Federal Court  Cour fédérale

Date: 20240213

Docket: T-1274-23

Citation: 2024 FC 242

Ottawa, Ontario, February 13, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

YAVAR HAMEED

Applicant

and

PRIME MINISTER AND MINISTER OF JUSTICE

Respondents

JUDGMENT AND REASONS

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I. Letter from Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023

[1] At its core, this matter concerns the following letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated, May 3, 2023 (English translation of Exhibit KKK of the Applicant's Record, Volume 1, as set out in Schedule A of this Judgment and Reasons):

> The Right Honourable Justin Trudeau
>
> Dear Prime Minister:
>
> As Chief Justice of Canada and Chairperson for the Canadian Judicial Council, I must express my deep concern with regard to the significant number of vacancies within Federal Judicial Affairs and the government's inability to fill these positions in a timely manner.
>
> The current situation is untenable, and I fear that this will result in a crisis for our justice system, which is already facing many challenges. Access to justice and the health of our democratic institutions are at risk.
>
> As you undoubtedly know, there are currently 85 vacancies within Federal Judicial Affairs across the country. Some courts have had to deal with a 10 to 15% vacancy rate for years now. It is also not uncommon for positions to remain vacant for several months, if not years, in some cases. As a concrete example, over half of the positions at the Manitoba Court of Appeal are currently vacant. Key chief justice and associate chief justice positions are also being filled at a very slow pace. In fact, there have recently been considerable delays in appointments to chief justice positions in a number of provinces, including Alberta, Ontario and Prince Edward Island. The chief justice of Manitoba position has been vacant for six months now, and the associate chief justice positions in the Court of King's Bench for Saskatchewan and the Superior Court of Quebec have been vacant for over a year. No clear explanation justifies these delays.
>
> It should be noted that the difficulties brought on by the judge shortage are exacerbating an already critical situation within several courts—namely a serious lack of resources due to chronic

underfunding by the provinces and territories. However, while several factors explain the crisis currently facing our justice system, the appointment of judges in due course is a solution within reach that could help quickly and effectively improve the situation. Given this obvious fact and the critical situation we are faced with, the government's inertia regarding vacancies and the absence of satisfactory explanations for these delays are disconcerting. The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

On behalf of the Canadian Judicial Council, I can attest to the fact that chief justices and associate chief justices across the country are satisfied with the quality of recent appointments and are thrilled with the addition of new judge positions in recent budgets. We also recognize that your government has made efforts to establish a more independent, transparent and impartial appointment process for federally appointed judges. It would be unfortunate if the failure to improve the pace of federal judicial appointments across the country were to ultimately discredit this process.

I recently had the opportunity to meet with the Minister of Justice and discuss this matter with him. The Chief Justices also have very good relationships with the Minister and his office, and we are confident that he is willing to make every effort to remedy the problems I have outlined.

Despite all these efforts, it is imperative for the Prime Minister's Office to give this issue the importance it deserves and for appointments to be made in a timely manner. It is essential that the vacant positions within the judiciary be filled diligently to ensure that judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, we have serious concerns that without concrete efforts to remedy the situation, we will soon reach a point of no return in several jurisdictions. The consequences will make headlines and have serious repercussions on our democracy and on all Canadians. This situation requires your immediate attention.

The positions that have been left vacant are having significant impacts on the administration of justice, the operations of our courts and the health of our judges. Canadian Judicial Council

members recently took it upon themselves to provide a more comprehensive overview of the difficulties faced by their respective courts. The findings are appalling.

Despite all our judges' professionalism and dedication, the staffing shortage inevitably results in additional delays in hearing cases and rendering judgments. Chief justices have indicated that, because judges are overburdened, delays in setting cases are unavoidable and hearings need to be postponed or adjourned. What's more, even when cases are heard, judgments are slow to be rendered because judges need to spend more time sitting, leaving them less time to deliberate. The analysis framework in *R. V. Jordan*, 2016 SCC 27, with respect to the accused's right to be tried within a reasonable time pursuant to the *Canadian Charter of Rights and Freedoms*, also plays an important role in that regard. It provides that, before superior courts, criminal charges must be tried within 30 months, save in exceptional circumstances. If a trial has not ended within that timeframe, a stay of proceedings may be ordered. Many chief justices say that as part of their efforts to respect the timelines prescribed by Jordan, they are currently forced to choose the criminal matters that "deserve" to be heard most. Despite their best efforts, stays of proceedings are pronounced against individuals accused of serious crimes, such as sexual assault or murder, because of delays that are due, in part or in whole, to a shortage of judges. For example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.

These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judge positions.

This is already the case in British Columbia.

Richard Wagner

II. Summary and conclusions

[2] This is the Applicant's request for judicial resolution of a dispute between himself and the Chief Justice of Canada and Canadian Judicial Council on the one hand, and the Prime Minister and Minister of Justice on the other.

[3] By the foregoing letter, the Chief Justice of Canada and Canadian Judicial Council requested the Prime Minister to fill a very large number of vacant Superior Court and Federal Courts judicial positions across Canada.

[4] The requested number of vacancies have not been filled. While appointments were made over the last 8 months, during the same period new vacancies have been created by resignation or otherwise. This significant and unacceptably large number of vacancies remains essentially unchanged. The facts are there were 79 vacancies when this application was filed in June 2023, and 75 vacancies as of February 1, 2024 according to the Federal Commissioner of Judicial Affair's website [FCJA]: https://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.aspx.

[5] Neither the Prime Minister and two successive Ministers of Justice have remedied this critical situation in the 9 months since the request by our Chief Justice of Canada and Canadian Judicial Council.

[6] With the greatest respect, the Court finds the Prime Minister and Minister of Justice are simply treading water. They have failed to take the actions requested by the Chief Justice of Canada and the Canadian Judicial Council. And with the greatest respect, they have also failed all those who rely on them for the timely exercise of their powers in relation to filling these vacancies. Also failed are all those who have unsuccessfully sought timely justice in the Superior Courts and Federal Courts across Canada.

[7] As a consequence, a point not contested, the Court finds the Prime Minister and Minister of Justice have refused the request made by the Chief Justice of Canada and Canadian Judicial Council.

[8] The Respondents offered no justification for their decision to refuse the request to fill these judicial vacancies.

[9] As a matter of well-established convention, also not disputed, the Prime Minister and Minister of Justice have effective and exclusive control over, and in the Court's view, they have the concomitant responsibility to appoint judges to the Superior Courts across Canada, and the Federal Courts. It is not doubted that no such appointments may be made without their advice and consent.

[10] Notably, the advice and consent of the Respondents must be directed to either the Governor General (by the Minister of Justice in the case of provincial Superior Court judges, or by the Prime Minister in the case of relevant Chief Justices), or to the Governor in Council (by

the Minister of Justice in the case of judges of the Federal Courts or by the Prime Minister in the case of relevant Chief Justices): see *Democracy Watch v Canada (Attorney General)*, 2023 FC 31 [*Democracy Watch*] [per Southcott J].

[11] The level of vacancies is now, as the letter describes and which is not contested, at both a crisis and critical level. Other words used by the Chief Justice of Canada and Canadian Judicial Council to describe the impact of the ongoing failure to fill vacancies include “appalling” and “untenable.”

[12] The Court is given no explanation or justification by the Respondents of this untenable situation. Notably, the Respondents filed no evidence to dispute what I accept as expert opinions of both the Chief Justice of Canada and the Canadian Judicial Council. Their unequalled individual and collective experience, knowledge and expertise in relation to the state of the federally appointed judicial vacancies across Canada was not questioned in any way.

[13] In these circumstances, the Court finds no reason to discount or disregard the evidence and submissions of the Chief Justice of Canada and Canadian Judicial Council to the Respondents. I find the responsibilities of the Prime Minister and Minister of Justice to meaningfully engage their powers with respect to filling the critical and untenable level of judicial vacancies across our federal judiciary may not be ignored.

[14] With the greatest respect, this Court faced with these assessments by such credible entities, accepts the views of the Chief Justice of Canada and the Canadian Judicial Council as set out in their letter to the Prime Minister.

[15] On this basis the Court has no hesitation in concluding the current level of vacancies is untenable, and at a minimum, requires the judicial response afforded in the following Judgment.

[16] The Court comes to this conclusion because the same constitutional convention giving the Respondents advice-giving responsibility respecting federal judicial appointments obviously entails their responsibility to fill judicial vacancies in a timely manner, that is, within a reasonable time. It would be absurd to suggest the "rule of law", essential to the proper function of the nation and enshrined in the preamble to the *Constitution Act, 1982,* exists at the whim of the executive government. The rule of law may not be critically and negatively impacted simply by what the Court finds the Respondents' unjustified and persistent failure to advise the Governor General and or Governor in Council to fill this critical and unacceptably high level of judicial vacancies.

[17] How long should it take to fill a sufficient number of vacancies? In the Court's view the answer is plain and obvious: these vacancies must be materially reduced within a reasonable time to a reasonable level.

[18] What is a reasonable or sufficient level of vacancies? The Court was provided with no reason the number of vacancies may not be reduced to the mid-40s: there were only 46 vacancies in the Spring of 2016, for example.

[19] That said, the number of vacancies in an ideal world should be very low, and it seems to me this is a matter to be determined by Parliament. In some cases it may be that all relevant vacancies must be filled, as where serious crimes are not prosecuted in a timely way such that victims, the public and accused are denied justice. That may not be possible in other cases, but as noted, no evidence was provided by the Respondents. This is a matter in respect of which the Respondents should obviously engage with the Chief Justice of Canada and relevant Chief Justices / Associate Chief Justices and in respect of which the Canadian Judicial Council, having come this far, should provide (as perhaps it has) specific guidance.

[20] By way of remedy, the Court may, and in this case will recognize and declare the constitutional convention that judicial vacancies on the provincial Superior Courts and Federal Courts must be filled within a reasonable time. The Court will make this declaration in its expectation that the number of vacant positions will be materially reduced to the mid-40s being the number of federal vacancies in Spring of 2016. In this manner, the Court expects the crisis and critical situation to be resolved.

[21] Specifically, the Court's declaration is:

> 1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of

> Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
>
> 2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.
>
> 3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023 set out in paragraph 1 and Schedule A to these Reasons for Judgment.
>
> 4. The Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis, and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

[22] I encourage the parties, and or the Chief Justice of Canada and or the Canadian Judicial Council to seek further direction and relief from this Court in the event this Court's Judgment is not satisfied or in issue.

[23] I now turn to a number of legal issues raised by the parties, at the conclusion of which the Court's Judgment will issue.

III. The Application

[24] The Applicant applies for a writ of *mandamus* pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] to compel the Prime Minister and the Minister of Justice [Respondents] to appoint judges to fill vacancies in the superior courts across

Canada including the Federal Courts. By law, these appointments are to be filled either by the Governor General pursuant to section 96 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985 [*Constitution Act, 1867*] in respect of Provincial Superior Court judges, or by the Governor in Council pursuant to section 5.2 of the *Federal Courts Act* in respect of judges of the Federal Court and Federal Court of Appeal [Federal Courts].

[25] The Applicant asks that such vacancies be filled i.e., that appointments be made within certain timelines, namely within the later of three months of the date of this Court's Order, or within nine months of their having become aware the positions would be vacated, and does so by analogy to practices developed by this Court in immigration cases.

[26] In the alternative, the Applicant asks the Court to declare that:

> a. The Prime Minister and Minister of Justice are in violation of their duties to appoint judges to the vacancies in the superior courts under section 96 of the *Constitution Act, 1867*, and section 5. 2 of the *Federal Courts Act*; and
>
> b. A reasonable interpretation of the requirement to appoint judges in section 96 of the *Constitution Act, 1867*, and section 5.2 of the *Federal Courts Act* is that, absent exceptional circumstances, the appointments shall be made within nine months of the date of the applicable Minister becomes aware that a position will be vacated, or three months after a position is vacated, whichever is later.

[27] It is noteworthy that while the Prime Minister and Minister of Justice are named parties against whom relief is sought, the Applicant (who confirmed his position at the hearing) does not name either the Governor General or the Governor in Council as parties, notwithstanding it is

they who by the *Constitution Act, 1867* or *Federal Courts Act* respectively hold the legal power to make these appointments.

[28] While the Applicant filed evidence in support of his Application, including of course the letter from the Chief Justice of Canada and Canadian Judicial Council, the Respondents filed no evidence disputing the same. Indeed, the Respondents filed no evidence at all.

[29] Instead, the Respondents raise and wholly rely on a number of procedural and technical objections, none of which - and with the greatest respect - the Court accepts.

IV. The Applicant

[30] The Applicant is a human rights lawyer in Ottawa. Called to the bar of Ontario 22 years ago, the Applicant regularly litigates in the Federal Court, the Ontario Superior Court of Justice, and Ontario's Court of Appeal. None of this is in dispute.

[31] In his affidavit, the Applicant states (and it is not disputed) that over the past several years he has experienced significant delays in litigation proceedings in the Superior Courts on behalf of vulnerable clients. In addition to this general information, which I accept, the Applicant provides concrete evidence of delay in the form of uncontested correspondence to him from the Ottawa Superior Court of Justice Trial Coordinator concerning a case of his that was adjourned in which the Trial Coordinator attributed the delay to the fact "[T]he court is experiencing a lack of judicial resources as of late." I accept this because the note to that effect is exhibited and is undisputed.

