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

APPLICANT'S RESPONDING MOTION RECORD

[Respondents' Motion to Dismiss for Mootness Returnable June 22, 2016]

Volume I of II

Aniz Alani
[redacted]

Applicant

On his own behalf

Department of Justice
Regional Director General's Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Solicitor for the Respondent

Jan Brongers and Oliver Pulleyblank
Counsel

INDEX – MOTION RECORD

Federal Court Cour fédérale

Date: 20160211

Docket: T-2506-14

Vancouver, British Columbia, February 11, 2016

PRESENT: Case Management Judge Roger R. Lafrenière

BETWEEN:

ANIZ ALANI

Applicant

and

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

Respondents

ORDER

UPON reading correspondence dated February 2, 2016 from the Applicant setting out a joint proposed timetable for service and filing of motion records in relation to the Respondents' motion to dismiss the application for mootness, and the Applicant's availability for the hearing of the application;

AND UPON reading correspondence dated February 3, 2016 from counsel for the Respondents setting out counsel's availability;

THIS COURT ORDERS that:

1. The Respondents shall serve and file their motion record for an order dismissing the application for mootness no later than May 16, 2016.

2. The Applicant shall serve and file his responding motion record by June 1, 2016.

3. The Respondents' motion and the application shall be heard together, or one after the other, as the hearing judge may direct, before this Court at the Pacific Centre - 3rd floor, 701 West Georgia Street, in the City of Vancouver, British Columbia, on Wednesday, the 22nd day of June, 2016, at 9:30 in the forenoon for a maximum duration of two (2) days.

"Roger R. Lafrenière"
Case Management Judge

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FEDERAL COURT

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Applicant

and

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

Respondents

WRITTEN REPRESENTATIONS OF THE APPLICANT

[Respondents' Motion to Dismiss for Mootness Returnable June 22, 2016]

Aniz Alani

[redacted]

Tel: 604.600.1156
Email: senate.vacancies@anizalani.com

Applicant
(On his own behalf)

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OVERVIEW

1. When the text of Canada's constitutional documents says that the Governor General "shall" summon a fit and qualified person to the Senate "when a vacancy happens", does this in turn impose a recognizable duty on the Prime Minister to provide advice, without which the Governor General by convention does not act?

2. This question alone is at the crux of this judicial review application.

3. The historical record before the Court confirms that Senate vacancies have, in fact, been left unfilled for varying lengths of time since Confederation to the present day. At issue in this proceeding is whether the timing of Senate appointments to fill vacancies is a matter entirely within the untrammeled discretion of the Prime Minister.

4. Until Prime Minister Stephen Harper was reported to have publicly commented in December 2014 that he was in "no rush" to fill Senate vacancies, the Applicant was not personally aware that vacancies had been accumulating in the Senate for over two years.

5. In an effort to challenge the constitutional validity of an ongoing course of conduct, the Applicant commenced the present judicial review proceeding. Regrettably, in retrospect, the notice of application referred to the Prime Minister's statement as communicating a decision not to appoint Senators. In fact, the referenced statement was merely emblematic of a course of conduct that has been continued by many if not most Prime Ministers since Confederation.

6. Since the application was brought and perfected, a new Prime Minister has taken office. The Respondents take the view that Prime Minister Trudeau's stated intention to fill Senate vacancies renders this application moot such that it would serve "no practical purpose" to adjudicate.

7. That there is has been a policy shift within the Prime Minister's Office is not disputed. The former Prime Minister went so far as to declare a "moratorium" on Senate appointments, asserting publicly that:

> "Under the constitution today, the prime minister has the authority to

appoint or not appoint. That is an authority."[1]

8. Following a change in government in November 2015, it became the policy of the present government not to appoint Senators except based on the recommendation of an Independent Advisory Board for Senate Appointments.[2]

9. Indeed, the Applicant acknowledges that the Prime Minister has recommended the appointment of seven Senators following the initial set of recommendations provided by the Independent Advisory Board. Clearly, the former Prime Minister's moratorium on Senate appointments is no longer in effect.

10. Despite the shift in policy, the underlying issue raised in the application remains unresolved. The question as to whether Senate vacancies must be filled within a reasonable time is not merely, as the Respondents contend, an academic question of interest to law journals. It goes to the fundamental question of whether the level of representation enshrined in the Constitution is merely aspirational or a substantive guarantee recognized by law.

