

Federal Court



Cour fédérale

Date: 20250109

Docket: T-1110-23

Citation: 2025 FC 52

Ottawa, Ontario, January 09, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

ALAIN MUSENDE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Alain Musende (“the Applicant”) is a federal public servant who wanted to become a candidate for a political party so that he could run in the federal election that is scheduled to be held on or before October 20, 2025. Under the *Public Service Employment Act*, SC 2003, c 22 [PSEA], he was required to obtain the approval of the Public Service Commission (“PSC” or the “Commission”) before seeking the nomination of his party.

[2] On April 27, 2023, the PSC granted the Applicant's request to seek nomination as a candidate, subject to a number of conditions. The Applicant challenges one of these conditions, which requires that he be on leave without pay ("LWOP") starting on the day his nomination is made public or that he undertakes activities in support of his candidacy, for a period lasting until 6 months after he withdraws as a candidate, or following the election (if he is not elected). The Applicant points out that this is a significantly more restrictive condition than was imposed by the PSC when he sought permission and stood for election in the last federal election in 2019. At that time, he was only required to be on LWOP for the duration of the election period.

[3] On May 26, 2023, the Applicant launched the present application for judicial review seeking to overturn the decision. His application focuses on the LWOP condition during the pre-election period; the Applicant does not object to the other conditions that were set by the PSC. The matter was set for hearing on March 28, 2024.

[4] On March 15, 2024, the Respondent filed a motion seeking an Order dismissing the application for judicial review on the basis that it had become moot because the Applicant had moved to a new temporary position and the PSC had issued a new decision setting significantly less onerous conditions on him. The Applicant opposed the Respondent's request. The parties addressed both the mootness question and the merits of the judicial review on the day of the hearing.

[5] For the reasons set out below, the application is dismissed because it is moot. I find that the application for judicial review is moot because the decision the Applicant challenges has

been superseded by a subsequent decision. The Applicant has not challenged the conditions that would apply to him while he continues to occupy the temporary assignment he currently occupies, which may well continue until the next federal election. I find this is not a suitable case to exercise the discretion to hear a matter even though it is moot.

I. Background

[6] At the time of the application for approval from the PSC that gave rise to this case, the Applicant was employed as a manager within the Marketed Health Products Directorate in the Health Products and Food Branch at Health Canada. He worked in the Section for Transparency and Advertising Regulatory Surveillance (“STARS”).

[7] The Applicant’s responsibilities included ensuring that health product advertising in Canada complies with legislation, regulations and policies. He was also involved in the development of public-facing policies and programs relating to health product advertising, and he provided subject-matter expertise to internal and external stakeholders about the legal requirements that govern regulatory advertising. The Applicant also played a role in recommending enforcement actions for advertising that does not comply with the rules, although a different branch of Health Canada is responsible for any enforcement action.

[8] The Applicant was previously granted permission to seek nomination and stand as a candidate in a federal election. On July 12, 2019, the PSC granted his request for the 2019 federal election, on the condition that he be on LWOP for the duration of the electoral period.

The election was held on October 21, 2019. The Applicant was not elected, and subsequently returned to his duties at Health Canada.

[9] On March 14, 2023, the Applicant submitted a request form to his manager in order to run as a candidate in the next federal election in the electoral district of Ottawa West-Nepean, Ontario. His manager and the Deputy Minister of Health Canada were required to complete the form before sending it to the PSC for consideration. However, the form was not completed in a timely way, and the Applicant therefore contacted the PSC for assistance. There was some urgency to complete the process, because the party nomination process in which the Applicant wanted to participate was closing as of April 29, 2023.

[10] On March 23, 2023, a Senior Analyst (the “SA”) at the PSC acknowledged the Applicant’s submission and advised him to submit additional information. The Applicant did that, and there were a series of exchanges, by email and telephone, between the Applicant and the SA. In addition, the SA contacted the Applicant’s managers at Health Canada to obtain their input and to clarify the Applicant’s job duties. In the course of these exchanges, the SA identified a risk to political impartiality relating to the Applicant’s candidacy, or that he may be perceived as unable to perform his duties in a politically neutral manner. The SA developed a number of conditions to mitigate this risk, including that the Applicant not be involved with policy or program development, and not meet with stakeholders outside of Health Canada including regulatory affairs professionals from pharmaceutical companies or their legal counsel.