V. Applicant's facts on federal judicial vacancies are accepted

[32] The Applicant also set out the following material facts which the Court accepts.

[33] As of the filing of this Application in June 2023, there were 79 superior court vacancies (including those in the Federal Courts) across Canada. This represents almost 7 percent of the total federally appointed judiciary.

[34] 79 vacancies represents a very significant increase from the Spring of 2016 at which time there were only 46 vacancies.

[35] It is also the case that many vacancies are of very great duration.

[36] These facts are also illustrated in the following tables produced and deposed to by the Applicant, the accuracy of which was not seriously disputed. The Court accepts this table into evidence:

Table 1: Vacancies

Court	Retiree or Act creating vacant position	Date position became vacant	Days vacant as of July 11, 2023	Exhibit
FC	*BIA, 2018*	21-Jun-18	1846	
FC	*BIA, 2019*	21-Jun-19	1481	
FC	*BIA, 2019*	21-Jun-19	1481	
FC	*BIA, 2019*	21-Jun-19	1481	
ONSC	*BIA, 2021*	29-Jun-21	742	

ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
ONSC	*BIA, 2021*	29-Jun-21	742	
FCA	*BIA, 2021*	29-Jun-21	742	
TCC	*BIA, 2021*	29-Jun-21	742	
BCCA	David Franklin Tysoe	01-Jan-22	556	**F**
ABKB	Donna L. Shelley	02-Jan-22	555	**G**
ABKB	Alan D. Macleod	13-Jan-22	544	**H**
ABKB	Kristine Eidsvik	07-Feb-22	519	**I**
BCSC	Robert Jenkins	15-Jun-22	391	**J**
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
ONSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
BCSC	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
SKKB	*BIA, 2022*	23-Jun-22	383	
ABKB	*BIA, 2022*	23-Jun-22	383	

ABKB	*BIA, 2022*	23-Jun-22	383	
NUCJ	*BIA, 2022*	23-Jun-22	383	
FCA	*BIA, 2022*	23-Jun-22	383	
TCC	*BIA, 2022*	23-Jun-22	383	
BCSC	Grace Choi	14-Jul-22	362	**K**
ABCA	Catherine Anne Fraser	30-Jul-22	346	**L**
BCCA	Richard B. T. Goepel	24-Aug-22	321	**M**
BCSC	Barry Davies	04-Sept-22	310	**K**
BCSC	William Grist	06-Sept-22	308	**K**
BCSC	Elaine Adair	31-Dec-22	192	**N**
BCSC	Arne Silverman	31-Dec-22	192	**N**
BCSC	James Williams	18-Jan-23	174	**N**
QCCA	France Thibault	26-Apr-23	76	**O**
ABCA	Marina Paperny	29-Apr-23	73	**P**
BCSC	George Macintosh	30-Apr-23	72	**Q**
ABCA	Barbara Veldhuis	01-May-23	71	**P**

[37] The Applicant also deposed to a table illustrating how quickly vacancies have been filled in the recent past. Again, the accuracy of this table was not seriously challenged. The Court accepts this table:

Table 2: Vacancies filled in less than 90 days

Appointee	Court	Date position Vacant	Date Appointed	Days Vacant	Exhibit
Philip W. Osborne	NLSC	Aug 4, 2021	Aug 6, 2021	2	**R**
Monica Biringer	TCC	Aug 4, 2021	Aug 6, 2021	2	**S**
Lisa Silver	ABKB	April 21, 2023	April 24, 2023	3	**T**

Allison Kuntz	ABKB	April 21, 2023	April 24, 2023	3	**T**
Kent J. Teskey	ABKB	April 21, 2023	April 24, 2023	3	**T**
Suzanne Stevenson	ONSC	Jan 30, 2020	Feb 3, 2020	4	**U**
Colin D. Clackson	SKKB	Dec 1, 2020	Dec 11, 2020	10	**V**
Robert W. Armstrong	ABKB	Jan 12, 2021	Feb 8, 2021	27	**W**
Lauren Blake	BCSC	Mar 31, 2021	Apr 27, 2021	27	**X**
Mark L. Edwards	ONSC	Jan 1, 2021	Feb 8, 2021	38	**Y**
Sherry L. Kachur	ABKB	Apr 26, 2020	June 3, 2020	38	**Z**
Marylène Pilote	NBKB	Dec 31, 2020	Feb 8, 2021	39	**AA**
Michael A. Marion	ABKB	Mar 4, 2022	Apr 20, 2022	47	**BB**
Jonathan M. Coady	PESC	May 3, 2022	June 21, 2022	49	**CC**
Karen Wenckebach	YKSC	Sept 30, 2020	Nov 19, 2020	50	**DD**
Leonard Marchand	BCCA	Feb 1, 2021	Mar 24, 2021	51	**EE**
Peter Kalichman	QCCA	Mar 1, 2021	Apr 27, 2021	57	**FF**
Meghan McCreary	SKCA	Apr 2, 2022	June 6, 2022	65	**GG**
Leonard Ricchetti	ONSC	Jan 31, 2020	Apr 6, 2020	66	**HH**
J. Ross Macfarlane	ONSC	Dec 15, 2022	Feb 20, 2023	67	**II**
Denise LeBlanc	NBKB	Mar 31, 2022	June 6, 2022	67	**JJ**
Lobat Sadrehashemi	FC	Jan 29, 2021	Apr 6, 2021	67	**KK**
Sophie Lavallée	QCCA	July 25, 2020	Oct 1, 2020	68	**LL**
Julie Bergeron	ONSC	Mar 28, 2022	June 6, 2022	70	**MM**
Nancy M. Carruthers	ABKB	Feb 7, 2022	Apr 20, 2022	72	**BB**
Diane Rowe	NSSC	Mar 1, 2020	May 14, 2020	74	**NN**
Eleanor J. Funk	ABKB	May 23, 2021	Aug 6, 2021	75	**OO**
Calum U.C. MacLeod	ONSC	Dec 30, 2019	Mar 16, 2020	77	**PP**

Charles C Chang	ONSC	Apr 4, 2022	June 27, 2022	84	**QQ**
Lorne Sossin	ONCA	Sept 2, 2020	Nov 26, 2020	85	**RR**
Spencer Nicholson	ONSC	June 15, 2020	Sept 8, 2020	85	**SS**
Jana Steele	ONSC	Feb 25, 2020	May 22, 2020	87	**TT**

[38] The Applicant also produced and deposed to a table illustrating how quickly various Chief Justice and Associate Chief Justice vacancies have been filled recently. This table is also accepted:

Table 3: Chief Justice and Associate Chief Justice Appointments

Appointee	Position	Vacant Date	Appointed Date	Days Vacant	Exhibit
Marc Richard	CJ NB	Apr 27, 2018	May 4, 2018	7	**UU**
Faye E. McWatt	ACJ ONSC	Nov 10, 2020	Dec 21, 2020	41	**VV**
Deborah K. Smith	ACJ NSSC	Apr 30, 2019	June 24, 2019	55	**WW**
Malcolm Rowe	SCC	Sept 1, 2016	Oct 28, 2016	57	**XX**
Manon Savard	CJ QC	Apr 8, 2020	June 11, 2020	64	**YY**
Suzanne Duncan	CJ YK	July 25, 2020	Oct 1, 2020	68	**ZZ**
Shannon Smallwood	CJ NT	July 11, 2022	Sept 22, 2022	73	**AAA**
Michael J. Wood	CJ NS	Feb 1, 2019	Apr 17, 2019	75	**BBB**
Tracey K. DeWare	CJ NBKB	Mar 20, 2019	June 4, 2019	76	**CCC**

[39] Finally, the Applicant attests to three instances of public judicial retirement notice announcements, which this table is also accepted:

Table 4: Public Retirement Notices

Retiree	Court	Notice Date	Vacant Date	Days Notice to Public	Exhibit

Robert J. Bauman	BCCA	Jan 10, 2023	Oct 1, 2023	264	**DDD**
Robert G. Richards	SKCA	Mar 17, 2023	Aug 31, 2023	167	**EEE**
Marc Noël	FCA	Mar 29, 2023	Aug 1, 2023	125	**FFF**

[40] The Respondents also objected to this evidence. However, I accept it for the reasons outlined below, including the fact these tables are based on publicly available information which information itself was not objected to by the Respondents. I also accept this evidence because it is confirmed in some material respects by the Chief Justice of Canada and Canadian Judicial Council's letter dated May 3, 2023.

VI. The Court accepts the facts and opinions of the Chief Justice of Canada and Canadian Judicial Council

[41] With great respect, and for the reasons set out, I accept the facts and opinions expressed by the Chief Justice of Canada and the Canadian Judicial Council in terms of the facts and consequences of delays in appointing judicial vacancies.

[42] The Court does so because, to begin with, the Canadian Judicial Council is composed of 44 members and includes all federally appointed Chief Justices and Associate Chief Justices of all provincial Superior Courts and the Federal Courts across Canada. The Chief Justice of Canada is the Chair of the Canadian Judicial Council on whose behalf the Chief Justice also wrote. These Chief Justices and Associate Chief Justices are responsible for managing the proper flow of criminal and civil cases within their respective courts.

[43] Notably, the Respondents raise no doubts concerning and do not dispute that these Chief Justices and Associate Chief Justices have unequalled knowledge of the critical situation and crisis in respect of which they wrote.

[44] Therefore, as the Chief Justice of Canada and Canadian Judicial Council wrote, I accept that some courts have had to deal with a 10 to 15% vacancy rate for years. I also accept it is not uncommon for positions to remain vacant for several months, if not years, in some cases:

> As you undoubtedly know, there are currently 85 vacancies within Federal Judicial Affairs across the country. Some courts have had to deal with a 10 to 15% vacancy rate for years now. It is also not uncommon for positions to remain vacant for several months, if not years, in some cases. As a concrete example, over half of the positions at the Manitoba Court of Appeal are currently vacant. Key chief justice and associate chief justice positions are also being filled at a very slow pace. In fact, there have recently been considerable delays in appointments to chief justice positions in a number of provinces, including Alberta, Ontario and Prince Edward Island. The chief justice of Manitoba position has been vacant for six months now, and the associate chief justice positions in the Court of King's Bench for Saskatchewan and the Superior Court of Quebec have been vacant for over a year. No clear explanation justifies these delays.

[45] The Chief Justice and Canadian Judicial Council wrote, it is not contradicted and I again accept, that delays in filling vacancies inevitably causes delays in prosecuting and determining serious violent crimes, such as sexual assault and murder, and other criminal and civil cases. In this connection, as an example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected:

> Despite all our judges' professionalism and dedication, the staffing shortage inevitably results in additional delays in hearing cases and rendering judgments. Chief justices have indicated that, because judges are overburdened, delays in setting cases are unavoidable and hearings need to be postponed or adjourned. What's more, even when cases are heard, judgments are slow to be rendered because judges need to spend more time sitting, leaving them less time to deliberate. The analysis framework in *R. v. Jordan*, 2016 SCC 27, with respect to the accused's right to be tried within a reasonable time pursuant to the *Canadian Charter of Rights and Freedoms*, also plays an important role in that regard. It provides that, before superior courts, criminal charges must be tried within 30 months, save in exceptional circumstances. If a trial has not ended within that timeframe, a stay of proceedings may be ordered. Many chief justices say that as part of their efforts to respect the timelines prescribed by Jordan, they are currently forced to choose the criminal matters that "deserve" to be heard most. Despite their best efforts, stays of proceedings are pronounced against individuals accused of serious crimes, such as sexual assault or murder, because of delays that are due, in part or in whole, to a shortage of judges. For example, the Court of King's Bench of Alberta has reported that over 22% of ongoing criminal cases are passing the 30-month deadline and that 91% of those cases involve serious and violent crimes. Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.

[46] In terms of the exacerbating consequences of delays ("government's inertia") in filling judicial vacancies on the critical situation of Canada's Superior Court and Federal Courts systems, the Chief Justice of Canada and Canadian Judicial Council wrote, and I accept that the slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government:

> It should be noted that the difficulties brought on by the judge shortage are exacerbating an already critical situation within several courts—namely a serious lack of resources due to chronic underfunding by the provinces and territories. However, while several factors explain the crisis currently facing our justice system, the appointment of judges in due course is a solution within reach that could help quickly and effectively improve the situation. Given this obvious fact and the critical situation we are faced with, the government's inertia regarding vacancies and the absence of satisfactory explanations for these delays are disconcerting. The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

[47] The Court is compelled to note Canadians access to justice without delay is and has been enshrined in various constitutional and quasi-constitutional documents since the *Magna Carta (Great Charter of Liberties)* of 1215 which promised: “To no one will we sell, to no one will we refuse or delay, right or justice.” See *Magna Carta*, article 40, *Select Documents of English Constitutional History*, London: MacMillan & Co., London 1918. With respect, I conclude the inevitable and untenable delayed justice caused by the executive government of Canada goes to the very heart of this 800-year-old promise and unacceptably denies access to justice without delay.

