

Court File No.: T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

APPLICANT

and

**THE PRIME MINISTER OF CANADA and
THE GOVERNOR GENERAL OF CANADA**

RESPONDENTS

WRITTEN REPRESENTATIONS OF THE RESPONDENTS
[Respondents' Motion to Dismiss for Mootness Returnable June 22, 2016]

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OVERVIEW

1. Following the October 19, 2015 federal general election, the Government of Canada ended the moratorium on Senate appointments that had been in effect pursuant to the policy of the former Prime Minister. A new process for appointing Senators involving an independent advisory board has now been put in place, and seven new Senators have been appointed by the Governor General on the advice of the Prime Minister. The Government of Canada has committed to filling the remaining outstanding Senate vacancies before the end of this year.
2. These developments notwithstanding, Mr. Alani refuses to abandon his application for judicial review. Mr. Alani still wants the Federal Court to provide him with an academic opinion on the constitutionality of now-spent political decisions of a former Prime Minister whose Government is no longer in office.
3. There is no valid reason for this moot application to proceed to judgment. If there ever was a truly live controversy between the parties, which Canada denies because of the standing, justiciability and jurisdiction issues discussed in Canada's main application record, that controversy ended when the former Prime Minister's moratorium on Senate appointments concluded. This is not an exceptional case that warrants being heard notwithstanding the fact that a judgment will have no practical effect. The application should be dismissed for mootness.

PART I - STATEMENT OF FACTS

4. On December 4, 2014, an article was published in the Toronto Star (the “Toronto Star Article”) that reported former Prime Minister Harper’s comments on outstanding vacancies in the Senate. Prime Minister Harper is quoted to have said, “I don’t think I’m getting a lot of calls from Canadians to name more senators right about now” and “[w]e 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” (the “December 4 Comments”).¹
5. Mr. Alani became aware of the Toronto Star Article and, on December 8, 2014, filed a notice of application seeking judicial review “in respect of the decision of the Prime Minister, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified Persons to fill existing vacancies in the Senate.”²
6. Mr. Alani later sought to divorce his application for judicial review from the December 4 Comments, and brought a motion for leave to amend his notice of application to delete any reference to a decision made by the Prime Minister. On April 23, 2015, Justice Harrington heard, along with Canada’s motion to strike (the “Motion to Strike”), Mr. Alani’s motion to amend. Justice Harrington dismissed the Motion to Strike, and allowed Mr. Alani to make certain amendments. However, he refused to allow Mr. Alani to delete the references to a decision of the Prime Minister, holding that to do such would impermissibly turn the judicial review application into a private reference.³
7. On May 29, 2015, Canada filed a notice of appeal in the Federal Court of Appeal from the Motion to Strike (the “Strike Appeal”).

¹ Affidavit of Aniz Alani, affirmed June 23, 2015 (“Alani Affidavit”), Exhibit “B”, Applicant’s Application Record, Tab 3, page 206.

² Amended Notice of Application, Applicant’s Application Record, Tab 2, Page 5.

³ *Alani v. Canada (Prime Minister)*, 2015 FC 649 (“*Alani, Motion to Strike and Amend*”), at paras. 45 and 46, Respondents’ Motion Record, Vol. 2, Tab 1.

8. Mr. Alani did not, in either the original or the amended application for judicial review, assert that any particular Senate seat had been left vacant for too long. Rather, apart from costs, the sole relief sought in the amended notice of application is a “declaration that the Prime Minister of Canada must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate.”⁴
9. On May 29, 2015, Mr. Alani wrote to the Federal Court suggesting an abbreviated timetable for the remaining steps in the litigation so as to allow it to be heard before the October 2015 federal election (the “May 29 Letter”). In that letter he observed:

Will the proceeding be rendered moot if not decided prior to a particular event?

As noted above, if the Respondents are correct in their position that only “political consequences” flow from the Prime Minister’s impugned inaction, and that judicial intervention is thereby precluded, the timing of the election may render moot the most obvious expression of political dissatisfaction citizens may choose to express in light of a determination that the Prime Minister’s inaction is unconstitutional but not subject to a judicial remedy.

Moreover, if the Prime Minister fills the vacancies but only after the election, or if a change in government results in a change in the policy of the government of the day in respect of Senate appointments, or a continuation of the existing policy of inaction but without a clear expression of that policy or “decision”, 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 after the election.

