

Court File No.

FEDERAL COURT

B E T W E E N:



YAVAR HAMEED

Applicant

-and-

PRIME MINISTER and MINISTER OF JUSTICE

Respondents

NOTICE OF APPLICATION
(Pursuant to section 18.1 of the *Federal Courts Act*)

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 20, 2023

Issued by:

Jonathan Macena

(Registry Officer)

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**Lawyer for the Respondents,
PRIME MINISTER et al**

I HEREBY CERTIFY that the above document is a true copy of
the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie confirmée
À l'original déposé au dossier de la Cour fédérale.

Filing Date
Date de dépôt : 20-JUN-2023

Dated 20-JUN-2023
Fait le : _____

APPLICATION

This is an application for the writ of *mandamus*, pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 for the Prime Minister and Minister of Justice (“**Ministers**”) to appoint judges to the 79 vacancies in superior courts across Canada, as required by s. 96 of *The Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (“**The Constitution Act, 1867**”), and s. 5.2 of the *Federal Courts Act*, RSC 1985, c F-7 (“**Federal Courts Act**”).

THE APPLICANT MAKES APPLICATION FOR:

- a) An order compelling the Prime Minister and Minister of Justice to appoint judges to each of the 79 vacancies in the superior courts across Canada within three months of the date of the order or nine months of having become aware that the position would be vacated, whichever is later;
- b) In the alternative, a declaration that
 - i. 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
 - ii. 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;
- c) Special costs on a full indemnity basis; and
- d) Such further and other relief as counsel may request and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

A. The Applicant

1. The Applicant, Yavar Hameed, is a human rights lawyer. He is the principal lawyer at Hameed Law, an Ottawa-based law firm that is focused on human rights litigation in a variety of areas including administrative law, *Charter* protections, discrimination prevention, employment, and prisoner rights. The law firm's animating purpose is to assist those who are marginalized by society and underserved by the legal system and to work in the public interest to achieve systemic change for the most vulnerable.
2. The Applicant primarily represents clients who are low-income and are in vulnerable positions due to factors beyond their control such as disabilities or experiences of trauma. The Applicant also represents non-profit organizations that work to promote human rights and protect the marginalized. These organizations often have limited budgets.
3. The Applicant regularly litigates in the Federal Courts, the Ontario Superior Court of Justice, and the Ontario Court of Appeal. He also litigates in the superior courts of other provinces on occasion.
4. Over the past few years, the Applicant has experienced significant delays in the litigation proceedings he has brought in superior courts on behalf of vulnerable clients. These delays have harmed his 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.
5. For example, the Applicant represented 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 counsel 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. At the time the Applicant was informed of the cancellation, he had already booked expert witnesses as well as flights for the experts to fly in to testify. The victim, who had limited financial means, had to bear the cost of cancelling the experts' flights and rebooking their schedules. The delayed hearing also caused the victim serious emotional and psychological harm as she was made to relive her trauma unnecessarily by preparing to testify for a trial that was then cancelled.

6. The issues the Applicant has encountered do not stem from any lack of hard work by the existing judges. The courts are simply overburdened by their immense caseload, which is significantly increased by the large number of unfilled judicial positions.

B. Judicial Vacancies

7. On May 3, 2023, the Chief Justice of the Supreme Court of Canada wrote to the Prime Minister, Deputy Prime Minister, and Minister of Justice to alert them of the serious consequences of judicial vacancies and to request that they fill the vacancies in a timely manner. The Chief Justice stated that the situation requires the government's immediate attention.
8. There are currently 79 judicial vacancies for federally appointed judges across Canada, as of June 1, 2023. The number of vacancies for each court are listed in the table below.