[48] In this connection I add that in the Canadian criminal context, section 11(b) of the *Canadian Charter of Rights and Freedoms* [*Charter*] guarantees “any person charged with an offence has the right to be tried within a reasonable time.” This was commented upon in detail in *R v Jordan*, 2016 SCC 27 where the Supreme Court of Canada applied section 11(b) of the *Charter* to set presumptive time limits for trials. The consequences of delay and not being tried

within a reasonable time are discussed by Moldaver, Karakatsanis and Brown JJ for the majority at paragraphs 19-26:

> [19] As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.
>
> [20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.
>
> [21] At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(b) was not intended to be a sword to frustrate the ends of justice (*Morin*, at pp. 801-2).
>
> [22] Of course, the interests protected by s. 11(b) extend beyond those of accused persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.
>
> [23] Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

> [24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.
>
> [25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).
>
> [26] Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as "a fair and balanced criminal justice system simply cannot exist without the support of the community" (*Askov*, at p. 1221).

[49] In terms of the significant ("appalling") negative impacts delayed vacancies create for the federally appointed judiciary, the Chief Justice of Canada and Canadian Judicial Council conclude and the Court accepts it is imperative for the Prime Minister and his office to give this issue the importance it deserves, and for appointments to be made in a timely manner. They say it is essential that the vacant positions within the federal judiciary be filled diligently to ensure the judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, the Chief Justice of Canada and Canadian Judicial Council have serious concerns that without concrete efforts to remedy the situation, Canada's federal judiciary will soon reach a point of no return in several jurisdictions.

The consequences will make headlines and have serious repercussions on our democracy and on all Canadians:

> Despite all these efforts, it is imperative for the Prime Minister's Office to give this issue the importance it deserves and for appointments to be made in a timely manner. It is essential that the vacant positions within the judiciary be filled diligently to ensure that judicial branch functions properly. In the past, the Canadian Judicial Council has urged governments to make judicial appointments more quickly. This time, we have serious concerns that without concrete efforts to remedy the situation, we will soon reach a point of no return in several jurisdictions. The consequences will make headlines and have serious repercussions on our democracy and on all Canadians. This situation requires your immediate attention.
>
> The positions that have been left vacant are having significant impacts on the administration of justice, the operations of our courts and the health of our judges. Canadian Judicial Council members recently took it upon themselves to provide a more comprehensive overview of the difficulties faced by their respective courts. The findings are appalling.
>
> These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judge positions.
>
> This is already the case in British Columbia.

[50] In terms of the (“untenable”) consequences for access to justice and the health of democratic institutions, the Chief Justice or Canada and Canadian Judicial Council wrote and the Court accepts appointments need to be made in a timely manner because the current situation is untenable, and they both fear that this will result in a crisis for our justice system, which is

already facing many challenges. The Court accepts their evidence that access to justice and the health of our democratic institutions are at risk, that the justice system is consequently at risk of being perceived as useless for civil matters, and that the types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine trust in our democratic institutions. They conclude and I accept that the current situation is untenable:

> The current situation is untenable, and I fear that this will result in a crisis for our justice system, which is already facing many challenges. Access to justice and the health of our democratic institutions are at risk.
>
> Furthermore, the necessary urgency in processing criminal cases means the courts' role in civil cases is being neglected. The justice system is consequently at risk of being perceived as useless for civil matters. These types of situations represent a failure of our justice system and are likely to fuel public cynicism and undermine their trust in our democratic institutions.
>
> In this context, these delays in appointments send a message that this is simply not a priority for the government.

[51] The Chief Justice of Canada and Canadian Judicial Council also found the vacancy crisis is having a “serious” impact on judges themselves, on their health in terms of medical leave, and on their training. The situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-quality candidates for judicial positions, all of which conclusions this Court respectfully accepts:

> These ongoing vacancies also have a serious impact on judges themselves. Faced with a chronic work overload and increased stress, judges are increasingly going on medical leave, which has a domino effect on their colleagues, who then must carry an additional workload. It is also becoming difficult for judges of certain courts to find the necessary time to complete training, including training that is considered mandatory. This situation does not bode well for ensuring a healthy and thriving judiciary. If current issues persist, it could also become difficult to attract high-

> quality candidates for judge positions. This is already the case in British Columbia.

[52] Neither Respondent gave any explanation or reason to justify this crisis situation, either to the Chief Justice of Canada or the Canadian Judicial Council, or to this Court. The Chief Justice of Canada and Canadian Judicial Council wrote and I have to agree that "[N]o clear explanation justifies these delays."

[53] Notably also, the Respondents did not object to any of the assessments in the letter. This Court has no hesitation in accepting the expert assessments by the Chief Justice of Canada and Canadian Judicial Council that the slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice:

> The slow pace of appointments is all the more difficult to understand since most judicial vacancies are predictable, especially those resulting from retirements for which judges usually provide several months' notice. In this context, these delays in appointments send a message that this is simply not a priority for the government.

VII. Demands made to the Respondents

[54] In addition to the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of May 3, 2023, which and with respect I consider a request for these purposes, on June 16, 2023, Applicant's counsel sent a letter to Canada's Minister of Justice, with the subject line "vacant judicial appointments" stating he echoes the request of the Chief Justice of Canada and respectfully requests to fill these vacancies in a timely manner.

[55] On June 17, 2023, the Applicant's lawyer sent the same letter, but addressed to the Prime Minister again echoing the request of the Chief Justice of Canada and the Canadian Judicial Council and respectfully requests the Prime Minister fill these vacancies in a timely manner.

[56] The Applicant received no response to either letter. And, in any event, as already seen, the number of vacancies has not gone down as requested by the Chief Justice of Canada and Canadian Judicial Council; in fact, according to the FCJA, the number superior count vacancies is 75 as of February 1, 2024, which is almost identical to the 79 vacancies when this application was commenced in June 2023.

[57] In this connection and in the Court's respectful view, reports on the public website of the FCJA may be accepted for the truth thereof, it being a highly professional and completely impartial and credible federal source of data in relation to federal judicial vacancies and appointments across Canada. See: *Barakat v Andraos,* 2023 ONSC 582 where Justice Trimble at paragraph 24 reviews the jurisprudence on judicial notice and government websites (most of which is of this Court). This Court agrees with and adopts their conclusions and applies them to the FCJA:

> A court may take judicial notice of facts can come from government and NGO websites provided that the government or organization has a reputation for credibility (see: *Araya v. Nevsun Resources Ltd*, 2017 BCCA 401 at par 24, *Mahjoub v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1503 at paras. 72–75, *Buri v. Canada (Minister of Citizenship and Immigration), 2001 FCT 1358, [2001] F.C.J. No. 1867* (Fed T.D.) at para. 22 and *Kazi v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 178, [2002] F.C.J. No. 223 (Fed. T.D.) at paras. 28, 30).

VIII. Issues

[58] The Applicant raises the following issues:

1. Should the Court order *mandamus*?
2. Should the Court order a declaration?

[59] The Respondents raise the following issues:

1. As a preliminary matter, whether the Applicant's affidavit evidence is admissible and relevant;
2. Whether the Federal Court has jurisdiction over the subject matter of the application;
3. Whether the Applicant has private interest standing or should be granted public interest standing to adjudicate the issues raised in the application;
4. Whether the requirements of *mandamus* have been met; and
5. Whether the Court should grant the Applicant's alternative request for declaratory relief.

IX. Relevant statutory provisions

[60] The following sections of the *Constitution Act, 1867* are relevant:

Exclusive Powers of Provincial Legislatures	**Pouvoirs exclusifs des législatures provinciales**
Subjects of exclusive Provincial Legislation	**Sujets soumis au contrôle exclusif de la législation provinciale**
92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	**92** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

[…]	[…]
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.	**14.** L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;
[…]	[…]
VII. Judicature	**VII. Judicature**
Appointment of Judges	**Nomination des juges**
96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.	**96** Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.
[…]	[…]
Salaries, etc., of Judges	**Salaires, etc. des juges**
100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.	**100** Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.
General Court of Appeal, etc.	**Cour générale d'appel, etc.**

101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.	**101** Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.
[Emphasis added]	[Je souligne]

[61] The following sections of the *Federal Courts Act* and *Interpretation Act*, RSC 1985, c I 21 are relevant:

Federal Courts Act	***Loi sur les Cours fédérales***
Appointment of judges	**Nomination des juges**
5.2 The judges of the Federal Court of Appeal and the Federal Court are to be appointed by the Governor in Council by letters patent under the Great Seal.	**5.2** La nomination des juges de la Cour d'appel fédérale et de la Cour fédérale se fait par lettres patentes du gouverneur en conseil revêtues du grand sceau.
[…]	[…]
Extraordinary remedies, federal tribunals	**Recours extraordinaires : offices fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18 (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against	**a)** décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement

any federal board, commission or other tribunal; and	déclaratoire contre tout office fédéral;
[…]	[…]
Application for judicial review	**Demande de contrôle judiciaire**
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
Powers of Federal Court	**Pouvoirs de la Cour fédérale**
(3) On an application for judicial review, the Federal Court may	**(3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut:
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	**a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
[…]	[…]
[Emphasis added]	[Je souligne]
Interpretation Act	**Loi d'interprétation**
Definitions	**Définitions**
General definitions	**Définitions d'application générale**
35 (1) In every enactment,	**35 (1)** Les définitions qui suivent s'appliquent à tous les textes.

[…]	[…]
Governor General in Council or Governor in Council means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada; (gouverneur en conseil ou gouverneur général en conseil)	gouverneur en conseil ou gouverneur général en conseil Le gouverneur général du Canada agissant sur l'avis ou sur l'avis et avec le consentement du Conseil privé de la Reine pour le Canada ou conjointement avec celui-ci. (Governor General in Council or Governor in Council)

X. Submissions and Analysis

A. *Jurisdiction of the Federal Court*

(1) The *ITO* test

[62] The starting point for this assessment is the Supreme Court of Canada's decision in *ITO-International Terminal Operations Ltd v Miida Electronics Inc,* [1986] 1 SCR 752 [*ITO*] at p.767. In *ITO* the Supreme Court sets a three-part test for construing the Federal Court's jurisdiction. In this connection it is worth noting the predecessor of the Federal Courts was set up by the same Act of Parliament that established the Supreme Court of Canada. Such statutes require interpretation in the constitutional setting:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s.101 of the *Constitution Act, 1867*.

[63] The Applicant submits the Federal Court has jurisdiction to hear this application and grant the relief sought. In this he relies on jurisprudence of this Court, jurisprudence of the Federal Court of Appeal and jurisprudence of the Supreme Court of Canada all of which mandate a broad, fair and liberal approach to this Court's jurisdiction.

[64] The Respondents disagree. They argue the Federal Court lacks jurisdiction to hear and decide this application.

[65] In this respect the Court determines that the leading jurisprudence is *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 [*Liberty Net*] per Bastarache J. In *Liberty Net*, the Supreme Court endorsed a fair and liberal approach to the Federal Court's jurisdiction. Justice Bastarache for the majority at pp. 657 and 658 states:

> These are the historical and constitutional factors which led to the development of the notion of inherent jurisdiction in provincial superior courts, which to a certain extent has been compared and contrasted to the more limited statutory jurisdiction of the Federal Court of Canada. But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow, rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada.
>
> [Emphasis added]

[66] Notably and central to this Court's conclusion in this regard, is the Supreme Court of Canada's plain rejection of a narrow interpretation of the Federal Court's jurisdiction in favour of a fair and liberal interpretation of statutes granting jurisdiction to the Federal Court set out in *Liberty Net*.

[67] Of interest, the Supreme Court in *Windsor (City) v Canadian Transit Co.*, 2016 SCC 54 [*Windsor*], pointed to by the Respondents, neither addresses nor considers the Supreme Court of Canada's own previous decision in *Liberty Net*.

[68] Upon reflection and due consideration, the Court will follow *Liberty Net* and persuasive post-*Windsor* jurisprudence and approach the determination of Federal Court's jurisdiction in fair and liberal manner, and not narrowly as the Respondents proposed.

