Federal Court of Appeal | Cour d'appel fédérale

Date: 20250618

Docket: A-100-24

Citation: 2025 FCA 118

CORAM: **BOIVIN J.A.**
LOCKE J.A.
HECKMAN J.A.

BETWEEN:

PRIME MINISTER and MINISTER OF JUSTICE

Appellants

and

YAVAR HAMEED

Respondent

and

BARREAU DU QUÉBEC and CANADIAN CONSTITUTIONAL LAW INITIATIVE OF THE UNIVERSITY OF OTTAWA PUBLIC LAW CENTRE

Interveners

Heard at Ottawa, Ontario, on April 7, 2025.

Judgment delivered at Ottawa, Ontario, on June 18, 2025.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: LOCKE J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Background

[1] In a letter dated May 3, 2023, and addressed to the Prime Minister of Canada, the Right Honourable Richard Wagner, Chief Justice of Canada and Chair of the Canadian Judicial Council, expressed "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" (*Hameed v. Canada (Prime Minister)*, 2024 FC 242 (Decision) at para. 1). Chief Justice Wagner further described the issue of judicial vacancies as "untenable" and underscored the threat these vacancies pose to democratic institutions (Decision at para. 1).

[2] Shortly after, on June 20, 2023, Yavar Hameed (the Respondent) brought an application before the Federal Court based in part on that letter. In so doing, the Respondent sought an order of *mandamus* or, in the alternative, a declaration pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c F-7, to compel the Prime Minister and the Minister of Justice to appoint judges to fill vacancies in the Federal Courts pursuant to section 5.2 of the *Federal Courts Act*, and across Canada in provincial superior courts pursuant to section 96 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.). The Respondent further requested that the Prime Minister and Minister of Justice fill the vacancies "within the later of three months of the date of [the Federal Court's] Order, or within nine months of their having become aware the positions would be vacated" (Decision at para. 25). The Respondent otherwise sought a declaration to that effect (Decision at para. 26).

[3] On February 13, 2024, the Federal Court (*per* Brown J.) partly granted the Respondent's application (Decision at para. 20). In its Decision, the Federal Court considered a number of

issues: its jurisdiction to hear the application, the applicable federal common law and constitutional conventions, the admissibility of the Respondent's evidence, the issues with respect to granting *mandamus*, the Respondent's standing to bring the application to the Federal Court, and the grounds for granting declaratory relief.

[4] More particularly, the Federal Court dismissed the requested order for *mandamus* on the basis that neither the Prime Minister nor the Minister of Justice have a legal duty vis-à-vis the judicial appointment process (Decision at paras. 166-174). However, the Federal Court issued a declaration on the basis of a newly recognized constitutional convention to the effect that "judicial vacancies on the provincial Superior Courts and Federal Courts must be filled within a reasonable time", and with "[the] expectation that the number of vacant positions will be materially reduced to the mid-40s" (see Decision at paras. 18, 20).

[5] Specifically, the Federal Court issued the following declarations at paragraph 200:

> 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 in the original]

[6] Before this Court, the Prime Minister and the Minister of Justice (or the Appellants) appeal the Federal Court's Decision and primarily argue that it lacked jurisdiction to hear the case. Further, the Appellants argue the Federal Court made a number of errors, namely in recognizing a new constitutional convention, in admitting some evidence, and in granting the Respondent public interest standing.

[7] By separate Orders rendered on October 2, 2024, this Court granted leave to intervene in this appeal to the Barreau du Québec and the Canadian Constitutional Law Initiative of the University of Ottawa Public Law Centre. Each intervenor weighed in on various issues raised by the parties.

[8] It is also noted that, at the outset of the hearing, the Respondent informed the Court that he was discontinuing his previously submitted cross-appeal.

II. Mootness

[9] The issue of mootness was raised by the Respondent and the Court first heard the parties' arguments on that issue. Hence, prior to addressing the substance of the appeal, the Court must dispose of that issue.

