Federal Court  Cour fédérale

Date: 20161013

Docket: T-2506-14

Citation: 2016 FC 1139

Ottawa, Ontario, October 13, 2016

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ANIZ ALANI

Applicant

and

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

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Mr Aniz Alani challenges a 2014 decision of then Prime Minister, the Right Honourable Stephen Harper, not to fill vacancies in the Senate of Canada. Mr Alani seeks a declaration that former Prime Minister Harper had a constitutional duty to advise the Governor General on

Senate appointments within a reasonable time after a vacancy arose. Mr Harper's position, says Mr Alani, failed to respect a binding constitutional convention.

[2] The respondents, the Prime Minister, the Governor General, and the Privy Council, raise numerous arguments against Mr Alani's position. First and foremost, the respondents submit that this matter is moot given that the current Prime Minister, the Right Honourable Justin Trudeau, has instated a new process for appointing Senators, has actually made a number of appointments to the Senate, and has committed to making more appointments in the near future. Therefore, according to the respondents, there is no longer any moratorium on Senate appointments, and no need to rule on the merits of Mr Alani's arguments. The respondents also maintain that Mr Alani's application for judicial review is not justiciable as it relates to a purely political question, that the Federal Court has no jurisdiction over the matter that Mr Alani does not have standing, and that the alleged constitutional convention on which Mr Alani relies does not exist. They ask me to dismiss Mr Alani's application.

[3] I agree with the respondents: this matter is moot. Therefore, I must dismiss Mr Alani's application for judicial review.

[4] The sole issue is whether Mr Alani's application for judicial review is moot. I express no view about the underlying merits of the application or the other grounds on which the respondents sought to dismiss it.

II. Background

[5] In late 2014, Mr Alani read an article in the Toronto Star in which former Prime Minister Harper was reported to have said, "I don't think I'm getting a lot of calls from Canadians to name more senators right about now" (December 4, 2014). A few days later, Mr Alani filed a notice of application seeking judicial review of Mr Harper's decision not to advise the Governor General to summon fit and qualified persons to fill Senate vacancies (the Governor General's authority is set out in the *Constitution Act, 1867,* s 32 – see Annex). In July 2015, Mr Harper confirmed that there was a moratorium on Senate appointments, although Mr Alani relied on the 2014 statement for his application.

[6] However, Mr Alani later sought to amend his application to remove any reference to Mr Harper's 2014 statement. Justice Sean Harrington allowed Mr Alani to make some amendments to his application, but did not allow him to delete his reliance on the 2014 statement. Justice Harrington observed that removing any mention of that statement from Mr Alani's application would convert the proceeding from an application for judicial review to an impermissible private legal reference. Justice Harrington also dismissed the respondents' motion to strike Mr Alani's application (*Alani v Canada (Prime Minister)*, 2015 FC 649). The Federal Court of Appeal later dismissed the respondents' appeal on the motion to strike (*Canada (Prime Minister) v Alani*, 2016 FCA 22).

[7] As the 2015 federal election neared, Mr Alani sought to expedite the hearing of his application. On May 29, 2015, in support of his desire to set down an early hearing, Mr Alani

wrote to the Court. In his letter, he recognized that "if a change of government results in a change in the policy of the government of the day in respect of Senate appointments, . . . the underlying issues raised in the application concerning the constitutional requirement to advise the Governor General to fill Senate vacancies may reasonably be expected to become moot". Soon thereafter, Mr Alani formally requested an expedited hearing. In his submissions, Mr Alani again conceded that the election could render his application moot. Nevertheless, Justice Jocelyne Gagné dismissed Mr Alani's motion to expedite (*Alani v Canada (Prime Minister)*, 2015 FC 859).

[8] On October 19, 2015, Mr Justin Trudeau became Prime Minister. In early December, the Minister of Democratic Institutions, the Honourable Maryam Monsef, announced the creation of an Independent Advisory Board for Senate Appointments to provide advice to the Prime Minister. In addition, Minister Monsef declared that five appointments would be made in early 2016, and that the remaining vacancies would be filled later in 2016. Indeed, in the spring of 2016, the Governor General – on the advice of the Prime Minister, who had received recommendations from the Advisory Board – appointed seven new Senators.

[9] On June 22, 2016, I heard the parties' submissions on the issue of mootness, as well as the merits of Mr Alani's application. I reserved judgment.

A. *Is Mr Alani's application for judicial review moot?*

[10] Despite his earlier concessions that the results of the 2015 election could render his application moot, Mr Alani argues that the underlying issue in this proceeding remains

unresolved: the fact that the Prime Minister has made appointments and has committed to filling remaining vacancies does not render his application moot. The question remains, he says, whether a constitutional convention requires the Prime Minister to fill vacancies on a timely basis.

[11] I disagree. Given the basis of Mr Alani's application – the former Prime Minister's decision not to make Senate appointments – current circumstances have rendered it moot, and there is no basis for exercising this Court's discretion to decide the moot question.

[12] The parties agree that the issue of mootness must be decided according to the framework set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. The first question is whether "the required tangible and concrete dispute has disappeared and the issues have become academic". If so, the second question is whether the court should exercise its discretion to decide the merits of the case (at p 353).

[13] In my view, the first question should be answered affirmatively; the essence of the dispute has vanished.

[14] Mr Alani's application for judicial review is based on a moratorium imposed by Mr Harper. While Mr Alani later tried to broaden his application, Justice Harrington denied his request. In effect, Mr Alani makes the same appeal here: his application does not relate to "a specific statement made by a particular Prime Minister or the precise intentions of a Prime Minister at an isolated moment in time". Rather, according to Mr Alani, his application raises a

general question about the existence of a constitutional obligation on the Prime Minister to advise the Governor General on Senate appointments within a reasonable time.