[Emphasis added].⁵

10. On June 11, 2015, Mr. Alani wrote to counsel for Canada seeking to expedite the hearing. He again raised concern that if the matter was not heard before the upcoming federal election, the issues raised in the application may become moot.⁶

⁴ Amended Notice of Application, Applicant’s Application Record, Tab 2, Page 5.

⁵ Affidavit of Karen Wong, affirmed May 6, 2016 (“Wong Affidavit”), Respondents’ Motion Record, Vol. 1, Tab 3, para 2 and Exhibit “A”, page 77.

⁶ Wong Affidavit, Respondents’ Motion Record, Vol. 1, Tab 3, para 3 and Exhibit “B”, page 84.

11. On June 17, 2015, Mr. Alani filed a motion seeking to abridge timelines and set the application for hearing at the earliest possible date (the "Motion to Expedite").
12. In his written representations in support of the Motion to Expedite, Mr. Alani submitted that the Court should expedite the proceeding as it might be rendered moot by the upcoming federal election. He submitted:

While neither party nor the Court can predict with certainty the impact of the October 19th federal election on this proceeding, the Applicant submits the following as reasonable hypotheticals that could realistically render the proceeding moot:

- i) If shortly before the election the Prime Minister resiles from his stated intention not to appoint Senators, it is reasonably foreseeable that the Respondents may raise mootness as a bar to proceeding with the application;
- ii) If the Prime Minister remains in office following the election and thereafter resiles from his stated intention not to appoint Senators, it is also reasonably foreseeable that the Respondents may raise mootness as a bar to proceeding with the application; and
- iii) If the Prime Minister does not remain in office following the election, it is reasonably foreseeable that the Respondents may raise ripeness as a bar to proceeding with the application unless and until the new Prime Minister states a similar intention not to appoint Senators.⁷

13. On July 14, 2015, Justice Gagné released a judgment dismissing the Motion to Expedite.⁸
14. On July 24, 2015, Prime Minister Harper announced a policy of a moratorium on further Senate appointments, pending sufficient provincial agreement on reform or abolishment of the Senate, or until appointments become necessary in order for government legislation to be passed by the Senate (the "Moratorium Announcement").⁹ Mr. Alani did not seek judicial review of the Moratorium Announcement, apparently choosing instead to pursue his challenge to the December 4 Comments.

⁷ Wong Affidavit, Respondents' Motion Record, Vol. 1, Tab 3, para 4 and Exhibit "C", pages 105-106.

⁸ *Alani v. Canada (Prime Minister)*, 2015 FC 859 ("*Alani, Motion to Expedite*"), Respondents' Motion Record, Vol. 2, Tab 2.

⁹ Affidavit of Lyse Cantin, sworn May 12, 2016 ("*Cantin Affidavit*"), Respondents' Motion Record, Vol. 1, Tab 2, para 2 and Exhibits "A" and "B" at pages 10-11.

15. On October 19, 2015, the Forty-Second General Election was held for the House of Commons. This resulted in the formation of a new government with the Right Honourable Justin Trudeau serving as Prime Minister.
16. On December 3, 2015, the Honourable Maryam Monsef, Minister of Democratic Institutions, announced a plan to establish an Independent Advisory Board for Senate Appointments (the "Advisory Board"). The Minister set out that the Advisory Board would be established to provide the Prime Minister with advice on appointees to the Senate, guided by public, merit-based criteria.¹⁰ Further, the Minister announced that the new appointments process would be implemented in two phases, with five appointments made in early 2016 during a transitional process to improve representation of the provinces with the most vacancies, followed by a permanent process to replenish the remaining vacancies later in 2016, including an application process open to all Canadians (the "Minister's December 3 Announcement").¹¹
17. On January 19, 2016, by Order in Council PC 2016-0011 ("OIC 2016-0011"), the Governor in Council established the Advisory Board. Attached as a schedule to OIC 2016-0011 are the Terms of Reference of the Advisory Board (the "Terms of Reference").¹²
18. The Terms of Reference set out the mandate of the Advisory Board:
1. The Independent Advisory Board for Senate Appointments ("Advisory Board") is an independent and non-partisan body whose mandate is to provide non-binding merit-based recommendations to the Prime Minister on Senate nominations.¹³

¹⁰ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 3 and Exhibits "C" and "D" at pages 15-18.

¹¹ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 3 and Exhibit "D" at page 17.

¹² Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 4 and Exhibits "E" and "F" at pages 19-21.

¹³ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 5 and Exhibit "F" at page 20.