[10] The leading authority on mootness is the Supreme Court of Canada's decision in *Borowski v. Canada (Attorney General),* 1989 CanLII 123 (S.C.C.), [1989] 1 S.C.R. 342 (*Borowski*). *Borowski* sets out a two-step analysis to determine whether a case is moot and, in the affirmative, whether a court should nonetheless exercise its discretion to hear it. At the first step of the analysis, the court must determine whether a live controversy still exists. If no live controversy exists, the court then moves to the second step of the analysis and considers whether it should nonetheless hear the moot case. The second step of the analysis involves consideration of three factors: the presence of an adversarial context, the concern for judicial economy**,** and the need for the court to be sensitive to its role as the adjudicative branch in our political framework.

[11] In support of its mootness argument, the Respondent notably argues that there is no longer a live controversy considering that the Federal Court declared that the number of judicial vacancies should return to the mid-40s and, at the time of the hearing before our Court, the number of judicial vacancies stood at 15—as opposed to 79 when the notice of application was filed in the Federal Court in 2023.

[12] Although it is true that the number of judicial vacancies has been materially reduced in the period between the application before the Federal Court and this appeal, it remains that the notice of application also sought either *mandamus* or declaratory relief, alleging a duty on the part of the Prime Minister and the Minister of Justice to appoint judges. The nature and existence of that duty remains a live controversy, meaning this appeal is not moot. Further, I am of the view that there is still an adversarial context with respect to the jurisdiction and constitutional issues raised by the Appellants. As these latter issues are, in and of themselves, elusive and

seldom come before the Court, they are sufficiently important to warrant the expenditure of judicial resources, even if this case were found to be moot (*Borowski* at 358-362; *Société Radio-Canada v. Canada (Attorney General)*, 2023 FCA 131 at para. 40).

[13] Thus, I find that this case is not moot, and even if it were, it would nonetheless warrant the exercise of the Court's discretion to hear it. I will now turn to the substance of this appeal.

III. Issue on Appeal

[14] While the parties allege various errors in the Decision in their written and oral submissions, the sole issue which is dispositive of this case is whether the Federal Court acted without jurisdiction in hearing the application.

[15] For the reasons that follow, I am of the view that the Federal Court lacked jurisdiction to hear the application, and I would therefore allow the appeal.

IV. Standard of Review

[16] The Court agrees with the parties that the applicable standard of review is as set out in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235 (*Housen*). Pursuant to *Housen*, questions of law are reviewable for correctness, whereas questions of mixed fact and law as well as questions of fact are reviewable for palpable and overriding error.

V. Relevant Legislative Provisions

[17] At this juncture, it is useful to provide an overview of the legislative provisions governing the judicial appointment process with respect to provincial superior courts and Federal Courts, as well as the legislative provisions governing the Federal Court's jurisdiction.

[18] As indicated at section 5.2 of the *Federal Courts Act*, the power to appoint judges to the Federal Courts rests with the Governor in Council:

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.
[Emphasis added]	[Non souligné dans l'original.]

[19] Subsection 35(1) of the *Interpretation Act,* R.S.C., 1985, c. I-21 defines the Governor in Council as follows:

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*)

[20] Pursuant to section 96 of the *Constitution Act, 1867*, it is the Governor General's role to appoint judges to the provincial superior courts:

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. [Emphasis added]	**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. [Non souligné dans l'original.]

[21] The provisions relevant to the Federal Court's jurisdiction are sections 18 and 18.1 of the *Federal Courts Act*:

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 any federal board, commission or other tribunal;	**a)** décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
…	[…]
Powers of Federal Court	**Pouvoirs de la Cour fédérale**
18.1 (3) On an application for judicial review, the Federal Court may	**18.1 (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;	**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;
…	[…]

[22] Pursuant to the above-quoted provisions, the Federal Court has jurisdiction to hear a matter if it arises from "a federal board, commission or other tribunal." Subsection 2(1) of the *Federal Courts Act* defines "federal board, commission or other tribunal" as follows:

Interpretation	**Définitions**
Definitions	**Définitions**
2 (1) In this Act,	**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; (*office fédéral*)	***office fédéral*** Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges et juges adjoints, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*. (*federal board, commission or other tribunal*)

[23] Thus, in order for the Federal Court to have had jurisdiction over this matter, pursuant to sections 18 and 18.1 of the *Federal Courts Act*, the Prime Minister and Minister of Justice—as named parties in the application—would have had to meet the definition of "federal board, commission or other tribunal" contained at subsection 2(1) of the *Federal Courts Act*.