[11] Health Canada senior management did not express concerns regarding the Applicant's ability to perform his duties and be perceived as performing his duties in a politically impartial manner if he stood as a candidate. Management noted that mitigation measures could be put in place and a reintegration plan would be developed if the Applicant was not elected and then returned to his position.

[12] The conditions proposed by the SA posed obvious difficulties for the Applicant's continued performance of his duties, since his work involved regular contact with persons outside of Health Canada. Health Canada acknowledged that the conditions would likely make it impossible for the Applicant to perform his duties, and therefore he would either have to be re-assigned to another position or go on LWOP.

[13] During this period, the Applicant told the SA that two of the proposed conditions were too broad and did not reflect his job duties, namely that he not be involved with policy or program development and that he not deal with external stakeholders. He expressed his objections both to his manager at Health Canada and the SA through emails and phone conversations. The Applicant indicated that he rejected the idea that he would have to go on LWOP for the duration of his candidacy, and viewed any job reassignment as unwarranted.

[14] The SA and his manager at the PSC prepared a Candidacy Request for Permission Analysis ("Permission Analysis"), detailing the information they had gathered about the Applicant's job duties, the risks to political impartiality that were associated with his candidacy, and the conditions they recommended to mitigate these risks. This document was presented at a

special meeting of the PSC on April 27, 2023. Rather than waiting for its next regular meeting, the PSC convened a special meeting so that a decision could be made on the Applicant's case prior to the close of the candidate nomination period.

[15] The PSC adopted the recommendations in the Permission Analysis and granted the Applicant permission to seek nomination as a candidate before and during the federal election period, and to be a candidate during the election period. This permission was subject to a number of conditions, including that the Applicant be on LWOP once his candidacy became public or he began activities in support of his candidacy. The PSC decision was communicated to the Applicant by letter dated April 27, 2023 (the "April 2023 decision"). The PSC indicated that it could reconsider the Applicant's circumstances if Health Canada was able to reassign him to a new position. The Applicant was asked to indicate whether he accepted the conditions by signing and returning the last page of the letter. On May 10, 2023, the Applicant confirmed he did not accept the conditions.

[16] On May 26, 2023, the Applicant launched an application for judicial review of the April 2023 decision, and the process followed the usual steps. Both parties filed their records and the matter was set down for hearing on March 28, 2024.

[17] On March 15, 2024, the Respondent filed a motion asking that the application for judicial review be dismissed because it had become moot. The Respondent based its motion on two key facts. First, on November 8, 2023, the Applicant began a temporary assignment in a different position within the Market Health Products Directorate at Health Canada. Second, the Applicant

had submitted a new request to the PSC for permission to seek a nomination and to run for election, and the PSC rendered a new decision on February 7, 2024 (the “February 2024 decision”). In light of the job duties in the Applicant’s temporary position, the new PSC decision granted him permission to seek nomination and be a candidate for a political party subject to certain conditions, in particular that he be on LWOP during the federal election period. The new decision indicated that the same LWOP condition as was imposed in the April 2023 decision would apply if the Applicant returned to his substantive position, including the LWOP condition during the pre-election period.

[18] In response to an inquiry from the Applicant following his receipt of the February 2024 decision, the PSC confirmed that the conditions set in that decision were in effect for the upcoming federal election.

[19] Based on these developments, the Respondent submitted that the application for judicial review was moot.

[20] With this background, we turn to a discussion of the issues in dispute.

II. Issues and Standard of Review

[21] The issues in this case are: is the application for judicial review moot; if not, should the PSC decision be quashed because it is unreasonable or because it was reached in a procedurally unfair manner?

[22] There is no standard of review that applies to the question of mootness, instead it must be assessed in accordance with the case-law discussed below. The merits of the PSC decision are to be reviewed under the framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], and recently confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[23] In summary, under the *Vavilov* framework, a reviewing court “is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints” (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [Canada Post]). An administrative decision-maker’s exercise of public power must be “justified, intelligible and transparent” (*Vavilov* at para 95). The onus is on the Applicant to demonstrate that “any shortcomings or flaws ... are sufficiently central or significant to render the decision unreasonable” (*Canada Post* at para 33, citing *Vavilov* at para 100). Such errors must be “more than merely superficial or peripheral to the merits of the decision.” (*Vavilov* at para 100).