19. The Terms of Reference set out that the Advisory Board is to be composed of three permanent federal members, one of whom is appointed as Chairperson, and two *ad hoc* members chosen from each of the provinces or territories where a vacancy is to be filled.¹⁴

20. The Terms of Reference set out the duty on the Advisory Body to make recommendations, stating that:

5. ... the Advisory Board must provide to the Prime Minister for his consideration, within the time period set by the Prime Minister upon the convening of the Advisory Board, a list of five qualified candidates for each vacancy in the Senate with respect to each province or territory for which there is a vacancy or anticipated vacancy and for which the Advisory Board has been convened. The Prime Minister may take into consideration all of the qualified candidates with respect to all vacancies for that province or territory.¹⁵

21. The Terms of Reference also set out a transitional process by which recommendations were to be made in early 2016 to fill two vacancies in Ontario, one in Quebec, and two in Manitoba (the "Transitional Process").¹⁶

22. On January 19, 2016, the Minister of Democratic Institutions announced the establishment of the Advisory Board, as well as the appointment of the Advisory Board's members (the "Minister's January 19 Announcement").¹⁷ Attached to the news release setting out the Minister's January 19 Announcement was a document entitled "Frequently Asked Questions", which set out that recommendations under the transitional process would be made in early 2016, and the remaining vacancies will be filled later in 2016 through a permanent process for which individual Canadians may apply.¹⁸

¹⁴ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 5 and Exhibit "F" at page 20.

¹⁵ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 5 and Exhibit "F" at page 21.

¹⁶ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 5 and Exhibit "F" at page 21.

¹⁷ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 6 and Exhibits "G" and "H" at pages 25 - 29.

¹⁸ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 6 and Exhibit "H" at pages 28 - 29.

23. Also on January 19, 2016, the Federal Court of Appeal, apparently concerned with whether the issue of Senate vacancies had been rendered moot by the Minister's January 19 Announcement, and without prompting from either party, issued a direction stating:

The Court indicates that the parties be asked if the appeal is not made moot by the Minister's January 19, 2016 announcement with respect to the establishment of an independent commission to advise the Government on Senate appointments, together with the Government's undertaking to fill the current vacancies within the calendar year. If they agree that the matter has become moot, would they please advise us as soon as possible. If not, they should come prepared to argue the issue of mootness as a preliminary question.

(the "FCA Direction re Mootness")¹⁹

24. On January 22, 2016, counsel for Canada wrote to the Federal Court of Appeal in response to the FCA Direction re Mootness, setting out Canada's position that the application for judicial review was rendered moot by the Minister's January 19 Announcement. On the other hand, Canada took the position that the appeal was not moot unless or until Mr. Alani withdrew his underlying application.²⁰ Canada also informed the Court that a without prejudice offer had been extended to Mr. Alani that this litigation be resolved on the basis that both parties discontinue their respective application and appeal, on a without costs basis.²¹

25. On January 22, 2016, Mr. Alani wrote to the Federal Court of Appeal stating his position that the Minister's January 19 Announcement did not make the appeal moot, and that whether the matter was moot should be determined by the Federal Court, not the Federal Court of Appeal (the "Applicant's January 22 Letter").²²

¹⁹ Wong Affidavit, Respondents' Motion Record, Vol. 1, Tab 3, para 5 and Exhibit "D", at page 113.

²⁰ Wong Affidavit, Respondents' Motion Record, Vol. 1, Tab 3, para 7 and Exhibit "F", at page 116.

²¹ Wong Affidavit, Respondents' Motion Record, Vol. 1, Tab 3, para 6 and Exhibit "E", at page 114.

²² Wong Affidavit, Respondents' Motion Record, Vol. 1, Tab 3, para 8 and Exhibit "G", at page 118 - 122.

26. As Mr. Alani refused to withdraw his application, the Strike Appeal proceeded on January 25, 2016. The Federal Court of Appeal dismissed the Strike Appeal, on the basis that Justice Harrington did not err in concluding it was not plain and obvious that the application was bound to fail.²³

27. On March 1, 2016, Mr. Alani posted an open letter to Prime Minister Trudeau on his website, www.anizalani.com (the "Open Letter to the Prime Minister"). In the letter he proposed that the government adopt "[l]egislation establishing time limits for filling Senate vacancies". He then stated that he would be willing to abandon this case if the

...government is willing to firmly commit itself to the path it has proposed for filling Senate vacancies by establishing clear, measurable timelines for implementation that demonstrate an appropriate regard for the promise of regional representation reflected in the Constitution.²⁴