[24] Throughout these reasons, any reference to a federal board should accordingly be understood as a reference to the term “federal board, commission or other tribunal” contained at subsection 2(1) of the *Federal Courts Act*.

VI. Did the Federal Court have jurisdiction to hear the application?

[25] However trite, it must be recalled that the Federal Courts are statutory courts, whose enactment by statute—like the Supreme Court of Canada—was envisaged under section 101 of the *Constitution Act, 1867*, which allows “for the Establishment of any additional Courts for the better Administration of the Laws of Canada.” It follows that the Federal Courts’ inherent jurisdiction is not as broad as that of the provincial superior courts.

[26] In connection with the Federal Court’s statutory jurisdiction, the Supreme Court elaborated a test in *ITO-Int'l Terminal Operators v. Miida Electronics*, 1986 CanLII 91 (S.C.C.), [1986] 1 S.C.R. 752 [*ITO*] to determine whether the Federal Court possesses the jurisdiction to hear a given issue. This test encapsulates the essential requirements for a finding of the Federal Court’s jurisdiction, which had been previously canvassed in the cases of *Quebec North Shore Paper. v. C. P. Ltd.*, 1976 CanLII 10 (S.C.C.), [1977] 2 S.C.R. 1054, and *McNamara Construction et al. v. The Queen*, 1977 CanLII 13 (S.C.C.), [1977] 2 S.C.R. 654 (*ITO* at 766).

[27] In summary, in order to make a finding of jurisdiction of the Federal Court, the following requirements must be met:

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.
>
> [*ITO* at 766]

[28] In the present matter, the Federal Court found that all three steps of the *ITO* test were satisfied and that it had the requisite jurisdiction to hear the case.

A. *The Federal Court's Decision on jurisdiction*

(1) Judicial appointments made under section 5.2 of the *Federal Courts Act*

[29] With respect to the first step of the *ITO* test, the Federal Court determined that there existed a sufficient statutory grant of jurisdiction by Parliament, pursuant to sections 18 and 18.1 of the *Federal Courts Act* (Decision at para. 78).

[30] In coming to this conclusion, the Federal Court relied on the general premise enunciated in *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (S.C.C.), [1998] 1 S.C.R. 626 (*Liberty Net*), to the effect that a narrow interpretation of the Federal Court's jurisdiction should be rejected in favour of a "fair and liberal" interpretation (Decision at para. 65). I agree with the premise. The Federal Court further relied on Federal Court decisions as well as a decision from our Court (*Deegan v. Canada (Attorney General)*, 2019 FC 960; *Bilodeau-Massé v. Canada (Attorney General)*, 2017 FC 604 (*Bilodeau-Massé*); *P.H. v. Canada (Attorney General)*, 2020 FC 393; *Lee v. Canada (Correctional Service)*, 2017 FCA 228).

[31] The problem, however, with the Federal Court's reasoning is that, in focusing on the premise enunciated in *Liberty Net*, the Court failed to apply other relevant Supreme Court rulings (*e.g. Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 (*Windsor*)) thereby failing to follow vertical *stare decisis*. The Federal Court preferred other cases—which were rendered by Federal Courts following the Supreme Court's decision in *Windsor*—finding them to be more "persuasive" without explaining why this was so (Decision at para. 68). Indeed, and I agree with the Appellants that, although the cases referred to by the Federal Court confirm the Court's power to determine all relevant questions of law—including constitutional questions—when it has subject matter jurisdiction, these cases do not stand for the principle that the Federal Court has jurisdiction over a constitutional case involving the executive branch when its subject matter jurisdiction is nonexistent (Appellants' Memorandum of Fact and Law at para. 22).

[32] In the present matter, the Federal Court also relied on the Supreme Court's decision in *Strickland v. Canada (Attorney General),* 2015 SCC 37 (*Strickland*) for the proposition that the Prime Minister and the Minister of Justice were federal boards in relation to appointments made under section 5.2 of the *Federal Courts Act* and that, consequently, sections 18 and 18.1 of the *Federal Courts Act* applied. This requires further examination.

