

FEDERAL COURT

B E T W E E N:

YAVAR HAMEED

Applicant

-and-

PRIME MINISTER and MINISTER OF JUSTICE

Respondents

APPLICATION RECORD

Volume 2 of 3

Memorandum of Fact and Law

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PART I – STATEMENT OF FACT

A. Overview

1. This is an application for *mandamus* to compel the Prime Minister and Minister of Justice (“**Ministers**”) to appoint judges to the vacancies in superior courts across Canada.
2. At least 81 positions are vacant, and at least 37 of these positions have been vacant for more than a year. The extended vacancies harm vulnerable litigants, who have trials unexpectedly cancelled and must wait years for justice. The vacancies harm judges’ health as they are overworked and sometimes unable to find time for training. The vacancies also harm the public’s confidence in the administration of justice since delays caused by the vacancies result in criminal charges against violent criminal offenders being stayed due to the timelines in *R v Jordan*.¹
3. The Ministers have an explicit statutory duty to appoint judges to the superior courts under 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 under s. 5.2 of the *Federal Courts Act*, RSC 1985, c F-7 (“**Federal Courts Act**”).
4. The unreasonable delay in appointing judges constitutes an implied refusal. The Ministers have demonstrated that they can appoint judges quickly enough that a position need only be vacant for 2 days. Despite this, positions lie vacant for months and years, and the Respondents have provided no explanation for the delays.
5. Thus, an order of *mandamus* is appropriate. The requested order strikes the balance of providing flexibility and time for the Ministers to conduct appropriate recruitment and vetting while ensuring they comply with their statutory duties. Specifically, the Applicant seeks an order compelling the Prime Minister and

¹ *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

Minister of Justice to appoint judges to each of the vacancies in the superior courts across Canada by the later of

- a. three months after the date of the order, or
 - b. nine months after becoming aware that the position would be vacated.
6. In the alternative, the Applicant requests a declaration 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;
7. Finally, the Applicant seeks special costs on a full indemnity basis since this case raises public interest matters that have significant and widespread societal impact; the Applicant has no proprietary or pecuniary interest in the litigation; and this case would not have gone forward with private funding.

B. Applicant

8. 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

9. 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
10. 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
11. 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
12. 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

² Affidavit of Yavar Hameed, July 11, 2023 (“**Hameed Affidavit**”), paras 2-4, **Application Record Volume 1 (“AR1”), p 13.**

³ Hameed Affidavit, paras 5-6, **AR1, p 13.**

⁴ Hameed Affidavit, para 7, **AR1, p 13.**

⁵ Hameed Affidavit, para 8, **AR1, p 13.**

the matter, so it would have to be cancelled, and the earliest available new hearing date would be December 12, 2022.⁶

13. At the time the Applicant was informed of the cancellation, he had already booked a hotel and flight for an expert witness to fly into Ottawa from Halifax and arranged the logistics for witnesses from outside Ottawa to attend the trial. The victim, who had limited financial means, had to bear costs associated with the cancellation. 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.⁷

C. Long Judicial Vacancies

14. 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.

15. On June 1, 2023, there were 79 vacancies for federally appointed superior court judges.⁸ This number increased to 81 by July 1, 2023.⁹ This is not a normal number of vacancies. For example, in the spring of 2016, there were only 46 vacancies.¹⁰

16. Currently, one judicial position has been vacant for more than five years. Four positions have been vacant for more than four years. Eleven positions have been vacant for more than two years. Fifteen positions have been vacant for more than one and a half years. Thirty-seven positions have been vacant for more than a year. And at least 48 positions have been vacant for more than 100 days.¹¹

⁶ Hameed Affidavit, para 9, **AR1, p 14**.

⁷ Hameed Affidavit, para 10, **AR1, p 14**; website of the Office of the Commissioner of Federal Judicial Affairs Canada, June 1, 2023, Hameed Affidavit, Exhibit "B", **AR1, p 34**.