28. On March 18, 2016, Prime Minister Trudeau announced that he would recommend to the Governor General for appointment seven Senators, based on the transitional process recommendations of the Advisory Board (the "Transitional Process Appointees"). The Transitional Process Appointees are:

- a. Raymonde Gagné (Manitoba)
- b. Peter Harder (Ontario)
- c. Frances Laskin (Ontario)
- d. Ratna Omidvar (Ontario)
- e. Chantal Petitclerc (Quebec)
- f. André Pratte (Quebec)
- g. Murray Sinclair (Manitoba)²⁵

29. The Transitional Process Appointees were each appointed to the Senate by the Governor General between March 23, 2016, and April 2, 2016.²⁶

²³ *Canada (Prime Minister) v. Alani*, 2016 FCA 22, Respondent's Motion Record, Vol. 2, Tab 5.

²⁴ Wong Affidavit, Respondents' Motion Record, Vol. 1, Tab 3, para 9 and Exhibit "H", at pages 123 - 128.

²⁵ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 6 and Exhibit "T" at pages 30 - 31.

²⁶ Cantin Affidavit, Respondents' Motion Record, Vol. 1, Tab 2, para 8 and Exhibit "K" at pages 67 - 70.

PART II - ISSUES

30. This motion raises a single issue: should the application for judicial review be dismissed as moot?
31. Canada's position on this issue is complicated by the fact that there never was, in Canada's estimation, a properly justiciable live controversy between the parties to begin with. Rather, as set out in Canada's memorandum of fact and law on the application, Mr. Alani has no standing to bring this matter forward, the relief sought does not raise a justiciable question, and there is no decision of a Federal Board, Commission or other Tribunal in issue that is within the jurisdiction of the Federal Court to judicially review. This is not an otherwise viable case that has been overtaken by subsequent events and rendered moot; this proceeding has been fundamentally flawed from its inception.
32. However, Canada says that even if the case raised a justiciable issue and Mr. Alani had standing to bring it forward, both of which are denied, the application for judicial review has been rendered moot by the announced intention of the Government to recommend Senators for appointment, formalized in OIC 2016-0011. The mootness was underscored when the Transitional Process Appointees were appointed to the Senate. This is also not a case where it would be appropriate for the Court to exercise its discretion to hear the matter notwithstanding the mootness of the issues raised.

PART III - SUBMISSIONS

Mootness: The Legal Framework

33. The leading authority on when a court should refuse to hear a matter that is or has become moot is the decision of the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*.²⁷ The plaintiff, Mr. Borowski, was an opponent of abortion. He brought a challenge to certain amendments to the *Criminal Code* that permitted abortion when authorized by a therapeutic abortion committee, arguing that these laws deprived the unborn child of rights protected under the *Charter of Rights and Freedoms*. He was unsuccessful at trial and at the Saskatchewan Court of Appeal.
34. Before Mr. Borowski's case was heard by the Supreme Court of Canada, that Court struck down the impugned legislation in its judgment in *R. v. Morgentaler*.²⁸ However, the *Morgentaler* ruling had the effect of removing barriers to access to abortion, the opposite of what Mr. Borowski hoped to accomplish. He therefore asked the Court to still consider the constitutional question raised by his case, which had been framed as "Does a child en ventre sa mère have the right to life as guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms?"²⁹
35. The Supreme Court of Canada declined to do so, finding the matter moot as the impugned provision had been struck down. Sopinka J. wrote for the unanimous Court. In an often cited passage, he described the doctrine of mootness and set out a two-step test for determining if a matter should be dismissed for being moot. He observed:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the

²⁷ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 ("Borowski") Respondents' Motion Record, Vol. 2, Tab 4.

²⁸ *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Respondents' Motion Record, Vol. 2, Tab 7.

²⁹ *Borowski*, at S.C.R. 351, Respondents' Motion Record, Vol. 2, Tab 4.

time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.³⁰

[Emphasis added].

36. Sopinka J. went on to discuss when a court might exercise its discretion to hear a case that is moot. He noted that when deciding whether to depart from the ordinary rule against deciding a matter without a live controversy, the Court should bear in mind the principal rationales for why such cases are not usually heard, specifically:

- a. that court's competence to resolve disputes is rooted in the adversary system;
- b. concern for judicial economy; and
- c. the need for the Court to demonstrate a measure of awareness of its proper role as the adjudicative branch in our political framework, and not intrude into the role of the legislative branch.³¹

37. These factors are not to be applied mechanically, and in exercising its discretion to hear moot cases the court should consider the extent that each of these rationales for the

³⁰ *Borowski*, at S.C.R. 353, Respondents' Motion Record, Vol. 2, Tab 4.