[33] Specifically, in *Strickland*, the legality of child support guidelines created by the Governor in Council, pursuant to section 26.1 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), was challenged by an application for judicial review before the Federal Court (*Strickland* at paras. 3-5). The appellants in that case sought a declaration that the guidelines in question were unlawful pursuant to section 18 of the *Federal Courts Act*, which states that the Federal Court

has “exclusive original jurisdiction . . . to . . . grant declaratory relief, against any federal board, commission or other tribunal” (*Strickland* at paras. 5-6). The Federal Court declined to exercise its discretion to hear the application as it reasoned that the provincial superior courts have jurisdiction over a claim that the guidelines are *ultra vires* if that claim is made in proceedings in which those courts are asked to apply them, and that the provincial superior courts have greater expertise in matters related to divorce (*Strickland* at para. 7). This Court upheld this conclusion (*Strickland* at para. 7). Likewise, the Supreme Court of Canada held that a provincial superior court can hear and determine a challenge to the legality of the guidelines where the determination is a necessary step in disposing of proceedings properly before it (*Strickland* at para. 15).

[34] As indicated, the Federal Court in this case relied on *Strickland* to find that the Prime Minister and the Minister of Justice were federal boards for the purpose of judicial appointments made under section 5.2 of the *Federal Courts Act*. It cited the following excerpt from *Strickland* in support of its conclusion:

> 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.*
>
> [Decision at para. 80, emphasis added]

[35] However, and with respect, the Federal Court’s interpretation and application of *Strickland* are misplaced. A careful reading of the Supreme Court’s decision in *Strickland* can in no way support the Federal Court’s finding that the Prime Minister and the Minister of Justice, in

this case involving judicial appointments, were acting as federal boards by virtue of section 5.2 of the *Federal Courts Act*.

[36] Indeed, the observation made in *Strickland* with respect to the Governor in Council and relied upon by the Federal Court was solely made in *obiter* at the conclusion of the majority's reasons (*Strickland* at paras. 63-64). At its core, the Supreme Court upheld the Federal Court of Appeal's decision and found that provincial superior courts could determine the legality of the guidelines in proceedings properly before them. It was accordingly not necessary in *Strickland* to determine the issue as to whether the Governor in Council could satisfy the definition of a federal board. Moreover, the cited excerpt from *Strickland* refers to the Governor in Council, not the Prime Minister nor the Minister of Justice named in this appeal. Finally, the Supreme Court's observation regarding the Governor in Council in *Strickland* merely reiterates the criteria for being a federal board, as defined in section 2(1) of the *Federal Courts Act*; it in no way serves to demonstrate how the Prime Minister and Minister of Justice would meet that definition in this case.

[37] Hence, the Federal Court's analysis in respect of judicial appointments made pursuant to section 5.2 of the *Federal Courts Act* is flawed as it disregards the requirements of the definition of a federal board. The Federal Court relied on authorities that were inapplicable or uninstructive to find that the Prime Minister and Minister of Justice were acting as federal boards in this case.

[38] In sum, for sections 18 and 18.1 of the *Federal Courts Act* to have satisfied the first step of the *ITO* test, the Federal Court would have had to articulate in its reasons how the Prime

Minister and Minister of Justice, when advising in the judicial appointment process, met the definition of a federal board outlined at subsection 2(1) of the *Federal Courts Act*. To satisfy that definition, the Prime Minister and Minister of Justice must be "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown". Although the Federal Court recognized these requirements, it erred in applying them, as its reasoning is silent as to how the Prime Minister and Minister of Justice in this case were empowered to advise in the judicial appointment process by any Act of Parliament or by any order made under a prerogative of the Crown.

(2) Judicial appointments made under section 96 of the *Constitution Act, 1867*

[39] With respect to judicial appointments made under section 96 of the *Constitution Act, 1867*, the Federal Court also rejected the Appellants' argument that the Prime Minister and Minister of Justice were not acting as federal boards (Decision at para. 81). The Federal Court qualified the Appellants' arguments as a "narrow construction in terms of granting declaratory relief in relation to appointments under section 96 of the *Constitution Act, 1867*" (Decision at para. 81).

[40] In this regard, the Federal Court relied, amongst other decisions, on *Bilodeau-Massé* and *Liberty Net* to conclude that "the Federal Court can be considered to have a plenary jurisdiction" (Decision at para. 81). Yet, when read in their proper context, these decisions are plainly distinguishable from the case at bar.

