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Federal Court of Canada declares judicial vacancies unacceptable

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Lawyers and clients have noticed that there are significant backlogs in Canada's courts, which have become worse since the COVID-19 pandemic. The Chief Justice of Canada has identified that one of the causes of the backlog is the pace of federal judicial appointments has not kept up with retirements and Parliament creating new judicial positions. As a result, there are numerous vacancies in Canada's federally-appointed judiciary.

What you need to know

- There is a record number of judicial vacancies in Canada, as appointments are not keeping up with retirements and added judicial positions.
- The result has been significant backlogs in the courts—particularly for civil matters—and our judiciary is strained with a heavy workload.
- In May 2023, the Chief Justice of Canada (who is also the head of the Canadian Judicial Council) wrote to the Prime Minister asking him to increase the pace of federal judicial appointments.
- A lawyer in Ottawa brought an application for judicial review, to force the federal government to speed up the process.
- The Court declined to order the federal government to make appointments within a defined timeframe, but issued a declaration that appointments should be made within a "reasonable time," with the expectation of judicial appointments returning to 2016 numbers.
- The Court left open the possibility that it could intervene if the situation does not improve.

The Federal Court's decision

The problem: Too many judicial vacancies

It is well known in the legal community that judicial vacancies are not being filled quickly, and judges, lawyers and litigants are feeling the effects. In criminal law, charges get dismissed because of the failure to conduct a trial within a reasonable time. This creates pressure to shift judicial resources to the criminal system, causing serious delays to

civil and family litigants. Motions can take months to be heard, and it can take years to get a civil case to trial. By May of 2023, the situation was serious enough that the Chief Justice of Canada took the extraordinary step of writing a letter to the Prime Minister. The Chief Justice advised that the "current situation is untenable," and feared that it could "result in a crisis for our justice system."

To try to force the government to move more quickly, Yavar Hameed, a lawyer in Ottawa, brought an application for judicial review against the Prime Minister and the Minister of Justice. Mr. Hameed asked for an order of *mandamus*—that is, a court order requiring them to make federal judicial appointments, or alternatively declarations.

The constitutional dilemma

Applications for judicial review are premised on the rule of law and are necessitated by the separation of powers in a Parliamentary democracy. Parliament passes laws. The executive—and its administrative officials—administers laws. When an administrative official does something that is inconsistent with their statutory obligations, the courts can intervene and ensure that they are complying with the law passed by Parliament. Occasionally this requires the court to issue a writ of *mandamus*, which requires an administrative official to carry out their statutory responsibilities.

While judicial review and *mandamus* orders fall within the day-to-day work of a court system, this case is not so straightforward. No act of Parliament imposes a statutory obligation to appoint judges. Instead, that power arises at the intersection of constitutional prerogatives and a convention about how this prerogative is to be exercised. Section 96 of the *Constitution Act, 1867* grants the power to appoint Superior Court judges to the Governor General. There is a long-standing convention (recognized in previous decisions) that appointments will be made on the recommendation of the Prime Minister and/or the Minister of Justice. This raised an immediate complexity in this case: while the applicant was seeking *mandamus* to require further appointments, the Governor General, who holds the relevant legal authority, was not before the Court. The Court therefore concluded that it could not order *mandamus*. However, it went on to consider whether it ought to order ancillary relief, such as declarations, against the respondents, the Prime Minister and the Minister of Justice.

The court issues declarations

The fact that they lacked express legal authority did not prevent the Court from examining the Prime Minister and Minister of Justice's conduct in the appointment of judges. Relying on the Chief Justice's letter, the Court concluded that there was, in fact, a "vacancy crisis" in Canada's judiciary, and that the Court could at least try to remedy it, in part.

The Court examined the allocation of judges to each Court in the *Judges Act*. It held that "given Parliament has determined what it considered an appropriate number of judges required by the Superior Courts … such appointments must be made within a reasonable time of the vacancy." The Court even went so far as to hold that there is a "constitutional convention that judicial vacancies must be filled as soon as possible after vacancies arise, except in exceptional circumstances." It therefore issued a declaration to that effect.

Building on its initial declaration, the Court also declared that "appointments to fill current judicial vacancies are required for the reasons set out in [the Chief Justice's] letter" and expressly stated that it was making these declarations "in the expectation that the number of judicial vacancies will be materially reduced in a reasonable time such that the total number of judicial vacancies returns to … the number in the Spring of 2016" so that "the untenable and appalling crisis and critical judicial vacancy situation … will be resolved." The Court concluded that by indicating that, although it was not ordering any specific timeline to resolve the problem, [t]hat may change of course if the underlying situation does not."

One question that the decision does not expressly answer is the legal basis for its orders. While there is nothing wrong with a court declaring the existence of a constitutional convention, what distinguishes a convention from constitutional law is that the latter is judicially enforceable, while the former is not.

Will this resolve the issue?

This decision made a lot of news, but it's unclear whether it will have any practical effect, for two reasons. First, the federal government has steadily increased the pace of judicial appointments in recent months. Second, this is a first-level decision and may well be appealed. Regardless, attention to this important issue can only serve to benefit

lawyers and clients who are anxiously awaiting its resolution.

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