[24] Procedural fairness is to be reviewed on a standard that is akin to “correctness,” although technically no standard of review is applied at all: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [Canadian Pacific] at para 55; see also *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107. Under this approach, a reviewing Court is required to assess whether the decision-making process was fair in all of the circumstances, “with a sharp focus on the nature of the substantive rights involved and the consequences for an individual...” (*Canadian Pacific* at para 54). The ultimate question

is “whether the applicant knew the case to meet and had a full and fair chance to respond” (*Canadian Pacific* at para 56).

III. Analysis

A. *Is the application for judicial review moot?*

(1) Legal framework

[25] The law concerning mootness is well-established, and not in dispute between the parties. The core principles were established in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. A matter is considered moot when there is no longer any “live controversy” between the parties, that is to say the decision will not resolve any controversy which affects or may affect the rights of the parties. If a matter is found to be moot, courts will generally exercise their discretion not to hear the case, in large part because courts are important public resources that should not spend their time resolving theoretical disputes that will not have some practical impact on the parties to the case.

[26] However, courts have a discretion to hear and decide matters even though they are moot. In exercising that discretion, the following factors are important: the absence or presence of an adversarial context (are there two or more sides that still want to argue the matter?); judicial economy and whether there is any practical utility in deciding the matter (who cares about the outcome and will the Court’s decision have some practical effect?); and whether the Court would be exceeding its proper role by making law in the abstract (is the case only of theoretical interest, or to give a legal opinion “in the air”?): see *Hakizimana v Canada (Public Safety and Emergency*

Preparedness), 2022 FCA 33 at para 20. The weight to be given each factor depends on the circumstances of each case: *Boland v Canada (Attorney General)*, 2024 FC 11 at para 16.

(2) The second application for permission

[27] As noted earlier, on April 27, 2023, the PSC granted the Applicant permission to seek nomination as, or to be a candidate in the upcoming federal election, subject to several conditions including that he be on LWOP for the duration of his candidacy. This decision was based on the job duties associated with the Applicant's substantive position as a manager of the STARS unit. The Applicant did not accept the terms of this decision, and he subsequently launched this application for judicial review.

[28] The Applicant says that he was concerned about the nomination deadline and knew that his application for judicial review would not be decided for some time. He therefore decided to submit a second request for permission on October 16, 2023. On October 24 and 25, 2023, a Senior Analyst at the PSC informed the Applicant that his second request could not be processed because the April 2023 decision "remains valid" and that the decision "is valid for the specific election identified in the request."

[29] On October 30, 2023, the Applicant was contacted by a Director General from the PSC who asked him to disregard the October 24 email that had indicated that his second request could not be processed. The Director General indicated that the PSC was considering whether it could proceed with his second request. On November 8, 2023, the Applicant began his temporary assignment, and he advised the PSC of this on November 9, 2023. The PSC asked him to

complete a formal request for candidacy permission under section 114 of the *PSEA*, as well as to obtain his supervisor's signatures that were missing from his second request form. The Applicant provided further information relating to his new assignment as well as his substantive position at STARS. The Applicant's request for permission was finalized on January 12, 2024, and it covered the duties associated with both positions.

[30] On February 11, 2024, the PSC granted the Applicant permission to seek nomination as, or to be, a candidate before and during the upcoming federal election. The February 2024 decision grants permission subject to two sets of conditions: in relation to the Applicant's acting assignment, he was required to be on LWOP only during the election period; in regard to his substantive position as a manager at STARS, the conditions are essentially the same as the ones set by the April 2023 decision, including that he be on LWOP for the duration of his candidacy.

(3) The submissions of the parties

[31] The Respondent argues that the application is moot because there is no longer any live dispute between the parties; the Applicant is in a new assignment and there is a new PSC decision that governs the permission for him to seek a political nomination. Essentially the Respondent argues that the April 2023 decision that the Applicant is challenging in this application has been overtaken by events, and there is no purpose in ruling on his claim about that decision.