[41] More particularly, in *Bilodeau-Massé*, the Federal Court considered whether it had jurisdiction to use section 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, to issue a formal declaration of invalidity "when the *ITO* test is met" (*Bilodeau-Massé* at para. 60). In *Liberty Net*, the Supreme Court considered whether the Federal Court had jurisdiction to issue an injunction under section 44 of the *Federal Court Act*, R.S.C., 1985, c. F-7, even though the body ultimately empowered to decide the merits of the case was the Canadian Human Rights Tribunal, not the Federal Court (*Liberty Net* at paras. 20-22).

[42] In both cases, it was determined that the Federal Court exercises a "general supervisory jurisdiction" over the federal board and tribunal at issue—the Parole Board of Canada in the case of *Bilodeau-Massé* and the Canadian Human Rights Tribunal in the case of *Liberty Net*—which empowered the Court to grant the requested relief in both cases (*Bilodeau-Massé* at para. 65, *Liberty Net* at paras. 23-24). It is noteworthy that in *Bilodeau-Massé* and *Liberty Net*, the existence of a federal board, commission or other tribunal was undisputed. In the present case, whether the Prime Minister and Minister of Justice qualify as federal boards for the purposes of establishing jurisdiction under sections 18 and 18.1 of the *Federal Courts Act* is the very issue at the heart of this matter.

[43] The Federal Court likewise erred in finding that it had jurisdiction to review appointments made by the Governor General pursuant to section 96 of the *Constitution Act, 1867*. In making this finding, the Federal Court circumvented the legal analysis of whether the Prime Minister and Minister of Justice qualify as federal boards, as defined by subsection 2(1) of the *Federal Courts Act*, for the purposes of establishing its jurisdiction under sections 18 and

18.1 of the *Federal Courts Act*. Rather, the Federal Court relied on inappropriate authorities, disregarding binding precedent from the Supreme Court of Canada on the jurisdiction of the Federal Court and on the application of the *ITO* test as it relates to an exercise of power pursuant to the *Constitution Act, 1867* (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40; *Windsor*).

[44] Before our Court, the Respondent expanded his jurisdiction argument, pointing to a patchwork of additional sources purporting to articulate a legal duty on the part of the Prime Minister and Minister of Justice to advise in the judicial appointment process. Despite the above conclusion, the Court will now consider the Respondent's expanded jurisdiction argument, and whether it can satisfy the first step of the *ITO* test.

B. *The Respondent's expanded jurisdiction argument*

[45] The Respondent insists that sections 18 and 18.1 of the *Federal Courts Act* constitute a statutory grant of jurisdiction for the purposes of step one of the *ITO* test, as the Prime Minister and Minister of Justice were acting as federal boards in the judicial appointment process.

[46] My understanding is that the Respondent essentially argues that since section 96 does not outline any advising role on the part of the Prime Minister and Minister of Justice, the advising duty is articulated in other sources, which would qualify the Prime Minister and Minister of Justice as federal boards. Furthermore, regarding appointments made pursuant to section 5.2 of the *Federal Courts Act*, the Respondent argues that this section does in fact impose a legal duty to advise through its reference to the Governor in Council.

[47] Moreover, the Respondent alleges that members of the Privy Council—which include the Prime Minister and the Minister of Justice—have a common law duty to advise and that this duty has been continued by section 11 of the *Constitution Act, 1867* and reaffirmed in the *Letters Patent Constituting the Office of Governor General of Canada* (1947), *Canada Gazette,* Part I, vol. 81, p. 3014 (reproduced in R.S.C. 1985, App. II, No. 31) (*Letters Patent, 1947).* According to the Respondent, the duty of the Minister of Justice to advise in judicial appointments is also articulated at section 4 of the *Department of Justice Act*, R.S.C., 1985, c. J-2.