Court	Vacancies
Federal Court of Appeal	3
Federal Court	4
Tax Court of Canada	2
Alberta Court of Appeal	3
Alberta Court of King's Bench	8
British Columbia Court of Appeal	2
British Columbia Supreme Court	11
Manitoba Court of Appeal	3
New Brunswick Court of King's Bench - Trial	2
New Brunswick Court of King's Bench - Family	1
Newfoundland and Labrador Supreme Court	3

Nova Scotia Court of Appeal	1
Nova Scotia Supreme Court	1
Nova Scotia Family Division	1
Nunavut Court of Justice	2
Ontario Court of Appeal	2
Ontario Superior Court of Justice	19
Ontario Family Court	3
Quebec Court of Appeal	1
Quebec Superior Court	4
Saskatchewan Court of King's Bench	3

9. This is not a normal number of vacancies. In the spring of 2016, the federal government reported only 46 vacancies as compared to the current 79.
10. The current vacancy rate in many courts is between 10 and 15 percent. It is not uncommon to see positions remain vacant for several months, or even, in some cases, for years.
11. As one example, the position of Associate Chief Justice of the Superior Court of Quebec has been vacant for more than 16 months since March 2022. The Superior Court in Montreal is one of the busiest districts in Canada, and the judges there have had to work exceedingly hard to compensate for this extended vacancy.
12. The positions left vacant have significant impacts on the administration of justice, the functioning of the courts, and the health of judges.
13. Despite all the professionalism and dedication of superior court judges, the vacant positions necessarily result in additional delays in hearing cases and rendering judgments. As judges are overworked, delays are unavoidable, and hearings have to be postponed or adjourned. Even when cases are heard, judgments are sometimes delayed since judges have to sit longer, which gives them less time to deliberate.
14. The Supreme Court's decision in *R v Jordan*, 2016 SCC 27, setting out the right of the accused to be tried within a reasonable time under the *Canadian Charter of Rights and Freedoms*, means that judicial vacancies can lead to an even more troubling consequence. *R v Jordan* provides that in superior courts criminal charges must be

dealt with within a maximum period of 30 months, except in exceptional circumstances. If a trial is not completed within that time, a stay of proceedings may be ordered. In trying to meet the *Jordan* deadline, several Chief Justices have been forced to choose the criminal cases that are most “deserving” to be heard. Despite their best efforts, procedural stays are pronounced against individuals accused of serious crimes, such as sexual assault or murder, due to delays due, in part or in whole, to a shortage of judges.

15. For example, in Alberta, where there are 11 judicial vacancies, 22 percent of active criminal cases now exceed the 30-month limit. This puts these legal proceedings at risk of being stayed due to unconstitutional delay. Of those, 91 percent involve serious and violent crimes. If these cases are stayed, public confidence in the courts and judges will likely be eroded.
16. Moreover, the urgency of dealing with criminal cases has the effect of removing civil cases from the courts. For those with civil cases, the justice system is more and more likely to be perceived as useless. Such situations demonstrate a failure of our justice system and are likely to fuel cynicism among the public and undermine public confidence in our democratic institutions.
17. The long and numerous vacancies have significant impacts on judges themselves. Faced with a chronic work overload and increased stress, it is more and more common to see judges placed on medical leave. This has a domino effect on their colleagues, who must pick up the additional workload.
18. It is also becoming difficult for the judges of some courts to find the time necessary to take training, including the compulsory training. This situation does not bode well for a healthy and prosperous judiciary. If the current difficulties persist, it could also become more difficult to attract quality candidates for the posts of judge.
19. There is no valid justification for the lack of appointments. Judges who retire or depart typically give six months notice, so the vacancies are foreseeable. There are candidates available in every province, so when such notice is given, the Ministers should be able to prepare in advance for the vacancy and fill positions almost as soon

as they are vacated, leaving little or no gap between appointments.

20. Indeed, the Ministers have proven that it is possible to appoint judges quite rapidly when a vacancy arises. For example, on April 24, 2023, the Minister of Justice appointed three judges to the Alberta Court of King's Bench only three days after each of the positions became vacant on April 21, 2023. Two of those three judges were female. As another example, on December 21, 2020, the Prime Minister appointed an Associate Chief Justice of the Ontario Superior Court of Justice after a 41-day vacancy.