³¹ *Borowski*, at S.C.R. 358 – 363, Respondents' Motion Record, Vol. 2, Tab 4.

enforcement of the mootness doctrine exists.³² This framework is routinely applied by this Court to determine whether a matter is moot.³³

Applying the *Borowski* Analysis

The Case is Moot

38. As set out in *Borowski*, a case is moot if the court's decision would not have any effect on resolving a live controversy between the parties.³⁴

39. Canada's position is, first, that there never was a live controversy between the parties. As set out in Canada's memorandum of fact and law, Mr. Alani does not have standing to bring this matter forward, the judicial review application is outside of the Federal Court's jurisdiction, and the relief sought fails to raise a justiciable issue.

40. However, if there ever was a live controversy between the parties, it related to a moratorium on Senate appointments that has ended. OIC 2016-0011 and the Minister's December 3 and January 19 Announcements set out the new government's policy on making Senate appointments, and the appointment of the Transitional Process Appointees confirmed that the former Prime Minister's moratorium is no longer in effect.

41. As submitted in Canada's memorandum of fact and law, this matter has always been in substance a private reference on a point of law, not a true application for judicial review. That this is the essential nature of the proceeding is underscored by Mr. Alani's desire that the matter continue following the end of the moratorium on Senate appointments. There is no potential practical consequence to anyone of proceeding with this hearing. Mr. Alani

³² *Borowski*, at S.C.R. 363, Respondents' Motion Record, Vol. 2, Tab 4.

³³ See e.g. *Harvan v. Canada*, 2015 FC 1026 ("*Harvan*") Respondents' Motion Record, Vol. 2, Tab 6; *Osakpamwan v. Canada*, 2016 FC 267 ("*Osakpamwan*") Respondents' Motion Record, Vol. 2, Tab 8; *Azhaev v. Canada*, 2014 FC 219 ("*Azhaev*") Respondents' Motion Record, Vol. 2, Tab 3.

³⁴ *Borowski*, at S.C.R. 353 Respondents' Motion Record, Vol. 2, Tab 4; *Harvan*, at para. 7, Respondents' Motion Record, Vol. 2, Tab 6; *Osakpamwan*, at para. 23, Respondents' Motion Record, Vol. 2, Tab 8.

invites the Court to offer an opinion on a matter that might be an interesting subject of academic debate in the law reviews, but not one that ought to be formally adjudicated by the courts.

42. This Court has recognized that a challenge to a moratorium that has ended does not raise a live controversy. In *Schwarz Hospitality Group Ltd. v. Canada*,³⁵ the applicant sought judicial review of a decision to implement a one-year development moratorium in Banff National Park. By the time the application for judicial review was heard, the moratorium had long since expired. The Court observed:

[27] I have earlier determined that the moratorium was a one-year development moratorium on commercial accommodation facilities outside park communities... The one-year moratorium has now long since expired... There is absolutely no evidence before the Court that the moratorium has been extended, or that a new moratorium has been imposed...

[28] In all of the circumstances, I conclude that there remains no "live controversy" regarding the moratorium between the parties that are before the Court. I further conclude that no purpose whatsoever would be served by examining at any length whether or not the moratorium was invalid or unlawful or of no force and effect as it purported to relate to the Storm Mountain Lodge redevelopment proposal.

[Emphasis added].

43. It is not readily apparent as to why Mr. Alani desires to persist with this application for judicial review, and rejected Canada's offer to allow him to withdraw the application on a without-costs basis following the Minister's January 19 Announcement. However, some clue as to the basis for Mr. Alani's position is provided in both his January 22 Letter, sent to the Federal Court of Appeal in response to its direction inquiring if the matter is not made moot by the Minister's January 19 Announcement, and the March Open Letter to the Prime Minister.
44. In the January 22 Letter, Mr. Alani first suggests that the case is not moot because "nothing in the Minister's news release commits to filling the current vacancies within the current

³⁵ *Schwarz Hospitality Group Ltd. v. Canada*, 2001 FCT 112 ("*Schwarz Hospitality*") Respondents' Motion Record, Vol. 2, Tab 10.

year, or at all". That however is mistaken; the Minister's January 19 Announcement is accompanied by a related "Frequently Asked Questions" document that states:

What is the timeline for the Advisory Board to provide its recommendations to the Prime Minister?