[69] To begin this, the Court adopts a fair and liberal approach because it agrees with Justice Mactavish (as she then was) in *Deegan v Canada (Attorney General)*, 2019 FC 960 [*Deegan*]:

> [224] In contrast to the inherent jurisdiction enjoyed by provincial superior courts, the Supreme Court held in *Windsor Bridge* that the Federal Courts have only the jurisdiction that has been conferred on them by statute, and that they are without inherent jurisdiction: at paragraph 33. This of course begs the question: if the Federal Courts' jurisdiction is constrained by the fact that they are statutory courts created under section 101 of the *Constitution Act, 1867*, how is it that the jurisdiction of the Supreme Court of Canada—another statutory court created under section 101 of the *Constitution Act, 1867*—is not similarly constrained?
>
> [225] Indeed, as the Federal Court of Appeal observed in *Lee*, "the Supreme Court and the Federal Courts (through their predecessor, the Exchequer Court) are both statutory courts under section 101 of the *Constitution Act, 1867*, born at the same time from a single joint statute: *Supreme and Exchequer Court Act*, S.C. 1875, c. 11": above, at paragraph 13. The Federal Court of Appeal went on to

> observe in *Lee* that "the Supreme Court and the Federal Courts must be seen as identical twins" in terms of their ability to manage their processes and proceedings, that is, their plenary powers: *Lee*, above, at paragraph 13.
>
> …
>
> [227] The fact is that the Federal Court is neither an inferior court nor an administrative tribunal: *Lee*, above, at paragraph 12; *Bilodeau-Massé*, above, at paragraph 72. It is, rather, a superior court of record having civil and criminal jurisdiction: *Federal Courts Act*, section 4. As a superior court, the Federal Court has plenary jurisdiction to determine any matter of law arising out of its original jurisdiction. This includes constitutional jurisdiction in matters that are properly before the Court.
>
> [Emphasis added]

[70] Justice Mactavish followed *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 [*Bilodeau-Massé*], where Justice Martineau concluded at paragraph 72 that "the grant of jurisdiction under the *Federal Courts Act* should not be interpreted in a narrow fashion." In this respect Justice Martineau adopts the reasoning of the Supreme Court in *Liberty Net* as does this Court:

> [78] As a result, as the Supreme Court noted in *Canadian Liberty Net*, "[i]n a federal system, the doctrine of inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court" (at paragraph 35). Thus, because this involves the Federal Court's general administrative jurisdiction over federal administrative tribunals, "[t]his means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction" (*Canadian Liberty Net*, at paragraph 36) (my emphasis). If section 44 of the *Federal Courts Act* gives the Federal Court jurisdiction to grant an injunction in enforcing the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, this is all the more reason to argue that in the context of an action against the Crown or an application for judicial review, the inherent or residual jurisdiction of the provincial

> superior courts in matters involving the constitution or *habeas corpus* in no way affects the "plenary jurisdiction" exercised by the Federal Court under sections 17 and 18 of the *Federal Courts Act*.
>
> [Emphasis added]

[71] To the same effect are the reasons of Justice Roussel (as she then was) in *PH v Canada (Attorney General)*, 2020 FC 393 [*PH*] at paragraphs 42 and 43. Justice Roussel declined to follow *Windsor*, holding:

> [42] With the greatest of respect to the Supreme Court of Canada, I do not consider myself bound by these *obiter* comments. The facts in this case differ from those in *Windsor*. That case dealt with the application of a municipal bylaw to a federal undertaking. The applicant was not seeking relief under an Act of Parliament and under a federal right, but was seeking relief under the *Constitution Act, 1867*. In this case, sections 18 and 18.1 of the Act grant this Court the jurisdiction to issue declaratory relief against the Parole Board of Canada. There is no need to interpret this Court's jurisdiction restrictively because this Court is a statutory court rather than a court of inherent jurisdiction. Although it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*, this Court is nevertheless comparable to a superior court when it exercises its general supervisory jurisdiction over federal boards, such as the Parole Board of Canada. Sections 18 and 18.1 of the *Act* do not remove the jurisdiction of provincial superior courts to grant a constitutional declaration against a federal board. However, the *Act* does create concurrent jurisdiction in cases where the Federal Court has been granted jurisdiction by an Act of Parliament (ss 18 and 18.1 of the *Act*) and the *ITO* test is otherwise met, as is the case here.
>
> [43] I do not intend to comment any further on the majority's *obiter* comments in Windsor. I accept and adopt as my own the reasoning of my colleagues who recently found that this Court does indeed have the jurisdiction to issue general declarations of invalidity for the purpose of section 52 of the *Constitution Act, 1982* (*Deegan v Canada (Attorney General)*, 2019 FC 960 at paras 212-240; *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*, 2018 FC 530 at paras 55-65; *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 at paras 38-88). I also rely on the statements made by the Federal Court of Appeal in *Lee v Canada*

> *(Correctional Service)*, 2017 FCA 228 regarding the plenary powers of the Federal Courts. As I do not find it useful to repeat their analysis in these reasons, I refer the parties and the reader to the cited portions of those decisions.
>
> [Emphasis added]

[72] As did Justice Roussel (as she then was), I also rely on the determinations of the Federal Court of Appeal in *Lee v Canada (Correctional Service)*, 2017 FCA 228 regarding the plenary powers of the Federal Courts emanating from their constitutional status as courts, as set out at paragraphs 8-12:

> [8] The idea is that the Federal Courts' plenary powers emanate from their constitutional status as courts, not from any particular legislative provision in the *Federal Courts Act*, R.S.C. 1985, c. F-7 or the *Federal Courts Rules*. The Federal Courts are not just ordinary agencies of government but rather part of the judicial branch within the constitutional separation of powers. If courts are to be courts and to fulfil their function as part of the judicial branch, they must have certain plenary powers to manage their processes and proceedings.
>
> [9] Cases decided by the Supreme Court after *Liberty Net* have alluded to these powers—in one case at the level of obiter in a single paragraph, and in another case buried as an afterthought in a endnote: see, respectively *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19 and *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617. Perhaps because the treatment of the powers is brief, both cases fail to cite *Liberty Net*. But both loosely suggest that the Federal Courts' plenary powers are "necessarily incidental" to statutory powers already granted, rather than powers stemming from the Federal Court's status as courts within the judicial branch.
>
> [10] In fact, in terms of the powers the Federal Courts have, *Cunningham* seems to place the Federal Courts on the same footing as administrative tribunals and other administrative functionaries throughout the government. But Cunningham is not the only word on this point.
>
> [11] Again, there is *Liberty Net.* And in a brief comment in another case, the Supreme Court seems to have recognized the Federal

> Courts as superior courts established under the federal power in the *Constitution Act*, 1867 to create federal courts, not just as mere administrative functionaries: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 136 (not cited in *Cunningham* and *Windsor*); see also the clear text of section 4 of the *Federal Courts Act*.
>
> [12] In my view, the Supreme Court's holdings in *Charkaoui* and *Liberty Net* are unassailable. The Federal Courts cannot be equated to administrative tribunals. As is suggested in *Liberty Net*, the Federal Courts—like the Supreme Court, the provincial courts (both superior and otherwise), the Tax Court and military courts—are fully fledged courts within the judicial branch and, by virtue of this, have all the plenary powers of courts to manage their processes and proceedings.
>
> [Emphasis added]

[73] This Court also agrees with Justice Martineau in *Bilodeau-Massé* that access to justice concerns, the unique fact that the Federal Court is fully bilingual and bijural forum, and that the Federal Court is nationally accessible, strongly militate in favour a fair and liberal approach to the Federal Court's jurisdiction.

[74] Moreover, the case at hand calls for the resolution of a quintessentially federal issue involving purely federal powers, in preference to a multiplicity of parallel proceedings in many different provincial court systems with attendant delays, possible inconsistent decisions, needless duplication overlap, expense and waste of judicial resources. Justice Martineau in *Bilodeau-Massé* states:

> [69] In short, justice is not in competition with itself: access to justice must prevail in every case, which favours a broad construction of the jurisdiction conferred on this Court by the *Federal Courts Act*. In this sense, the Federal Court is part of the solution, and it would be wrong to want to associate it with the problem of the increasing number of jurisdictions. When it created a national court of first instance, Parliament could very well have

> left it to the courts mentioned in section 129 of the *Constitution Act, 1867*, and to the other provincial courts created under subsection 92(14) of the *Constitution Act, 1867*, to exercise their traditional jurisdiction in civil and criminal matters, while making adjustments over time, if necessary, for the purposes of the "laws of Canada". But what characterizes the Federal Court is not only its nature as a national court (trial and appeal). Its composition also ensures national continuity (section 5.3 of the *Federal Courts Act*) and the maintenance of Canadian bijuralism (common law and civil law). However, like section 6 of the *Supreme Court Act*, section 5.4 of the *Federal Courts Act* provides for effective representation of Quebec, with a minimum and large number of judges (at least five judges of the Federal Court of Appeal and at least 10 judges of the Federal Court) who must have been judges of the Court of Appeal or of the Superior Court of Quebec or members of the Bar of Quebec. It is an eloquent legislative demonstration of Parliament's wish to create a pan-Canadian court that is particularly well adapted to Canada's reality and bijuralism.
>
> [Emphasis added]

[75] Further, there is no body of provincial law in dispute. This case relates to the federal power to make federal judicial appointments and an obvious disagreement between our most senior and most experienced judicial office holders including the Chief Justice of Canada and Canadian Judicial Council on the one hand, and the executive government including the Prime Minister and Minister of Justice on the other.

[76] There is no issue of competing jurisdiction. There is no "pretence" of provincial law in this case that exclusively involves the application of federal law in an area of undisputed federal jurisdiction. See *Girouard v Canada (Attorney General)*, 2020 FCA 129, at paragraph 108:

> [108] In stipulating that the Governor General appoints judges of the superior courts and has the authority to remove them (on address of the Senate and House of Commons) and that Parliament fixes and provides their salaries, the *C.A., 1867* clearly ousts provincial jurisdiction on any matters relating to these issues.

[77] And see *Deegan* per Mactavish J.:

> [232] There is, moreover, an existing body of federal law that is essential to the disposition of the case that nourishes the statutory grant of jurisdiction. The Impugned Provisions form part of the federal *Income Tax Act* and the *Implementation Act*, federal legislation implementing an agreement with a foreign state governing the sharing of information under a bilateral tax treaty. It also bears noting that no body of provincial law is implicated in this proceeding, and that the case does not involve competing spheres of jurisdiction. The case thus involves the application of federal law in an area of federal jurisdiction.
>
> [Emphasis added]

(2) First prong of *ITO*

[78] With this guidance, and to recall, prong one of *ITO* requires that "[T]here must be a statutory grant of jurisdiction by the federal Parliament." In my view, sections 18 and 18.1 of the *Federal Courts Act* constitute a statutory grant of jurisdiction by the federal Parliament to this Court to grant declaratory relief against any federal board: this point was expressly decided by the Court in *PH* at paragraphs 38 and 42. I therefore conclude the first prong of *ITO* is met.

[79] In this connection, and while the Respondents accept section 18.1 of the *Federal Courts Act* confers jurisdiction to the Federal Court to grant declaratory relief against any "federal board, commission or other tribunal" they argue it does not apply to the Prime Minister or Minister of Justice.

[80] With respect, I disagree. First of all, this submission does not apply in relation to appointments under section 5.2 of the *Federal Courts Act* given the Supreme Court of Canada's opposite conclusion in *Strickland v Canada (Attorney General)*, 2015 SCC 37:

> [64] At this point, it seems to me that the language of the Act conferring "exclusive original jurisdiction" can be taken as a clear and explicit expression of parliamentary intent. Similarly, as presently advised I see no reason to doubt that the Governor in Council, when exercising "jurisdiction or powers conferred by or under an Act of Parliament" is a "federal board, commission or other tribunal" within the meaning of s. 2 the *Act.*

[81] And I see no reason to accept the Respondents' narrow construction in terms of granting declaratory relief in relation to appointments under section 96 of the *Constitution Act, 1867*. In this connection, I take the same view of the authority conferred on this Court by paragraphs 18(1)(a) and 18.1(3)(a) of the *Federal Courts Act* as that taken to section 44 of the *Federal Courts Act* by the Supreme Court of Canada in *Liberty Net* and by this Court in *Bilodeau-Massé*, namely that "the Federal Court can be considered to have a plenary jurisdiction". This is further confirmed in *Deegan* and *PH*. I am not persuaded to depart from concurrent findings of my colleagues, nor to disagree with the Supreme Court of Canada's determination in *Liberty Net*.

(3) Second and third prongs of *ITO*

[82] The second step in *ITO* is that "[t]here must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction."

[83] The third step in *ITO* is that the law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[84] The Applicant submits that federal law includes federal common law. As outlined below, I agree. In particular, the Applicant argues federal common law includes law surrounding the

modalities of federal judicial appointments, including judicial recognition of constitutional conventions that such appointments may only be made on the advice and consent of Cabinet, and the Prime Minister or Minister of Justice. Again I agree.

[85] The Applicant submits that constitutional conventions may be recognized by courts as laws. But it is also well established that constitutional conventions may not be enforced by the courts.

[86] The Respondents argue that constitutional conventions, while being rules regulating conduct as between constitutional actors (a conclusion the Court accepts), are not laws for the purposes of the second prong of *ITO*. As I understand their argument, it is based on the rule that constitutional conventions may not be enforced by the Courts, from which they conclude constitutional conventions may not support step two of *ITO*.

[87] Through post-hearing submissions, the Court entertained additional arguments on this and related points as to whether federal common law and constitutional conventions may establish this Court's jurisdiction per *ITO* on the issue of filling vacancies on the provincial Superior Courts and Federal Courts.

[88] The Respondents argue the common law cited by the Applicant relates to the interpretation of legal principles governing reviewability of conventional actors and constitutional conventions, falling under the law of justiciability. The Respondents submit and rely on *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989]

2 SCR 49, where Chief Justice Dickson at pp.90-91 said that the law of justiciability involves "a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue…"

[89] The Applicant, in reply on this point, submits he is not relying on the common law of justiciability, but rather the common law regarding the transfer of power and duties from the Governor General to the Prime Minister and the Minister of Justice as a result of constitutional conventions. The Applicant submits this body of common law was created in the context of merits determinations about substantive legal rights, duties, and powers, citing the decisions to be discussed later namely *Acadian Society of New Brunswick v Right Honourable Prime Minister of Canada*, 2022 NBQB 85 [*Acadian Society*], *Conacher v Canada (Prime Minister),* 2010 FCA 131 [*Conacher*], and *Democracy Watch* [per Southcott J].