[32] In support of its position, the Respondent points out that although the Applicant's second request was submitted to the PSC before he began his new assignment, by the time his request

was finalized he had begun his new duties, and his application related to his new job duties as well as his former position. That is the application that resulted in the February 2024 decision. The Respondent says that the PSC was required to consider both positions by virtue of subsection 2(1) of the *Political Activities Regulations*, SOR/2005-373 [the *Regulations*].

[33] In addition, the Respondent submits that the PSC decision that is currently in effect regarding his political candidacy relates to both his new position as well as his substantive position as a manager in STARS. There is no end date to the Applicant's assignment, and so it is possible that the terms of the February 2024 decision will be in effect if and when the Applicant seeks a nomination or participates in the upcoming federal election. Furthermore, according to the Respondent, if the Applicant returns to his former position, his political candidacy will be subject to the terms of the February 2024 decision.

[34] In light of these developments, the Respondent submits that there is no live controversy between the parties regarding the April 2023 decision because it is no longer in effect. The February 2024 decision now governs the terms on which the Applicant can seek political candidacy. The Respondent acknowledges that the conditions relating to the Applicant's substantive position are essentially identical in both decisions, and that if he was to return to his substantive position as a manager in STARS he would still be required to be on LWOP for the duration of his candidacy and during the election. However, according to the Respondent, the possibility of an issue recurring does not in itself warrant hearing an otherwise moot case: *David Suzuki Foundation v Canada (Attorney General)*, 2019 FC 411 at para 97, citing *Kozarov v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185 at para 4.

[35] The Respondent argues that there is no practical utility in hearing the application because it has lost its primary purpose. On the “judicial economy” analysis, the Respondent argues there is no wider public interest in hearing this application because the PSC decision regarding such permission requests is highly factual: *Sinclair v Canada (Attorney General)*, 2023 FC 750 [*Sinclair (FC)*] aff’d 2024 FCA 57 [*Sinclair (FCA)*]. The PSC is required to apply the legal criteria to the facts of the matter at the time of the request, and that is what it did in this case.

[36] The Applicant resists the mootness motion on several grounds. The Applicant says that the PSC is *functus officio* in regard to the April 2023 decision. He submits that the PSC had no authority to re-open its previous decision, as confirmed by the October 24, 2023 email from the Senior Analyst which stated that the original decision was valid for the upcoming federal election. In light of that, the Applicant submits that the February 2024 decision is partially invalid, insofar as it purports to replace the April 2023 decision regarding his substantive position. He says that the February 2024 decision is valid only in relation to the conditions set for his temporary assignment.

[37] The Applicant also argues that he can be returned to his substantive position at any time, and therefore the objectionable requirement that he be on LWOP for the duration of his candidacy would still apply under the terms of either decision. He submits that the uncertainty of his job status and the fact that the objectionable condition still applies confirms that there is still a live controversy between the parties, and thus his application is not moot.

[38] As a secondary point, the Applicant questions whether the February 2024 decision is valid, given that there is no evidence that a completed request was ever submitted to the PSC. He points out that the form in the record relating to the second request is missing supervisor's signatures and appears to be incomplete. Based on this, the Applicant questions whether the February 2024 decision is, in fact, valid.

[39] The Applicant submits that his application is not moot. However, if the Court considers that the February 2024 decision is valid in respect of both the acting assignment and his substantive position at STARS, the Applicant submits that the *Borowski* factors favour dealing with his claim on its merits. He notes that the parties are prepared to argue the matter on the merits. The Applicant argues that the decisive factor in favour of hearing the case on its merits is that there is a public interest in dealing with his claim, because the PSC has shown that it is failing to follow and apply the binding authority of the leading decision on political candidacy decisions under section 114 of the *PSEA*, namely the decision of the Federal Court of Appeal in *Taman v Canada (Attorney General)*, 2017 FCA 1 [*Taman*].