Under the transitional process, it is expected that the Advisory Board will provide its recommendations to the Prime Minister in late February 2016. Appointments should be made shortly thereafter to immediately reduce partisanship in the Senate and improve the representation of the provinces with the most vacancies. The remaining vacancies will be filled later in 2016 through the permanent process.

45. Next in the January 22 Letter, Mr. Alani notes that no timeline has been established setting out when an advisory panel will be established to recommend nominees for current or expected vacancies, or for when those vacancies will be filled. However, this is not a case about whether the Prime Minister is subject to some undefined, and previously unheard of, obligation to set specific timelines for all current or expected Senate vacancies. It is rather a judicial review of the alleged December 4 "decision" by former Prime Minister Harper "not to advise the Governor General to summon fit and qualified Persons to fill existing vacancies in the Senate". As set out by Justice Harrington, "[t]he whole basis on which this application has proceeded is that it is a judicial review of a decision." If there ever was a reviewable decision at that time, it has been rendered moot, and the fact that Mr. Alani does not know precisely when every vacancy will be filled does not constitute a live controversy between the parties.

46. Finally, in his January 22 Letter Mr. Alani refers to the reasons of Justice Gagné in the Motion to Expedite, where she observed:

[24] However, if [Mr. Alani's] real intention is to have a declaration from the Court dealing with a Prime Minister's duties and obligations with respect to Senate appointments, this application for judicial review might not be moot if the vacancies are filled before a final judgment is rendered.³⁶

³⁶ *Alani, Motion to Expedite*, Respondents' Motion Record, Vol. 2, Tab 2.

47. Mr. Alani suggests that “[i]t follows, *a fortiori*, that neither the appeal nor the application is made moot by the announcement of an *intention* to fill some of the vacancies, and which is devoid of any commitment, reflected in an Order-in-Council, statute, or otherwise, to fill all existing vacancies according to any stated timeline.” (emphasis in the original)³⁷
48. However, Mr. Alani’s apparent view that his application is not moot notwithstanding the Government of Canada’s stated intention to fill all existing Senate vacancies is unfounded. Indeed, his application was framed as a judicial review of a statement alleged to reveal the former government’s intention in relation to Senate appointments. However, the present Government of Canada clearly has not maintained that intention, as demonstrated by the Minister’s December 3 and January 19 Announcements and the adoption of OIC 2016-0011. This new intention was further confirmed by the appointment of the Transitional Process Appointees. In sum, Mr. Alani sought to judicially review the former Prime Minister’s intentions with regard to Senate appointments, and that review became unquestionably moot when the new Prime Minister demonstrated that his intentions are markedly different from those of his predecessor.
49. Further, with regard to Justice Gagné’s comments, it is not sufficient simply to say that a *legal issue* raised by a case may not be moot in order for a matter to proceed in the absence of a live controversy between the parties. Indeed, moot cases nearly always present a legal issue of at least some continuing interest. *Borowski*, for example, raised the issue of whether the unborn possess *Charter* rights, which the Court described as “a question of great public importance”.³⁸ Nevertheless, despite continuing interest in the question, the matter was declared moot because of the absence of a live controversy within which to consider the issue. Indeed, the more important the legal issue, the more prudent it is to be especially wary of deciding the matter in the absence of a live controversy.
50. Finally, it appears from the Open Letter to the Prime Minister that Mr. Alani is of the view that his case will never be moot unless Parliament passes legislation establishing timelines for Senate appointments. However, to suggest that a litigation matter is not moot until

³⁷ Wong Affidavit, Respondents’ Motion Record, Vol. 1, Tab 3, para 8 and Exhibit G, at page 120.

³⁸ *Borowski*, at S.C.R. 364, Respondents’ Motion Record, Vol. 2, Tab 4.

legislation is adopted to address the subject of the underlying case misunderstands the role of the judiciary in Canada's democratic system of government. It is not the function of the courts to conduct a reference at the behest of any citizen who thinks there ought to be a law governing a particular situation, nor is it the court's function to decide a moot issue in order to compel legislative action in relation to constitutional convention.

51. To conclude on mootness, Mr. Alani has framed his application as a challenge to the now-ended moratorium on Senate appointments by the former Prime Minister. The first paragraph of Mr. Alani's memorandum of fact and law filed in support of his application reads:

1. The Prime Minister of Canada has notoriously declared a moratorium on filling vacancies in the Senate of Canada by refusing to provide advice to the Governor General necessary to effect such appointments. This application for judicial review seeks a declaration as to the legality of the Prime Minister's unilateral action.