[48] Regarding the texts of both the *Letters Patent, 1947* and section 4 of the *Department of Justice Act*, they are construed far too broadly to support a finding that the Prime Minister and Minister of Justice, when advising the Governor General or Governor in Council in their judicial appointments, are acting as federal boards. As for the duty of the Minister of Justice allegedly contained in section 4 of the *Department of Justice Act*, it relates generally to the administration of justice and does not bestow any explicit duty on the Minister of Justice with respect to advising on judicial appointments. The Respondent concedes as much in his Memorandum of Fact and Law when he states at paragraph 48 that "[the] Minister of Justice's legal duty to advise the Governor General about appointment of judges may be seen as reaffirmed in any or all of paragraphs 4(a), (b), (c) and (d) of the [*Department of Justice Act*]" [emphasis added].

[49] Similarly, while the Respondent emphasizes the importance of the *Letters Patent, 1947*, this does little more than reiterate the role of the Privy Council articulated at section 11 of the *Constitution Act, 1867*. It further fails to identify the Prime Minister and Minister of Justice specifically or otherwise assign to them an advising duty in the case of judicial appointments.

[50] The Respondent's argument is premised upon the idea that it is possible for a minister to meet the requirements of subsection 2(1) of the *Federal Courts Act* and qualify as a federal board. While this idea is theoretically correct, it can only be true where a minister is clearly "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown" (*Federal Courts Act*, s. 2(1)). For example, pursuant to subsection 7(1) of the *Fisheries Act*, R.S.C., 1985, c. F-14, the Minister of Fisheries and Oceans is empowered to issue fishing licences. Similarly, subsection 3(1) of the *Payments in Lieu of Taxes Act*, R.S.C., 1985, c. M-13, empowers the Minister of Public Works and Government Services to make certain payments out of the Consolidated Revenue Fund. Here, there is no such explicit language in the *Letters Patent, 1947* nor in the *Department of Justice Act* conferring power to the Prime Minister or Minister of Justice with respect to judicial appointments. This argument therefore fails.

[51] The Respondent also highlights that section 5.2 of the *Federal Courts Act* vests the power to make Federal Court appointments in the Governor in Council, which is comprised of the Governor General and the Privy Council. Since the Prime Minister and the Minister of Justice form part of the Privy Council, the Respondent argues they are captured by section 5.2 of the *Federal Courts Act* and, consequently, step one of the *ITO* test is met.

[52] I disagree.

[53] Subsection 35(1) of the *Interpretation Act* defines the Governor in Council as "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 [King]'s Privy Council for Canada". While it is true that the Prime Minister and Minister of Justice are *part* of the King's Privy Council, and thus part of the Governor in Council (*League for Human Rights of B'nai Brith Canada v. Canada*, 2010 FCA 307 at para. 77), the fact remains that when the Respondent filed his notice of application, he named the Prime Minister and Minister of Justice as parties, not the Governor in Council. This argument therefore also fails.

[54] Finally, the federal common law duty alluded to by the Respondent does not, on its own, establish that the Federal Court has jurisdiction. Under the *ITO* test, the Respondent must demonstrate that an Act of Parliament or an order made under a prerogative of the Crown specifically confers on the Prime Minister and Minister of Justice the duty to advise the Governor General regarding the appointment of judges. As I have explained, the *Department of Justice Act*, the *Letters Patent, 1947* and the *Federal Courts Act* do not assist the Respondent in this respect.

[55] To conclude on the issue of jurisdiction, the Prime Minister and Minister of Justice, when advising in respect of judicial appointments made under section 96 of the *Constitution Act, 1867*, and section 5.2 of the *Federal Courts Act*, cannot be qualified as federal boards for the purposes of sections 18 and 18.1 of the *Federal Courts Act*. Since sections 18 and 18.1 of the *Federal Courts Act* are inapplicable to the Prime Minister and Minister of Justice in this case, there is no statutory grant of jurisdiction and therefore, the first step of the *ITO* test is not met. The Federal Court thus erred in law in determining that it could exercise its jurisdiction in hearing the Respondent's application.

[56] My finding on the first step of the *ITO* test is sufficient to allow the appeal, and it is not necessary to proceed to the subsequent steps of the analysis of the *ITO* test. However, given the circumstances of this case, two general observations are nonetheless warranted with respect to the issue of constitutional conventions because of findings made by the Federal Court that are of concern.