(4) Analysis

[40] The following facts are important for assessing whether the application for judicial review is moot. The Applicant's application for judicial review focuses on the PSC's decision dated April 27, 2023, relating to his substantive position as a manager in the STARS unit. The PSC's analysis of the risks to political impartiality and the conditions it imposed all focused on his job duties in that position. The LWOP condition that the Applicant seeks to overturn was imposed because of the risks of a perception of political partiality that arose because of the job

duties associated with that position. The Applicant rejected the terms that were fixed by the PSC in that decision. He then challenged it in order to try to overturn the LWOP condition, so that he can seek the nomination of his party while still employed as a manager in the STARS unit rather than having to take an extended LWOP.

[41] As noted above, the Applicant rejected the PSC's decision on May 10, 2023, because he objected to the conditions that were attached to it, in particular the requirement that he be on LWOP prior to the election period. On October 16, 2023, the Applicant submitted a new request to seek nomination or be a candidate for the upcoming federal election. At that time, he still occupied his position as manager in the STARS unit.

[42] On November 8, 2023, the Applicant began a temporary assignment in a different position within the Marketed Health Products Directorate in the Health Products and Food Branch. He advised the PSC about this the following day, and the information gathering process by the PSC relating to his second application focused mainly on his new job duties.

[43] On December 19, 2023, the Applicant provided further information regarding his responsibilities in his new position. In summary, his new job involved developing project proposals and plans for regulatory advertising, and providing advice and recommendations to the Director General of the Marketed Health Products Directorate. The new position does not involve contact with external stakeholders or representing the Branch at meetings with external parties.

[44] On January 12, 2024, the Applicant submitted an updated request for permission that described his job duties during his temporary assignment, as well as those relating to his substantive position at STARS. His manager's input emphasized that the Applicant would not have contact with external parties and that there were no concerns regarding impartiality if he ran as a candidate in the upcoming election. Based on the new information, the PSC prepared a new Candidacy Request for Permission Analysis, which analyzed the risks associated with the Applicant's substantive position as a manager in the STARS unit as well as those arising in the course of his temporary assignment.

[45] The PSC analysis document indicated that the perceived risks to impartiality were reduced, largely because the Applicant's new job duties meant that his internal visibility level was low and his external visibility level was "nil." This was contrasted with his visibility as a manager in the STARS unit, where his internal and external visibility were rated as medium, given his acknowledged expertise in the field of regulatory advertising and his interactions with external stakeholders. Based on this, the PSC Candidacy Request for Permission Analysis recommended one set of conditions that would apply while the Applicant occupied the temporary assignment, while repeating the same conditions as before if he returned to his substantive position as a manager in STARS. Specifically, the analysis recommended that the Applicant be on LWOP only during the course of the election period while he remained in his temporary assignment.

[46] The PSC granted the Applicant's request for permission to seek nomination as a candidate before and during the next federal election. The PSC required the Applicant to take a

LWOP during the election period while he was on his temporary assignment, but would require him to take a LWOP prior to that if he reverted back to his substantive position. The PSC advised the Applicant of its decision by email on February 11, 2024, and the following day a PSC Analyst confirmed to the Applicant that the prior decision was no longer in effect.

[47] These facts set the context for the analysis of the Respondent's mootness motion. As explained below, applying the *Borowski* principles, I am persuaded that the application is moot, and that this is not an appropriate case to exercise my discretion to deal with the matter on its merits.

(a) *The challenge to the April 2023 decision is moot*

[48] I am not persuaded by the Applicant's arguments challenging the validity of the February 2024 decision insofar as it relates to his substantive position at STARS. The PSC had both the authority and responsibility to consider the Applicant's second request, and by the time it made its decision the application that he had submitted covered the job duties associated with the temporary assignment as well as his substantive position at STARS.

[49] Under paragraph 2(1)(a) of the *Regulations*, a request for permission under subsection 114(1) must contain information: "with respect to the duties that the employee performs on a permanent and temporary basis." The Commission was required to consider all of the information submitted by the Applicant and his employer in determining whether seeking nomination or being a candidate "impairs or is perceived as impairing the employee's ability to perform their duties in a politically impartial manner" (subsection 2(2) of the *Regulations*). In

light of this, the PSC had the authority to consider the Applicant's second request in relation to his temporary assignment and his substantive position.