52. Mr. Alani also candidly acknowledged that a change of government policy on Senate appointments would likely render the matter moot. As set out by Mr. Alani in his May 29 Letter sent to the Federal Court:

Moreover,... if a change in 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 after the election.

53. Accordingly, it is not plausible for Mr. Alani to assert now that the lack of a judicially enforceable deadline for the making of Senate appointments results in a justiciable live controversy. This matter is moot and the only remaining question is whether the Court ought nevertheless to exercise its residual discretion to adjudicate it notwithstanding its mootness.

The Court Should Not Exercise its Discretion to Hear This Moot Case

54. As set out above, in determining whether to hear a moot case the Court should consider the degree to which the three principal criteria for declining to hear a moot matter are

present. Canada says that each of the criteria in this case weigh heavily against entertaining and deciding this judicial review application.

A. The absence of an adversarial context

55. The first such criterion is that, as set out in *Borowski*, “a court’s competence to resolve legal disputes is rooted in the adversary system”. The Court noted that “The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.”³⁹

56. In the present case there is no proper adversarial context. As set out in the standing argument, Mr. Alani never had a stake in the outcome of this case. Indeed, he does not even attempt to claim private interest standing, asking instead that the Court grant him public interest standing, or, alternatively, decide the case even though he has no standing at all.⁴⁰ As noted in Canada’s memorandum of fact and law, Mr. Alani confirmed under cross examination on his affidavit 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 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 any negative economic or psychological impacts from Senate vacancies;
- f. he has not been deprived of any *Charter* right he enjoys, including democratic 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 a service he would otherwise be entitled to as a result of Senate vacancies.

³⁹ *Borowski*, at S.C.R. 358 – 359, Respondents’ Motion Record, Vol. 2, Tab 4.

⁴⁰ Applicant’s Memorandum of Fact and Law, Applicant’s Application Record, Tab 5, at para. 61.

57. Furthermore, Mr. Alani's approach to this litigation has not been consistent with what would be expected from an individual with a real direct stake in the outcome. Specifically:

- a. Mr. Alani filed a notice of application for judicial review just three days after learning for the first time about the issue of Senate vacancies, based only on "some initial research into the status and history of vacancies in the Senate".
- b. The notice of application contained no factual information about the case at all, apart from the simple number of outstanding vacancies in the Senate.
- c. Mr. Alani provided no evidence, expert or otherwise, on the scope or existence of the constitutional conventions put in issue by the case, even after Justice Harrington, in deciding the Motion to Strike, indicated that the Court was in need of such evidence.

58. Further, the case law makes clear that an adversarial context is not established simply because the party alleging the matter is not moot claims an interest in a legal issue raised. Rather, the Court looks for some tangible collateral consequence that will affect the individual if the matter is decided. This was explained in *Azhaev v. Canada*, in the following fashion:

[22] While this Court has room to exercise its discretion to hear the merits of the instant application, as guided by the principles in *Borowski*, I disagree with the Applicant that there is an adversarial context remaining in this matter. In *Borowski*, the Court discussed an adversarial context as one where "collateral consequences" arise in related proceedings. For example, if the resolution of an issue in an otherwise moot proceeding determines the availability of liability or prosecution in a related proceeding between the parties, there remains an adversarial context between them. In the instant application, no collateral consequences will arise as a result of whether the Officer erred in his decision.

59. Mr. Alani had no personal stake in the outcome of this case when it was started, and he certainly has no stake in its outcome now that there is no moratorium on Senate appointments in effect. Granting the relief sought would have no direct or collateral consequence to Mr. Alani. This is a case that perhaps retains some personal, academic, or political interest to Mr. Alani, but there is no adversarial context rendering it an appropriate matter for the Court's attention.

B. Concern for Judicial Economy

60. The second reason that courts decline to hear moot cases discussed in *Borowski* is a recognition that judicial resources are finite, and a concern for judicial economy. Scarce judicial resources are rationed amongst many claimants. The courts' attention should generally be allocated to live controversies, not moot issues. Further, the Supreme Court in *Borowski* made clear that it is no answer to simply say that the record is prepared and the matter is ready to proceed to hearing, something that is true of many cases that have become moot.⁴¹
61. The Court in *Borowski* outlined several circumstances where hearing a moot case could be an efficient use of judicial resources. None of those exceptions apply in this case.
62. First, the Court noted the concern over scarce resources could be partially answered where the court's decision will have some practical effect on the rights of the parties.⁴² As discussed above, this case will have no practical effect on Mr. Alani's rights.
63. Second, the Court noted that an expenditure of judicial resources may be warranted in cases which, though moot, are of a recurring nature and a brief duration. The mootness doctrine is relaxed so as to "ensure that an important question which might independently evade review be heard by the court".⁴³ While Senate appointments are a recurring matter, Mr. Alani's case is founded on a concern that Senate vacancies might be left outstanding for too long—that is to say for an *insufficiently brief* duration. If the issue evades judicial review because the moratorium on appointments was brief, that simply illustrates that the concern animating this application has resolved.
64. Finally, the Court in *Borowski* noted an "ill-defined basis for justifying the deployment of judicial resources" in matters which "raise an issue of public importance of which a