⁸ Hameed Affidavit, para 11, **AR1, p 14**; website of the Office of the Commissioner of Federal Judicial Affairs Canada, July 4, 2023, Hameed Affidavit, Exhibit "C", **AR1, p 40**.

⁹ Hameed Affidavit, para 12, **AR1, p 14**.

¹⁰ Hameed Affidavit, para 38, **AR1, p 21**.

¹¹ Hameed Affidavit, para 19 & Exhibits "F" to "Q", **AR1, pp 16 & 53-91**.

17. The vacancies have significant impacts on the administration of justice, the functioning of the courts, and the health of judges.¹²
18. The vacancies have created challenges for court scheduling, making it difficult for courts to deal with matters in a timely fashion. It also drives up costs to litigants when counsel appear only to have their matter not reached because the court is overburdened with an unrealistic list.¹³
19. The vacant positions result in delays in hearing cases and rendering judgments. As judges are overworked, delays are unavoidable, and hearings must be postponed or adjourned. Even when cases are heard, judgments are sometimes delayed since judges must sit longer, which gives them less time to deliberate.¹⁴
20. The Supreme Court's decision in *R v Jordan*,¹⁵ 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.¹⁶ 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.¹⁷
21. 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

¹² Hameed Affidavit, para 41, **AR1, p 22**.

¹³ Hameed Affidavit, para 29 & Exhibit "HHH", **AR1, pp 20 & 332**.

¹⁴ Hameed Affidavit, para 42, **AR1, p 22**.

¹⁵ *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

¹⁶ *Ibid* at para 46.

¹⁷ Hameed Affidavit, para 43, **AR1, p 22**.

justice system and are likely to fuel cynicism among the public and undermine public confidence in our democratic institutions.¹⁸

22. 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.¹⁹

23. It is also becoming difficult for the judges of some courts to find the time necessary to take training, including the compulsory training. This does not create the right conditions 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.²⁰

D. Appointments Can Be Made with Less than 90 Days Vacancy

24. There is no valid reason for these extended vacancies.

25. The Ministers are able to make appointments quickly enough that a judicial position is vacant for only a few days. On August 6, 2021, the Minister of Justice appointed a judge to the Newfoundland Supreme Court and another to the Tax Court of Canada just two days after each position became vacant.²¹ On April 24, 2023, the Minister of Justice appointed three judges to the Alberta Court of Kings Bench just three days after each position became vacant.²²

26. At the high end, a position should not need to be vacant for more than 90 days absent exceptional circumstances, and any vacancy that lasts more than 90 days is *prima facie* longer than required by the nature of the process. Since 2020, the Minister of Justice has appointed 32 judges with less than a 90-day vacancy.²³

¹⁸ Hameed Affidavit, para 45, **AR1, p 23**.

¹⁹ Hameed Affidavit, para 46, **AR1, p 23**.

²⁰ Hameed Affidavit, para 47, **AR1, p 23**.

²¹ Hameed Affidavit, para 22 & Exhibits “R” & “S”, **AR1, pp 18 & 93-104**.

²² Hameed Affidavit, para 22 & Exhibit “T”, **AR1, pp 18 & 106-108**.

²³ Hameed Affidavit, para 22, **AR1, pp 18-19**.

Since 2018, the Prime Minister (who is responsible for appointing considerably less judges) has similarly appointed nine judges with less than a 90-day vacancy.²⁴

E. Prior Notice Often Given of Vacancies

27. The extended vacancies are even more inexcusable given that judges typically provide around six months' notice before retiring or resigning. This gives the Ministers plenty of time to start finding a replacement even before the position becomes vacant.²⁵

28. The Ministers also had plenty of notice of vacancies caused by the new positions created by statute since the Bills creating the positions were each introduced in the House of Commons around two to three months before receiving royal assent:

Act	Bill	First Reading	Royal Assent	Days Notice
<i>Budget Implementation Act, 2018, No. 1, SC 2018, c 12.</i>	C-74	March 27, 2018 ²⁶	June 21, 2018	86
<i>Budget Implementation Act, 2019, No. 1, SC 2019, c 29.</i>	C-97	April 8, 2019 ²⁷	June 21, 2019	74
<i>Budget Implementation Act, 2021, No. 1, SC 2021, c 23.</i>	C-30	April 30, 2021 ²⁸	June 29, 2021	60
<i>Budget Implementation Act, 2022, No. 1, SC 2022, c 10.</i>	C-19	April 28, 2022 ²⁹	June 23, 2022	56

F. Demands for Performance of Duty

29. The Ministers have received multiple demands that they perform their duty and fill the judicial vacancies.

²⁴ Hameed Affidavit, para 23, **AR1, p 19**.

²⁵ Hameed Affidavit, paras 24-27 & 48 & Exhibits "DDD" to "GGG", **AR1, pp 19-20 & 324-330**.

²⁶ *House of Commons Debates*, 42nd Parl, 1st Sess, No 276 (27 March 2018) at [18166](#) (Hon Bardish Chagger).

²⁷ *House of Commons Debates*, 42nd Parl, 1st Sess, No 400 (8 April 2019) at [26820](#) (Hon Bill Morneau).

²⁸ *House of Commons Debates*, 43rd Parl, 2nd Sess, No 92 (30 April 2021) at [6460](#) (Hon Chrystia Freeland).

²⁹ *House of Commons Debates*, 44th Parl, 1st Sess, No 60 (28 April 2022) at [4508](#) (Hon Chrystia Freeland).

30. On February 13, 2023, the Federation of Ontario Law Associations (“**FOLA**”) sent a letter to the Prime Minister, Deputy Prime Minister, and Minister of Justice demanding that they fill the judicial vacancies.³⁰
31. On May 3, 2023, the Chief Justice of the Supreme Court of Canada sent a letter to the Prime Minister, Deputy Prime Minister, and Minister of Justice requesting that they fill the vacancies in a timely manner.³¹
32. On June 16, 2023, the Applicant’s lawyer sent a letter to the Minister of Justice requesting that he appoint judges to the vacant federal judicial positions.³²
33. On June 17, 2023, the Applicant’s lawyer sent a letter to the Prime Minister requesting the same.³³
34. Despite these demands, the Ministers have provided no justification for the delays,³⁴ and the number of vacant positions has only increased.³⁵

PART II – POINTS IN ISSUE

35. The Applicant submits that the following issues are to be determined:

ISSUE 1: Should the Court order *mandamus*?

ISSUE 2: Should the Court order a declaration?

ISSUE 3: Should the Court award special costs to the Applicant?

³⁰ Hameed Affidavit, para 28 & Exhibit “HHH”, **AR1, pp 20 & 332-334.**

³¹ Hameed Affidavit, para 32 & Exhibit “KKK”, **AR1, pp 21 & 349-350.**

³² Hameed Affidavit, para 50 & Exhibit “NNN”, **AR1, pp 24 & 364.**

³³ Hameed Affidavit, para 51 & Exhibit “OOO”, **AR1, pp 24 & 366.**

³⁴ Hameed Affidavit, paras 52-53, **AR1, p 24.**

³⁵ Hameed Affidavit, para 12 & Exhibit “C”, **AR1, pp 14 & 40-44.**

PART III – SUBMISSIONS

ISSUE 1: *Mandamus*

36. The Applicant submits that it is appropriate for *mandamus* to be granted 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.

37. The test for *mandamus* is as follows:

- 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. There 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.³⁶

38. All eight elements of the test for *mandamus* are met.

1) Legal Duty to Act

39. First, the Respondents have the public legal duties to appoint judges:

- a. under s. 96 of *The Constitution Act, 1867*,³⁷ they must appoint judges to the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick; and
- b. under s. 5.2 of the *Federal Courts Act*,³⁸ they must appoint judges to the Federal Court of Appeal and Federal Court.

2) Duty Owed to Applicants

40. Second, the duty is owed to the Applicant.

41. This element is meant to ensure that “*mandamus* cannot issue with respect to a duty owed to the Crown.”³⁹ The courts have found that the following duties are not owed to the Crown:

- a. The duty to retrieve a mayor’s expenses which were reimbursed to him without authority;⁴⁰
- b. The duty to repay money that was spent for the purpose of an *ultra vires* Act into the Consolidated Revenue fund;⁴¹

³⁶ *Canada (Health) v The Winning Combination Inc*, 2017 FCA 101 at para 60, 413 DLR (4th) 362; *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 at 766-769, 162 NR 177 (FCA), aff’d *Apotex Inc v Canada (Attorney General)*, [1994] 3 SCR 1100, 176 NR 1.

³⁷ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 96.

³⁸ *Federal Courts Act*, RSC 1985, c F-7, s 5.2.

³⁹ *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 at footnote 6, [1993] FCJ No 1098.

⁴⁰ *MacIlReith v Hart*, 39 SCR 657, 4 ELR 468; see *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 at 158-159, 1 NR 225.

⁴¹ *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 at 140 & 163, 1 NR 225.

c. The duty to stop illegal federal cost-sharing payments.⁴²

42. Similarly, the duty for the Ministers to appoint judges is not owed to the Crown. It is a duty owed to all Canadians. The duty provides a benefit to all Canadians by providing them with a judiciary that they can use to hold the Crown accountable and resolve private disputes.

43. Historically, the issue of whether the duty is owed to the Applicant “has been framed as one concerning standing to bring a *mandamus* application.”⁴³

44. The Applicant has private interest standing 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.⁴⁴ 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.⁴⁵

45. In the alternative, the duty is owed to the Applicant since the Applicant has public interest standing. The test for public interest standing is as follows:

- 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 courts⁴⁶

46. The factors must be interpreted in a liberal and generous manner⁴⁷ and in light of their purposes of ensuring access and preserving judicial resources.⁴⁸

⁴² [Finlay v Canada \(Minister of Finance\)](#), [1986] 2 SCR 607 at 613 & 634, 1986 CanLII 6.

⁴³ [Apotex Inc v Canada \(Attorney General\)](#), [1994] 1 FC 742 at footnote 6, [1993] FCJ No 1098.

⁴⁴ Hameed Affidavit, para 2, **AR1, p 13**.

⁴⁵ Hameed Affidavit, paras 7-8, **AR1, p 13**.

⁴⁶ [Canada \(Attorney General\) v Downtown Eastside Sex Workers United Against Violence Society](#), 2012 SCC 45 at para 37, [2012] 2 SCR 524.

⁴⁷ *Ibid* at para 35.

⁴⁸ *Ibid* at paras 23 & 36.

47. The Applicant has public interest standing because

- 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.

3) Clear Right to Performance of the Duty

48. Third, the Applicant has a clear right to performance of the duty because there are no conditions precedent to the duty; there were prior demands for performance of the duty; a reasonable time to comply with the demands has passed; and a subsequent refusal can be implied by the unreasonable delay.

i) Demands Made

49. There have been at least three demands made for the performance of the duty:

- a. On February 13, 2023, the Federation of Ontario Law Associations (“**FOLA**”) sent a letter to the Prime Minister, Deputy Prime Minister, and Minister of Justice demanding that they fill the judicial vacancies.⁴⁹
- b. On May 3, 2023, the Chief Justice of the Supreme Court of Canada sent a letter to the Prime Minister, Deputy Prime Minister, and Minister of Justice requesting that they fill the vacancies in a timely manner.⁵⁰
- c. On June 16, 2023, the Applicant’s lawyer sent a letter to the Minister of Justice requesting that he appoint judges to the vacant federal judicial

⁴⁹ Hameed Affidavit, para 28, **AR1, p 20**; Letter from Federation of Ontario Law Associations to Ministers, Feb 13, 2023, Hameed Affidavit, Exhibit “HHH”, **AR1, p 332**.

⁵⁰ Hameed Affidavit, para 32, **AR1, p 21**; Letter from Wagner CJ to Prime Minister, May 3, 2023, Hameed Affidavit, Exhibit “KKK”, **AR1, p 349**.

positions.⁵¹ On June 17, 2023, the Applicant's lawyer sent an identical letter to the Prime Minister.⁵²

ii) Reasonable Time Has Passed

50. The Respondents have had a reasonable time to fill the judicial vacancies.

51. Currently, one judicial position has been vacant for more than five years. Four positions have been vacant for more than four years. Eleven positions have been vacant for more than two years. Fifteen positions have been vacant for more than one and a half years. Thirty-seven positions have been vacant for more than a year. And at least 48 positions have been vacant for more than 100 days.⁵³

52. The Respondents have had more than 6 months to comply with the demand by the FOLA, 3 months to comply with the demand the Chief Justice, and 2 months to comply with the demand by the Applicant.

iii) Implied Refusal

53. A refusal should be implied by the unreasonable delay.

54. Pursuant to the Federal Court's decision in *Conille v Canada*, delay is considered unreasonable if

- a. the delay in question has been longer than the nature of the process required, *prima facie*;
- b. the applicant and his counsel are not responsible for the delay; and
- c. the authority responsible for the delay has not provided satisfactory justification.⁵⁴

⁵¹ Hameed Affidavit, para 50, **AR1, p 24**; Letter from Applicant's Lawyer to Minister of Justice, June 16, 2023, Hameed Affidavit, Exhibit "NNN", **AR1, p 364**.

⁵² Hameed Affidavit, para 51, **AR1, p 24**; Letter from Applicant's Lawyer to Prime Minister, June 17, 2023, Hameed Affidavit, Exhibit "OOO", **AR1, p 366**.

⁵³ See precise details in table at Hameed Affidavit, para 19 & Exhibits "F" to "Q", **AR1, pp 16-17 & 53-91**.

⁵⁴ *Conille v Canada (Minister of Citizenship and Immigration) (TD)*, [1999] 2 FC 33 at para [23](#), 159 FTR 215 [*Connille*].

55. All three elements in *Conille* are met. First, any vacancy that lasts more than 90 days is *prima facie* longer than required by the nature of the process. The Ministers have demonstrated that they are able to appoint judges with as little as two days vacancy. Since 2020, the Minister of Justice has appointed six judges with less than a four-day vacancy and 32 judges with less than a 90-day vacancy.⁵⁵ Since 2018, the Prime Minister (who is responsible for appointing considerably less judges) has similarly appointed nine judges with less than a 90-day vacancy.⁵⁶

56. Furthermore, judges typically provide around six months' notice before retiring or resigning, giving the Ministers plenty of time to find a replacement.⁵⁷ And the Ministers would have had plenty of advance notice of vacancies caused by new positions created by statute since the bills creating the positions were each introduced in the House of Commons around two to three months before receiving royal assent.⁵⁸

57. Second, neither the Applicant nor his counsel are responsible for any delay.

58. Third, the Respondent has provided no justification for the delay.

59. Furthermore, even if the Respondent had provided a justification, a blanket statement that a process is pending and may take months or years is inadequate.⁵⁹ Suggesting general problems without a "precise explanation" is not sufficient.⁶⁰

⁵⁵ Hameed Affidavit, para 22, **AR1**, pp 18-19.

⁵⁶ Hameed Affidavit, para 23, **AR1**, p 19.

⁵⁷ Hameed Affidavit, paras 24-27 & 48, **AR1**, pp 19-20 & 23.

⁵⁸ See table at para 28 above.

⁵⁹ *Samideh v Canada (Citizenship and Immigration)*, 2023 FC 854 at para 36; *Kanthasamyiyar v Canada (Citizenship and Immigration)*, 2015 FC 1248 at paras 49-50, 260 ACWS (3d) 579.

⁶⁰ *Conille v Canada (Minister of Citizenship and Immigration) (TD)*, [1999] 2 FC 33 at para 24, 159 FTR 215.

60. Administrative constraints, such as from complexity or voluminous reading cannot be used to justify delay.⁶¹ Neither can the need to receive advice from other agencies, such as from CSIS.⁶²

61. Finally, if any of the judicial appointments have not been actively moving forward, the delay is unreasonable regardless of how long a position has been vacant. If a file has been frozen at one stage of the process, the delay will be found unreasonable regardless of the total length of time elapsed.⁶³

4) Duty is Not Discretionary

62. Fourth, the duty sought to be enforced is not discretionary since it is required by s. 96 of *The Constitution Act, 1867* and s. 5.2 of the *Federal Courts Act*.

5) No Other Adequate Remedy Available

63. Fifth, no other adequate remedy is available to the Applicant since there is no other way for judges to be appointed to the courts.

6) Order Will Have Practical Value and Effect

64. Sixth, the order sought will have a practical value and effect. It will compel the Minister to fill the judicial vacancies in a reasonable time. This will have positive effects on the administration of justice, the functioning of the courts, and the health of judges.⁶⁴

7) No Equitable Bar to Relief

65. Seventh, there is no equitable bar to the relief sought.

8) Balance of Convenience Favours Granting Mandamus

⁶¹ *Thomas v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164 at paras [24-25](#).

⁶² *Almuhtadi v Canada (Citizenship and Immigration)*, 2021 FC 712 at para [41](#); *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 544 at para [16](#), [2005] FCJ No 669.

⁶³ *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1337 at paras [31](#) & [33](#), [2010] FCJ No 1680.

⁶⁴ Hameed Affidavit, para 41, **AR1**, p 22.

66. Eighth, the balance of convenience favours granting *mandamus* since no harm will result from the requested order and significant harm is being suffered every day because of the failure to appoint judges.
67. No harm will result from the requested order since it provides the Ministers with nine months to fill a position from the date they became aware of its vacancy, or three months from the date of the order, whichever is later. This is a more than adequate time since it is quite possible and reasonable for the Minister to make appointments within days or weeks after a position becomes vacant,⁶⁵ and these positions will have already been lying vacant for many months, if not years, prior to the granting of the order.
68. By contrast, the judicial vacancies cause significant harm. The vacancies negatively impact the administration of justice, the functioning of the courts, and the health of judges.⁶⁶
69. The vacancies cause delays in proceedings, which harm vulnerable clients, who often do not have the resources to wait years for justice. These delays exacerbate trauma for some clients and create pressure 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.⁶⁷
70. The vacancies also force courts to prioritize certain criminal matters over civil matters or else charges may be stayed against violent criminal offenders due to *R v Jordan*.⁶⁸
71. The vacancies also have significant impacts on judges themselves. Faced with a chronic work overload and increased stress, judges are more likely to need to go on medical leave. This has a domino effect on their colleagues, who must pick up the

⁶⁵ Hameed Affidavit, paras 22, 23 & 49, **AR1**, pp 18, 19 & 23-24.

⁶⁶ Hameed Affidavit, para 41, **AR1**, p 22.

⁶⁷ Hameed Affidavit, para 8, **AR1**, p 13.

⁶⁸ *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631; Hameed Affidavit, para 43, **AR1**, p 22.

additional workload.⁶⁹ It is becoming increasingly difficult for judges of some courts to find the time to take even compulsory training.⁷⁰

72. Based on the above, the Applicant respectfully requests that this Court grant the requested *mandamus* order.

ISSUE 2: Declaration

73. In the alternative, the Applicant submits that it is appropriate for the Court to order a declaration 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.

74. The elements required to grant a declaration are as follows:

- 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.⁷¹

⁶⁹ Hameed Affidavit, para 46, **AR1, p 23**.

⁷⁰ Hameed Affidavit, para 47, **AR1, p 23**.

⁷¹ *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 at para [60](#), [2019] 1 SCR 99; *British Columbia Civil Liberties Association v Canada (Royal Mounted Police)*, 2021 FC 1475 at para [32](#).

75. Each of these elements is met. First, 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*. And the question of how to interpret the requirements to appoint judges under s. 96 of *The Constitution Act, 1867*, and s. 5.2 of the *Federal Courts Act* is a justiciable issue.
76. Second, the dispute is real and not theoretical since there are at least 81 vacancies in superior courts across Canada,⁷² and these vacancies are significantly impacting the functioning of the courts.⁷³
77. Third, 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.⁷⁴ 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.
78. Fourth, the Respondents have a genuine interest in opposing the declaration being sought since they are the Ministers who are responsible for appointing judges.
79. The declaration sought has precedent in *BCCLA v Canada*, in which the Federal Court granted two similar declarations. In that case, the Federal Court declared (a) that the RCMP Commissioner was in violation of her statutory duty under s. 45.76 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, to respond to an interim complaint report, and (b) that a reasonable interpretation of the statutory duty is that, absent exceptional circumstances, a response should be provided within six months.⁷⁵

⁷² Hameed Affidavit, paras 12-13, **AR1**, pp 14-15.

⁷³ Hameed Affidavit, paras 8-10, 29 & 38-47, **AR1**, pp 13-14, 20 & 21-23.

⁷⁴ Hameed Affidavit, para 7, **AR1**, p 13.

⁷⁵ *British Columbia Civil Liberties Association v Canada (Royal Mounted Police)*, 2021 FC 1475 at para [52](#).

ISSUE 3: Special Costs

80. This case warrants an award of special costs on a full indemnity basis to the Applicant since it raises public interest matters that have significant and widespread societal impact; the Applicant has no proprietary or pecuniary interest in the litigation; and this case would not have gone forward with private funding.

81. The test for special costs is as follows:

- a. The case involves matters of public interest that are exceptional in that they have significant and widespread societal impact;
- b. The Applicant has no personal, proprietary, or pecuniary interest in the litigation that would justify the proceedings on economic ground; and
- c. It would not have been possible to effectively pursue the litigation in question with private funding.⁷⁶

82. When these three elements are met, it will be “contrary to the interests of justice to ask the individual litigants (or, more likely, *pro bono* counsel) to bear the majority of the financial burden associated with pursuing the claim.”⁷⁷

83. Each of the elements is met. First, the litigation raises public interest matters that are exceptional and have a significant and widespread societal impact. The failure to appoint judges affects the hundreds of thousands of Canadians across the country who interact with the court system each year.

84. Second, the Applicant has no economic interest in the litigation. No damages are sought, and the Applicant will not receive any financial gain through this case. The Applicant brought this case forward on a public interest basis because the judicial vacancies negatively impact vulnerable individuals who seek redress through the courts.⁷⁸

⁷⁶ *Carter v Canada (Attorney General)*, 2015 SCC 5 at para [140](#), [2015] 1 SCR 331.

⁷⁷ *Ibid.*

⁷⁸ Hameed Affidavit, para 54, **AR1**, p 24.

85. Third, this case could not have been brought forward with private funding. There is no individual who will obtain a certain, significant financial benefit from this case. Because of this, the Applicant's lawyer has taken on the matter *pro bono*.⁷⁹

86. Furthermore, the Respondent has provided no explanation for the unreasonable delay, even after this application for judicial review was filed.⁸⁰ In the immigration context, in which costs are not normally awarded, the Federal Court has held that if a Minister fails to provide an explanation for delay after the filing of a judicial review application, that constitutes "special reasons" warranting an award of costs against the Minister.⁸¹

87. Therefore, the Applicant respectfully request that he be granted special costs on a full indemnity basis.

PART IV – RELIEF SOUGHT

88. The Applicant seeks the following relief:

- a. An order compelling the Prime Minister and Minister of Justice to appoint judges to each of the 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

⁷⁹ Hameed Affidavit, para 55, **AR1**, pp 24-25.

⁸⁰ Hameed Affidavit, paras 52-53, **AR1**, p 24; the Respondents have chosen not to provide any affidavits in this proceeding, by which they could have attempted to explain the delays.

⁸¹ *Ghaddar v Canada (Citizenship and Immigration)*, 2023 FC 946 at para 48.

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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21 August 2023



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PART V – LIST OF AUTHORITIES

Legislation

- 1 [Budget Implementation Act, 2018, No. 1](#), SC 2018, c 12
- 2 [Budget Implementation Act, 2019, No. 1](#), SC 2019, c 29
- 3 [Budget Implementation Act, 2021](#), SC 2021, c 23
- 4 [Budget Implementation Act, 2022, No. 1](#), SC 2022, c 10
- 5 [Federal Courts Act](#), RSC 1985, c F-7
- 6 [The Constitution Act, 1867](#), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5

Jurisprudence

- 7 [Almuhtadi v Canada \(Citizenship and Immigration\)](#), 2021 FC 712
- 8 [Apotex Inc v Canada \(Attorney General\)](#), [1994] 1 FC 742, 162 NR 177 (FCA)
- 9 [Apotex Inc v Canada \(Attorney General\)](#), [1994] 3 SCR 1100, 176 NR 1
- 10 [British Columbia Civil Liberties Association v Canada \(Royal Mounted Police\)](#), 2021 FC 1475
- 11 [Canada \(Attorney General\) v Downtown Eastside Sex Workers United Against Violence Society](#), 2012 SCC 45, [2012] 2 SCR 524
- 12 [Canada \(Health\) v The Winning Combination Inc](#), 2017 FCA 101, 413 DLR (4th) 362
- 13 [Carter v Canada \(Attorney General\)](#), 2015 SCC 5, [2015] 1 SCR 331
- 14 [Conille v Canada \(Minister of Citizenship and Immigration\) \(TD\)](#), [1999] 2 FC 33, 159 FTR 215
- 15 [Douze v Canada \(Citizenship and Immigration\)](#), 2010 FC 1337, 382 FTR 81
- 16 [Finlay v Canada \(Minister of Finance\)](#), [1986] 2 SCR 607, 33 DLR (4th) 321
- 17 [Ghaddar v Canada \(Citizenship and Immigration\)](#), 2023 FC 946

- 18 [*Kanthasamyiyar v Canada \(Citizenship and Immigration\)*](#), 2015 FC 1248, 260 ACWS (3d) 579
- 19 [*MacIReith v Hart*](#), 39 SCR 657, 4 ELR 468
- 20 [*R v Jordan*](#), 2016 SCC 27, [2016] 1 SCR 631
- 21 [*SA v Metro Vancouver Housing Corp*](#), 2019 SCC 4, [2019] 1 SCR 99
- 22 [*Samideh v Canada \(Citizenship and Immigration\)*](#), 2023 FC 854
- 23 [*Singh v Canada \(Minister of Citizenship and Immigration\)*](#), 2005 FC 544, [2005] FCJ No 669
- 24 [*Thomas v Canada \(Public Safety and Emergency Preparedness\)*](#), 2020 FC 164
- 25 [*Thorson v Attorney General of Canada*](#), [1975] 1 SCR 138, 1 NR 225

Secondary Sources

- 26 [*House of Commons Debates*](#), 42nd Parl, 1st Sess, No 276 (27 March 2018)
- 27 [*House of Commons Debates*](#), 42nd Parl, 1st Sess, No 400 (8 April 2019)
- 28 [*House of Commons Debates*](#), 43rd Parl, 2nd Sess, No 92 (30 April 2021)
- 29 [*House of Commons Debates*](#), 44th Parl, 1st Sess, No 60 (28 April 2022)