11. The current Prime Minister's stated *intention* to eventually fill Senate vacancies cannot be enough to render moot the central issued raised in this application. Nineteen vacancies remain unfilled, some for over three and a half years. The Respondents have not provided the Court with any evidence that the government has taken steps to implement its proposed new appointments process beyond the preliminary phase that resulted in seven appointments. Nor has the government provided any information justifying its continuing delay in filling the outstanding vacancies. In short, a live controversy remains, and the Court ought not to dismiss this application on grounds of mootness.

PART I – FACTS

12. On December 8, 2014, the Applicant filed a notice of application for judicial review in this proceeding seeking, *inter alia*, a declaration that the Prime Minister of Canada must

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[1] Affidavit of Lyse Cantin sworn May 12, 2016 ("Cantin Affidavit"), Exhibit "B", Respondent's Motion Record, Tab 2, page 13.
[2] Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para. 3 and Exhibit "C", page 15.

advise the Governor General to summon a qualified person to the Senate within a reasonable time after a vacancy happens in the Senate.

13. At the time of the filing of the application, there were 16 vacancies in the Senate with no appointments having been made since March 25, 2013.[3]

14. When the notice of application was amended with leave on May 25, 2015, there were 20 vacancies in the Senate, with still no appointments having been made since March 25, 2013.[4]

15. At the time of dissolution of the 41st Parliament, there were 22 vacancies.[5]

16. As of May 30, 2016, there were 19 vacancies in the Senate.[6]

17. Of the 22 vacancies that existed when Prime Minister Harper resigned his office, 15 remain unfilled. These include, for example:

    i) a vacancy in British Columbia which has existed since the retirement of former Senator Gerry St. Germain on November 6, 2012, and

    ii) two vacancies in Nova Scotia that have remained unfilled since the retirement and resignation of former Senators Donald H. Holiver and Gerald J. Comeau on November 16, 2013 and November 30, 2013 respectively,

    iii) two vacancies in New Brunswick that have remained unfilled since the resignation and retirement of former Senators Noël Kinsella and Fernand Robichaud on November 27, 2014 and December 1, 2014 respectively,

    iv) a vacancy in one of four Senate seats guaranteed to Prince Edward Island that has remain unfilled since the retirement of former Senator Catherine Callbeck on July 25, 2014.

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[3] Parliament of Canada, Standings in the Senate (41st Parliament), retrieved May 30, 2016
[4] *Ibid.*
[5] *Ibid.*
[6] Parliament of Canada, Standings in the Senate (42nd Parliament), retrieved May 30, 2016

PART II – ISSUES

18. The Respondents' motion raises four issues:

i) Should the Court hear oral submissions on mootness before or during the parties' submissions on the remaining issues raised in the application?

ii) Are the issues raised in the application for judicial review moot?

iii) If the application is moot, should the Court nevertheless exercise its discretion to determine the application on its merits?

iv) What is an appropriate order as to costs of this motion?

PART III – SUBMISSIONS

1. PROCEDURE AS TO ORDER OF ORAL SUBMISSIONS

19. As a preliminary procedural matter, the Respondents' motion regarding mootness ought to be treated as a supplementary objection to the application with submissions heard on the issue of mootness as part of the parties' oral submissions on the application.

20. The case management order issued by the Court (Lafrenière P.) on February 11, 2016 provided, in part:

> 3. The Respondents' motion and the application shall be heard together, or one after the other, as the hearing judge may direct, before this Court […] on Wednesday, the 22nd day of June, 2016, at 9:30 in the forenoon for a maximum duration of two (2) days.[7]

21. Both the application and the supplementary objection concerning mootness require the Court to consider the underlying factual record. Moreover, if the Court concludes that the application has become moot through the effluxion of time and change in executive government, the Court must further consider whether the issues raised in the application warrant exercising its discretion to nevertheless hear and determine the application. In

[7] *Alani v. Canada*, Court File T-2506-14; Document No. 52, entered in J. & O. Book, volume 1292, page(s) 372 – 373.

order to fully address these issues, the parties' submissions regarding mootness necessarily overlap and duplicate arguments pertaining to the application itself.

22. To illustrate this duplication, the table below identifies examples of the Respondents' written representations on mootness addressing factual and legal issues that mirror or overlap factual material and legal arguments contained within the parties' application records. The table specifically excludes reference to the numerous authorities to be relied on by each party in relation to the issues common to both the underlying application and Respondents' motion.