[50] The prior interactions between the Applicant, the PSC and Health Canada demonstrate that the process of considering a request under section 114 of the *PSEA* is intended to seek to maximize the employee's exercise of the democratic right to stand for political office. In the information gathering process that preceded the April 2023 decision, the PSC and Health Canada managers examined whether the Applicant's job duties in his substantive position could be modified or whether he could be assigned to a different position in order to mitigate or eliminate the risk of political partiality. The Applicant was aware of this, although he argued that such modifications were not required. Moreover, when the PSC conveyed the April 2023 decision to the Applicant, it stated that it could reconsider the matter if there was any change in his circumstances. The point here is that the PSC and Health Canada reasonably sought to find a solution that minimized the risk of political partiality, so that the Applicant could participate in the democratic process as a candidate.

[51] The fact that the temporary assignment only became available after the first decision was issued did not make the PSC *functus officio* in regard to the Applicant's second request. By the time the second request came before the Commission, the Applicant's request for permission dealt with his temporary job duties as well as his substantive position. In that sense, the PSC did not decide to "re-open" its prior decision, but rather considered the Applicant's second request as a new matter, based on different facts than had been presented the first time.

[52] The PSC has confirmed that the February 2024 decision is currently in effect, and it will govern the Applicant's activities if he seeks nomination as a candidate or runs as a candidate in the next federal election. The Applicant is currently on a temporary assignment, and he has not challenged the conditions set by the PSC in relation to that position. In that respect, the earlier decision has been overtaken and superseded by the February 2024 decision, and the Applicant's challenge to the April 2023 decision is therefore moot.

[53] The fact that the LWOP condition that the Applicant objects to would come into effect if and when he returns to his substantive position is, at this stage, a hypothetical concern. I will examine the pertinence of this in the discussion of the discretionary factors below.

(b) *The Borowski factors*

[54] In *Borowski*, the Supreme Court of Canada identified the criteria to be considered by a court in deciding whether to exercise its discretion to decide a matter despite the fact that it is moot: (i) the existence of an adversarial relationship between the parties; (ii) the concern for judicial economy; and (iii) the need for the court to be sensitive to its adjudicative role.

[55] *Adversarial context*: The Respondent submits that there is no adversarial context, in light of the Applicant's failure to challenge the conditions set by the February 2024 decision. There is no objection to the conditions that now govern the Applicant if he decides to seek a party nomination or to run for office in the next federal election, as long as he remains in his temporary position. The Respondent submits there are no collateral consequences that affect the Applicant.

[56] I am satisfied that there is still an adversarial relationship between the parties, insofar as the LWOP condition that will apply if the Applicant returns to his substantive position at STARS and then seeks nomination as a candidate or runs during the election. The Applicant has maintained that this condition is unjustified, while the Respondent continues to defend the PSC's decision. There are still two parties prepared to present opposing views, which confirms the existence of an adversarial relationship. However, I note here that there is no challenge to the conditions that apply to the Applicant while he continues in his current temporary assignment, and thus the adversarial relationship depends to some extent on a future hypothetical event.

[57] *Judicial economy*: The concern for judicial economy raises the question of whether there are "special circumstances... [that] make it worthwhile to apply scarce judicial resources to resolve it" (*Borowski* at p. 360). This factor tends in favour of hearing an otherwise moot case where the decision will have some practical effect on the rights of the parties, or where the issue is recurring but evasive of judicial review because the controversy will disappear before a court can rule on it. In addition, some cases raise matters of such public importance that it is in the interests of justice to hear them even though the controversy between the parties is moot.

[58] The Applicant argues that this case should be heard on its merits for two reasons. First, he points out that if he returns to his substantive position at STARS, the LWOP condition will apply. He has put in the time, effort and expense to prepare his challenge to this condition, and the Respondent has prepared its response. Therefore, the matter should proceed to the merits so that he can know with certainty whether or not this condition is valid.

[59] Second, the Applicant contends that the PSC has failed to apply the binding guidance of the Federal Court of Appeal's decision in *Taman*. He says it is a matter of public interest that public servants' political participation is not unduly stifled by the PSC's incorrect application of the law.