21. Despite it being quite possible and reasonable for the Ministers to make appointments within days or weeks after a position becomes vacant, it is not uncommon for positions to remain vacant for months and even years. Delays in appointments occur simply because they are not a priority for the government.

C. Grounds for *Mandamus*

22. The Ministers have the public legal duty to 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, under s. 96 of *The Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, and to appoint the judges of the Federal Court of Appeal and Federal Court under s. 5.2 of the *Federal Courts Act*, RSC 1985, c F-7.

23. The duty is owed to the Applicant since the Applicant is directly affected by the lack of judicial appointments. The Applicant is a Canadian citizen and a lawyer called to the bar in Ontario. The Applicant regularly litigates before the Ontario Superior Court and Federal Courts, and he has experienced negative effects in his legal practice due to the backlogs in these courts.

24. In the alternative, the duty is owed to the Applicant since the Applicant has public interest standing. Specifically,

- a. This matter raises a serious justiciable issue;

- b. The Applicant has a genuine interest in the appointment of judges to the vacant positions due to his practice as a lawyer who regularly litigates before the provincial superior courts and Federal Courts; and
- c. This proposed suit is a reasonable and effective way to bring the issue before the courts.

25. There is a clear right to the performance of the duty, in particular,

- a. There are no conditions precedent to the duty;
- b. The Chief Justice of the Supreme Court of Canada made a demand for performance of the duty by sending a letter to the Minister of Justice, the Prime Minister, and the Deputy Prime Minister on May 3, 2023; the Applicant, himself, also made a demand to the Minister of Justice on June 16, 2023, and to the Prime Minister on June 17, 2023;
- c. There was a reasonable time of 48 days to comply with the Chief Justice's demand; this is reasonable since many of the judicial appointments have already been vacant for months or years, and the Ministers have demonstrated their ability to make appointments within as few as three days after a position becomes vacant; and
- d. A subsequent refusal is implied by the unreasonable delay; the delay is unreasonable because it is *prima facie* longer than the nature of the process requires; the Applicant is not responsible for the delay; and the Respondents have not provided satisfactory justification for the delay.

26. No other adequate remedy is available.

27. The order sought will have the practical value and effect of ensuring the appointment of judges. This will improve access to justice, reduce the burden on the judicial system, improve judges' mental health, and reduce the number of criminal proceedings which are stayed due to delay.

28. There is no equitable bar to the relief sought.

29. The balance of convenience favours granting *mandamus* since no harm will result from appointing judges to the vacancies. Rather, the judicial system will function better, judges' mental health will improve, and less violent criminals will have their criminal charges stayed due to delay. This will improve the public's confidence in the judicial system and protect our democratic institutions.

D. Grounds for Declaration

30. The Federal Court has the jurisdiction to hear this issue and grant a declaration under ss. 18 and 18.1 of the *Federal Courts Act*.

31. The dispute is real and not theoretical since there are 79 vacancies in superior courts across Canada, and these vacancies are significantly impacting the functioning of the courts.

32. The Applicant has a genuine interest in this dispute's resolution because he is a lawyer who regularly litigates before the provincial superior courts and Federal Courts, and he has been negatively impacted by the backlogs. As a Canadian citizen, he also has a genuine interest in the maintaining public confidence in the judicial system. This confidence is likely to be eroded by the lack of judicial appointments leading to stays of proceedings in matters involving violent criminal offences.

E. Grounds for Special Costs

33. It is appropriate for the Court to grant special costs to the Applicant since

- a. The litigation raises public interest matters that are exceptional and have a significant and widespread societal impact;
- b. The Applicant has no proprietary or pecuniary interest in the litigation; and
- c. Applicant's counsel is taking on this matter *pro bono*, and the case would not have gone forward with private funding.

F. Legal Authorities

34. Section 96 of *The Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985,

Appendix II, No 5.


35. Sections 5.2, 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

36. *Federal Courts Rules*, SOR/98-106.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- a) A supporting affidavit and exhibits attached thereto; and
- b) Such further and other materials as counsel may advise and this Honourable Court may permit.

June 20, 2023



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