#	Description of factual or legal issue	Relevant portion of Respondents' Motion Record	Relevant portion of parties' application records
1.	Timing and content of Prime Minister Harper's statement concerning not being in a rush to fill Senate vacancies	Page 131	Respondents' record, p. 184 Applicant's record, p. 316
2.	Timing of Applicant's knowledge of Prime Minister Harper's statements relative to filing of application	Page 131	Respondents' record, pp. 184-185 Applicant's record, p. 11
3.	Applicant's motion to abridge timelines for application	Pages 132-133	Respondents' record, p. 186
4.	Prime Minister Harper's announcement of moratorium on Senate appointments	Page 133	Respondents' record, p. 188 Applicant's record, pp. 316-317
5.	Whether Applicant has standing to challenge the constitutionality of prolonged Senate vacancies given that: a) he is not interested in becoming a Senator, b) he has no expectation of being made a Senator, c) he has not been involved in any campaign or lobbying	Page 147	Respondents' record, pp. 192-195 Applicant's record, pp. 10-12

#	Description of factual or legal issue	Relevant portion of Respondents' Motion Record	Relevant portion of parties' application records
	efforts to have a particular individual appointed to the Senate, d) he has not suffered any personal prejudice from Senate vacancies, e) he has not experienced negative economic or psychological impacts from Senate vacancies, f) he has not been deprived of *Charter* rights as a result of Senate vacancies, and g) he has never asked anything of the Senate or been involved with the Senate's business such that he might be denied a benefit or service otherwise entitled to.		
6.	Whether the applicant's conduct of the litigation has been inconsistent with what would be expected from an individual with a real direct stake in the outcome	Page 147	Respondents' record, pp. 193-194 Applicant's record, pp. 10-17, 326-327
7.	Whether the application for judicial review is a reasonable and effective way of bringing constitutional issues relating to the Senate before the Court	Page 141	Respondents' record, pp. 194-195 Applicant's record, pp. 16-17, 326
8.	Whether the Prime Minister's alleged duty to recommend the filling of Senate vacancies is justiciable	Page 150	Respondents' record, pp. 196-202 Applicant's record, pp. 327-329
9.	Whether the Prime Minister's advice to the Governor General to	Page 138	Respondents' record, pp. 203-204

#	Description of factual or legal issue	Relevant portion of Respondents' Motion Record	Relevant portion of parties' application records
	summon a fit and qualified person to the Senate when a vacancy happens therein gives rise to a decision of a federal board, commission or other tribunal within the Federal Court's jurisdiction to judicially review		Applicant's record, pp. 329-333
10.	Whether there is a social cost to leaving the constitutional issues raised in the application unaddressed	Pages 148-149	Applicant's record, pp. 13-14, 323-325

23. In order for the parties to properly address and respond to the issues raised in the Respondents' motion, as the table above illustrates, it will be necessary to provide the Court with submissions that will also be pertinent to the main application, including in particular the issues of standing and justiciability. Rather than bifurcate the hearing or constrain the parties' ability to effectively present their respective cases, it would be most expedient to permit the parties to each address all issues raised in both the application and the respondents' motion during their oral submissions in chief.

2. MOOTNESS

24. The parties agree that the analytical framework set out in *Borowski* remains the controlling test for determining mootness. However, the Applicant submits that the factual circumstances underpinning the application are such that there remains a tangible and concrete dispute for the Court to properly adjudicate. The application has not become merely academic, either in light of the change in government that followed the October 19th federal election or the Prime Minister's stated intention to eventually fill existing Senate vacancies using a new appointments process.

25. In particular, the application is not moot because:

i) This is a judicial review of a course of conduct, not of a specific Prime Minister's

intentions

ii) The constitutionality of existing prolonged Senate vacancies remains a live controversy

The Scope of the Judicial Review Application

26. In urging the Court to consider the application moot, the Respondents juxtapose the previous Prime Minister's refusal to fill any Senate vacancies – implicit since as early as September 7, 2006[8] and made expressly clear on July 24, 2015 -- against the current Prime Minister's stated intention to redesign the Senate appointment process in order to eventually fill Senate vacancies. In particular, the Respondents emphasize the fact the current Prime Minister has recommended the appointment of seven Senators, thus confirming the end of the "moratorium" said to be central to this application.