[90] In post-hearing submissions, the Respondents submit justiciability is common law, but does not have a federal character. The Respondents argue the concept of justiciability flows from the constitutional separation of power, and is inherently neither federal nor provincial. I disagree.

[91] The Applicant submits this is false, relying on *Quebec North Shore Paper v CP Ltd*, [1977] 2 SCR 1054 [*Quebec North Shore Paper*] for the proposition that when common law relates to both a provincial and federal issue, at p.1063, "it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province." The Applicant advances the argument here that when the common law about the transference of

powers and duties by constitutional convention relates to provincial actors, it is provincial common law. When it relates to federal actors, he submits it is federal common law.

[92] I agree with the Applicant in this respect.

[93] Lastly, the Respondents submit that if the Court finds that constitutional conventions are federal common law, they do not constitute an existing body of federal law essential to the disposition of this application, per the second prong of *ITO*. The Respondents submit justiciability is no more essential to the disposition of this application than it is to any other application, and is insufficient to satisfy the second prong of *ITO* given the high threshold on the party asserting the Court's jurisdiction.

[94] The Applicant, again in reply, submits this is incorrect and the Respondents mischaracterize the nature of the common law being relied upon in this case. Further, the Applicant asserts the Respondents argument comparing the federal common law to other applications to determine whether it is more essential to the disposition of this case is not found in the jurisprudence on the application of the *ITO* test.

[95] Lastly, the Applicant submits that just because the legal duty relied on to compel the appointment of provincial Superior Court judges is not created by a federal law, does not mean federal law is not essential to the disposition of the application. Again I agree with the Applicant. The Applicant submits the remedy does not need to be expressly created or conferred by federal law for the Federal Court to have jurisdiction; it is enough that a body of federal law has an

impact on the matter at every turn. For this, the Applicant correctly relies on *Rhine v The Queen*, [1980] 2 SCR 442, where Chief Justice Laskin stated at p. 447:

> At every turn, the Act has its impact on the undertaking so as to make it proper to say that there is here existing and valid federal law to govern the transaction which became the subject of litigation in the Federal Court. It should hardly be necessary to add that "contract" or other legal institutions, such as "tort" cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law.

[96] Having considered the matter, the Court is not persuaded the lack of enforceability at law renders federal constitutional conventions incapable of being considered federal laws for the purposes of *ITO*.

[97] To begin with, there is no jurisprudence to that effect.

[98] In addition, taking a fair and liberal interpretation to the Federal Court's jurisdiction per *Liberty Net, Lee, Deegan, Bilodeau-Massé* and *PH,* I am persuaded that constitutional conventions in relation to the appointment of federal judges by the Governor General and Governor in Council pursuant to section 96 of the *Constitution Act,1867* and section 5.2 of the *Federal Courts Act* do constitute federal laws essential to the disposition of this case and which nourishes the statutory grant of jurisdiction for the purposes of *ITO*.

[99] Upon review, and with respect, this Court concludes that a "federal law" for the purposes of the second step of *ITO* (and "a law of Canada" for the purposes of the third step, given there is here "clearly an overlap between the second and third" prong per Wilson in *Roberts v Canada*, [1989] 1 SCR 322 [*Roberts*]), includes federal statutes, federal regulations *and* federal common

law. This conclusion is endorsed by Chief Justice Laskin in *Quebec North Shore Paper* at p. 1063. There the Supreme Court unanimously held common law associated with the Crown's position as a litigant [it] is federal law:

> Stress is laid, however, on what the Privy Council said in discussing the application of s. *30(d)* of the *Exchequer Court Act*, the provision giving jurisdiction to the Exchequer Court in civil actions where the Crown is plaintiff or petitioner. I do not take its statement that "sub-s. (d) must be confined to actions ... in relation to some subject matter legislation in regard to which is within the legislative competence of the Dominion" as doing anything more than expressing a limitation on the range of matters in respect of which the Crown in right of Canada may, as plaintiff, bring persons into the Exchequer Court as defendants. It would still be necessary for the Crown to found its action on some law that would be federal law under that limitation. It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature. Crown law does not enter into the present case.
>
> [Emphasis added]

[100] Furthermore, Chief Justice Laskin in *Quebec North Shore Paper* at pp.1066 states:

> It is also well to note that s. 101 does not speak of the establishment of Courts in respect of matters within federal legislative competence but of Courts "for the better administration of the laws of Canada". The word "administration" is as telling as the plural words "laws", and they carry, in my opinion, the requirement that there be applicable and existing federal law, whether under statute or regulation or common law, as in the case of the Crown, upon which the jurisdiction of the Federal Court can be exercised. Section 23 requires that the claim for relief be one sought under such law.
>
> [Emphasis added]

[101] In *McNamara Construction et al v The Queen*, [1977] 2 SCR 654 at pp.658-659, Chief Justice Laskin again writing for the Supreme Court states:

> In *Quebec North Shore Paper Company v. Canadian Pacific Limited*, (a decision which came after the judgments of the Federal Court of Appeal in the present appeals), this Court held that the quoted provisions of s. 101, make it a prerequisite to the exercise of jurisdiction by the Federal Court that there be existing and applicable federal law which can be invoked to support any proceedings before it. It is not enough that the Parliament of Canada have legislative jurisdiction in respect of some matter which is the subject of litigation in the Federal Court. As this Court indicated in the *Quebec North Shore Paper Company* case, judicial jurisdiction contemplated by s. 101 is not co-extensive with federal legislative jurisdiction. It follows that the mere fact that Parliament has exclusive legislative authority in relation to "the public debt and property" under s. 91(1A) of the *British North America Act* and in relation to "the establishment, maintenance and management of penitentiaries" under s. 91(28), and that the subject matter of the construction contract may fall within either or both of these grants of power, is not enough to support a grant of jurisdiction to the Federal Court to entertain the claim for damages made in these cases.

[102] Then at p. 659, Chief Justice Laskin states: "[i]n the *Quebec North Shore Paper Company* case, this Court observed, referring to this provision, that the Crown in right of Canada in seeking to bring persons in the Exchequer Court as defendants must have founded its action on some existing federal law, whether statute or regulation or common law."

[103] In *Roberts*, Madam Justice Wilson expansively reviewed the issue and concludes that indeed federal law includes federal common law, writing for the Court at pp. 330 and 331:

> While there is clearly an overlap between the second and third elements of the test for Federal Court jurisdiction, the second element, as I understand it, requires a general body of federal law covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands, and the third element requires that the specific law which will be resolutive of the

> dispute be "a law of Canada" within the meaning of s. 101 of the *Constitution Act, 1867*. No difficulty arises in meeting the third element of the test if the dispute is to be determined on the basis of an existing federal statute. As will be seen, problems can, however, arise if the law of Canada which is relied on is not federal legislation but so-called "federal common law" or if federal law is not exclusively applicable to the issue in dispute.
>
> [Emphasis added]

[104] The Supreme Court of Canada per Wilson J. also concluded at pp. 339-340:

> If Professor Evans is saying in the above-quoted paragraph that only federal legislation can meet the description of a "law of Canada" within the meaning of s. 101, I think he must be wrong since Laskin C.J. clearly includes "common law" as existing federal law inasmuch as he says that the cause of action must be founded "on some existing federal law, whether statute or regulation or common law". Professor Evans may be right that *Quebec North Shore* and *McNamara Construction* deny the existence of a federal body of common law co-extensive with the federal legislature's unexercised legislative jurisdiction over the subject matters assigned to it. However, I think that the existence of "federal common law" in some areas is expressly recognized by Laskin C.J. and the question for us, therefore, is whether the law of aboriginal title is federal common law.
>
> [Emphasis added]

[105] In this context the Court finds that constitutional conventions concerning the appointment of the judiciary of Superior Court and Federal Courts such as already determined by this Court, and for the purposes of both the second and third element of *ITO*, constitute the required "general body of federal law covering the area of the dispute" identified by Wilson J in *Roberts*.

[106] In this connection, our highest Court in *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 [*Repatriation Reference*] at p. 882, confirms courts may determine and recognize the existence of constitutional conventions, as this Court does in the matter before it now.

[107] In addition, while the Supreme Court in *Repatriation Reference* confirms courts have no authority *to enforce* constitutional conventions, it appears to me this rule is irrelevant in the case at hand. I say this because in this case this Court will issue a declaration, but will not order *mandamus*. This Court remains free to *declare* the existence of constitutional conventions.

[108] Therefore this Court's decision to grant declarations in the case at hand fits harmoniously with the *Repatriation Reference*. The following passage from the *Repatriation Reference* confirms both that courts may recognize constitutional conventions and that they may not enforce them:

> Another example of the conflict between law and convention is provided by a fundamental convention already stated above: if after a general election where the opposition obtained the majority at the polls the government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious indeed that it could be regarded as tantamount to a coup d'état. The remedy in this case would lie with the Governor General or the Lieutenant Governor as the case might be who would be justified in dismissing the ministry and in calling on the opposition to form the government. But should the Crown be slow in taking this course, there is nothing the courts could do about it except at the risk of creating a state of legal discontinuity, that is, a form of revolution.

B. *What federal common law or constitutional conventions apply in this case*

[109] As submitted by the Applicant, I agree some constitutional conventions have the effect of transferring power from the legal holder to another official or institution. In coming to this conclusion I respectfully adopt *Acadian Society* per Chief Justice DeWare, citing with approval the late Professor Peter Hogg's text at paragraph 18:

> [18] The Respondents refer the Court to constitutional scholarship explaining the nature and importance of constitutional conventions as well as their lack of justiciability. Professor Hogg's discussion of convention at 1.10 in Constitutional Law of Canada, 5th edition, where he comments:
>
> > An extraordinary feature of the system of responsible government is that its rules are not legal rules in the sense of being enforceable in the courts. They are conventions only. The exercise of the Crown's prerogative powers is thus regulated by conventions, not laws. Conventions are the topic of the next section of this chapter.
> >
> > 1.10 – Conventions
> >
> > (a) – Definition of conventions
> >
> > Conventions are rules of the constitution that are not enforced by the law courts. Because they are not enforced by the law courts, they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution, they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution.
> >
> > Consider the following examples. (1) The *Constitution Act, 1867*, and many Canadian statutes, confer extensive powers on the Governor General or on the Governor General in Council, but a convention stipulates that the Governor General will exercise those powers only in accordance with the advice of the cabinet or in some cases the Prime Minister. (2) The *Constitution Act, 1867* makes the Queen, or the Governor General, an essential party

> to all federal legislation (s. 17), and it expressly confers upon the Queen and the Governor General the power to withhold the royal assent from a bill that has been enacted by the two Houses of Parliament (s. 55), but a convention stipulates that the royal assent shall never be withheld.
>
> If a convention is disobeyed by an official, then it is common, especially in the United Kingdom, to describe the official's act or omission as "unconstitutional". But this use of the term unconstitutional must be carefully distinguished from the case where a legal rule of the constitution has been disobeyed. Where unconstitutionality springs from a breach of law, the purported act is normally a nullity and there is a remedy available in the courts. But where "unconstitutionality" springs merely from a breach of convention, no breach of the law has occurred and no legal remedy will be available.
>
> [Emphasis added]

[110] The foregoing establishes constitutional convention may effectively transfer effective power from the legal holder to another official or institution. The fact they may not be enforced at law is irrelevant in this case.

(1) Constitutional convention concerning judicial appointment advice-giving roles of the Prime Minister and Minister of Justice

[111] I note in *Conacher* the Federal Court of Appeal indicated courts arguably may consider not only the powers of the Governor General but the advice-giving role of the Prime Minister. That is what the Applicant now asks this Court to do now: to find there has been a transference of the legal powers and duties from the Governor General or Governor General in Council, to the

Prime Minister and Minister of Justice in their advice-giving roles. In this connection, see Stratas J.A. at paragraph 5:

> [5] Various conventions are associated with the Governor General's status, role, powers, and discretions. Some of these conventions, which are open to debate as to their scope, concern the Prime Minister's advice to the Governor General about the dissolution of Parliament and how the Governor General should respond: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1, loose-leaf (Toronto: Carswell, 2007), at pages 9-29 to 9-33. In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role. In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.
>
> [Emphasis added]

[112] In fact, this Court recognized a constitutional convention in relation to the advice-giving role of the Prime Minister and Minister of Justice in relation to appointments of judges under section 96 of the *Constitution Act, 1867*, just as the Federal Court of Appeal indicated it might in *Conacher*. Importantly, this Court recognized a constitutional convention in *Democracy Watch*, a decision of Justice Southcott. In *Democracy Watch*, this Court recognized that the powers of both the Governor General under section 96 of the *Constitution Act, 1867* and the powers of the Governor in Council under section 5.2 of the *Federal Courts Act*, have been transferred as a matter of constitutional convention to the Governor in Council (the federal Cabinet) and Prime Minister and Minister of Justice.