[60] The Respondent argues that these types of decisions are not evasive of review, as demonstrated by the fact that other challenges have been brought by other public servants, citing *Sinclair (FC)* and *Sinclair (FCA)*. According to the Respondent, the application does not raise a matter of public importance but rather concerns the application of a statutory framework based on the particular circumstances of the case.

[61] I am persuaded that considerations of judicial economy favour not exercising my discretion to hear this matter. The strongest argument in favour of the Applicant on this factor is that he will face the same LWOP condition that he challenges in this application if he ever returns to his substantive position. However, I find that this is a hypothetical concern, for several reasons.

[62] First, the record shows that the Applicant's assignment is temporary, and subject to termination by either the employer or the Applicant. On the other hand, there is no set end date for the assignment, and Health Canada has not indicated any desire or need to return the Applicant to his position at STARS. On the record before me, it is entirely possible that the Applicant will remain in his temporary assignment for the duration of the next federal election. If that happens, he does not appear to object to the conditions that have been set by the PSC in

regard to that position. If it does not happen, the Applicant can launch a new application, and this Court can hear the matter on an urgent basis if necessary.

[63] Second, it is not certain whether the Applicant will, in fact, choose to seek a nomination as a candidate or run in the next federal election. I note that the Applicant has previously run for elected office, and more recently he has submitted two requests for permission to stand as a candidate and/or run for office in the upcoming federal election. Despite this, there remains some degree of uncertainty regarding his intention. On this point, I note that in an email exchange with the PSC analyst following his receipt of the February 2024 decision, the Applicant stated that he would advise the PSC when he informed Health Canada about “whether I wish to pursue my nomination or candidacy.” The Applicant inquired whether there was a deadline by which he should inform Health Canada of his decision, to which the PSC Analyst responded that the decision would remain in effect for the upcoming federal election. There is no information in the record confirming whether the Applicant has decided to seek a nomination and/or run as a candidate in the upcoming federal election.

[64] As matters stood at the time of the hearing, the Applicant continues to occupy a temporary position and he does not object to the conditions set by the PSC that would govern his candidacy in the next federal election so long as he is in that job. There is no fixed end date to his temporary assignment, and Health Canada has not indicated any need or desire to return him to his substantive position. In that respect, the Applicant’s challenge to the LWOP pay condition that would apply to his political candidacy is entirely hypothetical.

[65] It is important to recall that during the course of the PSC's consideration of the Applicant's first request for permission, the PSC Analyst and Health Canada explored whether the risks of political partiality could be mitigated by modifying the Applicant's job duties or moving him to a temporary assignment. At the time, the Applicant rejected these possibilities, arguing that neither were necessary. However, it is relevant to note that Health Canada was, even then, open to the idea of seeking to minimize the risks through a temporary assignment, and the PSC had indicated it could re-consider the matter if the Applicant's circumstances changed. The Applicant argues that he has been given no explanation for why he was placed into the temporary assignment, but he has not objected to it nor expressed a desire to return to his substantive position. He has brought no challenge to the *status quo*, nor has he indicated that he intends to bring it to an end before the next federal election.

[66] While I accept the Applicant's position that the rules governing political participation by public servants are matters of public importance, I am not persuaded that this militates in favour of hearing this case on its merits. On this point, the decision in *Sinclair (FCA)* is instructive. In that case, a federal prosecutor had sought permission to seek nomination and (if successful) to run as a candidate in the 2021 Yukon territorial election. The PSC denied his request. The territorial election was held, and three days later Mr. Sinclair sought judicial review of the PSC decision.

[67] Although the issue was moot, Mr. Sinclair submitted that he was "seeking statements of general principles from this Court that could be applied to any future decision of the PSC on an application by a public prosecutor for permission to be a candidate in an election" (*Sinclair*

(*FCA*) at para 7). The Federal Court of Appeal noted that guidance has already been provided in the *Taman* case on what the law requires from the PSC in a decision regarding a request by a public prosecutor to be a candidate in an election. Additional guidance on the application of the *Canadian Charter of Rights and Freedoms* by administrative decision-makers had also been provided by the Supreme Court of Canada in *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31. In light of this, it was “far from clear what other general guidance could be provided by this Court” (*Sinclair (FCA)* at para 11).