27. In doing so, the Respondents seek to narrowly construe the scope of the judicial review application so as to emphasize the contrast between the intentions of Prime Ministers Harper and Trudeau in an effort to downplay the continuing constitutional controversy that would be resolved if the application were determined on its merits. Throughout their written representations, for example, the Respondents characterize the ambit of the proceeding in the following narrow terms:

- The "constitutionality of now-spent **political decisions** of a former Prime Minister whose Government is no longer in office."[9]
- Being "**related to a moratorium** on Senate appointments that has ended."[10]
- "…[A] judicial review **of a statement** alleged to reveal the former government's intention in relation to Senate appointments."[11]
- "In sum, Mr. Alani sought to judicially review the former Prime Minister's **intentions**

[8] Special Senate Committee on Senate Reform, *Minutes of Proceedings*, 39th Parliament, 1st Session, No. 2 (7 September 2006), Applicant's Record, pp. 313-314.
[9] Respondents' Motion Record, p. 130 at para. 2 [Emphasis added].
[10] Respondents' Motion Record, p. 141 at para. 40 [Emphasis added].
[11] Respondents' Motion Record, p. 144 at para 48 [Emphasis added].

with regard to Senate appointments…".[12]

- "…Mr. Alani has framed his application **as a challenge to the now-ended moratorium** on Senate appointments by the former Prime Minister."[13]

28. By attempting to narrowly define the scope of the present judicial review application to a particular statement or intention of a former prime minister, the Respondents obfuscate the essential character of the application's objective of challenging the constitutional validity of a continuing course of conduct.

29. For the purposes of the application and the respondents' motion, the Court must read the amended notice of application "holistically and practically". As the Federal Court of Appeal stated in *JP Morgan*:

> The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form: *Canada v. Domtar Inc.*, 2009 FCA 218 (CanLII) at paragraph 28; *Canada v. Roitman*, 2006 FCA 266 (CanLII) at paragraph 16; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 (CanLII), [2010] 3 S.C.R. 585 at paragraph 78.[14]

30. It is open to the Federal Court on an application for judicial review to review not just decisions but also courses of conduct and failures or refusals to act.

31. As the Federal Court of Appeal explained in *Air Canada v. Toronto Port Authority*:

> [24] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." **A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*:** *Krause v. Canada*, 1999 CanLII 9338 (FCA), [1999] 2 F.C. 476 (C.A.). **Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding."** Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial

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[12] Respondents' Motion Record, p. 144 at para 48 [Emphasis added].
[13] Respondents' Motion Record, p. 145 at para 51 [Emphasis added].
[14] *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc., 2013 FCA 250 (CanLII)* at para. 50 [*JP Morgan*].

> review of "decisions or orders": Rule 300 of the *Federal Courts Rules*. [Emphasis added][15]

32. Viewed holistically and practically, this application was never about asking the Court to rule on the legality of a specific statement made by a particular Prime Minister or the precise intentions of a Prime Minister at an isolated moment in time. Rather, the *raison d'être* of the application has consistently been to determine whether the Prime Minister has a recognizable obligation under Canada's Constitution to provide timely advice to the Governor General in order to allow a fit and qualified person to be summoned to the Senate within a reasonable time after a vacancy occurs therein.

33. In light of the application's manifest objective, as reflected in the form of remedy sought and in the applicant's position throughout this proceeding including the various interlocutory motions and appeals along the way, the underlying controversy has plainly not been resolved.

A Live Controversy Remains Unresolved

34. The Respondents have provided no evidence to indicate that the government of the day considers that the Prime Minister has a constitutional obligation to fill Senate vacancies within a reasonable time. On the contrary, by having failed to either initiate the process for recommending appointments for 19 current vacancies or articulate a justification for not proceeding with such process in an expeditious manner, the course of conduct of the current Prime Minister suggests a view in common with his predecessor that the timing of Senate appointments is entirely at the untrammeled discretion of the Prime Minister.

35. Unlike in *Borowski*, this is <u>not</u> a case in which a legal opinion is being sought on the interpretation of the Constitution in the absence of legislation or other governmental action. The governmental action at issue is the ongoing failure to fill Senate vacancies. In the case of British Columbia, for example, the representation guaranteed by the

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[15] *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at para. 24; Daly, Paul. "Decisions, Decisions, Decisions: Alani v. Canada (Prime Minister), 2015 FC 649", http://www.administrativelawmatters.com/blog/2015/05/27/decisions-decisions-decisions-alani-v-canada-prime-minister-2015-fc-649/; retrieved: May 30, 2016

Constitution Act, 1867 has been denied since the vacancy created on November 6, 2012 has been left unfilled.