[113] The Court very respectfully adopts the conclusions of my colleague Justice Southcott in *Democracy Watch* at paragraph 9:

> [9] By constitutional convention, when appointing judges to provincial superior courts, the Governor General acts on the advice of the Committee of the Privy Council of Canada. Similarly, the GIC, which appoints judges to the Federal Court, the Federal Court of Appeal, and the Tax Court of Canada, is defined in the *Interpretation Act*, RSC 1985, c I-21, as the Governor General acting on the advice or consent of the Privy Council for Canada. The Privy Council is composed of all the ministers of the Crown, who meet in the body known as Cabinet (see *League for Human Rights of B'Nai Brith Canada v Attorney General (Canada)*, 2010 FCA 307 [*B'Nai Brith*] at para 77). As such, all federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice [Minister]. (In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet. For simplicity, these Reasons will refer to the advice to Cabinet being provided by the Minister.)
>
> [Emphasis added]

[114] The Respondents argue this application does not meet the criteria established by the *ITO* test because the Prime Minister and Minister of Justice (the only named Respondents) may give advice (and consent) but are not the legal actors named in either section 96 of the *Constitution Act, 1867* (the Governor General) or the Governor in Council in the case of section 5.2 of the *Federal Courts Act*. The Respondents correctly note they alone are vested the relevant legal powers to fill judicial vacancies.

[115] While I agree the legal jurisdiction and power to fill vacancies lie with the Governor General under section 96 of the *Constitution Act, 1867* and with the Governor in Council under section 5.2 of the *Federal Courts Act*, constitutional conventions place those decisions in practice on Cabinet, the Prime Minister and the Minister of Justice who are named in this

proceeding and whose advice-giving authority has already been confirmed by Southcott J., in *Democracy Watch*.

[116] As will be seen later in these reasons, the failure of the Applicant to name the legal actors is fatal to the Applicant's claim for *mandamus*.

[117] But that is not the end of the matter in terms of the alternative claim for declarations, where the issue becomes whether Justice Southcott's determination of the relevant advice-giving powers may be incorporated into a declaration.

[118] As stated at paragraph 9 of *Democracy Watch*, Justice Southcott concluded and put the convention this way:

> All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.

[119] With respect, there is no obstacle in making a declaration to the same effect as Justice Southcott's conclusion. In support, I note the Respondent in *Conacher v Canada (Prime Minister)*, 2009 FC 920 (an application for judicial review before Justice Shore) made related arguments submitting the decision then at hand was for the Governor General to make, and that the Prime Minister and Cabinet's advice was not legally binding on the Governor General. Therefore, the Respondents submit here that the relief sought in this application pursuant to section 18.1 of the *Federal Courts Act* is not available. I disagree.

[120] Indeed, Justice Shore rejected this argument, and was affirmed by the Federal Court of Appeal (*Conacher v Canada (Prime Minister),* 2010 FCA 131) which confirmed that the Federal Court has jurisdiction over direct exercises of Crown prerogative because they emanate from a federal source. At paragraph 68, Justice Shore stated:

> [68] The case of *Black v. Canada (Prime Minister),* above, shows that the Federal Court has jurisdiction over direct exercises of Crown prerogative because they emanate from a federal source. Although some prerogatives are reviewable, the Court must still determine whether a particular prerogative is justiciable. The hallmark of justiciability is whether the exercise of prerogative affects the rights or legitimate expectations of an individual. In the present case, no legal rights or legitimate expectations were affected, other than a claim having been made under the *Charter*, thus, the Prime Minister's advice is not reviewable. That being said, paragraph 18.1(4)(*f*) of the *Federal Courts Act* gives the Court the power to review, if, in fact, a decision maker acted "contrary to law" which is what the applicants imply in regard to section 56.1 of the *Canada Elections Act*.
>
> [Emphasis added]

[121] The Federal Court of Appeal in upholding Justice Shore, per Stratas J.A., determined:

> [5] Various conventions are associated with the Governor General's status, role, powers, and discretions. Some of these conventions, which are open to debate as to their scope, concern the Prime Minister's advice to the Governor General about the dissolution of Parliament and how the Governor General should respond: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1, loose-leaf (Toronto: Carswell, 2007), at pages 9-29 to 9-33. In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role. In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.

[122] With respect therefore, the constitutional conventions identified by Justice Southcott form part of Canada's federal constitutional common law in the sense they are judge-made rules which the courts are entitled and may recognize in the appropriate case through the Court's declaratory power, notwithstanding they are not laws that may been enforced by the courts.

[123] The Court was not pointed to any jurisprudence in which the distinction argued by the Respondents between *recognition* on the one hand, and *enforcement* of constitutional conventions on the other hand, results in the refusal of a declaration outlining the constitutional convention. .

(2) Constitutional convention to fill vacancies within a reasonable time

[124] The Chief Justice of Canada and the Canadian Judicial Council have requested that the vacancy crisis facing Canada's federal judiciary be remedied by filling vacant positions. I have accepted the facts and opinions of the Chief Justice of Canada and Canadian Judicial Council as expert evidence in this proceeding. They make an unanswerable case requiring this Court to take steps to cause the untenably high number of vacancies to be filled.

[125] The letter speaks for itself. It is set out above. The Court has already quoted extensively from it and needs not do so again. Obviously the root of the vacancy crisis is delay by the Governor General and Governor in Council in appointing judges to fill the critical and "appalling" level of federal judicial vacancies. It is apparent to this Court that the central issue is that judicial vacancies are not being filled within a reasonable time. And with respect, the Court is persuaded that the vacancy crisis is caused by delay – (unjustified "government inertia"

according to the letter) – by the Prime Minister and Minister of Justice in giving the required and necessary advice and consent to the Governor General and or Governor in Council to fill these critical vacancies. The Respondents filed no evidence to rebut any of this.

[126] It seems to me given Parliament has determined what it considered an appropriate number of judges required by the Superior Courts, including the Federal Courts, as it has in legislation authorizing that number of appointments, such appointments must be made within a reasonable time of the vacancy. The alternative would allow the current untenable and crisis number of vacancies to remain unacceptably high with the negative consequences set out in the letter, plus the added negative consequence of effectively permitting Canada's executive government to ignore the express will of Parliament.

[127] In response, the Respondents effectively argue they are under no duty to advise the Governor General or Governor in Council to make appointments under either section 96 or 5.2. They say that how long they may decline to deal with the crisis backlog of vacancies is not for the courts but wholly for them. I disagree.

[128] The Respondents' position is not supportable in this case. The Court is satisfied based on the letter of the Chief Justice of Canada and Canadian Judicial Council relied on by the Applicant, and the evidence before the Court, that the backlog of vacancies is legally untenable and must be reduced.

[129] In the Court's view, the acknowledged constitutional convention that it is the exclusive authority of the Respondents to advise in respect of vacancies necessarily implies the related constitutional convention that judicial vacancies must be filled as soon as possible after vacancies arise, except in exceptional circumstances.

[130] In this connection, nothing suggests *Democracy Watch*, which affirmed the existence of the convention, is the last word on the subject. The Court is certainly not persuaded that the framing of the convention in *Democracy Watch* was ever intended to justify the "untenable", "appalling", "crisis" and "critical" vacancy situation now existing in the federal judiciary.

[131] In my view, the Court should now recognize that the relevant constitutional conventions include not only the responsibility to take steps to fill vacancies as soon as possible, but in this appalling and critical situation, to materially reduce the present backlog to what it was as recently as the Spring of 2016, that is to reduce the vacancies to the mid-40s across the federally appointed provincial Superior Courts and Federal Courts.

[132] In addition to declaring the constitutional convention set out above as found by Justice Southcott in *Democracy Watch*, the Court will declare the constitutional convention that appointments to fill vacancies shall be made within a reasonable time, and that the vacancy situation described by the Chief Justice of Canada and Canadian Judicial Council shall be materially reduced to what it was in the Spring of 2016.

[133] In the result, the Court will issue declarations as follows:

> 1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
>
> 2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the Federal *Courts Act* must be made within a reasonable time of the vacancy.
>
> 3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023.
>
> 4. The Court makes Declarations 2 and 3 above in its expectation that the number of the judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

C. *Admissibility of the Applicant's affidavit evidence*

[134] I will briefly canvass some of the technical and procedural objections raised by the Respondents in the alternative to their jurisdictional arguments.

(1) The Applicant's tables are admissible

[135] I have dealt with this already, but would repeat and add as follows, to confirm what has already been stated and found by the Court.

[136] The Respondents challenge the tables referred to above in the Applicant's affidavit, primarily alleging they contain inadmissible opinion evidence. The Applicant disagrees. In my

respectful view, the tables should and will be accepted as evidence in this proceeding for the following reasons.

[137] In my view, these tables represent the aggregation by the Applicant of bare-bone raw statistical data the Applicant compiled from a great number of documents all of which are publicly available and obtained from federal and provincial websites, as identified and exhibited. The tables are also in the Court's view, useful aids in the analysis of the facts of this case. I see no point in going through the voluminous but uncontested record on which the tables are based simply to satisfy such unwarranted insistence.

[138] Also, the Respondents accept the documents on the basis of which these tables are produced, do not question to application of simple math to the many calendar dates, and point to no inaccuracies. To emphasize neither Respondent challenges the substance of the facts reported in these tables. The Respondents filed no contrary evidence although they had ample time and opportunity to do so. I therefore accept the tables for the facts they set out.

[139] The Court is also of the view the information in these tables is relevant to the Applicant's case in terms of the tests for *mandamus* (although *mandamus* is dismissed) and declaratory relief (which is granted) set out in *Apotex v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100 [*Apotex*] and *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 [*Metro Vancouver Housing Corp*]. I respectfully conclude the objections of the Respondents in this respect are unfounded.

[140] I appreciate the onus is on the Applicant to make his case. In my respectful view the Applicant has made his case. Notably, his evidence in this respect is confirmed and corroborated on the national scale by both the Chief Justice of Canada and the Canadian Judicial Council.

[141] To confirm, I accept there were 46 vacancies in the spring of 2016, that there were 79 vacancies by July 1, 2023, that delays in appointing federal judges across Canada average 504 days with a midpoint of 383 days, that 32 Superior Court appointments were made in less than 90 days since 2020, and that the appointment of Chief Justices and Associate Chief Justices since 2016 took an average 57 days. I also accept that appointments in some cases have been made with the benefit of some additional notice in advance of the actual vacancy.

(2) Evidence drawn from the *Budget Implementation Acts* is accepted

[142] I also accept that Parliament has enacted a series of *Budget Implementation Acts* which variously increased the number of positions that might be filled under sections 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*. I am entitled to take judicial notice of Acts of Parliament: see *Canada Evidence Act*, RSC 1985,c C 5, section 17:

> **17** Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the *Constitution Act, 1867*.

[143] The relevant *Budget Implementation Acts* relied upon by the Applicant in his affidavit are:

a. *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12 ("*BIA, 2018*");

b. *Budget Implementation Act, 2019, No. 1*, SC 2019, c 29 ("*BIA, 2019*");

c. *Budget Implementation Act, 2021, No. 1*, SC 2021, c 23 ("*BIA, 2021*");

d. *Budget Implementation Act, 2022*, No. 1, SC 2022, c 10 ("*BIA, 2022*").

[144] In this connection, the Respondents do not dispute any of the information relied upon by the Applicant drawn from these statutes. I therefore accept the Applicant's evidence in this respect.

(3) Speculation that provinces have not created relevant vacant judicial positions rejected

[145] The Respondents argue vacancies to which appointments may be made by the Governor General (i.e., under section 96 of *Constitution Act, 1867*) may not be filled if the relevant provincial legislature has not created the relevant judicial position that is vacant for the Governor General to fill under section 96 of *Constitution Act, 1867*. No one disagrees with that assertion. I likewise agree no appointments may be made under section 5.2 of the *Federal Courts Act* to the Federal Courts for the Governor in Council to fill unless Parliament has created a judicial position(s) that is (are) vacant.

[146] However, other than stating these undisputed propositions, the Respondents filed no evidence to rebut the submissions of the Applicant or the contents of the letter from the Chief Justice of Canada and Canadian Judicial Council. While the Respondents' argument is valid in

the abstract, I am therefore unable to give it any force in this case. Without a shred of evidence, the Respondents position that the Provinces (or Parliament with respect to the Federal Courts) is or are at fault must fail.

[147] The Respondents also submit much of the Applicant's affidavit should be struck on three main grounds: 1) it contains hearsay; 2) it contains opinion, argument, or legal opinion; and 3) it is not relevant to issues before the Court.

(4) Improper hearsay including letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister

[148] With respect to improper hearsay, the Respondents submit the affidavit includes media articles, reports, and letters that the Applicant did not author himself, that are relied upon for the truth of their contents to establish facts for this application.

[149] Principally, and among other things, the Respondents allege Exhibit KKK should be struck because it was tendered for the truth of its contents. Exhibit KKK is the email exchange between Applicant's counsel and a Radio-Canada/CBC journalist in which counsel requested and the journalist gave the Applicant's counsel a copy of the letter from the Chief Justice of Canada and the Canadian Judicial Council to the Prime Minister referred to throughout these Reasons.