⁴¹ *Borowski*, at S.C.R. 363, Respondents' Motion Record, Vol. 2, Tab 4.

⁴² *Borowski*, at S.C.R. 360, Respondents' Motion Record, Vol. 2, Tab 4.

⁴³ *Borowski*, at S.C.R. 360, Respondents' Motion Record, Vol. 2, Tab 4.

resolution is in the public interest”.⁴⁴ However, the Court made clear that it is not enough to simply show that a matter raises an issue of national importance; rather, there must be “the additional ingredient of social cost in leaving the matter undecided”.⁴⁵

65. 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.

66. No compelling reason exists to expend finite judicial resources on this case instead of matters that raise live controversies. As this Court concluded in *Schwarz Hospitality Group*, “no purpose whatsoever” is served by reviewing a moratorium that has since ended.⁴⁶

C. The Court’s Proper Role

67. Finally, the Court in *Borowski* noted the need for the Court to remain mindful of its role within the Canadian constitutional and democratic framework. The Court’s role is adjudicative, and “[p]ronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch”.⁴⁷

68. It is within this context that the Court in *Borowski* made clear that a case must not be allowed to turn into a private reference on a constitutional question. The Court held:

One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the *Canadian Charter of Rights and Freedoms* in the absence of legislation or other governmental action which would

⁴⁴ *Borowski*, at S.C.R. 361, Respondents’ Motion Record, Vol. 2, Tab 4.

⁴⁵ *Borowski*, at S.C.R. 362, Respondents’ Motion Record, Vol. 2, Tab 4.

⁴⁶ *Schwarz Hospitality*, at para. 28, Respondents’ Motion Record, Vol. 2, Tab 10.

⁴⁷ *Borowski*, at S.C.R. 362, Respondents’ Motion Record, Vol. 2, Tab 4.

otherwise bring the *Charter* into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference.⁴⁸

69. If this case is allowed to proceed notwithstanding the fact that there is no longer any moratorium on Senate appointments, it will unquestionably be nothing more than a private reference. Further, Mr. Alani's private reference would not consider any tangible issue, such as whether any particular Senate vacancy had been left open too long. Rather, the reference would be in respect of a series of constitutional questions posed in a factual vacuum, including the Court's role in recognizing and enforcing constitutional conventions, whether the Prime Minister's conventional power to recommend has turned into a duty to recommend, and, if so, whether any rule regarding timing of such advice has arisen by convention. Indeed, even if these questions were placed before the Court by a government in a proper reference, the Court must remain mindful of its place in the constitutional system and may decline to decide them on the basis of non-justiciability.⁴⁹ Such matters are plainly then not properly the subject of judicial consideration in a judicial review application lacking a live controversy.

⁴⁸ *Borowski*, at S.C.R. 365, Respondents' Motion Record, Vol. 2, Tab 4.

⁴⁹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 26 – 30, Respondents' Motion Record, Vol. 2, Tab 9.

PART IV - ORDER SOUGHT

70. That the motion be allowed.

71. That the application for judicial review be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this
16th day of May, 2016.



Jan Brongers and Oliver Pulleyblank

Counsel for the Respondents

PART V - LIST OF AUTHORITIES

1. *Alani v. Canada (Prime Minister)*, 2015 FC 649
2. *Alani v. Canada (Prime Minister)*, 2015 FC 859
3. *Azhaev v. Canada*, 2014 FC 219
4. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342
5. *Canada (Prime Minister) v. Alani*, 2016 FCA 22
6. *Harvan v. Canada*, 2015 FC 1026
7. *R. v. Morgantaler*, [1988] 1 S.C.R. 30
8. *Osakpamwan v. Canada*, 2016 FC 267
9. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217
10. *Schwarz Hospitality Group Ltd. v. Canada*, 2001 FCT 112