[57] Firstly, and trite as it may be, constitutional conventions are non-legal rules that govern relationships between political actors. They are not law, and more specifically they do not form part of the law of the Constitution. Although courts can recognize constitutional conventions, they cannot enforce them (*Re: Resolution to amend the Constitution*, 1981 CanLII 25 (S.C.C.), [1981] 1 S.C.R. 753 (*Patriation Reference*) at 774-775, 784 and 800). This has been clear since the *Patriation Reference* was rendered nearly 45 years ago.

[58] In the present matter, the Federal Court nonetheless considered constitutional conventions in relation to judicial appointments as federal laws and further characterized them as "judge-made rules" (Decision at paras. 98 and 122). This is misconceived and contrary to the non-legal nature of constitutional conventions (*Patriation Reference* at 880). Furthermore, contrary to what the Federal Court suggests at paragraph 122, a recognition of a constitutional convention in a previous decision does not transform the said convention into common law as constitutional conventions cannot crystallize into laws "unless it be by statutory adoption" (*Patriation Reference* at 882; *Osborne v. Canada (Treasury Board),* 1991 CanLII 60 (S.C.C.), [1991] 2 S.C.R. 69 at 86-87).

[59] Secondly, the Federal Court's declaration of a new constitutional convention, that judicial vacancies must be filled within a reasonable time, without applying the test for recognizing new conventions is also concerning (Decision at para. 20). While the *Patriation Reference* established that courts could recognize new constitutional conventions, it equally articulated certain requirements for the recognition of constitutional conventions by courts (*Patriation Reference* at 888). The Supreme Court adopted a three-part test first outlined by Sir W. Ivor Jennings in *The Law and the Constitution* (5th ed., 1959), which requires courts to consider three questions before declaring a constitutional convention: "first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?" (*Patriation Reference* at 888).

[60] Yet, the Federal Court makes no reference whatsoever to the test for the recognition of a new constitutional convention set out in the *Patriation Reference* and points to no authority to support its finding that such a convention should be declared. Rather, the Federal Court justifies its recognition of a new constitutional convention by merely stating that:

> …the acknowledged constitutional convention that it is the exclusive authority of the [Appellants] 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.
>
> [Decision at para. 129, emphasis added]

[61] As a matter of law, the Federal Court could not sidestep the normative requirements of the Jennings test confirmed by the Supreme Court in *Patriation Reference* in declaring a new constitutional convention that judicial vacancies must be filled within a reasonable time.

[62] No one disputes the utmost importance of filling judicial vacancies to ensure a healthy judiciary, and relatedly, a healthy democracy. But it remains that the judicial branch of government, like the other two branches of government—the executive and the legislative—fortify themselves by acting properly within their legitimate spheres of competence. In the case at hand, in deciding as it did, the Federal Court overstepped its jurisdictional bounds. (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (S.C.C.), [1993] 1 S.C.R. 319 at 389). That being said, just as the judiciary must accord respect and deference to the legislative and executive branches, so too must those branches reciprocate that respect and deference. This appeal serves as an important reminder that maintaining reciprocal respect and deference between the branches of government is a fundamental principle in a democracy under the rule of law.

VII. Conclusion

[63] For the reasons set forth above, I find that the Federal Court erred in concluding that sections 18 and 18.1 of the *Federal Courts Act* provided a statutory grant of jurisdiction, pursuant to the test in *ITO*, to review the advice-giving role of the Prime Minister and Minister of Justice with respect to judicial appointments to the Federal Courts and provincial superior courts.

[64] My silence on the other issues raised by the Appellants should not be understood as an endorsement of the Federal Court's conclusions in those regards.

[65] I would therefore allow the appeal and set aside the Federal Court's Decision (2024 FC 242) for lack of jurisdiction. Rendering the decision that the Federal Court should have rendered,

I would dismiss the Respondent's application. As per the parties' agreement, each party should bear its own costs.

"Richard Boivin"
J.A.

"I agree.
George R. Locke J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-100-24
STYLE OF CAUSE:	PRIME MINISTER and MINISTER OF JUSTICE v. YAVAR HAMEED and BARREAU DU QUÉBEC and CANADIAN CONSTITUTIONAL LAW INITIATIVE OF THE UNIVERSITY OF OTTAWA PUBLIC LAW CENTRE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 7, 2025
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRING REASONS BY:	LOCKE J.A. HECKMAN J.A.
DATED:	JUNE 18, 2025

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