power, to do

1 anything. And I am not asking for that.
2 That limitation, theoretical at best, is
3 that it wouldn't even prevent the court from hearing the
4 application on the merits as courts frequently do to
5 declare what the state of the law is as it pertains to
6 the express textual provisions referenced in the notice
7 of application.
8 Council for the respondents submitted
9 this morning that the issues are non-justiciable because
10 there is no legal yardstick. I refer to the *Persons'*
11 case, as we know, a very monumental case in Canadian
12 jurisprudence. The court may recall that before the
13 *Persons* case, there was complete legal uncertainty in
14 Canada about women, about whether women were qualified
15 to be appointed to the senate. Everyone looked at what
16 the section said, someone, a "person", a qualified
17 person to the senate. But nobody knew what that text
18 meant until the Supreme Court of Canada took a run at
19 it, got it wrong, and then it went to the Judicial
20 Committee of the Privy Council and they said "It does
21 include women."
22 JUSTICE: But is that not a case of
23 interpreting the constitution, like so many cases we
24 have with the limits of section 92 and section 91. It
25 is a statutory interpretation case.
26 MR. ALANI: It is absolutely a
27 statutory interpretation case.
28 JUSTICE: Yes.

1 MR. ALANI: And in my submission this
2 is a statutory interpretation case. The respondents
3 would like to point at the all the political
4 consequences that might fall from an interpretation. In
5 my submission, there is legal uncertainty to this day as
6 to the meaning of section 32 of the *Constitution Act* and
7 since it has come up I will take you right to it. I
8 include it in my motion record at page 50. Section 32:
9 "When a vacancy happens in the Senate by
10 resignation, death or otherwise, the governor
11 general shall by summons to a fit and
12 qualified person fill the vacancy."
13 There is disagreement within this country about what
14 "when" means and what "shall" means.
15 The prime minster, by taking the position
16 -- it's obviously not in evidence before you but I
17 submit that the fact that there are vacancies suggests
18 that he obviously doesn't feel that there is a legal
19 requirement under section 32 that the vacancies occur in
20 any particular order or once a vacancy happens. It's
21 not before the court but judicial notice perhaps may be
22 taken of the fact that the leader of the opposition of
23 this country has proposed that if he is prime minister,
24 he will never ever appoint anyone to the senate and
25 leave it to be abolished.
26 I have included in my materials a
27 selective -- there are many of these, but there is a
28 Senate Committee transcript -- because the issue of

1 vacancies and the timing of filing them has come up in
2 the past when vacancies have been allowed to accumulate
3 and there has been various measures taken to try and
4 address that. I won't get into all of them here but, I
5 can take you to its reproduced excerpted in my written
6 submissions at page 21. Paragraph 63.
7 JUSTICE: Just a second now. Yes.
8 MR. ALANI: So this is an exchange
9 that takes place before the Senate standing committee on
10 legal and constitutional affairs back in 2008. And is
11 arises in the context of, some senators are questioning
12 the then Minister for Democratic Reform Mr. Peter Van
13 Loan on why isn't the prime minister not appointing
14 senators, you know, when they read through section 32
15 and they seem to suggest that in some senators' opinion
16 there is clearly a statutory interpretation that yields
17 the result that the appointments must happen when the
18 vacancy happens. And there is a dispute about whether
19 that is the way you interpret the statue. And Mr. Van
20 Loan says:
21 "This question is raised about
22 constitutionality, the question of compelling
23 the prime minister and whether the
24 organization can exist if there is a
25 requirement that these spots be filled. If
26 it is, as the chair has indicated, that they
27 must be appointed 'when', again any one of
28 you could take the question with the courts.

1 You could seek injunctive relief. A mandamus
2 that the prime minister fill those
3 appointments. If none of you are keen to try
4 that approach that I expect…"
5 And he goes on to conclude,
6 "I am saying that the fact that this has not
7 happened that no one has done it, tells me
8 there probably is no requirement for that to
9 occur."
10 So not only does the Cabinet Minister in
11 charge of democratic reform seem to be of the view – he
12 is a lawyer by the way – that the issue would seem to be
13 judicable because if there is uncertainty about the
14 statutory interpretation you could go to the courts as I
15 am trying to do, but fundamentally, the point is there
16 is disagreement about what section 32 means.
17 And so to answer your question, yes, it
18 is absolutely a case of statutory interpretation. There
19 is disagreement about what section 32 means and by
20 seeking the declaration that I have requested I am
21 seeking interpretation as to whether section 32 imposes
22 an obligation that those vacancies be filled within a
23 reasonable time.
24 JUSTICE: So it we combine the
25 constitutional convention with section 32 it would read
26 something like "When a vacancy happens in the senate by
27 resignation, death or otherwise, the prime minister
28 shall advise the governor general to summons a fit and

1 qualified person to fill the vacancy." Maybe something
2 along those lines.
3 MR. ALANI: Yes. And of course, I
4 have added on my own this extra legal requirement that
5 is not in the text itself: that it be done within a
6 reasonable time. I have included as a epigraph to my
7 written submissions at page 4, because I think he sums
8 it up about as well as I ever could, Mr. Kunz who in a
9 text published in 1965 regarding the senate speaks
10 specifically to this issue of statutory interpretation.
11 JUSTICE: Which paragraph are you at,
12 now?
13 MR. ALANI: It is actually before
14 paragraph 1.
15 JUSTICE: Oh, I see, right. Your
16 overview, yes. All right.
17 MR. ALANI: Yes. He says:
18 "The maintenance to be sure of the specified
19 number of members in the senate was very
20 carefully provided for by the wording of the
21 two sections of the *BNA Act*."
22 Of course, now the *Constitution Act of 1867.*
23 "In addition to section 24, which provides
24 for the appointment of Senators, section 32
25 says:
26 'When a vacancy happens in the Senate,
27 by resignation, death or otherwise, the
28 governor general shall, by summons to a

1 fit and qualified person, fill the
2 vacancy.'"
3 Mr. Kunz says:
4 "The reason that the Senate does not have a
5 provision similar to the one in force in the
6 House of Commons regarding a time limit
7 within which vacancies must be filled, is
8 that the constitution itself is so clear and
9 plain upon the subject. It distinctly says
10 that appointments shall – not may – be made
11 when vacancies occur. That certainly does
12 not mean the moment they occur, because that
13 would be impracticable [*sic*]. The principle
14 in interpreting directory words of this kind
15 is that the action must be taken within a
16 reasonable time."
17 So, I have suggested that the declaration
18 should clear up the uncertainty about whether there is a
19 temporal obligation at all. Again, Mr. Mulcair thinks
20 there is no obligation to appoint them ever. And the
21 prime minister has --
22 JUSTICE: He is also a lawyer.
23 MR. ALANI: Well, perhaps non-
24 practicing. But it underscores the point that
25 reasonable people can disagree about what Section 32
26 means, whether they're legally trained or not. And when
27 there is uncertainty about what a statute means, we do
28 as we did in the *Persons* case: We go to court and we ask

1 the judiciary to interpret the law.
2 Now, I can't just come to court and say,
3 "Interpret section 32 and provide that interpretation in
4 your reasons for judgment," although a court would
5 perhaps flesh out some of its analysis and basis for
6 reaching a conclusion on the statutory interpretation in
7 its reasons. But the culmination, the order that would
8 be manifested in such a proceeding, would of course be a
9 declaration. And so that is why I sought a declaratory
10 relief.
11 JUSTICE: Now, your friends haven't
12 raised lack of standing here.
13 MR. ALANI: Mm-hmm.
14 JUSTICE: Because they think there are
15 other grounds. But there are cases where private
16 citizens have challenged statutes, challenged government
17 action. One was very unsuccessful; I think it was the
18 conversion to the metric system. There was quite a
19 kerfuffle about that in the courts. And there was one
20 -- I'm just trying to think. There was a retired judge
21 who I think took issue with the *Official Languages Act*.
22 They were given standing. Doesn't mean they necessarily
23 succeeded, but they were given standing. So you would
24 say there is a public interest in this.
25 MR. ALANI: I would.
26 JUSTICE: And that as a concerned --
27 although your friends say you don't say who you are, or
28 why you're concerned, you don't say you're a voter, you

1 don't say -- whatever. You would certainly say you have
2 a public interest in this. Who else is going to bring
3 it? The government could bring it itself, I suppose,
4 under a Reference.
5 MR. ALANI: Mm-hmm.
6 JUSTICE: As there have been on Senate
7 reform, for example. All right.
8 MR. ALANI: You're right, of course,
9 Justice Harrington, to point out that the respondents
10 haven't raised standing, and to be candid I give them
11 credit for doing that. They could have, and --
12 JUSTICE: Well, I haven't raised it,
13 so I'm certainly not raising it at this stage.
14 MR. ALANI: I would only respond to
15 the standing issue in the following way. Although it's
16 not raised, I take Mr. Brongers' point that Justice
17 Stratas has suggested that although originating
18 documents should be concise, as I think I've tried to
19 be. I think I was perhaps faulted for using only eight
20 words in a single sentence in the grounds. I've seen
21 judicial review applications that frankly spanned dozens
22 of pages. I just didn't think that was necessary. But
23 to the extent that there is any frustration from the
24 court that I haven't articulated the basis for standing,
25 even though it hasn't been raised as an objection, I am
26 happy as it is permitted to be considered on a motion to
27 strike that I can fill that in.
28 JUSTICE: I could give leave to amend.

1 MR. ALANI: Right.
2 JUSTICE: I could strike with leave to
3 amend.
4 MR. ALANI: Right. And I'm happy to
5 make those amendments in any event. I'm happy to set
6 out that I'm a citizen of Canada, I'm entitled to vote.
7 I'm a lawyer by profession. I'm happy to set out
8 whatever issues the court feels --
9 JUSTICE: You shouldn't have special
10 standing because you're a lawyer.
11 MR. ALANI: No, I'm just -- no.
12 JUSTICE: Although we all like to
13 think so, being a former lawyer myself.
14 MR. ALANI: Absolutely.
15 JUSTICE: All right.
16 MR. ALANI: The respondents have
17 suggested that declaratory relief would be useless
18 unless the applicant is seeking some sort of recourse.
19 And they pointed to this *Assiniboine* v. Meeches
20 decision.
21 JUSTICE: Yes.
22 MR. ALANI: As I pointed out, there is
23 actual disagreement about what Section 32 means. And I
24 take as a correct statement of the law that the
25 government is expected to comply with orders even in the
26 absence of, you know, a contempt application being
27 brought against them. I think -- I'm not fully familiar
28 with these cases, but I understand there may be some

1 situations involving a decision of Justice McTavish
2 where perhaps the government has not fully complied with
3 an order. But certainly --
4 JUSTICE: Oh, the health care funding
5 for refugees?
6 MR. ALANI: Right.
7 JUSTICE: Which is in appeal.
8 MR. ALANI: Right. But I think there
9 was a stay requested and denied, and --
10 JUSTICE: I'm not quite sure where
11 that stands.
12 MR. ALANI: But certainly the general
13 rule and the general expectation is that the government
14 will comply with an order of the court. And so, it
15 follows from that that a declaration practically
16 speaking may be enforcement in itself.
17 What I am suggesting is, given the
18 uncertainty as it exists about whether there is a
19 temporal requirement that Senate vacancies be filled,
20 I'd suggest that perhaps the reason why the Senators
21 haven't been appointed is because no court has said --
22 no one has authoritatively interpreted Section 32 to
23 say, "Yeah, you actually do need to appoint them when
24 they happen."
25 I would hope that if the court made a
26 pronouncement on that, fulfilled its statutory
27 interpretation role, that the court would comply, and
28 there would be no need for any further proceedings.

1 JUSTICE: There are situations --
2 because I mentioned the quorum, and I do see in your
3 documents the quorum, 15 Senators, and we're far from 15
4 at the moment.
5 MR. ALANI: Mm-hmm.
6 JUSTICE: But we have various statutes
7 which create certain federal boards and tribunals, and
8 they call for a quorum. And it sometimes happens that
9 we fall below the quorum. And what happens then? I
10 don't know if there is any case law that deals with
11 that. I can give you an example, and it would be --
12 people could look it up publicly. But the
13 whistleblowers' tribunal, the Public Servants'
14 Protection Disclosure Tribunal. I was a member of that.
15 My term expired, I wasn't looking for a re-appointment.
16 But there are to be between three and seven members, all
17 of whom have to be Federal Court or Superior Court
18 judges. And we haven't had three on that tribunal for
19 almost a year. I just wonder, are there court cases
20 around where someone has gone to court to oblige
21 the government to appoint someone to fill a vacancy
22 because --
23 MR. ALANI: Mm-hmm.
24 JUSTICE: -- otherwise the board can't
25 function, because it doesn't have a quorum?
26 MR. ALANI: I'm not familiar with any
27 of those cases.
28 JUSTICE: No, I don't know if there is

1 such a case.
2 MR. ALANI: I don't know if there are.
3 JUSTICE: That's my question.
4 MR. ALANI: Respectfully, Justice
5 Harrington, that is precisely the type of question that
6 ought to be asked and answered on the application on its
7 merits. Because that's getting into the legal question,
8 the statutory interpretation question, of whether there
9 is an obligation to fill the vacancies when they happen,
10 or, you know, even putting some flesh on the bones of
11 what reasonableness might require in terms of delay from
12 when the vacancy happened. That's not an issue that's
13 germane to the motion to strike. If anything, it
14 underscores that the question is justiciable because
15 it's precisely the sort of question that the court is
16 equipped to try and answer.
17 With respect to quorum, I mean, it is
18 true that the Senate has a quorum of 15. I don't think
19 that means that the prime minister is only required to
20 appoint Senators so that there is more than 15, and
21 there is two reasons for that. First is, looking at the
22 other provisions regarding the Senate as a whole, if you
23 look at Section 22, which is at page 46 of my motion
24 record --
25 JUSTICE: Yes.
26 MR. ALANI: So I'll just back up a
27 bit. Section 21 of course says, "The Senate shall,
28 subject to the provisions of this *Act*, consist of 105

1 members who shall be styled Senators." Section 22
2 fleshes out how that 105 is supposed to be broken down.
3 There's four divisions: Ontario, Quebec, the Maritimes,
4 the Western provinces. And then it goes further, to say
5 that the four divisions shall be equally represented.
6 Ontario, 24 Senators, Quebec, 24 Senators, the Maritimes
7 and Prince Edward Island 24 Senators, 10 for Nova
8 Scotia, 10 for New Brunswick, 4 for Prince Edward
9 Island, 24 for the Western provinces comprised of 6 for
10 Manitoba, 6 for British Columbia, 6 for Saskatchewan, 6
11 for Alberta. Newfoundland gets 6 members. Yukon
12 Territory and Northwest Territories and Nunavut each get
13 1 Senator.
14 So the quorum of 15 is really not the
15 only issue. Certainly it would be problematic if there
16 was a quorum, but the Constitution not only guarantees
17 that there would be 105 Senators, the Constitution also
18 grants each province and territory and also each region
19 a specific number of Senators. So, while it might be
20 nice to say that there's more than 15 Senators, we don't
21 have a quorum problem, that doesn't do much for the
22 folks of Prince Edward Island, who don't have their
23 three or four -- they don't have their four Senators.
24 And it's particularly problematic in the
25 constitutional sense, because as the Supreme Court of
26 Canada observed in the *Senate Reform Reference*, this was
27 an essential -- it was the *sine qua non* of
28 Confederation. The smaller provinces were very

1 concerned about how they were going to be represented in
2 Confederation, and the Senate was designed to alleviate
3 that concern.
4 So quorum alone, while a nice figure to
5 look at as a problem that isn't yet with us today, is
6 really not the only way to look at it.
7 JUSTICE: There has to be -- there is
8 certainly a political aspect to this, and I --
9 MR. ALANI: Yes.
10 JUSTICE: You know, apparently there
11 is going to be an election this October. You could see,
12 depending what the polls say, if the government in power
13 thinks it might lose the election, it might pack the
14 Senate, before the election.
15 MR. ALANI: Yes.
16 JUSTICE: I mean, that would be a
17 political decision.
18 MR. ALANI: Let's say -- there is nine
19 judges, of course, on the Supreme Court of Canada. I'm
20 not sure whether a quorum is three or five, but it's
21 certainly not nine. If four Justices of the Supreme
22 Court of Canada decided they were going to resign in
23 advance of October, is that a political decision? Can
24 the prime minister say, "No, I'm not going to appoint
25 Justices to the highest court in the land because quorum
26 is still met, I am still able to get my legislation past
27 the Supreme Court of Canada, or not."
28 The quorum clearly can't be the only --

1 JUSTICE: Yes.
2 MR. ALANI: -- the only relevant
3 consideration.
4 JUSTICE: No. You've got your section
5 32, "shall". That's your best argument.
6 MR. ALANI: Indeed. So I won't say
7 more on that.
8 JUSTICE: "Shall" means "shall".
9 MR. ALANI: "Shall" means "shall".
10 JUSTICE: Yes.
11 MR. ALANI: And --
12 JUSTICE: "Must".
13 MR. ALANI: Yes. That's exactly what
14 it means. And all I'm asking is that the court, on an
15 application on the merits, say that. So that --
16 JUSTICE: Or at least that your --
17 that isn't what you would be getting from me today.
18 MR. ALANI: No.
19 JUSTICE: What you're hoping for today
20 is that your friend's motion is dismissed.
21 MR. ALANI: I am hoping that you allow
22 me to go before the court again, on the application on
23 the merits.
24 JUSTICE: On the merits. Right. We
25 have to keep that in mind.
26 MR. ALANI: Yes.
27 JUSTICE: What we're focused on here.
28 It's just, is it plain and obvious that your case is

1 bereft of chance of success.
2 MR. ALANI: Any possibility of
3 success.
4 JUSTICE: Yes.
5 MR. ALANI: Is that one of the clearly
6 exceptional cases for which I should be driven from the
7 judgment seat, as, Justice Harrington, you pointed out.
8 Moving on to one of the submissions the
9 respondents made this morning, that the declaration I've
10 sought is so vague, because it says "reasonable" --
11 what's the point of a declaration that just says
12 "reasonable"?
13 First, the Federal Court, more than any
14 other court in this country perhaps knows well that
15 interpreting reasonableness is a fundamental part of
16 administrative law. *Dunsmuir* would have absolutely no
17 impact if judges could not determine on a case by case
18 basis by looking at the record before them whether
19 federal executive action conformed to the legal standard
20 or reasonableness or not. That's why I've suggested
21 that the declaration speak in terms of "in a reasonable
22 time".
23 Once the ambiguity about whether there's
24 an obligation that the appointments shall occur at all,
25 then if there is any disagreement about whether the
26 reasonable timeframe has been complied with, then, you
27 know, the executive, as they do in every other aspect of
28 administrative law can try and justify whether their

1 action conforms to the reasonableness standard.
2 JUSTICE: Now *Dunsmuir*, and cases
3 before it, and certainly many afterwards such as *Alberta*
4 *Teachers* talk about interpreting your home statute but
5 the Court of Appeal has held, and I can't think of the
6 name of the name of the case right now, the no deference
7 is shown to Minister in interpreting his own statute.
8 So it wouldn't be a question of -- it
9 might be an argument on the merits but it wouldn't be a
10 question of the prime minister saying, "I'm interpreting
11 the Constitution, I'm interpreting my own statute." You
12 have to give me deference as to what reasonableness
13 means. And in fact the case -- I just referred you to
14 the *Information Commissioner*. In the *Information*
15 *Commissioner* I do cite the decision of the Court of
16 Appeal which is in the last two years, which says "no
17 deference to a Minister" which is rather peculiar since
18 you have some of these people who are citizenship judges
19 and so on whose qualifications might possibly be suspect
20 and we have to show them deference on interpreting their
21 own statute, even though they might not be lawyers.
22 But I am just saying in terms of
23 reasonableness, yes, we are called upon almost every day
24 --
25 MR. ALANI: Yes.
26 JUSTICE: -- to interpret whether or
27 not a action taken or not taken was reasonable.
28 MR. ALANI: Right.

1 JUSTICE: This is slightly different
2 and we're talking about a timeframe.
3 MR. ALANI: We are talking about a
4 time range but both looking to what courts are asked to
5 do and whether a timeframe can ever be looked at as
6 reasonable or not, I draw the court's attention -- this
7 is on page 55 of my motion record. This is a
8 reproduction of section 18.1(3) of the *Federal Courts*
9 *Act*.
10 JUSTICE: Yes.
11 MR. ALANI: And I'll --
12 "On an application for judicial review the
13 Federal Court may (a) order a federal board,
14 commission or other tribunal to do any act or
15 thing it has unlawfully failed or refused to
16 do, or has unreasonably delayed in doing."
17 JUSTICE: Yeah.
18 MR. ALANI: Justice Harrington, you
19 may recall that in my proposed amendment the notice of
20 application I've removed the word "decision". I can
21 take you to it. The amended notice of application is at
22 -- begins at page 37 but the specific reference I take
23 you to is at the top of page 39.
24 So I requested leave -- and this is in
25 any event. This isn't really intended to address any
26 sort of alleged defect. I propose striking the
27 reference to a decision and replacing it, tracing the
28 language from Section 18.1(3)(a) in respect of the

1 court's jurisdiction regarding a failure, refusal or
2 unreasonable delay.
3 JUSTICE: Do I take it that in any
4 event you want to amend your application?
5 MR. ALANI: Yes, yes.
6 JUSTICE: Okay.
7 MR. ALANI: The announcement was made,
8 it was made in Markham, Ontario on December 4th. I read
9 about it in the morning of December 5th, which was a
10 Friday. This judicial review application was filed on
11 Monday, December 8th. I only worked on it on the
12 weekend. It had been a while since I had looked at the
13 case law, you know, *Krause* and course of conduct in
14 decisions and my primary concern was I knew there was
15 this 30-day time limit that might apply if it was in
16 respect of a decision.
17 JUSTICE: Yeah.
18 MR. ALANI: And so I drafted as is but
19 with the fullness of time and on reflection I thought
20 there would be some amendments that I would like to make
21 in any event to clarify the basis for seeking the
22 application.
23 I sent a substantially same version of
24 this draft notice of application to the respondents in
25 January to canvas whether those amendments could go by
26 consent, and of course we ended up with the case
27 management conference where I was told, you know, any,
28 any amendments you want to make, deal with in your

1 motion record and so that's why it's here.
2 JUSTICE: Mm-hmm.
3 MR. ALANI: But even in the absence of
4 the motion to strike I would have requested leave to
5 amend in this way.
6 So just to summarize then, the reference
7 to reasonableness in the notice of application, in the
8 proposed declaration is not a reason that this is not
9 justiciable. Clearly the Federal Court assesses
10 reasonableness all the time. It's right there in the
11 statute, the *Federal Courts Act*. You can order a board,
12 commission or tribunal to do something if they've
13 unreasonably delayed in doing it. So that's precisely
14 what I'm hoping to do.
15 With respect to it being a political
16 question, I certainly do not dispute that who gets
17 appointed to the Senate is a political issue. That's a
18 political matter and I don't -- I can't fairly conceive
19 of any situation in which I'd be able to come to court
20 and challenge who gets appointed to the Senate if
21 there's 19 vacancies now. If Stephen Harper wants to
22 appoint his wife to the Senate he can face the political
23 consequences for doing so. As long as she meets the
24 qualifications set out in the *Constitution Act* and the
25 Senate itself doesn't determine otherwise, he can go
26 ahead and do that.
27 What I am saying isn't a political
28 question, or at least not a wholly political question

1 but rather a legal question is whether those
2 appointments be made at all and what's a reasonable
3 timeframe for making them.
4 If I can refer to the *Patriation*
5 *Reference*, which -- this is at the respondent's book of
6 authorities, volume 2, tab 20.
7 I was pleased to hear that Mr. Brongers
8 spent six weeks in constitutional law covering this
9 case. Obviously Mr. Brongers went to law school less
10 recently than I did.
11 JUSTICE: And after I did.
12 MR. ALANI: It's rare that I am able
13 to say that there's a judgment about the same age as I
14 am and that would be the case here. So we covered some
15 other cases in addition to the *Patriation Reference* but
16 during the six weeks that this case was covered,
17 reference might have been had at page 885.
18 JUSTICE: 885. Yes.
19 MR. ALANI: The second paragraph from
20 the top of the page:
21 "Finally we are not asked to hold that a
22 convention has in effect repealed the
23 provision of the *BNA Act* as was the case in
24 the *Reference Re Disallowance and Reservation*
25 *of Political Legislation*, nor are we asked to
26 enforce a convention. We are asked to
27 recognize it if it exists.
28 Courts have done this very thing many

1 time in England and the Commonwealth to
2 provide aid for and background to
3 constitutional or statutory construction.
4 Several such cases are mentioned in the
5 reasons of the majority of this court
6 relating to the question whether
7 constitutional conventions are capable of
8 crystalizing into law."
9 And then he cites a few cases.
10 But to the end of that paragraph:
11 "This court did the same in the recent case
12 of *Arseneau v. the Queen* and in the still
13 unreported judgment after the rehearing of
14 the *Attorney General of Quebec and Blakey*."
15 Both *Arseneau* and *Blakey* cases that I have cited as
16 examples of the court's speaking to conventions, which
17 Mr. Brongers said don't even mention conventions. Well,
18 *Patriation Reference* seems to think they do.
19 The court goes on though, I should say:
20 "In so recognizing conventional rules the
21 courts have described them, sometimes
22 commented upon them and given them such
23 precision as is derived from the written form
24 of a judgment. They did not shrink from
25 doing so on account of the political aspects
26 of conventions, nor because of their supposed
27 vagueness, uncertainty or flexibility."
28 I can't really think of anything that was

1 more political at the time then what the amending
2 formula by convention required for patriating the
3 constitution.
4 The court could have considered, "Hey,
5 this is a political question, it has political impacts,
6 we're not going to step in." But they said, "No,
7 there's a legal element here, we're going to do our job
8 and interpret the effect of the convention."
9 It didn't matter that it was a non-
10 binding advisory reference opinion and it didn't matter
11 that there was no way to compel the federal government,
12 or, you know, issue an injunction restraining Parliament
13 from passing a resolution asking the Imperial Parliament
14 to pass the *Canada Act*. It was enough that there was a
15 legal aspect and the courts could speak to that.
16 JUSTICE: You are asking me, in a way,
17 is there a convention that the prime minister has
18 unfettered discretion in the timing of his
19 recommendations to the governor general to appoint
20 senators?
21 MR. ALANI: I'm certainly asking what
22 the parameters of that discretion are.
23 JUSTICE: Yes.
24 MR. ALANI: And when we speak of
25 parameters of discretion I suggest, and I'll speak to
26 this when I talk about jurisdiction, but that is -- that
27 really is -- discretion flows from prerogative power and
28 so the fact that there may be any discretion at all is

1 really an argument is support of their being
2 jurisdiction based on there being a prerogative power at
3 stake. But I'll come to that separately.
4 I spoke to that section about political
5 questions in the *Patriation Reference* but there's also a
6 reference in the *Quebec Succession Reference*, of course
7 also a political hotbed issue at the time. And of
8 course the court there said, "There maybe these
9 conventions, we're not going to be able to enforce them
10 but we're going to tell you what they are and the
11 political actors can act accordingly.
12 The *Succession Reference* is at tab 22 of
13 the respondent's second volume.
14 JUSTICE: Mm-hmm.
15 MR. ALANI: And the passage I take you
16 to is at page 237, paragraph 28. This is addressing
17 concerns about what the proper role of the court was in
18 a political issue.
19 The court says, "As to the legal nature…"
20 JUSTICE: Excuse me, which page is
21 that again?
22 MR. ALANI: Sorry, this is page 237.
23 JUSTICE: Yes, thank you.
24 MR. ALANI: Sorry, I'll actually back
25 up a bit on page 237. The first full paragraph, which
26 appears just after the block quote at the top of the
27 page. The court's discussing the circumstances in which
28 the court may decline to answer a question on the basis

1 on non-justiciability.
2 MR. BRONGERS: Excuse me, a reference
3 question.
4 MR. ALANI: A reference question, yes.
5 "The circumstances in which the court may
6 decline to answer a reference question on the
7 basis of non-justiciability. To do so would
8 take the court beyond it's own assessment of
9 it's proper role in the constitutional
10 framework of our democratic form of
11 government or if the court could not give an
12 answer that lies within its area of
13 expertise, the interpretation of law."
14 Towards the end of the page beginning at
15 paragraph 28:
16 "As to the legal nature of the questions
17 posed, if the court is of the opinion that it
18 is being asked a question with a significant
19 extra legal component, it may interpret the
20 question so as to answer only its legal
21 aspects. If this is not possible, the court
22 may decline to answer the question.
23 In the present reference the questions
24 may clearly be interpreted as directed to
25 legal issues and so interpreted, the court is
26 in a position to answer them."
27 We go back to the statutory
28 interpretation issue. Does "shall" mean "shall" and

1 what does "when" mean. Those are legal components.
2 Whatever the political extra-legal components may be, if
3 the court can pinpoint legal questions, it can answer
4 them.
5 Now there is this issue about but it's a
6 reference and no private citizen can bring a reference,
7 so we should look at the court's treatment of
8 conventions and enforceability differently other than in
9 the reference context.
10 First answer to that is the *Ontario*
11 *English Catholic Teachers* case, which is an association
12 obviously not named with any foresight for the fact it
13 might need to be referenced in court proceedings. So
14 I'll just call it *OECTA*. That appears at tab 12 of
15 volume 1 of the book of authorities.
16 JUSTICE: Of your book?
17 MR. ALANI: Sorry, of the respondent's
18 book of authorities.
19 JUSTICE: The respondent's book.
20 MR. ALANI: And tab 12, and I'm going
21 to page 515. Now, the respondents have highlighted it,
22 it's their book, paragraph 63 on page 514 and continuing
23 up page 515. But I look to the passage that immediately
24 follows the highlighted section.
25 "The OPSBA appellants nevertheless seek a
26 declaration that a constitutional convention
27 exists regarding the right of school boards
28 in Ontario to levy and determine property

1 taxes for education purposes, presumably so
2 that they could then seek a remedy for a
3 violation of this convention in the
4 appropriate forum. I cannot agree that such
5 a convention exists."
6 And then the court goes on to talk about what counts as a
7 constitutional convention, and what the test is.
8 So, on page 514, the court repeats, as
9 Mr. Brongers has pointed out, the comments in the
10 *Patriation Reference* about conventional rules and how
11 they are not enforceable by the courts. But then at
12 page 515, the Supreme Court of Canada, in a claim
13 brought by private citizens, not in the *Reference*
14 context, says:
15 "Even though conventions are not enforceable
16 by the courts, the appellants here want a
17 declaration about whether the constitutional
18 convention exists, so that they can enforce
19 it in some other forum."
20 Now, if that was a problem, the Supreme Court of Canada
21 could have said that, no, we're not enforcing
22 constitutional conventions, so we're not going to answer
23 them. We're not even going to begin the factual inquiry
24 of whether the convention exists. You don't get a
25 declaration full stop. Instead, the Supreme Court of
26 Canada clearly contemplated that there are situations in
27 which it's appropriate, if the factual foundation for a
28 convention exists, that the court issue a declaration

1 about what the convention requires, and then the parties
2 can, you know, seek the remedy wherever they want, other
3 than in the courts.
4 What would that look like here? Well, as
5 I've mentioned a few times — it bears repeating — there
6 is uncertainty about whether there is any obligation to
7 appoint senators. If a declaration is issued, stating
8 what the requirement is, and that it is something that
9 could be adjudicated for reasonableness with respect to
10 time -- well, there is a couple of things that could
11 happen.
12 First, as it stands, the duty is formally
13 stated to be an appointment power of the governor
14 general, and in the absence of any direction from the
15 court about whether there is even an obligation to
16 appoint Senators at all, one might argue that the
17 governor general could not legitimately, you know, put
18 any pressure, privately or otherwise, on the executive
19 to provide the advice to fulfill their advisory
20 function, or consider some other extra-legal remedies
21 that the governor general has as reserve powers. There
22 just couldn't be the legitimacy absent a court ruling on
23 what the law requires.
24 But the other remedy may well be
25 political. As it stands, I suggest there -- if there is
26 uncertainty at the executive level between Senators and
27 Cabinet ministers, the prime minister, the leader of the
28 opposition, about whether there is a requirement to

1 appoint senators at all, then there is probably also
2 fairly said confusion among the electorate as to whether
3 this is a constitutional requirement at all.
4 Mr. Brongers suggests this lies entirely
5 in the political realm. It follows from that that if
6 voters think it's unconstitutional, then they should
7 vote accordingly. The voters have no way of knowing
8 whether it's unconstitutional until the court tells them
9 it is, or provides some sort of insight as to what the
10 statutory interpretation is. Going back to the *Persons*
11 case. There were obviously people like Nellie McClung
12 and others who thought women ought to be able to be
13 appointed to the Senate. And there was confusion about
14 whether that was legally permissible. So they submitted
15 it to the courts. If, following the Privy Council
16 decision, the prime minister still said, "I'm not
17 appointing any women to the Senate just because I don't
18 want to, or I fear it's wrong," --
19 JUSTICE: Yes?
20 MR. ALANI: -- then people could have
21 exercised a political remedy and said, "Well, I'm not
22 going to vote for a political party that doesn't see
23 women as persons."
24 JUSTICE: Of course, if that happened
25 now, I just wonder, would the *Charter* somehow be
26 involved?
27 MR. ALANI: Well, I don't want to
28 stray down into an interpretation issue that doesn't

1 arise, but off the top of my head, I would suggest that,
2 to the extent there is a Section 15 equality argument
3 that -- and it would probably inform the interpretation
4 of *Persons* today, but if it didn't, I don't think you
5 can use one section of the Constitution to invalidate
6 another.
7 I'm mindful of the time, and I do have
8 some more submissions on justiciability. And of course
9 I haven't gone to jurisdiction. But I'm in the --
10 JUSTICE: No, we're -- do you have any
11 idea of how long you will be? We're not going to finish
12 before lunch, I think that's pretty clear.
13 MR. ALANI: No. I think I would
14 probably need more than ten minutes on justiciability.
15 JUSTICE: Right.
16 MR. ALANI: So there is probably not
17 going to be a fully natural break. And so I am happy
18 to, if the court wishes, to take a pause here and --
19 JUSTICE: So you're doing
20 justiciability and then you're doing jurisdiction of the
21 court.
22 MR. ALANI: Yes.
23 JUSTICE: And is that it?
24 MR. ALANI: And then the -- some
25 comments generally on the test for a motion to strike,
26 and then amendments.
27 JUSTICE: Yes. So we're talking about
28 an hour?

1 MR. ALANI: Yes.
2 JUSTICE: All told, say?
3 MR. ALANI: I believe so.
4 JUSTICE: And then the reply should be
5 reasonably short, I suppose.
6 MR. BRONGERS: Yes. At this point I
7 can't see it being more than five, ten minutes.
8 JUSTICE: Yes. Well, let's break,
9 then. I'm usually 45 minutes, but I think I'll give
10 everybody an hour. So we'll be back at 1:30.
11 MR. ALANI: Thank you.
12 MR. BRONGERS: Thank you, Justice.
13 (PROCEEDINGS ADJOURNED AT 12:27 P.M.)
14 (PROCEEDINGS RESUMED AT 1:30 P.M.)
15 JUSTICE: Mr. Alani?
16 **SUBMISSIONS BY MR. ALANI, Continued:**
17 MR. ALANI: Thank you, Justice
18 Harrington.
19 Before the lunch break, I was making
20 submissions on justiciability and particularly I just
21 referred to the comments of the Supreme Court of Canada
22 in the *Quebec Secession Reference* regarding political
23 questions.
24 JUSTICE: Yes.
25 MR. ALANI: What I propose to do for
26 the remainder of my submission -- I'm sorry, submissions
27 on justiciability, is, I'd like to -- there's probably
28 four specific points I'd like to make. But first I'd

1 like to address this notion that justiciability is
2 limited to reference cases. Second, I'm going to
3 respond to the respondent's contention that the issuance
4 of a declaratory order regarding Senate appointments
5 would somehow unduly fetter the discretion of the prime
6 minister in an improper way.
7 Third, I will respond to the *Galati* case
8 and the alleged slippery slope that that --
9 JUSTICE: Sorry, which case?
10 MR. ALANI: The *Galati* --
11 JUSTICE: Oh, yes.
12 MR. ALANI: The *Citizenship Act*.
13 JUSTICE: This is a citizenship one.
14 MR. ALANI: Yes. And then fourthly,
15 I'm just going to take the court through some passages
16 in the *Senate Reform Reference*.
17 JUSTICE: Mm-hmm.
18 MR. ALANI: But before doing any of
19 that, sometimes out of habit when I'm trying not to
20 repeat my written submissions, I fail to situate myself
21 within them, and so just to kind of remind the court
22 where I saw the analysis going structurally, I will just
23 refer back to the structure of my written submissions on
24 justiciability --
25 JUSTICE: Mm-hmm.
26 MR. ALANI: -- which begin at page 8
27 of my responding motion record. And specifically at
28 paragraph 16, I say that this non-justiciability

1 objection can't be sustained, firstly, because
2 justiciability has nothing to do with enforcement, and I
3 will speak to that just briefly by reiterating the
4 passage that's cited on page 9. The sub-points (2),
5 (3), (4), (5), and (6), namely the court's not being
6 asked to enforce constitutional conventions, that courts
7 do that all the time anyways by addressing the
8 conventions. The impact that ignoring conventions would
9 have on shielding executive action from the rule of law,
10 and the suggestion that the distinction in the
11 *Patriation Reference* between law and conventions is no
12 longer supported by law, and that the governor general
13 is legally required to act on the advice of his
14 Ministers. I am going to rely just on my written
15 representations, unless the court has any questions.
16 JUSTICE: No, no, I'm fine.
17 MR. ALANI: I'm not going to go
18 through that in much detail. But I did want to repeat
19 what I've set out, beginning at paragraph 17, because in
20 my view really all this talk about constitutional
21 conventions is a red herring.
22 And I quote a passage from Dean Lorne
23 Sossin who taught me administrative law — not that that
24 means anything. But he's certainly no stranger to
25 administrative law, and he's got a book called
26 *Boundaries of Judicial Review: The Law of*
27 *Justiciability in Canada*. What does he say about
28 justiciability and enforceability? He says:

1 "Occasionally a court will refer to a matter
2 as non-justiciable in the sense that a court
3 will not or cannot enforce a remedy. These
4 are related concepts, but it is important to
5 distinguish between a non-justiciable matter
6 and a matter unenforceable by the courts."
7 And he cites:
8 "The classic illustration of this distinction
9 in Canadian law is the constitutional
10 convention. Constitutional conventions are
11 unwritten rules which governments are obliged
12 to follow. However, if these conventions are
13 not followed, a court cannot enforce them.
14 The violation of the convention, in other
15 words, gives rise to political, not legal,
16 sanctions. Conventions are thus justiciable
17 in the sense that a court could interpret the
18 scope of a convention and declare whether a
19 convention has been breached by government
20 action. They are enforceable, however, in
21 the sense that a court cannot compel a
22 government to act in accordance with the
23 convention."
24 Now, there is no dispute that there is a
25 constitutional convention here. The Supreme Court has
26 said these Senate appointments are only going to get
27 made on the advice of the prime minister. So I'm not
28 asking the court, on this motion or on the application

1 on the merits, to declare that that convention exists.
2 We already know it does.
3 I'm also not asking the courts to enforce
4 that convention. If I were asking the court to enforce
5 the convention, and I speak to this beginning at
6 paragraph 20 of my written representations, that would
7 be a situation where, for example, the governor general
8 decides he's been advised to appoint one person in the
9 Senate. He says, "Forget it, I'm not listening to your
10 advice, I'm going to appoint who I want." Any sort of
11 case arising out of a dispute like that would
12 necessarily ask the courts to enforce a constitutional
13 convention, because the law says the governor general
14 appoints the Senators. It's only convention that says
15 that the prime minister's advice is what determines who
16 gets appointed.
17 I'm not taking any issue with what the
18 governor general does once they get the advice. All I'm
19 asking is that there be a declaration that the
20 appointments need to be made, and that it's frankly up
21 to the governor general and the prime minister to sort
22 out how that advice is going to be given.
23 But I did want to highlight, because I
24 think Dean Sossin does a nice job of this, there
25 shouldn't be any confusion that the potential lack of an
26 enforcement mechanism somehow makes a convention non-
27 justiciable. He says plainly that that's not the state
28 of the law.

1 JUSTICE: Mm-hmm.
2 MR. ALANI: Justiciability is not
3 synonymous with enforcement. You can have something not
4 be enforceable and still be justiciable.
5 Turning to this issue about whether
6 references are the only way that an issue like this can
7 be brought, and of course the references can't be
8 brought by private citizens, I've already referred the
9 court, and I won't do it again, to the *OECTA* case.
10 JUSTICE: Mm-hmm.
11 MR. ALANI: Again that was a private
12 citizen, no suggestion by the Supreme Court that, asking
13 us to rule on conventionalism how improper because it is
14 not a reference. But more generally it seems to me it
15 would be an absurd result if the Rule of Law could only
16 be applied to government action. If the government
17 itself agreed to submit the question in issue by way of
18 a reference to the courts. In this case I brought a
19 notice of application. I have served notice of the
20 notice of application obviously on the prime minister
21 and the governor general but also on the Attorneys
22 General of every province and territory in Canada in
23 case they want to seek leave to intervene or if they
24 want to bring their own reference. No reference has
25 been brought.
26 Of course, as the court knows, in the
27 case of Justice Nadon's eligibility has to sit on the
28 Supreme Court of Canada, it started as an application

1 for judicial review in the Federal Court but it
2 essentially all became deferred once the federal
3 government agreed to submit that question by reference
4 to the Supreme Court of Canada.
5 JUSTICE: Mm-hmm.
6 MR. ALANI: If the federal government
7 is willing to submit to the question that forms the
8 basis of my judicial review application in a reference,
9 I will pack up and go home. I will withdraw my notice
10 of application. My purpose is to have the section
11 interpreted by a court. I can't refer something on my
12 own to the Supreme Court of Canada, the governments of
13 the provinces and the federal government are not
14 willing, yet, to submit this by way of reference, so
15 that leaves me with what I see as a basis under section
16 18 or alternatively 17.
17 The suggestion has been made that a
18 declaration in the form sought would improperly fetter
19 the discretion of the prime minister.
20 JUSTICE: Yes.
21 MR. ALANI: It is certainly the case
22 that when courts issue declarations or really when they
23 purport to adjudicate the legality and appropriateness
24 of government action, some measure of deference needs to
25 be made to the executive's margin of manoeuver. I think
26 a good example of the courts' demonstration that is in
27 the *Khadr* case. And that appears -- I won't actually
28 take you first to the *Khadr* case itself because I think

1 Justice Rothstein in the presentation of the American
2 Bars Association does a really good job of summarizing
3 what the court did there and so I will take you to that.
4 So in my second volume of the book of
5 authorities discussions of the *Khadr* case beginning at
6 page -- it's 576 of my book of authorities, page 965 of
7 the administrative law review. I have highlighted a
8 section on page 965. He says:
9 "I now turn to two recent cases that touch on
10 the concept of justiciability in the context
11 of foreign affairs. These two cases again
12 illustrate the increased willingness of
13 Canadian courts to subject certain decisions
14 made by the Executive to judicial review. But
15 they also illustrate that there may be a
16 restrained approach to remedies when dealing
17 with the judicial review of complex policy
18 decisions."
19 Turing over to page 578 he introduced the
20 *Khadr* case, which of course was -- involved the
21 continued attention of the Canadian citizen at
22 Guantanamo Bay. I have highlighted on page 578 where
23 justice Rothstein writes:
24 "But the Court also recognized that Khadr's
25 situation involved the Crown's prerogative
26 power over foreign affairs. If the Court
27 ordered the Canadian government to ask the
28 U.S. government to repatriate Khadr, then it

1 would be stepping into the area of foreign
2 relations, an area clearly within the
3 competence of the Executive as opposed to the
4 courts. Nevertheless, the Court found that
5 this case was justiciable."
6 It goes on to say:
7 "What is interesting about the *Khadr* case is
8 that the Court recognized that it had a duty
9 to review the exercise of the prerogative
10 power for constitutionality, yet it had to
11 give weight to the constitutional
12 responsibility of the Executive to exercise
13 that power."
14 Going to the next paragraph he says:
15 "The Court concluded that the appropriate
16 remedy was to issue a declaration that Canada
17 had infringed Khadr's *Charter* rights and
18 'leave it to the government to decide how to
19 best respond to the judgment in light of
20 current information, its responsibility for
21 foreign affairs, and in conformity with the
22 *Charter*.'"
23 So no specific causative duty was imposed by the court
24 on the government. The government did not ask the U.S.
25 government to repatriate Khadr. Speaking to remedy, the
26 highlighted passage at the bottom of 579, Justice
27 Rothstein says:
28 "What if the government chose not to take any

1 remedial action? What if Khadr thought the
2 remedial relief the government provided was
3 inadequate and asked for judicial review of
4 that decision?"
5 which I will pause to say is not unlike the suggestion
6 Mr. Brongers presented to the court today: Well, what
7 if Alani does not like how long it takes the prime
8 minister to appoint once this declaration is sought?
9 Justice Rothstein says:
10 "What if the Court did order the government
11 to carry out a special remedy, like asking
12 the U.S. government to repatriate Khadr, and
13 the government just didn't do it? It brings
14 to mind President Jackson, who didn't like
15 another of Chief Justice Marshall's decisions
16 and is supposed to have said, 'Well, John
17 Marshall has made his decision, now let him
18 enforce it.' Fortunately for us, these are
19 all questions that we haven't yet had to
20 answer. We'll cross those bridges if we come
21 to them."
22 So does a declaration necessarily fetter
23 the discretion of the prime minister? Well, it fetters
24 it a bit to the extent that declaring that someone has
25 an obligation to do something fetters their discretion,
26 but as the Supreme Court of Canada demonstrated in the
27 *Khadr* case, and as Mr. Justice Rothstein explains in his
28 journal article, there is a way you can do that while

1 being respectful of the executive's expertise in certain
2 areas.
3 Now, that was an issue of forgiven
4 affairs which is something clearly that the courts
5 aren't very well equipped to deal with. This is a
6 question of legal interpretation, but I concede that in
7 deciding when to appoint Senators, and how long to wait
8 and what the timing of all that is, there may be
9 political considerations at play that ought to be given
10 some deference.
11 Off the top of my head, suppose
12 hypothetically that the government was actually in
13 negotiations with the provinces over an amendment to the
14 constitution that conforms to what the Supreme Court of
15 Canada said was required in the *Senate Reform Reference*
16 and they were on the heels of making some announcement
17 that there was going to be a change in the distribution
18 of regional representation. The public's just not aware
19 of it. I do not have the rule 317 material, so I have
20 no idea what is going on behind the scenes.
21 That might be a situation which the court
22 would say, “Okay, there has been some delay in filling
23 the vacancies but we are not going to say it is
24 unreasonable because there is a credible back story that
25 explains what is going on.”
26 All that to say that a declaratory order
27 from this court after the application on the merits need
28 not necessarily completely fetter the prime minister’s

1 discretion. And as in all administrative law cases,
2 there is going to be a mechanism for allowing the
3 executive to justify the reasonableness of their actions
4 or inaction.
5 JUSTICE: Now your friend suggested
6 that the current state of the law is that is a
7 declaration of this sort could lead to a contempt of
8 court proceeding if the declaration was ignored.
9 MR. ALANI: Well, again I would go
10 back to the O*ECTA* case. There the private citizens at
11 the Supreme Court of Canada were asking for the
12 recognition of the convention by way of declaratory
13 order --
14 JUSTICE: To fund the schools.
15 MR. ALANI: Right.
16 JUSTICE: Yes.
17 MR. ALANI: Now the Supreme Court did
18 not say -- well, first of all, just on the evidence did
19 not find that there was a basis for the convention that
20 was suggested. But let's say they did. There is no
21 suggestion in the judgment that all of this is
22 immaterial because we can't grant you a declaratory
23 order, because of we do that and the government does not
24 listen then we are going to have to deal with a contempt
25 action. It goes right back to what Justice Rothstein
26 was talking about. The court didn't know when it issued
27 a rather vague declaratory remedy saying Khadr's rights
28 had been violated, you are not following the *Charter*.

1 It left it to the government to decide, that the Supreme
2 Court did not know how the government was going to
3 respond, and it did not know what would happen it the
4 government refused to respond. Buy that does not
5 prevent the court — and it certainly did not in Khadr
6 — from issuing the declaratory in the first place. As
7 Justice Rothstein said, "That is a bridge we will cross
8 when we come to it." It's certainly not --
9 JUSTICE: You could say as well this
10 would be a bridge you would come to when this case is
11 argued on the merits.
12 MR. ALANI: Well, no, you would argue
13 it on the merits. If I succeed on the merits and I get
14 the declaration then you now have an order saying that
15 the vacancies must be filled within a reasonable time.
16 There would then presumably be perhaps some call to
17 account of -- you know, say three years goes by after
18 that and you bring another judicial review application,
19 that is when the bridge would be crossed.
20 JUSTICE: Okay.
21 MR. ALANI: The slippery slope
22 argument referring to the *Galati* case, which appears at
23 tab 8 of the respondent's motion record -- sorry, book
24 of authorities.
25 JUSTICE: Yes.
26 MR. ALANI: My comments on the *Galati*
27 case as it pertains to justiciability is really by way
28 of, to distinguish the case. I agree that this is a

1 case that in my respectable submission never had a
2 chance. But what the applicants were seeking to do was
3 to judicially review the governor general's granting or
4 royal assent to a Bill passed by the House of Commons
5 and the Senate. At section 2 of the *Federal Courts Act*
6 on deciding a federal board, commission, or other
7 tribunal, specifically excludes legislative acts. It's
8 clear that the House of Commons as a legislative body is
9 not a federal board, commission, or tribunal whose
10 decisions are subject to judicial review. So just as
11 the applicants would have never have been able to get in
12 the door of the Federal Court to judicially review the
13 introduction of the Bill that was being challenged, it
14 was really smoke and mirrors I suggest to try and
15 judicially review the culminating legislative act which
16 is the granting of royal assent.
17 And I think that Justice Rennie says that
18 fairly clearly in his decision. So to the suggestion
19 that there is some slippery slope – Hey if we issue
20 declarations concerning advice given to the governor
21 general then everything is on the table – well, that is
22 respectively not the case. There was already an
23 existing carve-out in the federal court's jurisdiction
24 regarding judicial review of a legislative acts. This
25 is not a legislative act. The appointment of a senator
26 is not a legislative act.
27 And finally regarding justiciability,
28 I'll just go to the Senate's reform reference at tab 21

1 of the respondent's second book of authorities.
2 I want to be careful here not to get into
3 a substantial argument on the merits of the application.
4 I think when the court is deciding whether or not this
5 is a justiciable issue, in other words, is there a legal
6 yardstick against which the prime minister's actions can
7 be assessed, there are certain passages in the Supreme
8 Court reference that really speak to how this is a legal
9 issue.
10 Beginning at page 736 of the judgment.
11 Sorry, beginning at page 735, paragraph 51. This is in
12 the context of submissions made to the Supreme Court on
13 consultative elections.
14 Paragraph 50 that in the courts we have
15 noted many times, it's made clear that there is a
16 constitutional convention that the governor general
17 follow the recommendations of the prime minister when
18 filling Senate vacancies.
19 With respect to consultative elections at
20 paragraph 51 the Attorney General of Canada, among
21 others made the argument that consultative elections
22 wouldn't be an amendment to the constitution because
23 you're not changing the text of the *Constitution Act of*
24 *1867* or the means of selecting senators. As the court
25 says, he points out that the formal mechanism for
26 appointing senators summoned by the governor general
27 acting on the advice of the prime minister would remain
28 untouched.

1 And there at paragraph 52, the court
2 says:
3 "In our view the argument that
4 introducing consultative elections does not
5 constitute an amendment to the constitution.
6 The privilege is form or substance. It
7 reduces the notion of constitutional
8 amendment to a matter of whether or not the
9 letter of the constitutional text is
10 modified.
11 This narrow approach is inconsistent
12 with broad and purposive manner in which the
13 constitution is understood and interpreted as
14 discussed above.
15 While these provisions regarding the
16 appointment of senators would remain
17 textually untouched, the senate's fundamental
18 nature and role as a complementary
19 legislative body of sober second thought
20 would be significantly altered."
21 Although I won't read it here, the court
22 beginning at paragraph 54 talks about how consultative
23 elections would alter the architecture of the
24 constitution.
25 And the court, a few paragraphs earlier,
26 recognizes there is a convention at play here. The
27 constitution expressly says formal powers of the
28 governor general, but by convention the prime minister

1 does things.
2 JUSTICE: Yeah.
3 MR. ALANI: But it rejected the
4 argument that substance -- that form prevailed over
5 substance that are essentially, as the respondents I
6 think are suggesting here, ignoring the conventional
7 aspects. The court took a holistic view, as it should,
8 it looked at the constitution as a whole, not just the
9 text but the architecture and indeed the conventions and
10 it looked at what the impact on that whole system is.
11 On page 741 at paragraph 65, the court
12 does more to recognize the conventional impact. It
13 says:
14 "The words 'the method of selecting senators'
15 include more than the formal appointment of
16 senators by the governor general. Section
17 42(b) refers to the method of selecting
18 persons for employment, not the means of
19 appointment."
20 And on page 742 near the top of the page:
21 "The Attorney General's position is that
22 legislation implementing consultative
23 elections would not, in its purpose and
24 effects, constitute an amendment in relation
25 to the method of selecting senators. He
26 confines the meaning of this expression to
27 the formal mechanism of appointment of
28 senators by the governor general."

1 And I submit that's what we'd be doing if the court held
2 that this matter was non-justiciable simply because
3 convention plays a role in some part of the appointment
4 process. We'd be interpreting a constitution without
5 actually looking at what's practice and reality, which
6 the Supreme Court of Canada was unwilling to do in the
7 *Senate Reform Reference*.
8 The final reference I have in that
9 decision is at paragraph 102 beginning at page 753.
10 This is in the context of which section of the amending
11 formula would apply to an amendment that sought to
12 abolish the Senate entirely.
13 Paragraph 102, the fourth line in:
14 "The mention of amendments in relation to the
15 powers of the Senate and the number of
16 senators for each province pre-supposes the
17 continuing existence of a Senate and makes no
18 room for an indirect abolition of the Senate.
19 Within the scope of section 42 it is possible
20 to make significant changes to the power of
21 the Senate and the number of senators. It is
22 outside the scope of section 42 to altogether
23 strip the senate of its powers and reduce the
24 number of senators to zero."
25 Again not wanting to delve into the
26 substantive arguments fully that deserve to be heard on
27 the merits, but clearly as the Supreme Court has
28 grappled with in the context of Senate reform, there are

1 clear legal issues that are there to be interpreted and
2 those legal issues include a consideration of what might
3 seem to be done indirectly rather than directly.
4 Subject to any questions on
5 justiciability, I'll move on to my submissions on
6 jurisdiction.
7 JUSTICE: Fine.
8 MR. ALANI: Regarding jurisdiction,
9 Justice Harrington I will follow more closely my written
10 representations. I think analytically it's a rather
11 technical issue and I don't want to -- my submissions
12 are as set out in the written representation but this
13 really is an aspect that I think bears some elaboration.
14 I'll take as a starting point -- well,
15 first of all the observation: If the Federal Court
16 doesn't have jurisdiction either under section 18 or
17 section 17 but assuming for the sake of argument that
18 the issues are justiciable, the net result is we go to a
19 provincial superior court to hear the same question.
20 And my submissions are really focused on whether it is
21 more appropriate, also whether it's permissible under
22 the legislation for the Federal Court to assume
23 jurisdiction over this issue rather than a provincial
24 superior court.
25 JUSTICE: Well, how would a provincial
26 court of jurisdiction -- it would be under section 17?
27 MR. ALANI: It's the only way that a
28 provincial superior court could have jurisdiction is if

1 it --
2 JUSTICE: Because we start off the
3 Crown can do no wrong, then the Crown can choose the
4 court in which she will be sued. It was only the
5 Exchequer Court until the early 1990s. So I don't see
6 -- if the Federal Court doesn't have jurisdiction and we
7 have a judicial exclusive jurisdiction in judicial
8 review, concurrent jurisdiction and actions against the
9 Crown at large, I don't understand why a provincial
10 court would have jurisdiction.
11 MR. ALANI: Right, and that's --
12 JUSTICE: No court would have
13 jurisdiction.
14 MR. ALANI: Well that's what I -- my
15 goal is to address that.
16 JUSTICE: All right.
17 MR. ALANI: So I, I will take as a
18 starting point -- and Mr. Brongers suggested that
19 whether the *Constitution Act of 1867* is a law of Canada
20 isn't relevant. I suggest that it still is relevant
21 only in the following way: Whether something falls
22 under Section 18 or 17, it is still the case that
23 constitutionally the Federal Court must be clothed with
24 jurisdiction under Section 101 because, of course, the
25 Federal Court is not a court of original inherent
26 jurisdiction, it only gets what it gets through
27 legislation. And so the constraining parameters of
28 section 101 are that, first of all, whatever the court

1 is being asked to adjudicate be based on the laws of
2 Canada.
3 So there's clearly a possible subset of
4 disputes that would fall outside the laws of Canada but
5 still be within the jurisdiction of the section 96
6 courts, and that's where the provincial superior courts
7 might have jurisdiction.
8 JUSTICE: All right.
9 MR. ALANI: I also take as a starting
10 point that if the Federal Court has jurisdiction under
11 Section 18 or Section 17, the difference between those
12 two sections is fundamentally about whether what's being
13 sought is relief against a Federal Board, Commission or
14 other tribunal.
15 Might be helpful now, at least for me, to
16 look at page 54 of my motion record, set out Section 18
17 and Section 18.1.
18 Section 18, as the court's well aware,
19 grants exclusive original jurisdiction to the Federal
20 Court to issue an injunction, writ of -- I'm not going
21 to try and pronounce those, or grant declaratory relief
22 against any federal board, commission or other tribunal
23 or in (b) to hear and determine any application or other
24 proceeding for relief and the nature of the relief
25 contemplated in paragraph (a) including any proceeding
26 brought against the Attorney General of Canada to obtain
27 relief against a federal board, commission, or other
28 tribunal.

1 And subsection 3 provides that the
2 remedies sought in one and two may only be obtained in
3 an application for judicial review under 18.1
4 I think the key term in 18 is whether the
5 relief is sought against a federal board, commission or
6 other tribunal. I say if the -- essentially the
7 respondents fall within the definition of a federal
8 board, commission, or other tribunal, then 18 applies
9 and the jurisdiction is exclusive. I don't think that's
10 controversial.
11 If it's a federal board, commission, or
12 other tribunal, you can't go to a provincial superior
13 court. Federal court is the only place you can do it.
14 But Section 17 on page 53 -- and I
15 haven't included all of Section 17 but there's nothing
16 in Section 17 that refers to a federal board,
17 commission, or other tribunal at all. And of course
18 Section 17 doesn't speak of exclusive jurisdiction. It
19 speaks of -- at 17(1) it speaks of:
20 "…concurrent original jurisdiction except as
21 otherwise provided in this Act or another act
22 of Parliament in which relief is claimed
23 against the Crown."
24 So the relevant distinction, in my
25 submission is, if you fall within federal board,
26 commission, or other tribunal, it's 18 no matter what
27 and you can't go anywhere else. If it's relief against
28 the Crown but not in a matter that fits the definition

1 of federal board, commission, or other tribunal, then
2 you have a choice. You can go to section 17 under the
3 Federal Court or you can go to a provincial superior
4 court under its section 96 power. And I can take the
5 court through *TeleZone* but I think the court in its
6 comment in *TeleZone* in speaking of the choice afforded
7 to litigants when they were not seeking administrative
8 law remedies against a federal board, commission, or
9 other tribunal was essentially a policy choice that was
10 made in favour of access to justice.
11 And so of course, whether it's 18 or 17,
12 it all turns of the definition of "federal board,
13 commission, or other tribunal" and this is where we get
14 to whether the power comes from an Act of Parliament or
15 a prerogative, which I will have to -- it will be aim to
16 persuade the court that there is a prerogative that's
17 invoked and so Section 18 does apply.
18 Just to read into the record:
19 "'Federal board, commission, or other
20 tribunal' means 'any body, person, or persons
21 having, exercising or purporting to exercise
22 jurisdiction or powers conferred by or under
23 an Act of Parliament, or by or under an order
24 made pursuant to a prerogative of the
25 Crown,'"
26 subject to some exceptions that don't apply here."
27 So if the body has jurisdiction under an
28 Act of Parliament or a prerogative, it meets the

1 definition of a federal board, commission, or other
2 tribunal, and my only choice is under section 18. Can't
3 go anywhere else.
4 If I can't fit it into the square hole of
5 an Act of Parliament or a prerogative that's invoked,
6 then I can't rely on section 18, and I say as long as
7 it's relief claimed against the Crown, I have the choice
8 to invoke section 17 in the Federal Court or take my
9 case elsewhere.
10 I agree with Mr. Brongers'
11 characterization of my position in that I'm not saying
12 that the jurisdiction of the prime minister or the
13 governor general here arises by an Act of Parliament and
14 so the only option left to me is to persuade the court
15 that there is a prerogative power invoked.
16 I'm next going to take the court through
17 some authorities in support of the proposition that all
18 federal power must be exercised and it must find its
19 source either in an Act of Parliament, which I say
20 doesn't apply here, or a prerogative. There's just no
21 other relevant option for official federal power to be
22 exercised.
23 And so if I can convince the court that
24 that is correct, then there's a prerogative power
25 involved here. The definition of "federal board,
26 commission or other tribunal" is satisfied and section
27 18 applies.
28 The first authority I'll take the court

1 to in support of this proposition is the *Black* case,
2 which is in the respondent's book of authorities at tab
3 3.
4 Turning to paragraph 39. Before I read
5 the relevant passage to kind of situate this in context
6 and I understand Mr. Brongers was counsel in this case
7 so I am sure I stand to be corrected if I've got this
8 wrong, but Mr. Black, as he then was, was challenging
9 the Prime Minister's statements to the Queen regarding
10 his eligibility for a foreign honour. And in moving to
11 strike Mr. Black's claim, one of the arguments made by
12 the Attorney General of Canada was that the Federal
13 Court has exclusive jurisdiction over this.
14 JUSTICE: Mm-hmm.
15 MR. ALANI: Because under section 18 you
16 are seeking relief against a federal board, commission
17 or other tribunal because there is a prerogative power
18 involved. In paragraph 39 the court of appeal says,
19 "One answer," -- sorry I need to back up a bit. Mr.
20 Black's argument appears to rest on the notion that
21 Prime Minister Chrétien's communication with the queen
22 was grounded not in the prerogative but was a personal
23 intervention motivated by a personal vendetta. He
24 argues that the exercise of a prerogative power is
25 confined to powers and privileges unique to the Crown.
26 Power and privileges enjoyed equally with private
27 persons are not part of the prerogative.
28 The court says:

1 "There are two answers to Mr. Black's
2 argument. One answer is that the Prime
3 Minister's authority is always derived from
4 either a federal statute or the prerogative.
5 It is never personal in nature."
6 And the court cites *Dicey*, *Schreiber* and then goes on to
7 say:
8 "Here, Prime Minister Chrétien did not act
9 under a statute, he therefore acted under the
10 authority of the Crown prerogative."
11 If I say here, there is no statute and
12 certainly no act of parliament that gives the prime
13 minister authority to advise the governor general on
14 appointing Senators, and therefore when he is acting,
15 when he is giving advice, by the Ontario Court of
16 Appeal's statements, he must necessarily be acting under
17 the authority of the Crown prerogative.
18 JUSTICE: But your friend disagrees
19 with you on this point. He says that this conventional,
20 constitutional convention is something that is neither a
21 Crown prerogative nor a law.
22 MR. ALANI: Well the Ontario Court of
23 Appeals was it has got to be one or the other. It has
24 got to be an Act, or it has got to be a prerogative. So
25 with respect to my --
26 JUSTICE: But you have to consider
27 that language in the context of the case.
28 MR. ALANI: Yes. And there are

1 other --
2 JUSTICE: I don't imagine there were
3 any constitutional conventions mentioned in the *Black*
4 case. I may be wrong because I am not completely
5 familiar with it.
6 MR. ALANI: No. Well I mean the court
7 did not say that there are three possible ways you can
8 get your authority: constitutional convention, Act of
9 Parliament, or prerogative. It said these are the
10 options: There has got to be an Act, or it has got to be
11 the prerogative. But the Ontario Court of Appeal is not
12 the only authority for that. Turning again to Justice
13 Rothstein's article. This is in my second book of
14 authorities at page 574.
15 JUSTICE: Mm-hmm.
16 MR. ALANI: I have highlighted the
17 section I am going to read. He says:
18 "First I should give you some background
19 about the authority of the Executive Branch
20 of government in Canada. There are two
21 sources of power that enable the Executive
22 Branch to exercise some form of discretion.
23 The first being power granted by statute, the
24 second, a residual discretion known as the
25 Crown prerogative."
26 Now Justice Rothstein is no stranger to
27 discord certainly, and although he is speaking in his
28 own capacity at this convention, he is certainly no

1 stranger to administrative law and judicial review, and
2 he certainly seems to be of the view in his comments
3 there that there is -- like the Ontario Court of Appeal
4 said, there is only two sources of power.
5 But the Federal Court itself has also
6 said statements to similar effect. I will turn to the
7 *Conacher* case which is in the respondents' volume book
8 -- volume 1 book of authorities at tab 6. And I am
9 going to refer to paragraph 26 of Justice Shore's
10 judgment. Paragraph 26 Justice Shore says:
11 "At first blush it appears that the prime
12 minister's decision to advise the governor
13 general is not reviewable because the power
14 to dissolve parliament is the governor
15 general's prerogative not the prime
16 minister's. However, the prime minister's
17 power can be seen as a prerogative because it
18 is discretionary. It is not based on the
19 statutory grant of power and has its roots in
20 the historical power of the monarch.
21 Although actual discretion therein lies with
22 the governor general, the case of *Black v.*
23 *Canada*…
24 as the Ontario Court of Appeal decision,
25 "…held that the prime minister also has a
26 capacity to exercise prerogative powers."
27 So you've got the Ontario Court of Appeal
28 and Black saying there are two sources of federal power:

1 statute and prerogative. We've got Justice Rothstein
2 saying there are two sources of federal power: statute
3 and prerogative. And we have got Justice Shore and the
4 Federal Court in *Conacher* saying that if it's not
5 statute then it's got to be prerogative if there is
6 discretion being involved.
7 Now it's true that the Crown prerogative
8 is something recognized by case law, and as Mr. Brongers
9 pointed out, I have no case law that I can draw the
10 court's attention to that says that there is a specific
11 prerogative power that has been recognized for the prime
12 minister to advise the governor general on Senate
13 appointments. But that does not mean that there can't
14 be one. Going back to the *Black* decision at tab 3 of
15 the respondents' book of authorities.
16 First I will refer to paragraph 26.
17 "The prerogative is a branch of the common
18 law because decisions of courts determine
19 both its existence and its extent. In short,
20 the prerogative consists of the powers and
21 privileges accorded by the common law to the
22 Crown."
23 Paragraph 29 on the next page:
24 "As is evident from my earlier discussion,
25 whether the prime minister exercised a
26 prerogative power, is a question of law. The
27 court has the responsibility to determine
28 whether a prerogative power exists, and if

1 so, its scope and whether it has been
2 superseded by statute."
3 I think it is fair to say that in the
4 history of the common law, nothing has even been set out
5 in case law until a judge actually set it out in case
6 law. So it's no answer to say that the prerogative
7 cannot be applicable here because there is no case law
8 yet. Well as Mr. Brongers pointed out, this is an
9 unprecedented case in that no one has ever sought the
10 court's intervention on Senate appointments before so it
11 is not surprising that there is no specific judgment
12 that identifies this particular prerogative power.
13 And again I have referred the court to
14 three authorities that suggest that there can only be
15 two sources of power that is official, and there can be
16 no suggestion that the prime minister in advising the
17 governor general is doing so in a private capacity. It
18 has always got to be an official function. It has
19 either got to e by statute or prerogative and it is not
20 by stature so it must be prerogative.
21 I do include in my written submissions,
22 there is some academic commentary that suggests that the
23 giving of advise does in fact involve a common law
24 prerogative power. And I will take the court to, it is
25 cited on page 25 of my written submissions. At
26 paragraph 81 I cite in an article from Professor Walters
27 and I will just take you to that.
28 JUSTICE: Just a second let me get

1 there.

2 MR. ALANI: Yes.

3 JUSTICE: Yes.

4 MR. ALANI: And I actually will just

5 go — because I did not include the entire passage in my

6 motion record — in my second volume book of authorities

7 at page 674. We will read the highlighted section.

8 Beginning at the bottom of page 674:

9 "The Privy Council established for Canada by

10 section 11 of the *Constitution Act, 1867* does

11 not exist in the air but rather exists

12 against an historical narrative that helps us

13 to understand its role within the modern

14 Canadian Constitution. The legal status of

15 the Privy Council derives originally from the

16 feudal origins of the English constitution.

17 The legal relationship between a feudal lord

18 and his tenants was based on the relationship

19 of tenure. Tenants who held land from a lord

20 owed various incidents, services and duties,

21 one of which was attending the lord's

22 manorial court to give counsel. The common

23 law came to see it as "incident to the manor"

24 that the lord held the right to hold an

25 assembly or court of his tenants for this

26 purpose."

27 And Professor Walters cites some decisions from 1606 to

28 that effect which I haven't referred to myself.

1 "The right of the medieval King as lord
2 paramount to gather his tenants in chief in a
3 *curia regis*, or royal court, may be seen as
4 this legal right writ large. As Dicey states
5 in his study of the Privy Council: 'The
6 interchange of advice between the King and
7 his nobles' was an inherent part of every
8 feudal monarchy, something demanded of nobles
9 as a show of submission and allegiance to
10 their sovereign lord. From this feudal *curia*
11 *regis* there emerged a Common Council, or
12 Parliament, and a smaller permanent body of
13 advisors, the Privy Council. We may say,
14 then, that historically it was the Crown's
15 prerogative or common law right to summon
16 advisors to gather in the Privy Council. It
17 follows that the act of attending upon the
18 Crown to give advice in the Privy Council was
19 not itself a power or a right, but is better
20 described in law as either a privilege
21 derived from the Crown's prerogative act of
22 summoning the advisor, or, more accurately,
23 as a form of common law *duty*."
24 So whether or not there is an existing
25 case and I have not pointed the court to any that says,
26 the prime minister has a prerogative obligation or
27 there's a prerogative power involved in advising the
28 governor general. Professor Walters sets out the

1 historical basis for the Privy Council and shows that
2 the monarch and the sovereign had a common law or
3 prerogative right to summon advisers. And so I say the
4 governor general, by analogy, has a common law or
5 prerogative right to summon the Prime Minister for the
6 purpose of getting advice on fillings that had
7 vacancies. It would appear the at the Prime Minister
8 has not performed that common law obligation, has not
9 given effect to the governor general's common law or
10 prerogative right because he has refuse to tenure that
11 advice.
12 And as I set out in my written
13 submissions, viewed in that way, there is a prerogative
14 power involved here. You can either look at it as the
15 governor general's prerogative, but either way when the
16 Prime Minister is tendering advice, he does so by or
17 under a prerogative. So he fits within the definition
18 of a federal board, commission, or other tribunal, and
19 that of course is consistent with the authorities I have
20 already referred to that say, "all federal power must be
21 found in either federal statue or prerogative." Those
22 were seen as the only ways you could get it. So that is
23 the historical explanation for the governor general's
24 summoning of advice.
25 There are also I think, practical
26 considerations. I think it is more consistent with what
27 we know about the scope of judicial review to see this
28 as something falling within section 18. Although I have

1 to say if the court doesn't agree that this is either
2 arising -- that this arises under some form of the
3 prerogative, then it couldn't fall under Section 18,
4 whether you think it should or not. But I will suggest
5 that what we know of judicial review certainly favours
6 subjecting the Prime Minister's inaction to judicial
7 review under Section 18.
8 One of the authorities I wanted to go to
9 is the *Air Canada* case in the respondent's book of
10 authorities. That has some comments on the broad scope
11 of judicial review. It's at tab 1 of the respondent's
12 book of authorities.
13 At paragraph 23, the court's saying:
14 "Although the Federal Court judge and the
15 parties focused on whether a decision or
16 order was present, I do not take them to be
17 saying that there is to be a decision or an
18 order before any sort of judicial review can
19 be brought. That would be incorrect."
20 And at paragraph 24, the court looks at
21 subsection 18.1(1) of the *Federal Courts Act*, points out
22 that judicial review may be brought by the Attorney
23 General of Canada or by anyone directly affected by "the
24 matter in respect of which relief is sought". A matter
25 that can be subject to judicial review includes not only
26 a decision or order, but any matter in respect of which
27 a remedy may be available under Section 18.
28 Subsection 18.1(3) sheds further light on

1 this, referring to relief for an act or thing; a
2 failure, refusal, or a delay to do an act or thing; a
3 decision, order, and a proceeding.
4 Finally the rules that govern
5 applications for judicial review apply to applications
6 for judicial review of administrative action, not just
7 applications for judicial review of decisions or orders.
8 At paragraph 25, the Court of Appeal
9 points out that the only relevant distinction between
10 whether a decision or order is involved is that that 30-
11 day statutory time limit kicks in, if it's a decision or
12 order. But if it's not a decision or order, it's just a
13 continuing course of conduct, then Section 18 applies,
14 without any specific time limit.
15 Mr. Brongers made the submission that the
16 prime Minister's power couldn't be an incident of the
17 Crown prerogative, because the Senate itself was created
18 by the *Constitution Act, 1867*. I'd say to that, well,
19 so was the House of Commons. And by that, I mean I
20 don't think anyone would seriously dispute that the
21 governor general has a prerogative to grant Royal assent
22 to legislation — whether it's justiciable or not is
23 clearly a separate issue — or that there is a
24 prerogative power to prorogue Parliament, to call an
25 election. But none of those prerogative powers would
26 exist but for the creation of Parliament in the
27 *Constitution Act, 1867*. So it's simply no answer to say
28 it can't be a prerogative because none of these

1 institutions existed until 1867 and the *Constitution*
2 *Act*. Well, the *Constitution Act, 1867* created those
3 institutions against the backdrop of generally
4 articulable prerogative common law rights of the Crown.
5 JUSTICE: Well, we have the *Preamble*
6 to the *Constitution* as well.
7 MR. ALANI: Exactly. The *Constitution*
8 could have spelled out, you know: "We really mean the
9 prime minister is going to be the one appointing
10 Senators," but as, Justice Harrington, you just pointed
11 out, the Preamble incorporates by reference a
12 constitution similar in principle to the United Kingdom.
13 The drafters of the constitution knew about all of these
14 conventions. I think it would be surprising if, you
15 know, the constitution -- the express provisions were
16 ever intended to be interpreted other than against the
17 backdrop of those conventions.
18 What would that look like, by the way?
19 Some people have asked me, "Why don't you just seek a
20 declaration that the governor general has got to appoint
21 these people or, you know, seek *mandamus* against the
22 governor general? Then you can do away with all this
23 convention argument." I couldn't possibly be asking the
24 court to enforce a convention, or involving these
25 allegedly non-justiciable conventions, if I just cut to
26 the chase and asked that the governor general be the
27 subject of the declaration. It would probably, in my
28 view, get rid of the convention argument but it would be

1 a cure that's worse than the disease.
2 I mean, I don't think it's right. I
3 don't think the proper answer is that the governor
4 general should be directed by the court to appoint these
5 senators, even though section 32 and section 24 refer to
6 the governor general, and not the prime minister. As
7 the court knows, the prime minister is not referenced at
8 all in the Constitution, except I think in respect of a
9 constitutional conference that was supposed to happen
10 after 1982. The Prime Minister doesn't exist, according
11 to the Constitution.
12 As I say in my written representations,
13 I've chosen not to focus on this artificial construct
14 that's -- that a limited view of just what's in the
15 *Constitution Act, 1867*. I do, as the Supreme Court of
16 Canada suggests, look at how things operate in practice.
17 I'm not asking for an order that the governor general be
18 directed to do this because I think the Constitution
19 needs to be read in light of the conventions, rather
20 than despite that conventions exist.
21 The respondents have also pointed to some
22 minutes of Council, which I admit I had a turn of heart
23 about myself. Mr. Brongers referred to a series of
24 minutes of Council between 1896 and 1935. I'll tell you
25 why I had a change of heart, but I still think they're
26 relevant in a secondary sense.
27 These appear at tabs 29, 30, and 31.
28 They're handwritten. I guess they didn't have computers

1 over at the Privy Council back when these Privy Council
2 minutes were prepared. But looking at the minutes of
3 Council at tab 29, at paragraph 4, which appears on the
4 second page of the minutes of Council --
5 JUSTICE: Yes.
6 MR. ALANI: It says "The following
7 recommendations are the special prerogative of the Prime
8 Minister." And if you read the fourth bulleted item
9 from the bottom, it includes Senators. Now, when I say
10 I had a change of heart, when I first stumbled upon
11 these minutes of Council, and I saw they're entitled
12 "Special prerogatives of the Prime Minister," I thought,
13 "Well, there's your answer." The minutes of Council say
14 that they're the prerogative of the Prime Minister, so
15 why are we having a debate about whether there was a
16 prerogative involved?
17 But I take the respondent's point that
18 the fact that the minutes of Council referred to these
19 as a special prerogative of the prime minister, isn't
20 necessarily -- it's odd that they would use what seems
21 to be a legal term of art, "prerogative", when they
22 didn't actually mean "prerogative" in the sense that's
23 relevant here. But I don't think that the fact that
24 they use that phrase necessarily means that that's a
25 prerogative of the Prime Minister in the sense relevant
26 to Section 2.
27 When I say the minutes of Council are
28 relevant in a secondary sense, I mean this. The minutes

1 of Council, whether they are capable of creating a
2 prerogative on their own or not, if nothing else they
3 reflect the advice of the Privy Council to the governor
4 general. And the advice given in those minutes of
5 Council to the governor general is, as regards Senate
6 appointments, the Privy Council is only going to be
7 advising the governor general on the recommendation of
8 the prime Minister. In other words, as far as the Privy
9 Council is concerned, no one but the prime minister is
10 entitled to make a relevant recommendation as to who is
11 going to be appointed to the Senate.
12 JUSTICE: Are you putting yourself
13 into a bit of a box here? What is your -- well, your
14 amended -- you still have the prime minister.
15 MR. ALANI: Yes.
16 JUSTICE: Or alternatively, the
17 Queen's Privy Council.
18 MR. ALANI: Right.
19 JUSTICE: All right.
20 MR. ALANI: And the reason for that
21 is --
22 JUSTICE: If you were eliminating the
23 prime minister, you might find yourself in some
24 difficulty.
25 MR. ALANI: I'm certainly not removing
26 him as a respondent. What my primary -- my first answer
27 is, this is an act of the prime minister.
28 Alternatively, it's a failure by the Queen's Privy of

1 Council and by that I mean according to the minutes of
2 Council, the Privy Council is only going to submit
3 advice to the governor general based on the
4 recommendation of the prime minister. And that's done
5 by an instrument of advice now, and I've set out at
6 paragraph 88 of my written record — I won't go to it
7 here — kind of the formal mechanism that advice is
8 given.
9 The prime minister, acting as a quorum of
10 one of the Privy Council, submits the advice to the
11 governor general on who to appoint. But it is still the
12 Privy Council that is providing that advice to the
13 governor general. It's just a subset of the Privy
14 Council. So that's why I've added the Privy Council as
15 an alternative respondent.
16 Going back to the minutes of Council, the
17 relevance within the context of Section 2 of the *Federal*
18 *Courts Act* is when the prime minister issues that
19 instrument of advice to the governor general, either he
20 is doing so as an incident of the prerogative power that
21 I've already described earlier, that he is acting -- he
22 has got jurisdiction under a prerogative power.
23 Alternatively, or we think perhaps in addition, the fact
24 that he issues the instrument of advice to the governor
25 general under -- he is doing so pursuant to the terms of
26 a previous order, being those earlier minutes of
27 Council. In other words, the Privy Council is
28 constrained in who can provide the recommendation. It's

1 only going to come from the prime minister. And the
2 minutes of Council themselves are orders issued under
3 the prerogative of the Crown.
4 JUSTICE: All right.
5 MR. ALANI: I think the last point I
6 wanted to make with respect to jurisdiction concerns a
7 submission that was made by the respondents that if it
8 can't be done under Section 18, it shouldn't be able to
9 be done under Section 17, because in some way that might
10 make Section 18 redundant.
11 As I've already mentioned, I think the
12 key distinction between 18 and 17 is whether it's a
13 federal board, commission, or other tribunal. If you do
14 not accept my submission that there is a prerogative
15 power invoked here, then Section 18 doesn't apply. But
16 I say Section 17 still may, because it is relief sought
17 against the Crown other than a federal board,
18 commission, or other tribunal. It's not making Section
19 18 redundant, it's saying Section 18 doesn't apply
20 because there is no federal board, commission, or other
21 tribunal, because there is no prerogative power
22 involved.
23 So if you accept my argument that there
24 is a prerogative power involved, I have no choice, I've
25 got to bring under Section 18. If you don't, I can
26 bring it under Section 17.
27 JUSTICE: All right.
28 MR. ALANI: With respect to the test

1 for a motion to strike, I don't really want to get into
2 too much argument about what the proper test is. But I
3 do have a concern about the procedure that the court
4 follows on a motion to strike.
5 As I point out at the outset of my
6 written submissions, it's clear from the case law,
7 including *David Bull*, and I don't think there's any
8 dispute, that the default that's supposed to be taken in
9 judicial review applications if the respondent has
10 objections, is to bring those objections at the hearing
11 of the application on the merits.
12 And the reason for that is of course
13 applications are supposed to be dealt with summarily
14 without delay. *TeleZone* talks about, you know,
15 litigants wanting to strike quickly.
16 JUSTICE: Yes.
17 MR. ALANI: And against improper
18 executive action. That's completely different from the
19 context in an action.
20 The respondents cite -- I believe it was
21 the *Hryniak* decision, talking about proportionality.
22 And of course that's talking about -- you know, the
23 dichotomy is between -- do you have a full trial of an
24 action with all the procedural niceties of discovery and
25 affidavits and document production --
26 JUSTICE: I wouldn't get too worked up
27 on that. Section 300 and following of our *Rules* talk
28 about this is supposed to be a summary proceeding.

1 MR. ALANI: Right. Yes. So, all
2 that --
3 JUSTICE: There already is supposed to
4 proportionality built in.
5 MR. ALANI: Yes.
6 JUSTICE: Although when you have a
7 three-week application on a patented medicine notice of
8 compliance matter, you have to doubt that.
9 MR. ALANI: Right. I think it
10 certainly makes sense in the NOC proceedings that there
11 be some alternative to the whole intellectual property
12 analysis of whether you're offside the patent medicine
13 regs. But here, and in most judicial review
14 applications, you know, objections as to jurisdiction or
15 justiciability could be brought on the hearing of the
16 merits. So that --
17 JUSTICE: I'm not going to put it
18 over.
19 MR. ALANI: No.
20 JUSTICE: This has gone a little too
21 far for me to say, "Well, I'm not going to make any
22 decision whatsoever, I'm going to leave it to the judge
23 who hears the case on the merits."
24 MR. ALANI: That would be the worst
25 possible outcome for me, and I certainly encourage the
26 court not to do that.
27 JUSTICE: It would be the worst
28 possible outcome, I would think, for everybody.

1 MR. ALANI: Right. But the fact
2 that --
3 JUSTICE: No, I'm either going to -- I
4 have to say either in my opinion this application is
5 bereft of any chance of success, and I'm going to strike
6 it now, get everyone out of their misery, or I'm going
7 to say, no, it isn't plain and obvious that there is no
8 chance of success, and the matter continues.
9 MR. ALANI: Right.
10 JUSTICE: Now, in terms of the
11 amendment, you want the amendment in any event.
12 MR. ALANI: The amendments that are
13 reflected in Schedule A --
14 JUSTICE: Yes.
15 MR. ALANI: -- of my motion record, I
16 want in any event.
17 JUSTICE: Yes.
18 MR. ALANI: When I talked about --
19 JUSTICE: And there's been no answer
20 to your original application. If we look at, I guess,
21 Rules 75 and 76 and so on, you can make an amendment
22 before there is a pleading on the other side, although
23 here there has been a motion to strike.
24 MR. ALANI: Right. Well, the -- I'd
25 have to look at the Rule, but either the -- so that -- I
26 will look at the Rule.
27 JUSTICE: Well, applications, *mutatis*
28 *mutandis*, apply the other rules of the court. So you're

1 not talking here about a motion to amend because
2 otherwise I might strike. You're talking about, you
3 want to amend it in any event.
4 MR. ALANI: Well, there is two sets of
5 amendments. The first are the ones I want to make in
6 any event.
7 JUSTICE: Yes. I know. And then you
8 have some others.
9 MR. ALANI: And with respect to the
10 ones that I want to make in any event, as I mentioned
11 earlier, I put those proposed amendments to the
12 respondents in January. I think it was January, but
13 certainly before February. And what I did is, I asked
14 at the case management conference for directions as to
15 the procedure I should follow for bringing about those
16 amendments that I wanted to make in any event. And as
17 the court's heard, the case management judge's direction
18 was --
19 JUSTICE: Yes.
20 MR. ALANI: -- do that in your motion
21 record. Rule 75 talks about allowing on motions any
22 time, allowing a party to amend a document, and of
23 course as the court knows, on motion can include a court
24 acting on its own motion, even if there is, you know,
25 strictly speaking no motion to amend.
26 MR. BRONGERS: If I may, Justice
27 Harrington, just to be of assistance --
28 JUSTICE: Rule 200?

1 MR. BRONGERS: Yes, exactly. I just
2 found Rule 200. And, but of course that applies only to
3 actions. That's in the section on actions. It's not
4 applicable in our submission to applications or appeals.
5 JUSTICE: All right. Anyway, the
6 court has a power to permit amendments. And if worst
7 came to worst, you'd just take a fresh action, a fresh
8 application. So, I don't get too hung up if I can
9 possibly avoid it, like with questions of procedure.
10 MR. ALANI: Okay. Turning to the
11 amendments that aren't exclusively ones that I want to
12 make in any event, this discussion of removing
13 references to the prime minister. Here is what I mean
14 by that. I spoke earlier about how I don't want to come
15 to court asking for an order against the governor
16 general. I think that would be artificial and not the
17 proper way to go about doing this.
18 But, as I say at -- I was pretty clear
19 about this at paragraph 100 of my motion record, on page
20 30, if the court determines that the application is non-
21 justiciable by reason only that it requests relief that
22 reflects the *de facto* exercise of power by the prime
23 minister, which in turn depends on recognition of an
24 unenforceable constitutional convention, I ask leave to
25 make amendments by removing reference to the prime
26 minister's role in the appointment process.
27 So if the only problem the court has is
28 that I am somehow invoking convention in an improper

1 way, I'll stop relying on the convention. I'm not going
2 to go so far unless the court makes me, to --
3 JUSTICE: I can't possibly see that.
4 Everybody agrees that the convention is that the
5 governor general only appoints on the advice of the
6 prime minister. So I don't see how I can possibly, if
7 this matter goes ahead, not have the prime minister
8 named as a respondent.
9 MR. ALANI: I agree. It's an
10 alternative argument --
11 JUSTICE: Yes.
12 MR. ALANI: -- that if --
13 JUSTICE: Well, I don't see you going
14 anywhere with that one. You're thinking too far ahead
15 of yourself here, I think.
16 MR. ALANI: Well, I'm trying to reduce
17 the number of motions that might be necessary, following
18 disposition of this motion.
19 And then of course if the court concludes
20 that there is no jurisdiction under Section 18, Rules --
21 I cite these in paragraph 101 -- Rule 57 says:
22 "An originating document shall not be set
23 aside only on the ground that a different
24 originating document should have been used."
25 So if I was supposed to bring this by a
26 statement of claim under Section 17 as opposed to an
27 application for judicial review under Section 18,
28 declaratory relief being available in either case, then

1 I'm saying I should have an opportunity to replace the
2 notice of application with a statement of claim. Again
3 in the alternative, I believe, this should be brought
4 under Section 18.
5 JUSTICE: All right.
6 MR. ALANI: And that's confirmed in
7 the recent *Paradis* decision as well. They confirmed
8 that the court there talks about the applicant realized
9 after the first level proceeding that they should have
10 started by a statement of claim, and they asked the
11 Federal Court of Appeal, "Well, can I convert this to a
12 statement of claim?" And the Court of Appeal, I think
13 rightly, said that's a notion that -- it's that's
14 something the Federal Court should be ordering.
15 JUSTICE: Yes.
16 MR. ALANI: As opposed to on appeal.
17 I also want to just -- I said I'd come
18 back to this so I will. In the amended notice of
19 application, on page 42, I've proposed striking out
20 paragraph 11. It was in the original, and said, "By
21 constitutional convention appointments to the Senate are
22 made on the advice of the prime minister." I'm not
23 resiling from the position that the constitutional
24 convention applies. I've merely elaborated on in the
25 preceding paragraph 10, which is proposed to make even
26 more clear that it's not just me alleging this
27 constitutional convention. Paragraph 10 is proposed to
28 say,

1 "In the *Senate Reform Reference*, the Supreme
2 Court of Canada confirmed in practice
3 constitutional convention requires the
4 governor general to follow the recommendation
5 of the prime minister of Canada in filling
6 Senate vacancies."
7 I just wanted to respond to any concern that I was
8 backing off of the position on the applicability of the
9 convention.
10 Of course, the *Paradis* decision also
11 talks about the appropriateness of considering a
12 proposed amendment on a motion to strike, so that the
13 court has an idea of what amendments might be made. I
14 haven't provided a draft statement of claim in case you
15 only accept my second alternative argument that's got to
16 be made under Section 17. Frankly, that was because I
17 didn't want to be put to the hassle of taking another
18 run at drafting a document that would never see the
19 light of day, in case you accept my Section 18 argument.
20 JUSTICE: Now, we don't have a time
21 bar issue here that you're worried about, or you --
22 MR. ALANI: Well, I think there is
23 always, you know, perhaps the doctrine of *laches*, and
24 that sort of thing.
25 JUSTICE: You were pretty quick. You
26 were three or four days after this declaration by the
27 prime minister, in filing.
28 MR. ALANI: Yes, and in the relief

1 that I -- the proposed order on this motion, I think I
2 -- on page 32, I suggested that any leave to amend,
3 given myself ten days to do that. That, of course, is
4 largely out of my -- I think, like the respondents, I'd
5 like this matter to move forward as quickly as possible.
6 When I originally reckoned, and this goes to the
7 appropriateness of a motion to strike, there is a
8 practice direction that lets counsel know on judicial
9 review applications, you don't necessarily have to wait
10 until application records are perfected before you ask
11 and before you file the requisition for a hearing. You
12 can get consent on a timetable and then knowing when
13 everything is going to --
14 JUSTICE: And this is one of the
15 benefits of case management.
16 MR. ALANI: Right.
17 JUSTICE: That would be something to
18 discuss with Prothonotary Lafrenière, I guess, who is
19 case-managing this. Is it?
20 MR. ALANI: Right. My point was
21 simply that I looked at what the ordinary time limits
22 that would have applied to this application, the
23 responding application record would have been perfected
24 next week, and I think on April 27th. And so in the
25 ordinary course, but for this motion to strike, an
26 application of the merits would have been heard
27 following a hearing some time after April 27th, if the
28 ordinary time limits applied.

1 I think the only relevance of that here
2 is, frankly, an issue for costs. The courts referred to
3 the test being plain and obvious. One of the things I
4 set out in my motion record is, like, first of all
5 neither the motion -- the Rule that allows for motions
6 to strike, that Rule doesn't strictly apply to
7 applications. It's only under the court's inherent
8 jurisdiction that this motion could even be considered,
9 and that's fair enough. *David Bull* says that.
10 But what I suggest at paragraph -- I
11 suggest it at paragraph 12 and 13 of my motion record,
12 you know, the same objections to justiciability and
13 jurisdiction could have been brought as a motion under
14 Rule 20 for a preliminary determination of a question of
15 law -- questions of law being is this justiciable, and
16 is this --
17 JUSTICE: I don't think you'll get
18 far there. Like, 108(a) is saying the respondent's
19 motion is dismissed with prejudice to raising the same
20 issues.
21 MR. ALANI: That's if you agree to
22 grant that order, yes. If it --
23 JUSTICE: I can't possibly do that.
24 There is a case of *Toney*, for example. *Toney* in
25 Alberta, in this court. It was a boating accident where
26 it was alleged that -- well, a young girl died.
27 MR. ALANI: Mm-hmm.
28 JUSTICE: And it was alleged that the

1 government of Alberta had a rescue boat and they
2 operated it negligently, and that's why she died. There
3 was an action in the Federal Court. There was a motion
4 to dismiss on the grounds that this court lacked
5 jurisdiction, and I said it's plain and obvious that
6 this is a matter of navigation and shipping. Dismissed
7 the motion. Went to the Court of Appeal. Dismissed the
8 motion. Then they came for -- they came under a
9 preliminary determination of a point of law, shifted
10 things a little bit to argue that Her Majesty in Right
11 of Alberta had never consented to be sued in the Federal
12 Court. Lost in the first instance, but succeeded in
13 appeal.
14 So if I dismiss this motion --
15 MR. ALANI: Mm-hmm.
16 JUSTICE: -- the respondent is fully
17 entitled, on a hearing of the merits, to argue every
18 single point they've argued before me today.
19 MR. ALANI: Right.
20 JUSTICE: Because I'm not deciding
21 who's right or who's wrong, I'm just deciding, have you
22 got a case?
23 MR. ALANI: Right. And I accept that
24 that may be your only option, and to that, I just have
25 two submissions to make.
26 JUSTICE: All right.
27 MR. ALANI: The first is, and it came
28 up in the context of the case management conference,

1 where again one of my requests was, like they did in the
2 *Galati* case, the case management judge made a direction
3 that -- because there was a motion to strike in that
4 case for jurisdiction and justiciability. And the case
5 management judge, who, I believe, was Prothonotary
6 Milczynski ordered the motion to strike is going to be
7 heard at the beginning of the application on the merits.
8 JUSTICE: Could have done that. I
9 have done that.
10 MR. ALANI: Right. So what I asked at
11 the case management conference is, can we do that? So
12 that we don't come here, spend four hours arguing these
13 two things on the plain and obvious test, and then
14 potentially re-arguing those same four hours at the
15 allocation on the merits, in case the motion is
16 dismissed.
17 The Prothonotary's response was, "Well,
18 the objections are going to be *res judicata*." I thought
19 that was odd, but I didn't take issue with it during the
20 case management conference. I followed up by letter to
21 respondent's counsel following the case management
22 conference and, you know, do you agree that these would
23 be *res judicata* in the event the motion is dismissed?
24 And the response back was, "We're not going to speculate
25 until we see the reasons."
26 JUSTICE: Do we have the reasons?
27 MR. ALANI: I'm sorry, the reasons
28 from you.

1 JUSTICE: Oh, from me.
2 MR. ALANI: From you. And there were
3 no --
4 MR. BRONGERS: We certainly weren't
5 willing to stipulate in advance of a court ruling what
6 our position would be.
7 JUSTICE: Yes. No, no. I don't know
8 what the context of what Prothonotary Lafrenière was
9 saying, but my experience is clear. You can argue the
10 darn thing over again. It might be unfortunate that
11 this is the state of our law, but that *Toney* case,
12 frankly, irritates me.
13 MR. ALANI: And I don't take issue
14 with that, that may well be a decision of law. It
15 certainly -- I suspected it was, and I was very
16 concerned about the -- I mean, like I said, the
17 application records would have been perfected but for
18 this motion to strike.
19 JUSTICE: True.
20 MR. ALANI: And so I would have had a
21 hearing, you know, perhaps over the summer. There is an
22 election in October. If the respondents are right, and
23 the only remedy here is political, the courts can't hear
24 this -- well, now we're potentially not going to know
25 that until after the election.
26 JUSTICE: However I decide on this
27 point, I'm certainly not going to say that the motion on
28 behalf of the respondents is frivolous or vexatious.

1 Clearly not. There is a lot of meat in here.
2 MR. ALANI: Right. And that may be in
3 answer to my second submission. But I'll just make it,
4 because I --
5 JUSTICE: All right.
6 MR. ALANI: -- planned to. It's -- I
7 would make the submission, as I do at paragraph 106 of
8 my motion record, that with respect to costs --
9 JUSTICE: Yes?
10 MR. ALANI: Again, looking at what
11 *David Bull* tells us, that these are supposed to be
12 exceptional cases, there is, you know, presumably
13 supposed to be some judgment brought to bear on whether
14 it is in fact plain and obvious that this is one of
15 those cases that should be thrown out at the outset. I
16 think the court sees all the time -- I understand there
17 was a case, Justice Harrington, where you yourself
18 refused to accept for filing at the registry an
19 application some years ago by someone who was seeking to
20 sue judges.
21 JUSTICE: I don't think that was me.
22 In fact I did accept them and then threw them out on the
23 merits.
24 MR. ALANI: Right.
25 JUSTICE: Are you talking about a
26 case, Mr. Mazero? Mr. Mazero was serving everybody,
27 suing everybody in sight. And I looked at this, and I
28 said, "Well, we don't have jurisdiction." And tell him

1 that if he wants to pursue -- give him back his money
2 and tell him that if he wants to pursue this, he has to
3 come up with some reasons why we have jurisdiction.
4 Well, he kept pursuing it, right? So I threw him out.
5 And then he sought a judicial review of
6 my decision, which would have been an appeal, and Mr.
7 Justice von Finckenstein, I think it was, threw him out.
8 Then he goes to the Court of Appeal, and three -- there
9 is two Prothonotaries threw him out. Three judges of
10 the Court of Appeal. Then he complains about all of us
11 to the Canadian Judicial Council. And then finally his
12 matter was dismissed because he didn't pursue it. It
13 was dismissed for want of prosecution.
14 But I did accept his --
15 MR. ALANI: Right. I think --
16 JUSTICE: Maybe in retrospect I
17 shouldn't have, but I did.
18 MR. ALANI: All that to say, in my
19 submission, there is clearly some subset of cases that
20 aren't actually plainly and obviously, you know, to use
21 the old standard of patently unreasonable. It's
22 apparent on their face that they're not going to go
23 anywhere. And so you should bring those motions to
24 strike in those cases.
25 As I submit in writing at paragraph 106,
26 if the motion is dismissed because you can't determine
27 the issues of justiciability and jurisdiction, and you'd
28 said you can't. You can't determine them conclusively,

1 so they will need to be reargued at the hearing. I
2 think it's open to the court to consider whether this is
3 a motion that, following the language of *David Bull* was
4 brought in respect of my application that was clearly
5 improper, rather than one of those raising simply a
6 debatable issue. I submit the issues of justiciability
7 and jurisdiction are at best debatable issues. I mean,
8 they are debatable issues.
9 JUSTICE: All right. So what is your
10 conclusion, then, on costs?
11 MR. ALANI: My conclusion is --
12 JUSTICE: Here are the possibilities.
13 One, their motion is granted.
14 MR. ALANI: Yeah. Right.
15 JUSTICE: What happens to you? They
16 ask for costs against you of a thousand dollars.
17 MR. ALANI: Right. And so at the
18 beginning of paragraph 102, because I think lawyers are
19 often loath to stipulate in advance of knowing what the
20 decision is going to be what their position of costs is
21 going to be. I tried to avoid that. So I lay out all
22 the possibilities, as I saw them.
23 At 102, I say if you grant the motion on
24 non-justiciability, that's a ballot-box issue.
25 Everyone's got -- you essentially turn voters into a
26 jury on the constitutional issue. The claim is not
27 justiciable, it's something the public benefits from
28 knowing. So they shouldn't wait for a decision from the

1 courts like Mr. Van Loan suggested. They should make a
2 constitutional interpretation --
3 JUSTICE: We're guessing. Let's get
4 to the nitty-gritty on this.
5 MR. ALANI: Yeah. So I --
6 JUSTICE: If you lose, what happens?
7 MR. ALANI: If I lose --
8 JUSTICE: You don't want to pay costs.
9 MR. ALANI: Right. I say at 104, I
10 submit I am a genuine public interest litigant.
11 JUSTICE: Yes.
12 MR. ALANI: According to the *Mcewing*
13 decision, which I won't go through. So, if you accept
14 that, that I have nothing personally to gain from
15 seeking this, that would --
16 JUSTICE: Yes?
17 MR. ALANI: The respondents have a
18 superior capacity to bear the costs. The only rationale
19 for ordering costs against me, whether it's a thousand
20 dollars or some other amount, is to deter people like me
21 from bringing these applications in the first place.
22 And deterrence would be the only justification and can I
23 suggest that that's not a justification for ordering
24 costs in this case.
25 JUSTICE: So it would be a granting of
26 a motion without costs.
27 MR. ALANI: Right.
28 JUSTICE: If the motion is

1 dismissed --
2 MR. ALANI: If the motion is
3 dismissed, 105 is not going to apply, because in 105 I
4 said if you are able to do it conclusively, then I
5 conceded that we were going to have to argue these two
6 things anyways. I was willing to take the same amount,
7 $1,000, and I'd only get those in the cause.
8 JUSTICE: Mm-hmm.
9 MR. ALANI: Because I --
10 JUSTICE: Another alternative is that
11 I say costs in the cause.
12 MR. ALANI: Well, and that's my
13 submission on 106. If the motion is dismissed, and
14 we've got to reargue these things on the application of
15 the merits, then it's open to the court under Rule 401.
16 JUSTICE: Well, I could order costs.
17 I mean, we have done that. We order costs against a
18 successful party. Or wait a minute, in this case --
19 MR. ALANI: Sorry. I'd say if the
20 motion is dismissed --
21 JUSTICE: Then the unsuccessful party
22 would pay your costs --
23 MR. ALANI: If the unsuccessful party
24 -- but it should be -- it's open to the court to say the
25 motion shouldn't have been brought because it's not
26 super plain and obvious.
27 JUSTICE: And therefore there should
28 be some kind of enhanced costs?

1 MR. ALANI: No, not enhanced. Just
2 payable forthwith, and in any event of the cause.
3 JUSTICE: Forthwith and in any event.
4 MR. ALANI: And in that case, I just
5 -- I think quickly looking at the *Paradis* case --
6 JUSTICE: Yes. Well, I'm pretty up on
7 Rules 400 and following of our rules about costs.
8 MR. ALANI: Yeah. Well, then I don't
9 need to draw your attention -- if the court agrees that
10 the proper way to contest these would have been a
11 judicial review, then they should be costs of the motion
12 fixed and payable forthwith. And in that case, I don't
13 limit myself to the thousand dollars that I would have.
14 JUSTICE: I understand.
15 MR. ALANI: Thank you.
16 JUSTICE: All right. Well, thank you,
17 Mr. Alani.
18 Now, where am I? Mr. Brongers?
19 **REPLY BY MR. BRONGERS:**
20 Thank you, Justice Harrington.
21 I only have two points in reply. And the
22 first is just to correct, I think, a slight misquote of
23 the position that I advanced, with respect to the
24 unprecedented nature of this case. Mr. Alani, I think,
25 understood me to say that no one has ever asked the
26 court to issue relief in respect of Senate appointments
27 before him. That's not what I said. I said that no one
28 has successfully obtained an order from a court issuing

1 relief in respect of Senate appointments. In fact,
2 there is the *Brown v. Alberta* case --
3 JUSTICE: Yes.
4 MR. BRONGERS: -- that I spent some
5 time on, which is virtually identical to this case, in
6 terms of the motivations and the relief sought by Mr.
7 Brown. He, of course, clearly had standing. He was an
8 individual who had won that Senate election in Alberta,
9 and the government was refusing to appoint him as a
10 Senator. So he went to the Alberta courts, asking for
11 declaratory relief, knowing it wouldn't be technically
12 enforceable, but hoping that it would create some
13 political pressure.
14 The government responded with a motion to
15 strike, and it was allowed on grounds of justiciability.
16 The Court of Appeal affirmed that decision.
17 JUSTICE: Mm-hmm.
18 MR. BRONGERS: So there is a precedent
19 for what has been done here.
20 JUSTICE: Yes. There is no
21 requirement that the governor general on the advice of
22 the prime minister is somehow bound by recommendations a
23 province gives to the prime minister.
24 MR. BRONGERS: There is no
25 constitutional convention to that effect, no.
26 JUSTICE: No.
27 MR. BRONGERS: That's right. So, I
28 just wanted to correct that. There is a precedent, and

1 we would submit, although obviously the Alberta Court of
2 Appeal is not binding on the Federal Court, we would
3 submit that this is a very persuasive decision that
4 ought to be followed.
5 With respect to costs, my only
6 submissions are with respect to what Mr. Alani referred
7 to before the Prothonotary as a request for adverse
8 costs immunity. Essentially, as I understand it, Mr.
9 Alani is asking that in the event the motion to strike
10 is allowed, that costs should not follow the event, as
11 they ordinarily do, because he characterizes himself as
12 a “genuine public interest litigant” who has done the
13 public a service by bringing this proceeding, because
14 the judgment it will create, and I’m quoting from his
15 factum, "will provide significant clarity for the public
16 at large".
17 But Mr. Alani has led no evidence to
18 support this bald allegation that he’s a public interest
19 litigant. I don’t think we can take judicial notice
20 that there is great public interest in obtaining a court
21 judgment that would somehow pronounce on the
22 appropriateness of the fact that there are now 16, 17,
23 18 vacancies in the Senate. So in order --
24 JUSTICE: Mr. Van Loan’s statement in
25 the Commons that he referred to, about if you want to
26 seek mandamus, go for it.
27 MR. BRONGERS: Well, Mr. Van Loan may
28 have said that. Obviously that is not the position of

1 the prime minister and the governor general with respect
2 to this motion today. But in any event, the point is
3 that generally when someone is seeking an advance costs
4 order or an immunity from costs order, there has to be
5 some evidence that is presented that would justify that
6 exceptional departure --
7 JUSTICE: Yes.
8 MR. BRONGERS: -- from the ordinary
9 Rule that costs follow the event. Something to show
10 that Mr. Alani is perhaps indigent, or that he is indeed
11 a true public interest litigant, and we have nothing
12 before the court there. And I don't think the court can
13 take judicial notice that this is so obviously a public
14 interest issue that Canadians would benefit from having
15 a judicial pronouncement on.
16 And what Mr. Alani of course has done by
17 filing this application is, he has required that public
18 resources be devoted to addressing his lawsuit, and
19 these are resources that could have been used elsewhere.
20 And that, of course, occurs any time an individual
21 chooses to commence a lawsuit against the government,
22 and it's well-established that if those lawsuits turn
23 out to be unmeritorious, the unsuccessful plaintiff then
24 has to pay a portion of the government's costs. So it's
25 not just about deterrence. It is about compensation.
26 And the mere fact that the government of course has
27 greater resources than the litigant has never been a
28 reason for any court to say the government is not

1 entitled to costs in the ordinary event.
2 And again, with respect to both
3 compensation and deterrence, these are still valid
4 objectives, and are important principles that have to be
5 kept in mind when making a cost order. And indeed, we
6 are asking for what we think is a reasonable amount, a
7 $1,000 cost figure, to demonstrate not just to Mr. Alani
8 but in terms of the precedential value of this judgment,
9 that it is not a cost-free exercise just because
10 somebody is interested in a constitutional law issue and
11 seeks to get an opinion from the court on it. If that
12 matter is not justiciable, then there is a cost to
13 bringing that application. And Mr. Alani should be
14 aware that the next time an issue comes along that he
15 finds interesting, if he chooses to sue over this, and
16 is unsuccessful, there will be a cost consequence to it.
17 Those are my submissions. Thank you.
18 JUSTICE: Well, thank you very much.
19 This has been a very interesting day. And I am taking
20 this decision under reserve.
21 MR. BRONGERS: Thank you, Justice
22 Harrington.
23 (PROCEEDINGS ADJOURNED AT 3:08 P.M.)
24
25
26
27
28

I HEREBY CERTIFY THAT THE FORGOING is a true and accurate transcript of the recording supplied to me to the best of my skill and ability.

D.A. Bemister, Court Reporter

May 13, 2015

News / Canada

Stephen Harper in no rush to fill Senate vacancies

Prime Minister Stephen Harper and new Senate Speaker Pierre Claude Nolin have different views on the role of the Upper Chamber.

ADRIAN WYLD / THE CANADIAN PRESS FILE PHOTO

Senate Speaker Pierre Claude Nolin says multiple vacancies can affect the funtioning of the Senate. ""The idea is to have the fullest contingent possible so that the role of regional representation can be carried out by my colleagues as best as possible and the best way to achieve this is to have the complete contingent."

By: Joanna Smith Ottawa Bureau reporter, Published on Thu Dec 04 2014

OTTAWA—Prime Minister Stephen Harper says he is in no rush to fill the empty seats in the Senate.

“I don’t think I’m getting a lot of calls from Canadians to name more senators right about now,” Harper told reporters in Markham, Ont. Thursday.

“We will be looking at this issue, but for our government the real goal is to ensure the passage of our legislation by the Senate and thus far, the Senate has been perfectly capable of fulfilling that duty,” Harper said.

That assessment stands in contrast to the one new Senate Speaker Pierre Claude Nolin told reporters earlier Thursday, when he said the number of vacancies in the Senate — 16 out of 105 seats — is affecting the proper functioning of the institution and the balance between regions.

“Does it affect the functioning of the institution? I think yes. The idea is to have the fullest contingent possible so that the role of regional representation can be carried out by my colleagues as best as possible and the best way to achieve this is to have the complete contingent,” Nolin told reporters at a news conference in the Senate Chamber Thursday.

Nolin, who is undergoing experimental treatment for cancer, assumed his new role as speaker last week — replacing Conservative Sen. Noël Kinsella — and said he is making it his mission to help his

colleagues better understand their roles.

“I need to provoke my colleagues to make sure we will understand the role of the institution and what our role is as individuals,” said Nolin.

His view once again differs with the one expressed by Harper, in that he views the Senate as doing more than simply passing legislation proposed by the elected government.

“We had a very interesting discussion,” Nolin said, when asked whether he had shared his views with Harper.

Nolin said the Supreme Court of Canada reference rejecting the Conservative government’s proposals for Senate reform in April shaped his own understanding, especially when the judges referred to its independence, its non-elected nature and that it is “one of Canada’s foundational political institutions” that “lies at the heart of the agreements that gave birth to the Canadian federation.”

Nolin said he is not sure all his Senate colleagues read those words or really understand what they mean in terms of being independent from their elected — and partisan — colleagues across the way in the House of Commons.

“They understand that we have a legislative role. To what extent we can be independent from the other place, that’s why we think we need to explore that,” Nolin said.

When asked whether he thinks some senators are too tied to directives from their parties, Nolin said: “I don’t want to judge and to pass judgment on the decisions that are taken by my colleagues, but I want them to properly understand that they have a role to play like it was stated by the Supreme Court and they can do it. If they want to do it, it’s up to them.”

Nolin said partisanship itself is not a problem, but it can become one when it clouds their judgment.

“I don’t want my colleagues to be blinded by partisanship,” he said.

The new speaker also believes the days of spending scandals in the Senate dominating headlines are over, even though the auditor general is expected to release his report into expenses next March.

“I think the big stories are behind us,” said Nolin.

Nolin said he expects the report to uncover minor things like staff mistakenly claiming a per diem when a senator has already expensed a lunch, disagreements over what a senator would define as a parliamentary function and the higher cost of stamps to mail Christmas cards to the United States.

“Our processes are good,” he said.

Nolin, who was appointed to the Senate on the advice of former prime minister Brian Mulroney in 1993, also spoke about his experience in the Conservative caucus room during the Oct. 22 attack on Parliament Hill.

“I was glad that those doors were quite thick,” said Nolin.

“I saw my prime minister becoming white, pale and that was a shock for me,” he said.

Aniz Alani <aniz.alani@gmail.com>

Vacancies in the Senate

Aniz Alani <aniz.alani@gmail.com> Sat, May 16, 2015 at 8:09 AM
To: pm@pm.gc.ca
Cc: Jan Brongers <Jan.Brongers@justice.gc.ca>, "Oliver R. Pulleyblank" <oliver.pulleyblank@justice.gc.ca>

Kindly acknowledge receipt of the email correspondence of December 8, 2014 below.

Thank you and best regards,
Aniz Alani

On Dec 8, 2014 4:12 PM, "Aniz Alani" <aniz.alani@gmail.com> wrote:

> Dear Prime Minister:
>
> I write in response to your recent comments indicating that you are not in a rush to appoint Senators to fill any of the 16 existing vacancies in the Senate. You also mentioned that you were not receiving a lot of calls from Canadians asking you to fill these vacancies.
>
> Please accept this note as one such call for action.
>
> Section 32 of the Constitution Act, 1867 states:
>
> "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."
>
> While no specific time limit is expressed, it is in my respectful view a violation of our Constitution to deliberately delay the filling of vacancies to the extent you have. Section 21 sets the size of the Senate at 105 members, and withholding advice to the Governor General on recommendations for appointments to fill that number does not show respect for the rule of law.
>
> Notwithstanding the difference of opinion that may exist with respect to the utility of the Senate or the wisdom of Senate reform, I urge you to perform the function entrusted to you under Canada's Constitution by recommending for appointment to the Senate such persons as you consider appropriate having regard to the qualifications set out in the Constitution Act, 1867.
>
> I would be pleased to discuss this further with you at your convenience.
>
> Respectfully,
> Aniz Alani
> 604.600.1156

Opinion

Let Canadian Senate die of attrition: Goar

Contrary to public belief, there is a simple way to put an end to the Senate: stop appointing members.

ADRIAN WYLD / THE CANADIAN PRESS

If Stephen Harper had pledged when he took office in 2006 to forswear Senate appointments, there would be 57 vacancies in the 105-seat upper chamber of Parliament today.

By: **Carol Goar** Star Columnist, Published on Thu Nov 14 2013

There is a foolproof way to abolish the Senate.

It doesn't require a reference to the Supreme Court, a change to the Constitution or provincial consent.

All it requires is an unequivocal commitment from every current and future candidate for the Prime Minister's office never to appoint a senator.

It would take time — but not as much as you might think. If Stephen Harper had pledged when he took office in 2006 to forswear Senate appointments, there would be 57 vacancies in the 105-seat upper chamber of Parliament today.

If he were to stop appointing senators now, there would be 11 vacancies (more in the event of criminal convictions) by the end of his current term.

If all three national party leaders made a commitment in the 2015 election to appoint no senators, there would be 38 vacancies by 2019 — probably more taking into account voluntary departures and deaths.

If the same tripartisan resolve prevailed in the 2019 election, there would be at least 81 empty seats within 10 years. That would still be enough senators for a quorum — only 15 members are required to convene a meeting of the upper house — but it's unlikely the last two dozen stragglers would want to

prop up a dying institution.

The process could be accelerated with voluntary buyouts.

This approach would not solve Harper's immediate political problem: a still-unfolding Senate expense scandal involving three of his highest profile appointees and his most senior aides. Nor would it satisfy those who want the Senate abolished by fiat.

But it is a simple, effective way to resolve a dilemma that has stymied politicians, lawyers and academics for generations. Best of all, it would put power where it belongs: in the hands of the people. If Canadians genuinely believe the Senate has no useful role in their system of government, all they have to do is vote against any federal party leader who refuses to guarantee that he/she will make no appointments to the upper house.

If this seems naive, think back 20 years. It seemed inconceivable then that any political leader would relinquish his/her power to raise taxes at will. Today no politician dares increase taxes, even as concerns mount that government austerity has gone too far.

It is also worth remembering that seven provinces — Ontario (then known as Upper Canada), Quebec, Manitoba, Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island — once had upper legislative chambers. None exist today.

History has a way of imbuing decisions made by querulous, self-interested politicians with a mythic quality. Canada's appointed Senate was the product of partisan haggling between Sir John A. Macdonald and George Brown over the terms of Confederation. Brown, a Liberal, fought for an appointed upper chamber, thinking it would deprive Macdonald's moneyed friends of the legitimacy and stature that flowed from an earned mandate. At the same time, he argued against an upper chamber for Ontario because he did not think it was important enough to preserve.

There was nothing elegant or far-sighted about Brown's reasoning. It served his interests at the time. Within less than 10 years his own party, led by his protégé, Prime Minister Alexander Mackenzie, wanted to extricate itself — and Canada — from the arrangements Brown had made.

He tried, as did many of the prime ministers who followed him. None succeeded.

As defenders of the Senate point out, it has made a contribution to the affairs of the nation: drafting thoughtful reports, holding respectful public hearings, looking into complex, long-term issues and, in its better days, demonstrating civility and cross-party co-operation in politics.

But in recent years, the excesses of prominent senators, their assumption of entitlement to public funds, and the "jobs for the boys" mentality articulated by former prime minister Brian Mulroney and exemplified by Harper have pushed many once-ambivalent Canadians into the abolitionist camp.

If they are serious, they have the means to achieve what they want.

If Harper is serious about abolition, he doesn't have to wait for permission from the Supreme Court, the premiers or anyone else. He can publicly announce right now that he has made his last Senate appointment — ever.

Historical research provided by Star librarian Astrid Lange.

***Carol Goar**'s column appears Monday, Wednesday and Friday.*

(http://looniepolitics.com)

June 19, 2015

Vacant senate seats breaking Confederation's promises

December 23, 2013 - By Dale Smith

(http://looniepolitics.com/wp-content/uploads/2013/12/Parliament-Hill-2-e1386637988678.jpg)

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In the wake of the Senate spending scandals, Stephen Harper has decided that he's not going to fill any Senate vacancies for the time being, apparently unaware that he's in abeyance of his constitutional obligations to do so. But more than that, he is both precipitating a future crisis for the chamber, and breaking the promises made by the

Fathers of Confederation almost 150 years ago.

It has become the fashion among the pundit class and certain opposition MPs lately to declare that Harper should just keep refusing to appoint senators in the hopes that one day the attrition will simply force the upper chamber to wither away simply vanish from lack of membership, and that it can be done without a constitutional amendment. Problem solved, ingeniously! Of course, anyone with half a clue about the way our system of government works also realizes that this is not only unrealistic, but is simply a recipe for legislative paralysis since it's explicitly written in our constitution that Parliament consists of the Commons, the Senate, and the Queen, and that legislation must pass all three before it can become law. If you want to change that order of things then guess what – you're going to need to change the constitution.

Undaunted, would-be clever commentators and partisans have wondered whether the constitution dictates that there be a minimum number of senators, and if one could simply adhere to that bare minimum in order to keep legislation flowing and leave it at that. And while one could reply that quorum in the Senate is 15, one wonders why you would really want to concentrate that much power in the hands of 15 individuals with few constraints, institutional independence, and an absolute veto over legislation. It hardly seems wise. The real answer, however, is that the minimum number of Senators is really 105 – just as there is no "minimum number" of MPs in the Commons, and why it has been mandated that by-elections be held to fill vacancies within six months.

Vacant senate seats are as anathema as they would be in the Commons because the Senate exists for a purpose under our constitution. In fact, it was the deal-breaker when it came to Confederation because the minority provinces and populations in this country demanded the protections that the Senate afforded them that the Commons could not if it was to be based around the principles of representation by population. When a prime minister doesn't appoint senators to fill vacancies, he or she is not only denying those provinces of their rightful representatives, but he or she is also breaking the terms by which Confederation came to be.