[68] Of particular importance here, the Federal Court of Appeal noted a concern that one comment in the PSC’s decision in Mr. Sinclair’s case could be interpreted as a general pronouncement that would apply to applications for permission by any Crown prosecutor. The Court of Appeal’s guidance below applies with equal force here:

[15] Any decision under the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) to grant or deny permission for a public servant, who is otherwise eligible to be a candidate in an election, is to be based on the facts and circumstances related to that particular person. A blanket prohibition on any Crown prosecutor seeking to be a candidate in an election would not be consistent with the purpose of Part 7 of the *PSEA*: “to recognize the right of employees to engage in political activities while maintaining the principle of political impartiality in the public service” (section 112 of the *PSEA*).

[69] Based on this, I am not persuaded that it would be appropriate to hear this case on its merits, simply to try to provide more general guidance on the application of the *Taman* case. On this, I agree with Justice Sadrehashemi’s statement in *Sinclair (FC)* at paragraph 20:

I find that there is limited practical utility in expending judicial resources in deciding this matter and that to do so in the absence of

a live controversy carries with it the problem of creating a legal precedent for its own sake instead of resolving a particular dispute (*Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 [*CUPE (Air Canada Component)*] at para 13).

[70] Based on the analysis set out above, I find that considerations of judicial economy favour not exercising my discretion to hear this matter on its merits.

[71] *The judicial role*: There is considerable overlap between the analysis of the judicial economy and judicial role factors in this case. The Applicant seeks a ruling that would apply to the LWOP condition that would trigger if and when he returns to his substantive position at STARS and if and when he decides to seek a nomination as a political candidate and to run in the next federal election. He also seeks more general guidance to “correct” what he sees as the PSC’s incorrect application of the guidance from the *Taman* decision.

[72] In *Borowski*, the Supreme Court of Canada counselled judges to be mindful of the Court’s “proper law-making function:” “The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing 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” (p. 362). The rule is subject to exceptions, in particular where a case raises matters of wider public importance. In considering this factor, however, “the Court should be sensitive to the extent to which it may be departing from its traditional role” (*Borowski* at p. 363).

[73] In my view, this factor favours not exercising the discretion to hear this case on its merits. The LWOP condition that is the core focus of the Applicant's case does not apply to him, as long as he remains in his temporary assignment. Whether the condition will ever trigger in his case depends on two hypotheticals: that he returns to his substantive position, and that he seeks nomination as a candidate for a political party or runs as a candidate in the next election. In the meantime, the Applicant has not launched a challenge to the conditions that currently govern his participation in the electoral process.

[74] As noted earlier, the Applicant seeks a ruling that would provide more general guidance to the PSC in regard to its decision-making on requests for permission under section 114 of the *PSEA*. In the absence of a live dispute, where the ruling would have practical and immediate consequences for the party bringing the claim, I find that making such a ruling is neither necessary (in light of the *Taman* decision), nor appropriate (in light of the judicial function of resolving disputes between parties).

IV. Conclusion

[75] For the reasons set out above, this application will be dismissed because it is moot. The *Borowski* factors do not favour exercising my discretion to hear the matter on its merits.

[76] The Respondent sought its costs on the motion, but in exercise of my discretion under Rule 400 of the *Federal Courts Rules*, SOR/98-106, I find that no award of costs is appropriate. The Applicant advanced a claim in good faith, and responded to the mootness motion with substantial arguments. Each side shall pay its own costs.

[77] One final minor procedural point. The Style of Cause in this matter shall be amended, with immediate effect, to name the Attorney General of Canada as the sole respondent. The Public Service Commission of Canada is not an appropriate respondent in this case.

JUDGMENT in T-1110-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed because the application is moot.
2. No costs are awarded. Each party shall pay its own costs.
3. The style of cause is amended, with immediate effect, to name the Attorney General of Canada as the sole respondent in this matter.

"William F. Pentney"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1110-23

STYLE OF CAUSE: ALAIN MUSENDE v THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: VIA ZOOM

DATE OF HEARING: MARCH 28, 2024

REASONS FOR JUDGMENT AND JUDGMENT: PENTNEY J.

DATED: JANUARY 09, 2025

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