[150] As I understand the Respondents they say the letter may not be considered because it contains impermissible information from a third party and not from the Applicant himself. They say the letter is hearsay.

[151] I disagree. The letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister was widely publicized at the time, and extensively quoted by both English and French media. In my view the letter was not tendered for the truth of its contents, but as proof the Chief Justice of Canada and Canadian Judicial Council made a demand and request that the vacancies be filled and that the demand was worded as it was. I come to the same conclusion for Exhibit HHH from the Federation of Ontario Law Associations.

[152] In addition, the letter itself appears not to be publicly available. However, the record contains additional information confirming the letter was sent and received; both the Chief Justice of Canada and Prime Minister have said it was: see Applicant's Record, Volume 1, Exhibits LLL and MMM.

[153] The unchallenged evidence is that Applicant's counsel requested a copy of the letter from a journalist at Radio Canada/CBC who had written and published a report about the letter. The Radio-Canada/CBC journalist sent the Applicant an email copy of the letter in response to the Applicant's request.

[154] In my view, the copy exhibited in the Court's record meets the test of necessity. The letter was provided by a reputable source in whose business one might expect him to have

received such a letter. I have no reason to doubt the honesty or truthfulness of the journalist. The letter was published widely. The Respondents do not suggest the exhibit is fabricated or unreliable. The letter was not disavowed and was indeed subsequently referenced by both the sender and recipient: see Applicant's Record, Volume 1, Exhibits LLL and MMM.

[155] I find it more likely than not the letter as set out in the journalist's email was sent and received as stated on its face.

[156] The Court reviewed the letter with Counsel for the Respondents at the hearing on several occasions. At no time was it suggested the Chief Justice of Canada was not qualified to write the letter on his behalf or for the Canadian Judicial Council.

[157] No one cast doubt on the qualifications or expertise of the Chief Justice of Canada or Canadian Judicial Council members, individually or collectively, to form the opinions expressed. Indeed, no one suggested the exhibited letter was not sent, its contents were not disputed, and no doubt was cast on the proposition that the letter exhibited what the letter said.

[158] In all the circumstances, the Court concludes the letter is admissible because it is both necessary and reliable as an exception to the hearsay rule: *Telus Communications Inc v Telecommunications Workers Union*, 2005 FCA 262 at paragraphs 25-26; *Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at paragraph 30.

[159] Given the absence of any evidence on this point from the Respondents, the Court accepts and adopts what it finds the credible and evidence-based facts and opinions of the Chief Justice of Canada and Chair of Canada's collective federally-appointed senior most judiciary, and Canadian Judicial Council as expressed in the letter.

(5) Opinion and argument submissions rejected

[160] The Respondents also argue the Applicant's affidavit contains his opinion and the opinion of others that are irrelevant to the issues. In particular, the Respondents seek the following:

> a) Paragraphs 17, 18, 19, 20, 24 and 26 should be struck because they contain opinions and/or are irrelevant.
>
> b) Paragraphs 27, 29, 30, 31, 33, 34, 36 and 37 (as well and Exhibits HHH, III, JJJ, KKK, LLL and MMM attached thereto) shoud be struck because they contain improper hearsay.
>
> c) Paragraphs 38 to 49 should be struck because they contain improper hearsay, argument and opinion.

[161] As stated by Justice Noël at the Federal Court of Appeal in *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at paragraph 2, the purpose of an affidavit is "to adduce facts relevant to the dispute without gloss or explanation."

[162] However, by this I do not understand an affidavit which betrays a belief in the facts presented is inadmissible and must be struck in its entirety, particularly where, as here, the central facts are gathered up from a great number of original sources the veracity of which the Respondents do not question, not to mention they are corroborated by our Chief Justice of

Canada and the Canadian Judicial Council. It is, with respect a question of degree. I am not persuaded to strike the entire affidavit.

[163] However, paragraphs 17, 20, 24, 26, 29, and 39-49 of the affidavit summarize in his own words the Applicant's views as to the content of the exhibits relied upon. This is unnecessary and they will be struck.

D. *Mandamus not granted*

[164] I turn now to the relief requested. The Applicant requests an order of *mandamus* compelling the Prime Minister and Minister of Justice to appoint judges to each of the vacancies in the superior courts across Canada by the later of the following two dates:

> a) Three months of the date of the order, or
>
> b) Nine months of having become aware that the position would be vacated.

[165] The Applicant states, it is not disputed and the Court agrees the test for *mandamus* is set out by the Federal Court of Appeal in *Apotex* as follows. Notably, all branches of the test for *mandamus* must be met; failure on one disentitles an applicant to relief:

> 1. There must be a legal duty to act;
>
> 2. The duty must be owed to the applicant;
>
> 3. There must be a clear right to performance of that duty, in particular;
>
> a. The applicant has satisfied all conditions precedent giving rise to the duty; and
>
> b. The was;

i. A prior demand for performance of the duty;

ii. A reasonable time to comply with the demand unless refused outright; and

iii. A subsequent refusal which can be either expressed or implied, e.g. by unreasonable delay;

4. Where the duty sought to be enforced is discretionary, certain additional principles apply;

5. No adequate remedy is available to the applicant;

6. The order sought will have some practical value or effect;

7. The Court finds no equitable bar to the relief sought; and

8. On a balance of convenience, an order of *mandamus* should be issued.

(1) Legal Duty to Act lies with non-parties

[166] The Applicant submits the Respondents have the legal duty to appoint judges pursuant to section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*.

[167] Under the theory of transference discussed above, it is not disputed and I find the Respondents by constitutional convention have the sole authority to advise and give consent as to who and when the Governor General and or Governor in Council makes appointments to fill federal judicial vacancies.

[168] Because it is a convention, I am not persuaded there is an enforceable legal duty on the named Respondents in this case. The applicable legal duty in this case lies on the Governor General to make appointments in the case of section 96 of the *Constitution Act, 1867*, and the

Governor in Council under section 5.2 of the *Federal Courts Act* as set out by Justice Southcott in *Democracy Watch*.

[169] However the jurisprudence is universal that courts may not compel the Governor General or Governor in Council to follow a constitutional convention. In other words, it appears there is nothing this Court can do to enforce the constitutional convention even if the Governor General were to unconstitutionally reject the advice of Cabinet. This is thoroughly discussed above.

[170] That said, and even accepting as I do that by constitutional convention certain powers of the Governor General and Governor in Council under sections 96 and 5.2 are now effectively transferred to Cabinet, the Minister of Justice and the Prime Minister, it remains the law that the assent of the Governor General and Governor in Council to the advice offered is and remains a statutory legal requirement under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act*.

[171] The Court has no power to amend the language of either section 96 or section 5.2 to remove the references to the Governor General and or the Governor in Council.

[172] Given the Applicant's decision not to name either the Governor General or the Governor in Council as parties, the Court declines to issue *mandamus* in this case.

[173] The tests for *mandamus* being conjunctive, all must be met. Having failed the first, it is not necessary to consider the remaining test.

[174] Therefore the request for *mandamus* will be dismissed.

E. *Applicant has public interest standing*

[175] The Respondents further alleged the Applicant had no standing to bring this application. The Applicant argued that he meets the tests for both private interest standing and public interests standing.

[176] With respect, the Court finds the Applicant meets the test for public interest standing. It is not necessary to consider the private interest standing test for *mandamus* because, as discussed above, the Court is not granting *mandamus*.

[177] The Applicant deposes and it is not disputed that he is affected by judicial vacancies as counsel representing vulnerable clients:

> 8. Over the past few years, I have experienced significant delays in the litigation proceedings I have brought in superior courts on behalf of vulnerable clients. These delays have harmed my clients, who often do not have the resources to wait years for justice. These delays exacerbate trauma for some clients and create additional pressure for clients to settle legitimate claims for a lesser amount than might be obtained in court because they do not have the financial resources to pay their bills while waiting for a trial date to be set or a judgement to be rendered.
>
> 9. For example, I represented Margaret Godard, a victim of workplace sexual harassment, in a civil action before the Ontario Superior Court of Justice. After many years of pre-trial proceedings, the court confirmed that a trial date was set for the week of October 17, 2022. However, mere days beforehand, on October 13, 2022, the Trial Coordinator informed me that there were no judges available to preside over the matter, so it would have to be cancelled, and the earliest available new hearing date would be December 12, 2022. The email chain containing this correspondence is attached as Exhibit “A”.

[178] The test for public interest standing is set out by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown East Side*]. At paragraph 37, Justice Cromwell for the majority identifies three factors to consider in exercising discretion to grant public interest standing:

> a. There is a serious justiciable issue raised;
>
> b. The plaintiff has a real stake or a genuine interest in it; and
>
> c. In all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

[179] The Applicant meets all three tests.

[180] The first test is met. The issue is serious and justiciable, and accords with paragraph 73 of *Democracy Watch* where the appropriateness of judicial involvement in a matter was explored with the following questions: the issues are entirely legal, the factual basis not being contested; the issue is not abstract of hypothetical, is not simply a disagreement with a government opinion as indeed the Respondents provided no opinion to justify or explain their decisions, it is appropriate for the courts to engage on this issue as others have not, the issuance of a declaration is expected to have practical effect assuming the Court's Judgment is respected by the Respondents.

[181] I also find the Applicant has a real stake and genuine interest in this issue. He represents clients whose right to access justice in a reasonable time and without unreasonable delay is infringed or denied.

[182] *Downtown Eastside* at paragraph 44 recognizes the third issue entails asking if the manner the proceeding is undertaken is a reasonable and effective means to bring the challenge to court. In *League for Human Rights of B'Nai Brith Canada v Attorney General (Canada)*, 2010 FCA 307, Justice Stratas recognized at paragraph 61 a "concern that an overly restrictive approach to public interest standing would immunize government from certain challenges."

[183] In my respectful view, this Application is a reasonable and effective manner in all the circumstances of bringing this issue before the courts, particularly as it concerns an issue in respect of which the government should not be immunized from challenge. The issue raised is obviously an important one for the Chief Justice of Canada and the Canadian Judicial Council.

[184] Frankly in my discretion this case is one that should be addressed because of its importance not just to the Applicants but to the federally appointed judiciary as a whole, and is of great importance to the Canadian public who need access to the courts and wish to see criminal and civil justice dispensed without unreasonable delay and impediments such as caused by the untenable level of vacancies, as stated by the Chief Justice of Canada and the Canadian Judicial Council, and whose submissions have been accepted by this Court.

[185] See the Court's discussion under Parts V and VI and elsewhere above.

F. *Declaratory Relief*

[186] While *mandamus* will not be granted, in the alternative the Applicant requests declarations that:

> A. the Prime Minister and Minister of Justice are in violation of their duties to appoint judges to the vacancies in the superior courts under s. 96 of the *Constitution Act, 1867*, and s. 5.2 of the *Federal Courts Act*; and
>
> B. A reasonable interpretation of the requirement to appoint judges in s. 96 of the *Constitution Act, 1867*, and s. 5.2 of the *Federal Courts Act* is that, absent exceptional circumstances, the appointments shall be made within nine months of the date the applicable Minister becomes aware that a position will be vacated, or three months after a position is vacated, whichever is later.

(1) Declaratory relief granted

[187] For the reasons outlined above, the Court will not grant the first declaration which seeks the same relief requested by way of *mandamus* which the Court has declined to grant.

[188] Turning to the second declaration sought, the test for granting declaratory relief is stated by the Supreme Court of Canada in *Metro Vancouver Housing Corp* at paragraph 60. Declaratory relief is appropriate where a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought.

[189] In my respectful view, this case meets these requirements but a declaration will not be granted in the terms sought.

[190] First, as extensively considered already, the Court has jurisdiction to hear the matter and to grant the specified relief pursuant to section 18 and 18.1 of the *Federal Courts Act*.

[191] Second, I agree the dispute is real and not theoretical. The Applicant's assertions are in material respects corroborated and confirmed by the Chief Justice of Canada and Canadian Judicial Council, there are approximately 80 judicial vacancies in the provincial Superior Courts and Federal Courts across the country, and unquestionably these vacancies pose serious and critical challenges to the functioning of our courts, access to justice, timely determination of serious criminal cases and civil actions and other consequences as set out in the letter from the Chief Justice of Canada and Canadian Judicial Council.

[192] Indeed, no one can review the words of the Chief Justice of Canada and the Canadian Judicial Council in their letter, understanding nothing has changed in the intervening 9 months, and suggest the dispute between Canada's federally appointed judiciary and the Prime Minister and his Minister of Justice is in any way theoretical.

[193] I have already found per (c) of the test that the party raising the issue has a genuine interest in its resolution and therefore have granted him public interest standing. I also find the Respondents have an interest in opposing the declaration being sought, thus satisfying (d) of the tests for a declaration.

(2) Appointments shall be made within a reasonable time

[194] The Court is not persuaded to accept the timelines proposed by the Applicant within which these "appalling" and unacceptably high vacancies levels should be filled. The situation as outlined by the Chief Justice of Canada and Canadian Judicial Council is clearly critical and untenable and thus most serious, and therefore in the Court's view may not simply be ignored.

[195] Very unfortunately, the Court has no reason to expect the situation will change without judicial intervention. The Respondents filed no evidence to justify why the "appalling", "untenable" and "crisis" situation created by the unacceptably high number of vacancies has not yet been remedied by the Prime Minister, and now by two successive Ministers of Justice.