3. DISCRETION TO HEAR AND DETERMINE ISSUES NOTWITHSTANDING ALLEGED MOOTNESS

36. In the alternative that the Court concludes that the issues raised in the present application have been rendered moot by the change in government, the Court ought to nevertheless determine the issues in the application because:

i) The parties have already provided the court with as complete a record as will likely ever exist on which to adjudicate the constitutionality of prolonged Senate vacancies.

ii) Neither the executive nor legislative branches of government have availed of the opportunity to clarify whether and when the Prime Minister must recommend appointments to the Governor General to fill Senate vacancies.

iii) Judicial economy militates in favour of resolving the issues raised in the application rather than awaiting a fresh application.

iv) Whether the Prime Minister has an obligation to provide the advice necessary in order for the Governor General to summon a fit and qualified person to the Senate within a reasonable time after a vacancy happens therein is an important question which might independently evade review by the Court.

v) There is a social cost to leaving the matter undecided.

37. It is noteworthy that, throughout this proceeding, the Respondents have made no attempt to substantively justify the Prime Minister's delay in recommending the appointment of Senators to fill Senate vacancies. Rather, the declaration sought in the application for judicial review is contested primarily on the basis of the applicant's alleged lack of standing, non-justiciability, the Court's lack of jurisdiction, and now mootness.

38. In particular, the Respondents do not argue that provisions of the *Constitution Act, 1867*

relied upon by the Applicant do not require the filling of a Senate vacancy "when it happens" or even within a reasonable time. Nor do the Respondents advance any argument that the factual circumstances surrounding any of the presently existing Senate vacancies are such that the failure to fill them is reasonable.

39. The significance of the Respondents' reliance on procedural objections rather than substantive arguments to oppose the granting of the relief sought is of particular relevance to the Court's discretion to determine the issues in the application even if it concludes that they are moot. Specifically, in the absence of a contextual or fact-specific defence to the legality of the impugned course of conduct, the record before this Court is precisely the same as would exist if a fresh application were brought.

40. If, for example, a new application for judicial review were brought to specifically challenge the failure of Prime Minister Trudeau to recommend the appointment of a Senator to fill particular vacancies, the exact same issues of standing, justiciability, and jurisdiction would need to be resolved. Most importantly, the task of interpreting the Constitution to determine whether the declaration sought is substantively justified would be precisely the same as it is in this existing application.

41. Finally, with respect to whether there is a "social cost" to leaving the issues in the application unresolved, the Respondents contend as follows:

> The federal bicameral system of parliamentary government has been operating since Confederation without a judicial ruling on whether a declaration should be made that the "Prime Minister of Canada must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate". There is no obvious social cost to Canadians in leaving this matter undecided. [16]

42. With respect, the fact that prolonged Senate vacancies have existed from time to time since Confederation or that there is currently no authoritative guidance on whether the Constitution requires the Prime Minister to cause appointments to be made within a reasonable time does not mean that there is no social cost to leaving this constitutional issue unaddressed.

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[16] Respondents' Written Representations, para. 65.

43. The duty of the judiciary is to ensure that the Constitution is followed.[17] This application for judicial review calls into question, perhaps for the first time within the judicial arena, whether the course of conduct of the former and current Prime Minister violates the supreme law of Canada.

44. If the answer is yes – recalling that both the Federal Court and Federal Court of Appeal have concluded that it is not plain and obvious that the application is without merit – the social cost of perpetuating unconstitutional activity by declining to recognize it as such is profound.

45. For these reasons, this Court ought to exercise its discretion to hear and determine the issues raised in the application even if it determines that the application as framed is technically moot.

4. COSTS

46. If this Court determines that the application is moot and declines to exercise its discretion to hear the application, the Applicant submits that the Court ought nevertheless to award costs of the motion and the application regardless of the outcome. As in *Caron*, this litigation has raised issues of national interest and has served an important public function.[18]

PART IV – ORDER SOUGHT

47. The Applicant respectfully requests the Court to issue the following order:

i) the respondents' motion is dismissed;

ii) costs of the motion are payable by the respondents to the applicant in any event of the cause in an amount to be fixed by the Court.

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[17] *Re Manitoba Language Rights*, [1985] 1 SCR 721.
[18] *Caron v. Alberta*, 2015 SCC 56 at paras. 109-114.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Aniz Alani
Applicant

June 1, 2016