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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS

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AUTHOR'S NOTE

In *Hameed v. Canada (Prime Minister)*, 2024 CF 242, 2024 FC 242, 2024 CarswellNat 317, 2024 CarswellNat 318 (F.C.), the Federal Court considered an unusual judicial review request from a human rights lawyer, challenging the slow pace of judicial appointments and alleging that the high level of judicial vacancies imperilled the rule of law in Canada. The Federal Court accepted uncontested evidence in the form of a letter from the Chief Justice of Canada to the Prime Minister, dated May 3, 2023, and on behalf of the Canadian Judicial Council, decrying the failure to address judicial vacancies, and concluded that the Government was in breach of a constitutional convention regarding filling judicial vacancies in a timely fashion. Finding mandamus inappropriate in this context, the Court issued a series of declarations, including that, "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."

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In his sweeping reasons, Brown J. linked the current challenge around judicial appointments with a government commitment as old as the *Magna Carta*!

On the substantive challenge, Mosley J. held that the reasons provided for the decision to declare a public order emergency dis not satisfy the requirements of the *Emergencies Act* and that certain of the temporary measures adopted to deal with the protests infringed provisions of the *Canadian Charter of Rights and Freedoms* and were not justified under section 1 of the *Charter*. He further found that the temporary measures were not incompatible with the *Canadian Bill of Rights*, S.C. 1960, c. 44.

> [47] The Court is compelled to note Canadians access to justice without delay is and has been enshrined in various constitutional and quasi-constitutional documents since the *Magna Carta (Great Charter of Liberties)* of 1215 which promised: "To no one will we sell, to no one will we refuse or delay, right or justice." See *Magna Carta*, article 40, *Select Documents of English Constitutional History*, London: MacMillan & Co., London 1918. With respect, I conclude the inevitable and untenable delayed justice caused by the executive government of Canada goes to the very heart of this 800-year-old promise and unacceptably denies access to justice without delay.

While access to justice serves as a backdrop for Brown J.'s reasons, the basis for the declaratory relief is a more specific constitutional convention relating to the timely filling of judicial vacancies.

> [115] While I agree the legal jurisdiction and power to fill vacancies lie with the Governor General under section 96 of the *Constitution Act, 1867* and with the Governor in Council under section 5.2 of the *Federal Courts Act*, constitutional conventions place those decisions in practice on Cabinet, the Prime Minister and the Minister of Justice who are named in this proceeding and whose advice-giving authority has already been confirmed by Southcott J., in *Democracy Watch*.
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> …
>
> [129] In the Court's view, the acknowledged constitutional convention that it is the exclusive authority of the Respondents 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.
>
> [130] In this connection, nothing suggests *Democracy Watch*, which affirmed the existence of the convention, is the last word on the subject. The Court is certainly not persuaded that the framing of the convention in *Democracy Watch* was ever intended to justify the "untenable", "appalling", "crisis" and "critical" vacancy situation now existing in the federal judiciary.

> [131] In my view, the Court should now recognize that the relevant constitutional conventions include not only the responsibility to take steps to fill vacancies as soon as possible, but in this appalling and critical situation, to materially reduce the present backlog to what it was as recently as the Spring of 2016, that is to reduce the vacancies to the mid-40s across the federally appointed provincial Superior Courts and Federal Courts.
>
> [132] In addition to declaring the constitutional convention set out above as found by Justice Southcott in *Democracy Watch*, the Court will declare the constitutional convention that appointments to fill vacancies shall be made within a reasonable time, and that the vacancy situation described by the Chief Justice of Canada and Canadian Judicial Council shall be materially reduced to what it was in the Spring of 2016.

This decision is under appeal (and cross-appeal), and so may not be the last word on the constitutional convention set out by Brown J., his conclusions with respect to the breach of that convention given the current state of judicial vacancies, and the declaratory remedy imposed.

Whether on appeal or in subsequent decisions, however, far more elaboration will be needed on the origins of this convention, and the analysis by which a court may determine its breach (in this case, the government focused on the argument that the pace of its judicial appointments was outside the proper sphere of judicial review and so did not fully engage the nature and scope of any applicable convention).

It remains to be seen whether *Hameed* is looked back on as a high water mark of judicial activism on the appointment process, or the beginning of a new to judicial oversight over that process.

This Release also includes a variety of updates on other important new administrative law decisions:

In *City of Richmond v. British Columbia Utilities Commission*, 2024 BCCA 16, 2024 CarswellBC 102, [2024] B.C.J. No. 81 (B.C. C.A.), the City of Richmond challenged the British Columbia Utilities Commission's reconsideration decision ordering FortisBC Energy Inc. to undertake work to offset its gas distribution piping and setting out the terms under which the work was to be completed. Those terms included a limitation of liability clause. Richmond argued that the Commission exceeded its jurisdiction under s. 32 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 when it imposed the limitation of liability provision in its order. The B.C. Court of Appeal dismissed Richmond's appeal, holding that the Commission was not required to apply the doctrine of necessary implication to establish its jurisdiction. The Court held that while the impugned provision of the Act interfered with the parties' right to contract, the Commission was provided with jurisdiction to impose or specify terms impacting common law rights so long as those terms are consistent with the provision, with the scheme and purpose of the statute and with the Commission's core mandate.

In *British Columbia (Police Complaint Commissioner) v. Sandhu*, 2024 BCCA 17, 2024 CarswellBC 110 (B.C. C.A.), the B.C. Court of Appeal considered allegations of an improperly initiated disciplinary investigation under the *Po-*

lice Act. The respondent was ultimately found to have committed deceit in the course of an investigation into another officer's misconduct. Together with other decisions that preceded it, the misconduct decision was quashed on judicial review on the basis of jurisdictional error and procedural unfairness. The Commissioner appealed. The Court of Appeal allowed the appeal, but held that it was not in the interests of justice to quash the decisions and require the process to be repeated. While there was a jurisdictional error, the process followed was fair, the misconduct in question was serious, and the substantive decision is unchallenged.

In *New Blue Ontario Fund v. Ontario (Chief Electoral Officer)*, 2024 ONSC 1048, 2024 CarswellOnt 2122 (Ont. Div. Ct.), the Ontario Divisional Court rejected an application for judicial review seeking to reverse a decision of the Chief Electoral Officer (CEO) of Ontario declining to pay per-vote subsidies to the New Blue Party of Ontario following the 2022 provincial election. Before considering the reasonableness of the CEO's decision, the Court first concluded that the CEO rendered a reviewable decision based on his interpretation of the *Elections Finances Act*, and this was not an appropriate setting for an order of mandamus.