Oh, but they're not elected, so how can they be representative? Such an attitude presumes that there is really only one type of representation that can happen. People seem to forget that there had been elected members of the Legislative Councils – the pre-confederation upper chambers of the colonies – and that they had largely soured on the experience. One of the best descriptors of these elected proto-senators was that they were Triple-R: rich, rural, and reactionary. It was becoming a problem the amount of money that they had to raise and spend in order to wage an election campaign across the whole of the colony rather than a defined electoral district like an MP. And when the time came, the Fathers decided to go a different route, choosing appointed representatives that had the institutional independence enough to speak truth to power, and who could best represent minorities in a way that elected officials could not because that minority representation was guaranteed by virtue of appointment. And yes, they have as much constitutional legitimacy as a representative as an elected MP does.

There is a further problem with the increasing number of vacant senate seats in that a large influx of new members when they are filled causes a shock to the system. This happened in 2009, when Harper appointed eighteen senators in one fell swoop after previously refusing to appoint any senators who hadn't been elected in a provincial process (Michael Fortier excepted). While the Senate can easily absorb two or three members at a time without disruption, and give those new senators time to learn the ways of the upper chamber – a process that can take up to three years – a full fifth of its membership at once caused a shock to the system.

It's one of the reasons why the independence of the Senate has been so damaged in recent years – too many new senators without a sense of their roles, being told by their senate leadership that they can be whipped like MPs can, and acting out of a sense of obligation to the prime minister that appointed them. So many at once is why the Senate became more of an echo of the backbenches of the Commons, with pliant senators willing to do the Prime Minister's bidding unquestioned, and why it's only now that those senators are starting to get a firmer grasp of their roles and responsibilities and are starting to exercise more independence, as we've seen increasingly over the past few months.

But Harper is on course to repeat this shock to the system as the current number of vacancies sits at nine, with more on the way. Sure, Harper has a right to be nervous, given that his track record on appointments can't exactly be called stellar, and so much of that is his own fault – the first batch of 18 weren't properly vetted because he abdicated that responsibility until he panicked and made those appointments before an opposition coalition could do it for him. But he has the time and the people who can do the vetting properly now.

By leaving these seats vacant, Harper is not only looking to create more problems with the system down the road, but he is breaking the covenants of confederation. Canadians should care about this because it's their representatives, their parliament, and their country that is ultimately being underserved.

———-

Other articles by Dale Smith

A bashful Speaker Scheer helps no one (http://looniepolitics.com/bashful-speaker-scheer-helps-one/)

Rent-a-Tories, Liberal Supporters, and the death of accountability (http://looniepolitics.com/rent-tories-liberal-supporters-death-accountability/)

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Stephen Harper under pressure to fill Senate vacancies

Retirements and resignations will soon leave 17 seats empty in the red chamber

By Rosemary Barton, CBC News Posted: Jul 08, 2014 9:00 PM ET Last Updated: Jul 08, 2014 10:07 PM ET

Prime Minister Stephen Harper may soon be grappling with a whole new problem inside the Senate.

He has already endured a Senate expenses scandal that cost him his chief of staff and suffered another setback in his attempts to reform the upper chamber thanks to a recent Supreme Court decision.

Now, with 11 current vacancies and looming retirements, Harper is faced with 17 empty seats in the red chamber by the end of the year — not to mention the three former Conservative Senators who have been suspended for ineligible housing and living expenses.

And CBC News has learned Harper is under growing pressure from a number of Conservative senators to fill those empty seats.

The senators cite concerns about how the Senate, and committees in particular, will be able to operate. They also question whether the regions are being fairly represented given the vacancies.

By the end of July, Prince Edward Island will lose Senator Catherine Callbeck to retirement. With Mike Duffy's suspension, that means P.E.I. will be reduced to half of its active representation.

Premier Robert Ghiz says the island will be underrepresented in Ottawa and while he admits the Senate has not been operated as well as it could, he believes the prime minister could do something about that in the next round of appointments.

"This time, I would try to stay away from the partisan route or attack dogs," suggests Ghiz. "I think there are a lot of quality people out there who want to make a difference in our country, who want to contribute, and hopefully the PM will look at someone of that quality."

P.E.I. is not alone in losing out on regional representation. The province of Manitoba will also be down to half of its Senate seats in the coming weeks, with three out of six seats vacant. By contrast, Nova Scotia and New Brunswick each have only two seats vacant out of 10.

But while Conservative senators may be gently pushing him to name appointees, the prime minister has given no sign he intends to do so.

No constitutional requirement

Harper's stated preference is to send elected senators to the upper chamber. He has urged the provinces to hold elections for senate nominees, but only Alberta has proved willing to do so.

When the Supreme Court delivered its opinion that the federal government could not reform the Senate without the support of at least seven provinces, Harper said it meant Canada was "stuck in the status quo for the time being."

The Prime Minister's Office goes further, saying that as long as the Senate continues to be able to deal

with government legislation there is no plan to fill any of those seats.

Hugh Segal, who recently resigned his seat from the Senate to head up Massey College at the University of Toronto, points out there is no constitutional requirement for the prime minister to fill the vacancies, nor does he think Harper should rush into it.

But the former senator does think Harper has an opportunity to make the Senate a different place — and to send a message.

"You and I could make a list of people from the sciences, from the arts, from business, from philanthropy, from community service, some of whom may have been involved politically — that's not a bad thing — some of whom may have had no partisan involvement ever in their lives, but who could be expected to be absolutely reasonable and thoughtful senators who would vote on matters based on their merits," Segal suggests.

Segal also says context is important.

"I think every prime minister has to look at the context in which he or she is operating, what is necessary — what's in the best interest of the country at the time."

Harper has named 59 senators since he became prime minister in 2006.

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Analysis

Is Stephen Harper obliged to fill empty Senate seats?

By James Cudmore, CBC News Posted: Jul 10, 2014 5:00 AM ET Last Updated: Jul 10, 2014 5:00 AM ET

Pity the poor prime minister.

Stephen Harper, pre-disposed as he is to dislike an unreformed and now not-easily reformable Senate, is faced with yet another difficult constitutional question.

He's allowed the 11 vacancies to build up in red chamber — there'll be 17 by the end of the year — and the feeling is he is not all that interested in filling them.

- **Harper faces growing pressure to fill Senate vacancies**
- **What the constitution says about Senate appointments**

Harper's majority there remains intact and by not making appointments to the now unpopular and scandal-ridden upper chamber, he can avoid having to answer uncomfortable questions about patronage and power, and perhaps, expenses.

But can the prime minister keep holding on? And if so, for how long?

CBC News reported Tuesday Harper is under pressure from Conservative senators to start filling up those empty seats.

They argue work is becoming difficult — not enough senators to fill up committees — and besides that, the regional balance is starting to go wonky: An unacceptable situation in what's supposed to be the House of the Provinces.

But the prime minister has shown no interest so far in meeting those requests and it's not clear he even has to.

Opposition leader Thomas Mulcair argues Harper could turn his back on the Senate and simply walk away, leaving that piece of our Parliament to wane from neglect.

"There's no constitutional requirement to fill them," Mulcair told host Rosemary Barton on CBC News Network's *Power & Politics*. "We could let the thing die on the vine — just wither away by attrition, name no one else to the Senate."

'Summon qualified persons'

Of course, that fits with the NDP leader's view of the place: That the thing should be abolished. But the prospect of a Senate starved of money, membership and legitimacy would likely not keep with the constitution.

Yes, it's true the prime minister is not by name required to appoint senators, but the constitution does spell out the Governor General's responsibility to ensure qualified Canadians are brought forward as new members.

Section 24 says 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, as everyone knows, in our system, the GG doesn't do that sort of thing without the prime minister's advice.

Political scientist Emmett Macfarlane argues the imperative placed on the shoulders of the Governor General is, in practical terms, actually a constitutional burden the prime minister must wear.

"I wouldn't say that it is black and white crystal clear that there is an obligation to name senators," Macfarlane said.

But, he says, if you interpret Section 24 in practical terms, it does begin to look an obligation.

The Governor General politically is unable to act without the support of the prime minister. To act on his own would lead to a separate set of constitutional problems that would shake the foundations of Canada's democracy.

Macfarlane argues a long-term refusal by the prime minister to name new Senators for the Governor General to appoint would lead to an inconsistency between constitution and convention that cannot stand.

"I would personally argue that the phrasing in the text speaks of a constitutional requirement to make regular Senate appointments, and I think the conventions certainly speak to that as well," Macfarlane said.

"Whether the Supreme Court would agree with me is an entirely different matter."

A role for the Supreme Court?

Tuesday, former Conservative senator Hugh Segal told CBC News he didn't think there was any obligation to name senators to sit in the 105-member chamber, as long as its membership didn't dip below the quorum of 15 bums in cushy red seats.

Renowned constitutional lawyer and professor Peter Hogg takes a position in line with Segal.

There's no legal obligation for Harper to name new names, Hogg says. But the prime minister could have trouble following that road to its end.

The Supreme Court in the recent Senate reference ruling said the government could not make changes to the Senate that have the effect of amending the Constitution without undertaking a full-blown bit of Constitutional reform.

So, if the Senate was diminished to such a degree that it could not do its work or serve its Constitutional function, then that diminishment would be unconstitutional in itself.

Phew.

It's here Peter Hogg says the Supreme Court might think about beginning to act — but, he says, that would be an extreme case.

"Where the Senate has effectively been abolished by the refusal of the PM to recommend appointments,

perhaps that is one instance where the [Supreme Court] might be tempted to grant a remedy," Hogg wrote in an e-mail.

"Not because of a general duty to make appointments, but because the constitution assumes a functioning upper house and the PM by unilateral inaction should not be allowed to effectively amend the constitution."

But, possessed as it's said to be of "neither the purse nor the sword," the Supreme Court would not be able to make those appointments itself. The prime minister technically doesn't make the appointments and the Governor General likely can't be ordered to — so what then?

University of Ottawa political scientist Philippe Lagasse says if by refusing to name so many new senators the prime minister unconstitutionally altered the architecture and operation of Canada's Parliament, the Governor General would be left with no choice.

"The Governor General at that point would effectively recognize that the prime minister of Canada was acting unconstitutionally. If the GG found the PM just totally refused, then he would have grounds to dismiss him."

The nuclear option, one might say.

Where's the guidebook?

It's this sort of conundrum that highlights a failure in the administration of our constitution.

There's been no codification of the conventions that flow from the old and arcane bits of the act.

There are a few key opinions that all Canadians seems to share that offer general guidance — that the Governor General can't willy-nilly start ignoring the advice of democratically elected leaders, for instance, lest our system of government fail, or that the prime minister can't ignore the will of Parliament expressed through a vote, lest our democracy fail. But there are no guidebooks for how the other bits must be run.

Lagasse says there is such a guidebook for the United Kingdom. The Cabinet Manual, as it's called, "sets out the main laws, rules and conventions affecting the conduct and operation," of the government of the U.K. — even defining the relationship between the government, the Sovereign and the judiciary.

Canada, Lagasse says, could use such a book.

In the meantime, you might as well be asking: How many senators can dance on the head of a pin?

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Brad Wall says Senate 'atrophy is not a bad end game'

Prime Minister Stephen Harper has been under pressure to fill the growing number of Senate vacancies

CBC News Posted: Jul 12, 2014 7:00 AM ET Last Updated: Jul 12, 2014 7:00 AM ET

Saskatchewan Premier Brad Wall says not many people would be outraged if Prime Minister Stephen Harper decided to stop appointing senators.

CBC News reported this week that some Conservative members of the upper chamber are putting pressure on Harper to fill Senate vacancies. There are currently 11 empty seats, and there will be 17 by the end of the year. That doesn't included suspended Senators Patrick Brazeau, Mike Duffy and Pamela Wallin.

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"Atrophy is not a bad end game as well for the Senate as far as we're concerned," Wall told CBC Radio's *The House*. "We don't think the Prime Minister should be in any particular hurry to appoint any senators," he said.

Wall has advocated for Senate abolition in the past. Saskatchewan's official position is that the red chamber should be eliminated.

"I don't think we'd have a problem if he (Stephen Harper) came out emphatically and said: 'Look, we're… we just think this institution is not relevant, it's unelected, and for the reasons I've just mentioned, we're not going to be appointing any more senators for the life of this government,'" Wall told guest host Terry Milewski. "It's a long goodbye but it is a goodbye," he said.

Does the PM have to appoint senators?

The prime minister seems to be in no rush to fill the current vacancies. His office says that as long as the Senate continues to be able to its work, there is no plan to fill any of those seats.

Experts are divided about whether the prime minister has a constitutional obligation to fill the seats. Section 24 of the Constitution says 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."

Former Conservative senator Hugh Segal told CBC News this week that he didn't think there was any obligation to name senators to the 105-member chamber, as long as its membership didn't dip below the quorum of 15.

There's no ambiguity for the leader of the Official Opposition Tom Mulcair. "There's no constitutional requirement to fill them," Mulcair told CBC News Network's *Power & Politics* this week. "We could let the thing die on the vine — just wither away by attrition, name no one else to the Senate."

Despite all this, the pressure to appoint senators will not go away, especially when it comes to some provinces.

With Senator Catherine Callbeck about to retire and Mike Duffy currently suspended from the Senate,

Prince Edward Island will soon find itself with half the representation it's entitled to. Premier Robert Ghiz has expressed concerns about that upcoming under-representation. Manitoba will also be down to half of its Senate seats in the coming weeks, with three out of six seats vacant.

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MACLEAN'S

Brazen populism can't kill the Senate

Why the red chamber won't die of simple neglect

Nick Taylor-Vaisey

July 16, 2014

Chris Wattie/Reuters

If the Senate haters have their way, the chamber bathed in royal red will sit empty, indefinitely, come May 4, 2030. Here's how it might play out: On that date, Michael L. MacDonald, a Nova Scotia businessman who once served as the former vice-president of the Conservative party, would celebrate his 75th birthday and retire. The Senate, its numbers having dwindled for some 17 years since Prime Minister Stephen Harper last appointed anyone to the upper chamber, would lose quorum. Down to the last 14 senators (one fewer than the Constitution says must be present to exercise the Senate's powers), the remaining 12 Conservatives, a single Liberal and a single Independent would be powerless to do any business. They'd leave one of the most beautiful rooms in the land unoccupied.

There are a lot of variables in that scenario, of course—some current senators may die, wind up behind bars or resign for other reasons—but it would only come to pass if Harper refuses to appoint new senators ever again, and each prime minister who follows shows the same restraint. Harper, who has said he has no plans to appoint more senators, is no stranger to the art of intentional neglect. He may have named 59 senators between late 2008 and early 2013, but he also allowed 18 vacancies to pile up during his first two years in office. Even that didn't set the empty-seats record. During Pierre Trudeau's last year in office, he let the number rise to 21, meaning there was a time when 20 per cent of the Senate's seats collected dust. Democracy didn't verge on collapse.

But now, after layers of scandal have tarnished the unelected chamber's reputation, a debate has gripped Ottawa over whether or not a prime minister is obliged to fill Senate vacancies, and to what extent neglecting the Senate might be a valid tactic to abolish it. This week in Saskatchewan, the country's most popular premier, Brad Wall, said he openly favours abolition and that atrophy is "a long goodbye, but it is a goodbye."

The issue has flared up amid rumours that some restless Tories are concerned about the growing number of vacancies. NDP Leader Tom Mulcair has been quick to weigh in, claiming there is no constitutional requirement forcing the Prime Minister's hand. Toronto MP Craig Scott, the NDP's democratic reform critic, explained the party's position. The Constitution, he says, mandates only that the Governor General "shall from time to time...summon qualified persons to the Senate." Scott claims the "time to time" provision "gives the Prime Minister a wide degree of latitude" to turn a blind eye to attrition.

If that argument seems as though it's splitting hairs, Emmett Macfarlane, an assistant professor of political science at the University of Waterloo, says that's because it amounts to "constitutional sabotage. These are smart people and, frankly, they should know better." He says the Supreme Court's ruling on Senate reform and abolition earlier this year concluded that "any fundamental change" to the upper house requires provincial consent. A Senate unable to function due to a shortage of warm bodies, he says, would constitute fundamental change. To wit: Senate rules dictate that each of the 16 standing committees requires a minimum of four senators. Eventually, the whole enterprise would collapse under the weight of so many overworked senators and reach a point where it could no longer properly conduct its business. "I suspect, by the time the Senate itself starts to complain that its capacities and function have been damaged, that we have hit unconstitutional waters," says Macfarlane.

What complicates matters is that, apart from that definitive lack of quorum, there's no consensus on when the Senate would reach a tipping point of parliamentary incapacitation. However, it's almost certain that, long before then, a citizen, accompanied by an activist lawyer, would launch a court challenge to compel Harper or a future prime minister to act. "Conceivably, a case could be brought forward by...any citizen who's able to get public-interest standing before the court," says Macfarlane. "You have to identify a pressing constitutional concern. Standing has been liberalized to the extent that I think a court would allow the case to proceed."

When pollsters ask Canadians about the Senate, two-thirds say the red chamber serves no "necessary and useful political function." Against that backdrop, Senate opponents are hungry to see it disappear by any means necessary. But if that means abolition by neglect, the inevitable court challenge will spark a slow-motion crisis that pits brazen populism against the country's founding principles. Whoever wins, there's no guarantee anyone will be better off.

Winnipeg Free Press

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Analysis

Abolition by stealth

By: Linda Trimble
Posted: **03/27/2015 3:00 AM** |

No one could fault Canadians for thinking the sky had suddenly fallen on Senate reform last April. "Did the Supreme Court just kill Senate reform?" asked a columnist for Maclean's magazine, and his answer was an unequivocal "yes."

Prime Minister Stephen Harper agreed, blaming the court for slamming the door on his government's attempt to "elect" senators and limit their terms in office. Following the court's ruling, Harper announced the federal government would cease its attempts to renovate the upper house.

But it seems the prime minister has not in fact given up on reshaping the Senate. Harper is undertaking a covert demolition of the red chamber. Delivered a smack-down by the court, told it cannot unilaterally achieve its vision for Senate reform, the government is engaging in abolition by stealth.

The prime minister has stopped appointing senators. The last appointment was made two years ago, and there are now 18 vacancies. Harper says he is in no hurry to fill the empty seats. So, if the Conservative Party wins another majority government and holds power until Oct. 21, 2019, another 27 senators will have reached the mandatory age of retirement. And if the three suspended senators are given the boot, there will be at least 48 empty seats in a 105-member chamber. In a few short years, half of the Senate will have withered away.

Starving the Senate in this manner is a sneaky way of doing an end run around the Constitution. The Supreme Court's opinion was unequivocal: The federal government must have the agreement of all 10 provinces to abolish the Senate. But the PM doesn't want to talk to the premiers about constitutional reform, and he certainly doesn't want to put the Senate in the intense media spotlight that would undoubtedly shine on constitutional talks about vanquishing the upper house. After all, the upcoming trials of the malfeasant senators will cause the government enough embarrassment.

A slow and silent dismemberment of the chamber is the Harper government's way of making the problem go away.

Why should we care that the PM is furtively "disappearing" the Senate? After all, as public-opinion polls conducted in the wake of the Senate expenses scandal showed, fully half of Canadians were so disgusted by the bad behaviour of a few senators they wanted to scrap the institution entirely.

But most people don't know what senators do on a daily basis, nor can they identify the role of the Senate in the Canadian parliamentary system. If they understood how Parliament works, Canadians would be deeply concerned about the extreme concentration of power in the Prime Minister's Office.

The type of careful legislative oversight the Senate is designed to provide is crucial given the fusion of powers in the executive branch. Given the Harper government's flagrant disregard of judicial oversight, any limited checks and balances offered by the Senate are welcome. Indeed, the Senate may prove to be an important bulwark against Bill C-51, the profoundly scary anti-terrorism act.

Fortunately for Canadians, abolition by stealth is unconstitutional. Although retired Conservative senator Hugh Segal believes the prime minister has no obligation to name senators as long as the upper house meets its quorum of 15 members, provincial governments and legal scholars beg to differ.

Making appointments is not an option, but a duty, argues constitutional expert Emmett Macfarlane. The premier of P.E.I. has urged the prime minister to fill his province's vacant seats, and a Vancouver lawyer filed an application in the Federal Court to contest the government's inaction.

That the PM's refusal to appoint senators has received little media scrutiny is dismaying, albeit unsurprising; surreptitious abolition is not nearly as dramatic as the spectacle offered by the coming Duffy trial. More astounding is the support for Harper's tactics from purported champions of democracy.