[196] While timelines are routinely ordered for hearings before immigration officials in immigration cases, I am not persuaded the situation of judicial appointments is analogous. The classic immigration situations does not usually involve delay caused by a shortage of decision makers but delay in obtaining evidence often from foreign governments. To the contrary, the sole issue in this case is the critical vacancy situation.

[197] While the Respondents cite *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paragraph 11 for the proposition that "a declaration can only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties," in my respectful view the Court is entitled to expect the Respondents - particularly the Respondent Minister of Justice who in his capacity as Attorney General of Canada is the chief law officer of the Crown - to obey the law.

[198] The Court has no reason to believe a declaration in this case will be ignored. Rather, the Court has every expectation and entitlement to proceed on the opposite presumption. Indeed, in *Assiniboine v Meeches*, 2013 FCA 114 the Federal Court of Appeal holds that declaratory relief declares what the law is, without ordering any sanction or specific action that must be done. The

Federal Court of Appeal also holds that compliance by government actors (i.e., the state) is expected:

> 12 … [A] declaratory judgment is binding and has legal effect. A declaration differs from other judicial orders in that it declares what the law is without ordering any specific action or sanction against a party. Ordinarily, such declarations are not enforceable through traditional means. However, since the issues which are determined by a declaration set out in a judgment become res judicata between the parties, compliance with the declaration is nevertheless expected, and it is required in appropriate circumstances.
>
> 13. Declaratory relief is particularly useful when the subject of the relief is a public body or public official entrusted with public responsibilities, because it can be assumed that such bodies and officials will, without coercion, comply with the law as declared by the judiciary. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory orders against public bodies and public officials.
>
> 14 …[The] proposition that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law, which is enshrined in the Constitution of Canada by the preamble to the Canadian Charter of Rights and Freedoms. ... Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. If the public body or official has doubts concerning a judicial declaration, the rule of law requires that body or official to pursue the matter through the legal system. ... The rule of law can mean no less.
>
> 15 … As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at par. 62, the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully. However, should this not be the case, the Supreme Court of Canada has laid to rest any doubt about the availability of contempt proceedings in appropriate cases in the event that public bodies or officials do not comply with such an order. As noted by Iacobucci and Arbour JJ. at par. 67 of *Doucet-Boudreau*: “[o]ur colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings

> against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases" (emphasis added).

[199] Given this, and with respect, the Court has concluded no timelines should be ordered as proposed at least at this time. That may change of course if the underlying situation does not, in respect of which the Court is not asked to speculate.

[200] For the reasons set out above, the Court declares that:

1. All federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.

2. Appointments to fill judicial vacancies under section 96 of the *Constitution Act*, 1867 and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.

3. Appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023, reproduced herein.

4. The Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced within a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

   [Emphasis added]

XI. Conclusion

[201] The Court grants the application in part. The request for an order of *mandamus* is dismissed, as is the request for the first declaration. However declarations will be issued.

XII. Costs

[202] The parties agreed that if the Applicant is successful he would receive all inclusive costs of $1500.00 but if the Applicant is not successful, the parties would bear their own costs. In my discretion these agreements are reasonable. The Applicant having succeeded for the most part, the Court awards him costs in the all-inclusive sum of $1,500.00 payable by the Respondents.

JUDGMENT in T-1274-23

THIS COURT'S JUDGMENT is that:

1. The Application is granted in part.
2. It is hereby declared:
    1. That all federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice. In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet.
    2. That appointments to fill judicial vacancies under section 96 of the *Constitution Act, 1867* and section 5.2 of the *Federal Courts Act* must be made within a reasonable time of the vacancy.
    3. That appointments to fill current judicial vacancies are required for the reasons set out in the letter from the Chief Justice of Canada and Canadian Judicial Council to the Prime Minister of Canada dated May 3, 2023 set out in paragraph 1 and Schedule A to these Reasons for Judgment.
    4. That the Court makes Declarations 2 and 3 above in its expectation that the number of said judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to the mid-40s, that is, to the number of federal judicial vacancies in the Spring of 2016; in this manner the Court expects the untenable and appalling crisis, and critical judicial vacancy situation found by this Court as identified by the Chief Justice and Canadian Judicial Council will be resolved.

3. While I will not seize myself of this matter, the Court may provide guidance or resolution of related issues if requested.

4. Paragraphs 17, 20, 24, 26, 29, and 39-49 are struck from the Applicant's affidavit.

5. The Respondents shall pay the Applicant $1500.00 all inclusive costs.

"Henry S. Brown"
Judge

SCHEDULE A

Nicholas Pope

From: DANIEL LEBLANC <daniel.leblanc@radio-canada.ca>

Sent: June 16, 2023 9:18 AM

To: Nicholas Pope

Subject: Re: Wagner CJ's May 3 letter to PM

Good morning, here is the letter.

Le 3 mai 2023

Le très honorable Justin Trudeau

Monsieur le Premier ministre.

En tant que juge en chef du Canada et président du Conseil canadien de la magistrature, je dois vous faire part de ma très grande inquiétude concernant le nombre important de postes vacants au sein de la magistrature fédérale et l'incapacité du gouvernement à combler ces postes en temps opportun.

La situation actuelle est intenable et je crains qu'elle ne résulte en une crise pour notre système de justice, qui fait déjà face à de multiples défis. L'accès à la justice et la santé de nos institutions démocratiques sont en péril.

Vous le savez sans doute, il y a à l'heure actuelle 85 postes vacants au sein de la magistrature fédérale à travers le pays. Certains tribunaux doivent composer depuis des années avec un taux de postes vacants se situant entre 10 et 15 pour cent. Il n'est d'ailleurs pas rare de voir des postes demeurer vacants pendant plusieurs mois, voire, même dans certains cas, pendant des années. À titre d'exemple concret, la moitié des postes à la Cour d'appel du Manitoba sont présentement vacants. Les nominations aux postes clés de juges en chef et de juges en chef associés se font également à un rythme très lent. À cet effet, il y a récemment eu des délais considérables dans les nominations au poste de juge en chef dans nombre de provinces, incluant l'Alberta, l'Ontario et l'Île-du-Prince-Édouard. Le poste de juge en chef du Manitoba est quant à lui vacant depuis maintenant six mois, et les postes de juges en chef associés à la Cour du Banc du Roi de la Saskatchewan et à la Cour supérieure du Québec sont vacants depuis plus d'une année. Aucune explication claire ne justifie ces délais.

Il faut préciser que les difficultés engendrées par la pénurie de juges exacerbent une situation déjà critique au sein de plusieurs tribunaux, confrontés à un manque criant de ressources, en raison d'un sous-financement chronique de la part des provinces et territoires. Toutefois, bien que plusieurs facteurs expliquent la crise à laquelle fait face notre système de justice

actuellement, la nomination des juges en temps utile est une solution à portée de main, qui permettrait d'améliorer la situation de manière rapide et efficace. Compte tenu de ce fait évident et de la situation critique à laquelle nous sommes confrontés, l'inertie du gouvernement quant aux postes vacants et l'absence d'explications satisfaisantes pour ces retards sont déconcertantes. La lenteur des nominations est d'autant plus difficile à comprendre que la plupart des vacances judiciaires sont prévisibles, notamment celles générées par les départs à la retraite, pour lesquelles les juges donnent généralement un préavis de plusieurs mois. Dans ce contexte, les retards quant aux nominations envoient un signal qu'elles ne sont tout simplement pas une priorité pour le gouvernement.

Au nom du Conseil canadien de la magistrature, je peux attester que les juges en chef et juges en chef adjoints de tout le pays sont satisfaits de la qualité des récentes nominations et se réjouissent de l'ajout de nouveaux postes de juge dans les derniers budgets. Nous reconnaissons d'ailleurs que votre gouvernement a déployé des efforts afin d'instaurer un processus de nomination plus indépendant, transparent et impartial pour les juges de nomination fédérale. Il serait malheureux que le rythme perfectible des nominations à la magistrature fédérale à travers le pays discrédite ultimement ce processus.

J'ai eu récemment l'occasion de rencontrer le ministre de la Justice et de discuter avec lui à ce sujet. Les juges en chef entretiennent d'ailleurs de très bonnes relations avec le ministre et son cabinet et nous sommes confiants qu'il est disposé à déployer tous les efforts nécessaires pour remédier aux problèmes que je viens d'exposer.

Malgré tous ces efforts, il est impératif que le Cabinet du Premier ministre accorde à cette question l'importance qu'elle mérite et que les nominations soient faites en temps opportun. Il est en effet primordial de combler les postes vacants au sein de la magistrature avec diligence, afin d'assurer le bon fonctionnement du pouvoir judiciaire. Le Conseil canadien de la magistrature a dans le passé exhorté les gouvernements à procéder aux nominations judiciaires plus rapidement. Cette fois, nous craignons sérieusement que, sans des efforts concrets pour remédier à la situation, nous atteignions très bientôt un point de non-retour dans plusieurs juridictions. Les conséquences feront les manchettes et seront graves pour notre démocratie et l'ensemble des Canadiens et Canadiennes. La situation exige votre attention immédiate.

Les postes laissés vacants ont des impacts significatifs sur l'administration de la justice, le fonctionnement de nos tribunaux et la santé des juges. Les membres du Conseil canadien de la magistrature ont récemment entrepris de dresser un portrait plus complet des difficultés rencontrées dans leurs tribunaux respectifs. Les constats sont accablants.

Malgré tout le professionnalisme et le dévouement de nos juges, le manque d'effectifs se traduit nécessairement par des délais additionnels pour entendre des causes et rendre des jugements. Les juges en chef rapportent que, puisque les juges sont surchargés, les délais pour fixer des affaires sont inévitables et des audiences doivent être reportées ou ajournées. De plus, même lorsque les affaires sont entendues, les jugements tardent parfois à être rendus, puisque les juges doivent siéger davantage, ce qui leur laisse moins de temps pour délibérer. Le cadre d'analyse de l'arrêt R. c. Jordan, 2016 CSC 27, quant au droit de l'accusé

d'être jugé dans un délai raisonnable en vertu de la Charte canadienne des droits et libertés, joue également un rôle important à cet égard. Il prévoit que, devant les cours supérieures, les accusations pénales doivent être traitées dans un délai maximum de 30 mois, sauf circonstances exceptionnelles. Si un procès n'est pas achevé dans ce délai, un arrêt des procédures peut être ordonné. Plusieurs juges en chef mentionnent qu'en s'efforçant de respecter le délai prévu dans Jordan, ils sont actuellement contraints de choisir les affaires pénales qui « méritent » le plus d'être entendues. Malgré tous leurs efforts, des arrêts de procédure sont prononcés contre des individus accusés de crimes graves, comme des agressions sexuelles ou des meurtres, en raison de délais dus, en partie ou en totalité, à une pénurie de juges. À titre d'exemple, la Cour du Banc du Roi de l'Alberta rapporte que plus de 22 pour cent des affaires pénales en cours dépassent le délai de 30 mois et que 91 pour cent de ces affaires concernent des crimes graves et violents. Par ailleurs, l'urgence de traiter les affaires pénales a aussi pour effet d'écarter les affaires civiles du rôle des tribunaux. Pour celles-ci, le système de justice risque de plus en plus d'être perçu comme inutile. De telles situations démontrent une faillite de notre système de justice et sont susceptibles d'alimenter le cynisme auprès du public, et d'ébranler la confiance de ce dernier dans nos institutions démocratiques.

L'impact des postes laissés vacants sur les juges eux-mêmes est aussi non négligeable. Faisant face à une surcharge de travail chronique et à un stress accru, il est de plus en plus fréquent de voir des juges placés en congés médicaux, ce qui a un effet domino sur leurs collègues qui doivent alors porter un fardeau additionnel. Par ailleurs, il devient difficile pour les juges de certains tribunaux de trouver le temps nécessaire pour suivre des formations, y compris celles dites obligatoires. Cette situation n'augure rien de positif pour assurer une magistrature saine et prospère. Si les difficultés actuelles perdurent, il pourrait également devenir plus difficile d'attirer des candidatures de qualité aux postes de juge.

C'est d'ailleurs déjà le cas en Colombie-Britannique.

Richard Wagner

Le ven. 16 juin 2023, à 07 h 40, Nicholas Pope <npope@hameedlaw.ca> a écrit :

Hi Daniel,

I’m a lawyer in Ottawa. I read your story on Chief Justice Wagner’s May 3, 2023, letter to the Prime Minister about judicial vacancies. Would you be able to share a copy of this letter with me?

Thanks,

Nicholas Pope
Lawyer (he/him)
Phone: 613.656.6917 | Fax: 613.232.2680 | npope@hameedlaw.ca
43 Florence Street | Ottawa, Ontario, Canada | K2P 0W6
www.hameedlaw.ca

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1274-23
STYLE OF CAUSE:	YAVAR HAMEED v PRIME MINISTER AND MINISTER OF JUSTICE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 15, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	FEBRUARY 13, 2024

APPEARANCES:

Nicholas Pope	FOR THE APPLICANT
David Aaron Dylan Smith	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Hameed Law Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS