

FEDERAL COURT

B E T W E E N:

YAVAR HAMEED

Applicant

-and-

PRIME MINISTER and MINISTER OF JUSTICE

Respondents

**APPLICANT'S REPLY TO THE SUPPLEMENTAL SUBMISSIONS OF THE
RESPONDENTS**

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1. This is a reply to the Supplemental Submissions of the Respondents regarding the federal common law that is essential to the disposition of this application.

A. Federal Nature of the Common Law

2. The Respondents argue that the common law the Applicant relies upon is part of the law of justiciability.¹ It is not. As the Respondents note, justiciability is about “delineating the scope of judicial intervention.”² The common law that the Applicant relies on is the law regarding the transfer of powers and duties from the Governor General to the Prime Minister and Minister of Justice (“**Ministers**”) as a result of constitutional conventions. This judge-made law was not created in the context of analyzing justiciability, but in merits determinations about substantive legal rights, duties, and powers.³
3. The Respondents argue that there is nothing about the common law the Applicant relies on that gives it federal character.⁴ This is false. The Supreme Court in *Quebec North Shore Paper* said that when common law can relate to both federal and provincial issues, “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

¹ Supplemental Submissions of the Respondents at para 5.

² Supplemental Submissions of the Respondents at para 6.

³ See *Acadian Society of New Brunswick v Right Honourable Prime Minister of Canada*, 2022 NBQB 85 at paras [18](#) & [36](#), **Applicant’s Supplementary Book of Authorities (“SBOA”), Tab 2, pp 15 & 29**; [2022] NBJ No 74; *Democracy Watch v Canada (Attorney General)*, 2023 FC 31 at paras [9](#) & [129](#), **SBOA, Tab 9, p 353**; *Conacher v Canada (Prime Minister)*, 2010 FCA 131 at para [5](#), **SBOA, Tab 6, p 187**; *Democracy Watch v Canada (Prime Minister)*, 2023 FCA 41 at para [26](#), **SBOA, Tab 10, p 416**; *Engel v Prentice*, 2020 ABCA 462 at para [27](#), **SBOA, Tab 11, pp 428-429**; *Meeches v Meeches*, 2013 FC 196 at para [20](#), **SBOA, Tab 16, pp 577-578**.

⁴ Supplemental Submissions of the Respondents at para 7.

Province”.⁵ So too here. 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, it is federal common law.

B. Essential to the Disposition of the Case

4. The Respondents argue that the common law the Applicant relies on does not meet the requirements of the second element of the *ITO* test because it is not essential to the disposition of the application.⁶ This is incorrect. The Respondents mischaracterize the nature of the common law as being about justiciability, but even with that mischaracterization admit that this law is essential to the disposition of the case. The Respondents admit that it is “a concept that the Federal Court must consider in every application”.⁷
5. The Respondents attempt to create a new element to the *ITO* test when they argue that the test is not met because the essential federal law is “no more essential to the disposition of this application than it is to any other.”⁸ This comparison to other applications to determine whether the law is “more essential” for this application than for others is not found in any jurisprudence and is not part of the *ITO* test.

⁵ *Quebec North Shore Paper v CP Ltd*, [1977] 2 SCR 1054 at [1063](#), 71 DLR (3d) 111, **SBOA, Tab 17, p 619**.

⁶ Supplemental Submissions of the Respondents at para 8

⁷ Supplemental Submissions of the Respondents at para 11, emphasis added.

⁸ Supplemental Submissions of the Respondents at para 11.

6. The Respondents argue a constitutional convention is not, on its own, a basis for the Federal Court to review the matters raised in the application.⁹ They are correct that a court cannot enforce a constitutional convention, but they mischaracterize the basis on which the application is brought. The legal duties that the Applicant seeks to be enforced are found in s. 96 of the *Constitution Act, 1867* and s. 5.2 of the *Federal Courts Act*.¹⁰ The political actors have chosen a constitutional convention in which part of those legal duties (the advice and consent as to which persons are to be appointed, which is a necessary precondition to an appointment¹¹) are transferred to the Prime Minister and Minister of Justice. The Applicant is not asking the Court to enforce this transfer of powers and duties. The Respondents have agreed to this transfer of powers and duties.¹² There is no evidence that the Ministers are seeking to disregard or modify the constitutional convention, such as by transferring the duties to another cabinet minister or returning them to the Governor General. The only duties that they are neglecting – and that the Applicant is seeking to enforce – are the legal duties in the *Constitution Act, 1867* and the *Federal Courts Act*. The political actors are free to choose who

⁹ Supplemental Submissions of the Respondents at para 12.

¹⁰ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 96, **Applicant's Book of Authorities ("ABOA"), Tab 6, p 36**; *Federal Courts Act*, RSC 1985, c F-7, s 5.2, **ABOA, Tab 5, p 30**.

¹¹ See analogous situation regarding the appointment of Lieutenant-Governors in *Acadian Society of New Brunswick v Right Honourable Prime Minister of Canada*, 2022 NBQB 85 at para 11, **SBOA, Tab 2, p 10**.

¹² Respondents' Memorandum of Fact and Law at para 34.

will be responsible to fulfill these duties, but they have chosen the Ministers, so the Applicant has brought this application against the chosen Ministers.

7. Even if the application for *mandamus* were to be viewed as seeking enforcement of a constitutional convention (which it is not), the court could still issue a declaration. Declarations do not constitute enforcement,¹³ and “[i]f there is a valid constitutional convention the courts will not enforce it, but may make declarations in respect of its content.”¹⁴
8. Finally, the fact that 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. In *Rhine v The Queen*, the Supreme Court held that 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.¹⁵
9. *Rhine* dealt with two appeals that raised the same issue: whether the Federal Court had jurisdiction to hear a claim made by the Crown to recover funds owed to it under a contract. The cause of action in each claim was the enforcement of a contract, which is provincial common law.¹⁶ Despite the cause of action and remedy being provincial common law, the Federal Court had jurisdiction

¹³ *Alani v Canada (Prime Minister)*, 2015 FC 649 at para [34](#), **SBOA, Tab 3, p 69**.

¹⁴ *Alani v Canada (Prime Minister)*, 2015 FC 649 at para [37](#), **SBOA, Tab 3, p 69**.

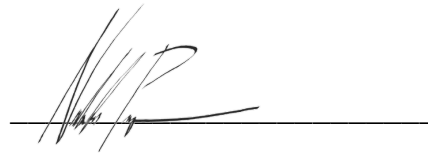
¹⁵ *Rhine v The Queen*, [1980] 2 SCR 442 at [447](#), 116 DLR (3d) 385, **SBOA, Tab 18, p 628**.

¹⁶ *Rhine v The Queen*, [1980] 2 SCR 442 at [444-445](#), 116 DLR (3d) 385, **SBOA, Tab 18, pp 625-626**.

because various federal Acts impacted upon the matters at every turn.¹⁷

Likewise, here the federal common law about the transfer of powers and duties due to constitutional convention has its impact on this matter at every turn such that this law is essential to the disposition of the application, and the Federal Court has jurisdiction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11 December 2023



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¹⁷ *Rhine v The Queen*, [1980] 2 SCR 442 at [447](#), 116 DLR (3d) 385, **SBOA, Tab 18, p 628**.

LIST OF AUTHORITIES

Legislation

- 1 [Federal Courts Act](#), RSC 1985, c F-7
- 2 [The Constitution Act, 1867](#), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5

Jurisprudence

- 3 [Acadian Society of New Brunswick v Right Honourable Prime Minister of Canada](#), 2022 NBQB 85, [2022] NBJ No 74
- 4 [Alani v Canada \(Prime Minister\)](#), 2015 FC 649
- 5 [Conacher v Canada \(Prime Minister\)](#), 2010 FCA 131, [2011] 4 FCR 22
- 6 [Democracy Watch v Canada \(Attorney General\)](#), 2023 FC 31
- 7 [Democracy Watch v Canada \(Prime Minister\)](#), 2023 FCA 41
- 8 [Engel v Prentice](#), 2020 ABCA 462, [2020] AJ No 1405
- 9 [Meeches v Meeches](#), 2013 FC 196, 428 FTR 208
- 10 [Quebec North Shore Paper v CP Ltd](#), [1977] 2 SCR 1054, 71 DLR (3d) 111
- 11 [Rhine v The Queen](#), [1980] 2 SCR 442, 116 DLR (3d) 385