Saskatchewan Premier Brad Wall, once a vocal proponent of Senate reform, feels "atrophy is not a bad end game for the Senate." The New Democratic Party also seems to be onside: "We could just let the thing die on the vine -- just wither away, name no one else to the Senate," NDP Leader Tom Mulcair told the CBC.

This would be a mistake. Canada desperately needs a national dialogue on the fate of the Senate. Yet abolition by stealth seems expressly designed to avoid this conversation and to divert attention from the rapidly declining health of parliamentary democracy in Canada. It's an underhanded way of denying Canadians a meaningful voice in the design and operation of our governing institutions.

Linda Trimble is a political science professor at the University of Alberta.

FULL COMMENT

National Post View: The Canadian Senate — the dinner guest who won't go home

NATIONAL POST VIEW | April 24, 2015 7:39 PM ET
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The Senate. THE CANADIAN PRESS/Adrian Wyld

Canada's Senate has become the dinner guest who won't go home, the distant relative who comes for a visit and refuses to vacate the guest room. Its future has become a choice between two unattractive alternatives: is the annoyance of putting up with it better or worse than the trouble involved in making it go away?

A new front was opened Thursday when a Vancouver lawyer appeared in court to argue that Prime Minister Stephen Harper should be forced to appoint new senators to the growing ranks of empty seats, whether he wants to or not. Aniz Alani, a self-professed constitutional buff, says other prime ministers have allowed empty seats to accumulate, but Harper is the first to openly declare his unwillingness to fill them. Harper hasn't named any new senators since 2013, and said in December he wasn't "getting a lot of calls from Canadians" urging him to do so.

It's not clear whether Alani has a case. Constitutional experts say there is no law requiring the prime minister to act. True, the Constitution Act, 1867, states that "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." Practically speaking, however, the governor general cannot act without the approval of the prime minister, making the whole issue yet another bog of constitutional uncertainty.

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Living expenses meant for senators who actually pay out of pocket to live in Ottawa, Duffy trial hears

Majority of Canadians support either abolished or reformed Senate: poll

It highlights the overwhelming mess the Senate issue has become. Rarely has anything Canadians cared so little about occupied so much national attention. With six months to go before the next election, the trial of Senator Mike Duffy is reminding voters once again of everything they dislike about the place. On Friday the court was told the disgraced senator charged per diems even when staying at his son's home on "Senate business" that coincided with the birth of his grandson. While scheduled for another three weeks, the case could well extend beyond that point, a constant threat to a government that would prefer Canadians forget it had anything to do with Duffy's appointment.

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Neither the Liberals nor NDP are any more keen on filling the vacancies in the upper House — now at 19 and counting — that senators say will soon affect their ability to do their job. Liberal leader Justin Trudeau has banished his party's senators from his caucus, while NDP leader Thomas Mulcair objects to the very existence of the chamber. Yet a Supreme Court ruling last year appeared to make dramatic reform out of the question, barring a constitutional amendment with the support of at least seven of the provinces — a prospect for which no party would appear to have any appetite.

Some suggest the unloved institution could be allowed to wither away from simple neglect. Former Senator Hugh Segal says Harper could probably avoid any new appointments until the 105-member chamber fell below the quorum of 15. At that point, however, if not before, the prime minister could be found in violation of the Constitution — the Senate having effectively ceased to function — and a whole new battle could begin.

There are alternatives, however. One is to reform the appointment system. While attempts to create an elected Senate have failed, a more open, less partisan appointment process, at arms-length from the prime minister of the day, would improve the quality of appointees while insulating future prime ministers from blame for appointments that went horribly wrong, a la Duffy.

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A second, as proposed in these pages by constitutional scholars Andrew Heard and Adam Dodek, would ask the Senate to reform itself: pass resolutions restricting its ability to overturn legislation passed by the Commons, to tighten the rules on expenses and partisan activity, and to make its proceedings more transparent. If the prime minister threw his support behind it, it is hard to see how it would not happen.

Harper may be reluctant to touch this file, having been burned before. But he can hardly claim the status quo is working, even for him.

National Post

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THE GLOBE AND MAIL

POLITICS

Stephen Harper's game of Senate appointment make-believe will end

CAMPBELL CLARK
OTTAWA — The Globe and Mail
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Stephen Harper is playing at pre-election make-believe with Senate appointments. We have a Vancouver lawyer to thank for calling us back to reality.

The Prime Minister's game of pretend is in declaring he won't appoint senators. The unloved, disrespected Red Chamber has caused him a spot of bother, notably because of ill-advised appointees such as Mike Duffy and Patrick Brazeau. So Mr. Harper stopped appointing new senators back in 2013. There are now 20 vacant seats.

It is, for Mr. Harper, a way to avoid uncomfortable optics and deflect uncomfortable questions about the Senate. But the catch is that it's Mr. Harper's job to appoint senators. And one day, he will have to appoint lots of senators – at least if he's re-elected in October.

Nonetheless, Mr. Harper has said publicly that he won't. Then along came Vancouver lawyer Aniz Alani, who asked the Federal Court of Canada to declare that the PM (technically the Governor-General) must appoint senators within a reasonable time. He felt Mr. Harper was refusing to do what the Constitution requires. "For me, it's really a rule-of-law issue," Mr. Alani said in a phone interview.

Government lawyers tried to get the case dismissed, on the grounds that Mr. Alani's court action has no hope of success. But on Thursday, Federal Court judge Sean Harrington disagreed. He noted that the Senate is sometimes "a source of embarrassment" to the government, but that doesn't mean it has no duty to appoint senators.

"I know of no law which provides that one may not do what one is otherwise obliged to do simply because it would be embarrassing," Justice Harrington said.

Mr. Harper has shrugged off questions about the vacancies, saying he doesn't get a lot of calls from the public asking him to appoint senators, and doesn't need more to pass legislation.

Mr. Alani was surprised. The Constitution says the Governor in Council "shall" appoint senators to fill vacancies, and that word means they must. "It can't just be that we've got a Constitution nobody

follows because on any given day it doesn't poll very well," Mr. Alani said. Politicians wouldn't make an issue of it; Mr. Alani decided he would. The 33-year-old was once a clerk to the Federal Court, so he knows this kind of law and, he said, was willing to put in the time.

Mr. Harper's unwillingness to appoint senators clashes with the fact that he's named scads of them – 59 in all. And if past practice is any guide, once he's past the election – if he wins – his reluctance will subside.

He also let Senate vacancies pile up in his first term. But after the 2008 election, he appointed 18 new senators three days before Christmas, including Mr. Duffy and Mr. Brazeau, Pamela Wallin, his chief fundraiser, Irving Gerstein, and a key Quebec political organizer, Leo Housakos.

That's not very different from what his predecessors did – Liberal and Conservative. Perhaps that's also noteworthy. In his early days in office, Mr. Harper vowed to reform the Senate. Since the Supreme Court ruled last year that Senate reform requires the consent of the provinces, he has given up. His approach to the Senate now comes down to the kind of senators he appoints.

In fact, if he's re-elected, he'll not only have to fill the 20 currently vacant seats, but 25 more due to open up in the next four-year term. All told, that would make 104 Harper appointments, more than any other PM ever.

There's no point pretending there'll be no new appointees. For that matter, any party leader should be telling us how they'd fill those 45 vacancies. That includes NDP Leader Thomas Mulcair, who vows to abolish the Senate. He wouldn't be able to accomplish that in the first few months, and would have to appoint senators.

It's possible the courts won't step in. They're often reluctant to define these kinds of Crown powers. But a PM who refused to appoint senators indefinitely would risk a crisis: He or she would be advising the Governor-General to ignore the Constitution. In theory, a Governor-General has to dismiss a prime minister who gives unacceptable advice. But that's all theoretical, of course, in a world of pre-election pretend. After Oct. 19, it's a safe bet there will be new senators.

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Tuesday, June 2, 2015

Feds Appeal Senate Lawsuit

Cabinet is widening a legal battle over whether Senate vacancies must be filled by the Prime Minister. The government is appealing a Federal Court ruling that the case proceed after federal attorneys argued the claim was frivolous.

"It's difficult to avoid the inference that the respondents are trying to drag this out," said Aniz Alani, a Vancouver attorney who filed the original lawsuit to appoint more senators. There are currently 20 vacancies in the 105-seat chamber, with another five senators due to leave within a year as they reach the mandatory retirement age of 75.

Prime Minister Stephen Harper halted all new Senate appointments last August 23 after three Conservative senators were suspended in an expense scandal. Two – Patrick Brazeau and Mike Duffy – subsequently faced criminal charges, still unproven in court.

Alani said he'd hoped to have his legal claim settled by this October's federal election till the government responded with a series of challenges, first arguing the lawsuit should be dismissed as pointless, and then appealing the ruling of a federal judge that it was worthy enough to proceed.

"They have in correspondence vigorously opposed any effort to expedite the hearings," said Alani; "I suppose I always considered it was a possibility they could do that, but wanted to give them the benefit of the doubt."

Alani argues that under the 1867 *Constitution Act* the Prime Minister has no choice but to immediately fill Senate vacancies as they occur. Under section 32 of the Act, "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."

Prof. Adam Dodek of the University of Ottawa law faculty said the lawsuit illustrates a valid constitutional point. "The case raises the important issue of whether there is any legal recourse if the Prime Minister simply refuses to appoint persons to the Senate," Dodek said. "In other words, is it legally permissible for the Prime Minister to simply let the Senate wither away into nothingness?"

Federal Judge Sean Harrington, who earlier rejected the government's claim the issue was not a court matter, wrote that new senators will eventually have to be appointed as age and attrition take their toll. "Certainly at some stage senators have to be appointed," Harrington wrote. "If there were to be no quorum, Parliament could not function as it is composed of both the House of Commons and Senate."

The Senate requires a quorum of 15 members. It currently has 82.

By Dale Smith

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LAROCQUE

Canada's war on the Senate? Just say no.

BY COREY LAROCQUE, OTTAWA SUN

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Let the Senate die on the vine.

Senate reform is on the tips of Canadians' tongues now because of last week's report by the Auditor General on the dubious expense claims of senators, the never-ending courtroom saga of Sen. Mike Duffy and the prospect more members of the so-called chamber of sober second thought might land before a judge.

There's no longer any doubt. The Senate can't continue the way it is.

After the beating it took last week, it's impossible to imagine Senate reform not being an issue in the looming federal election campaign.

Yet Canada's political leaders aren't giving Canadians the straight goods about Senate reform.

Prime Minister Stephen Harper has been talking Senate reform for more than a decade, but today Parliament's upper house is more the same than ever.

The NDP's Tom Mulcair pledged to work toward its abolition even though experts have warned it's not a realistic option.

And Liberal Leader Justin Trudeau is lost in the woods with a plan to appoint independent senators.

When Harper's Conservative party first formed the government in the House of Commons, the resistance the Liberal-dominated Senate gave to Conservative bills rankled Canada's new government.

So, the outspoken Senate critic used his prime ministerial powers to stack upper chamber with his friends. Over time, he swung its membership so that it's now dominated by members of his party.

In fact, Harper, supposedly a fierce critic of the Senate, has appointed 59 members.

When Harper asked the Supreme Court of Canada whether the federal government could act alone to scrap it, he didn't like their advice.

A prime minister can't act unilaterally.

Abolishing the Senate or any major overhaul would require the consent of the federal government and all 10 provinces.

So, Canada needs a practical solution that's constitutional, practical and realistic.

Here it is: Just stop appointing senators.

If a prime minister stopped naming replacements every time there's room for one more hog at the trough, the darned thing would go away on its own.

The average age of the Canadian senator is 65. If a prime minister simply stopped filling vacancies, over time, the Senate's membership would dwindle.

It might take 10 years, but by the ravages of time or by senators hitting their mandatory retirement age of 75, Canada could clean house in its upper house.

Technically, Canada would still have an upper house, but nobody would be home.

Canada's Constitution requires Parliament have an upper house -- the Senate -- whose members are appointed, rather than elected like the members in the lower house, the House of Commons.

Traditionally, the Senate has been thought of as the "chamber of sober second thought" because its role is to review the laws passed by the elected members of the House of Commons, occasionally suggest changes, and apply the brake to the government's agenda.

However, there doesn't seem to be anything preventing a prime minister from leaving vacancies empty when they arise.

Filling Senate vacancies is the sole responsibility of the prime minister.

(Technically, the governor general "summons" qualified members to sit in Parliament's upper house, but he does that on the prime minister's advice).

To satisfy the constitutional requirement that a Senate exist, the government could leave a token handful of senators.

They'd hang around like Maytag repairmen, not doing anything.

But at least it would reduce the cost of the red chamber to a paltry $1 million a year from its current annual cost of about $100 million and Canadians wouldn't hear as many horror stories about expense scandals.

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9 ~~8~~ pages including this page

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PO Box 2703 (J-1)
Whitehorse, YK Y1A 2C6

December 27, 2014

[Distribution List on previous page]

Dear Sirs/Mesdames:

Re: ALANI, Aniz v. The Prime Minister of Canada et al.
Court No: T-2506-14

I write to serve notice in accordance with Rule 110(a) of the *Federal Courts Rules*, SOR/98-106, of a potential question of general importance raised in the above referenced proceeding.

For your ease of reference, Rule 110 provides:

> 110. Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,
>
> (a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;
>
> (b) the Court may direct the Administrator to bring to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and
>
> (c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.

In my view, notice of a constitutional question is not required in this proceeding under section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, because the relief sought in the notice of application does not call into question the "constitutional validity, applicability or operability of an Act of Parliament or of the legislature of any province, or of regulations thereunder" within the meaning of that section: see, for example, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2004 FCA 66 at paras. 70-81 (per Sharlow J.A., dissenting, but not on this point).

I am also not aware of any judicial or statutory interpretation of the phrase "question of general importance" as used in Rule 110(a), which I note is permissive in respect of notice being served in any event.

Out of an abundance of caution, therefore, and in particular to avoid any unnecessary obstacle to securing the just, most expeditious and least expensive determination of this proceeding on its merits, I am enclosing a copy of the Notice of Application filed on December 8, 2014 and served on the respondents under Rule 133.

If your respective province or territory intends to apply for leave to intervene in accordance with Rules 109 or 110, kindly advise at your earliest convenience.

For expediency, I would be especially grateful if any correspondence regarding this matter could be sent by email to senate.vacancies@anizalani.com.

Kindly acknowledge service of this notice by signing and returning the duplicate copy of this page enclosed for this purpose.

Sincerely,

Aniz Alani

Encl.

- Notice of Application

cc: Department of Justice Canada, attn: Messrs. Jan Brongers and Oliver Pulleyblank, counsel for the Respondents (via email: jan.brongers@justice.gc.ca and oliver.pulleyblank@justice.gc.ca)

Aniz Alani
2930 Woodland Drive
Vancouver, BC V5N 3R1
Tel.: 604.600.1156
E-Mail: senate.vacancies@anizalani.com

April 27, 2015

BY E-MAIL

Department of Justice Canada
B.C. Regional Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Attention: Mr. Jan Brongers, Senior General Counsel
Mr. Oliver Pulleyblank, Counsel

Dear Sirs:

Re: ALANI, Aniz v. Canada (Prime Minister) et al.
Court No: T-2506-14
Proposed Resolution

I write to respectfully propose that the issues the above referenced proceeding be resolved on the following terms:

1. The Prime Minister shall cause the Governor in Council to refer questions for the opinion of the Supreme Court of Canada for its hearing and consideration, pursuant to section 53 of the *Supreme Court Act*, including questions substantially as follows:

    a) Does the Constitution of Canada require the Prime Minister to recommend to the Governor General that a qualified person be summoned to the Senate when a vacancy happens in the Senate by resignation, death or otherwise?

    b) If the answer to the previous question is "yes", when does the Constitution of Canada require that such recommendation be made?

    (the "Reference")

2. The parties will consent to an order holding Federal Court File T-2506-14 in abeyance pending the determination of the Reference.

3. The parties will consent to the discontinuance of Federal Court File T-2506-14 without costs to any party forthwith upon the determination of the Reference.

This offer is open for acceptance until the issuance of the Court's reasons for judgment in respect of the Respondents' motion to strike the application for judicial review, currently under reserve, upon which issuance this offer is withdrawn.

The Applicant reserves the right to disclose the terms of this proposal; for greater certainty, settlement privilege does not apply in respect of this communication.

Would you kindly communicate this proposal to your client(s).

Sincerely,

Aniz Alani

Department of Justice Canada
Ministère de la Justice Canada

900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Telephone: (604) 666-0110
Facsimile: (604) 666-1585

Our File: 7755923

April 29, 2015

BY E-MAIL: senate.vacancies@anizalani.com

Aniz Alani
2930 Woodland Drive
Vancouver, British Columbia
V5N 3R1

Dear Mr. Alani:

Re: ALANI, Aniz v. Canada
Federal Court File No. T-2506-14

Thank you for your letter of April 27, 2015. Please be advised that the respondents do not accept your offer to resolve your Federal Court application on the terms that you have proposed.

Yours sincerely,

Jan Brongers
Senior General Counsel,
B.C. Regional Office

JB/tm

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Department of Justice
British Columbia Regional Office
Attn: Jan Brongers and Oliver Pulleyblank
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

June 11, 2015

Dear Sirs/Mesdames:

Re: ***Canada (Prime Minister) et al. v. Alani*; A-265-15 (the "Appeal")**
***Alani v. Canada (Prime Minister) et al.*; T-2506-14 (the "Application")**
Notice of Constitutional Question

I write in my capacity as the Applicant in the above referenced Application and as the Respondent in the above referenced Appeal.

Please find enclosed for service upon you in accordance with section 57 of the *Federal Courts Act*:

1. Notice of Constitutional Question in respect of the Appeal
2. Notice of Constitutional Question in respect of the Application

If your respective province or territory intends to apply for leave to intervene in the Appeal or the Application in accordance with Rules 109 or 110, kindly advise at your earliest convenience.

Similarly, if a reference question to your respective Court of Appeal concerning the filling of Senate vacancies is under consideration, I would be grateful if you could advise accordingly, as a parallel proceeding may render the Application or Appeal unnecessary.

A copy of the Notice of Appeal and Amended Notice of Application is also enclosed.

Materials related to the Application and Appeal, including pleadings, motion records, authorities, and court transcripts, are also available at http://www.anizalani.com/senatevacancies.

For expediency, I would be grateful if any correspondence regarding this matter could be sent by email to senate.vacancies@anizalani.com.

Your acknowledgment of receipt by return e-mail, or alternatively by fax to 604.563.0510, would be appreciated.

Sincerely,

Aniz Alani

Encl.:

1. Notice of Constitutional Question (A-265-15)
2. Notice of Constitutional Question (T-2506-14)
3. Amended Notice of Application
4. Notice of Appeal

Department of Justice Canada
Ministère de la Justice Canada

900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Telephone: (604) 666-0110
Facsimile: (604) 666-1585

Our File: 7755923

June 15, 2015

Federal Court
701 West Georgia Street
Vancouver, British Columbia
V7Y 1B6

Attention: Courts Administration Services

Dear Sir/Madam:

Re: ALANI, Aniz v. Canada
Federal Court File No. T-2506-14
Respondents' Response to Rule 317 Request for Certified Tribunal Record

On May 25, 2015, the Applicant, Mr. Alani, filed an amended Notice of 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." In my capacity as counsel for the Respondents, I write in respect of the Applicant's Rule 317 request for a certified tribunal record contained in this amended Notice of Application which is worded as follows:

> 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 and the Queen's Privy Council for Canada in making the decision not to advise the Governor General to fill the currently existing Vacancies, to the applicant and the Registry.

In response to this Rule 317 request, the Respondents advise that there was no "decision not to advise the Governor General to fill the currently existing [Senate] Vacancies" as alleged by Mr. Alani. Accordingly, Rule 317 is not applicable (as per *Alberta Wilderness Association v. Canada*, 2013 FCA 190) and no material will be transmitted to either the Registry or the Applicant pursuant to Rule 318.

Yours sincerely,

Jan Brongers
Senior General Counsel, B.C. Regional Office

JB/tm

c.c. Aniz Alani
Applicant