[15] I cannot agree with Mr Alani's submissions on this point. First, Justice Harrington already denied Mr Alani's request to frame his application as a general constitutional inquiry. Subject to a successful appeal of that order, it binds both Mr Alani and me. Second, he cannot broaden the scope of his application simply by way of legal representations before me. The notice of application provides the foundation for Mr Alani's case, and that notice refers specifically to Mr Harper's 2014 statement.

[16] I agree with Mr Alani that his notice of application should be read "holistically and practically" (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 50). However, that generosity of interpretation cannot amount to amending the very basis of the application. Mr Alani's application was inspired by a moratorium on Senate appointments; he specifically relied on the moratorium in his notice of application, and his request to broaden its scope was denied. Accordingly, the case before me is inextricably connected to the moratorium on Senate appointments announced by the former Prime Minister. That moratorium is clearly over. There is no live controversy remaining between the parties. Mr Alani's case is moot.

[17] Mr Alani argues that if I should find his application moot, I should exercise my discretion to decide it anyway because:

- The parties have compiled a complete record on the issues raised in his application, so it would be a more efficient use of judicial resources to decide them now rather than wait for a fresh application sometime in the future;
- There remains a question whether the Prime Minister considers himself bound to make timely appointments to the Senate;
- The application raises an important question that might otherwise evade judicial review; and
- There is a social cost to leaving undecided an important constitutional question.

[18] Again, I disagree with Mr Alani's submissions. In keeping with *Borowski*, the discretion to decide a moot case should be exercised only where an adversarial context remains, expending scarce judicial resources is not a major concern, and the court is not being asked to step outside its judicial role. These factors do not weigh in Mr Alani's favour.

[19] Without commenting on Mr Alani's standing, I note that there does not appear to be a genuine adversarial context here. Mr Alani brings his application essentially as a concerned and interested citizen. He has no particular or personal stake in the outcome.

[20] With respect to judicial resources, significant time and effort would be required to rule definitively on Mr Alani's application. True, the parties have already compiled the necessary written materials and the Court has received the parties' oral submissions. However, a full judgment on the merits would likely require weeks of analysis and writing that could be devoted instead to cases where the parties are engaged in a concrete and significant dispute that demands

timely resolution. Further, I do not see the constitutional issue at stake here as being evasive of judicial review. If a Senate vacancy remained open for a significant period, the Prime Minister's failure to act could be the subject of an application for judicial review. In addition, it is hard to see a significant social cost that the Canadian public would bear if the question Mr Alani has raised went unanswered for now. Given the current circumstances, an answer may not be needed for several years, if ever.

[21] Finally, taking account of the courts' proper role to decide real disputes between parties, not to legislate on academic legal questions, I find that Mr Alani's application falls into the latter category. He raises a question of constitutional law whose factual context has now evaporated. As the respondents point out, there is no longer any need to decide whether a constitutional convention has been breached by leaving open Senate vacancies beyond a reasonable period of time because the government has already begun filling the vacancies and has committed to filling the remainder in the near future.

[22] Therefore, I find Mr Alani's application to be moot, and I can find no reason to exercise my discretion to decide the question he raises.

III. Conclusion and Disposition

[23] Mr Alani's application for judicial review was based on a moratorium on Senate appointments imposed by former Prime Minister Harper. That moratorium is now over; Prime Minister Trudeau has committed to filling Senate vacancies and has, indeed, made several appointments. Accordingly, Mr Alani's application is moot.

[24] Deciding the moot question raised by Mr Alani would require the Court to decide a question that has no adversarial context, to expend significant judicial resources better applied to other cases, and, essentially, to legislate in respect of an academic constitutional question. In the circumstances, I decline to do so.

[25] The respondents, while recognizing that Mr Alani brought his application in good faith as a concerned and interested citizen, point out that he has pursued his case in the face of clear indications of mootness and has put the government to substantial legal costs. They ask the Court to grant them costs calculated according to the usual tariff. I agree and will make the corresponding order.

[26] As this decision involves an ancillary motion, not the merits of the application for judicial review, I find that it does not relate to a question of general public interest or importance. Therefore, this decision does not fall within s 20(1)(a) of the *Official Languages Act*, RSC 1985, c 31 (4th Supp), so I am releasing it in English only.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed as moot.

2. Mr Alani shall pay the respondents' costs.

"James W. O'Reilly"
Judge

Annex

The Constitution Act, 1867 (UK), 30 & 31 Vict, c 3	*Loi constitutionnelle de 1867* (R-U), 30 & 31 Vict, c 3
Summons on Vacancy in Senate	Nomination en cas de vacance
32 When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.	**32** Quand un siège deviendra vacant au Sénat par démission, décès ou toute autre cause, le gouverneur-général remplira la vacance en adressant un mandat à quelque personne capable et ayant les qualifications voulues.
Official Languages Act, RSC 1985, c 31 (4th Supp)	*Loi sur les langues officielles*, LRC 1985, c 31 (4^{e} suppl))
Decisions, orders and judgments that must be made available simultaneously	Décisions de justice importantes
20 (1) Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where	**20** (1) Les décisions définitives — exposé des motifs compris — des tribunaux fédéraux sont simultanément mises à la disposition du public dans les deux langues officielles :
(a) the decision, order or judgment determines a question of law of general public interest or importance;	a) si le point de droit en litige présente de l’intérêt ou de l’importance pour celui-ci;

FEDERAL COURT

SOLICITORS OF RECORD

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