

Dr. Gerald Heckman
Associate Professor
Faculty of Law, Robson Hall
University of Manitoba
Winnipeg, Manitoba
Canada. R3T 2N2

By facsimile: 41 (0) 22 979 38 01

By e-mail: info@icj.org

Mr. Wilder Tayler
Secretary General
International Commission of Jurists
Rue des Bains 33
P.O. Box 91
1211 Geneva 8, Switzerland

**Re : Recent statements by the Government of Canada regarding the Chief Justice of
Canada and their impact on the independence of the Canadian judiciary**

Dear Mr. Secretary General,

We are a group of Canadian lawyers and legal academics united in our concern over recent public statements by the Prime Minister of Canada and by Canada's Minister of Justice and Attorney General which insinuate, with no factual or legal basis, that the Chief Justice of Canada acted inappropriately when she provided advice to the government on the legal framework governing judicial appointments to the Supreme Court of Canada. We fear that the unprecedented statements of the Prime Minister and Minister of Justice and Attorney General, which question the integrity and judgment of the Chief Justice of Canada, may seriously undermine judicial independence in Canada. These public statements have been criticized by the legal profession, legal academics and by the Council of Canadian Law Deans. The Prime Minister and Minister of Justice have been invited to clarify these statements in order to remove any impression that the Chief Justice behaved improperly, or alternatively to withdraw statements that could be understood as impugning the integrity of the Chief Justice and the independence of the Supreme Court. To date, they have declined to do so.

The factual context within which the statements were made and their possible impact on judicial independence are very well captured in an open letter penned by eleven past presidents of the Canadian Bar Association and published on 6 May 2014, which we reproduce here for your convenience:

The recent comments by Prime Minister Stephen Harper, claiming that the Chief Justice of Canada attempted an inappropriate conversation with him, demonstrate a disrespect

by the executive branch for the judicial branch of our constitutional democracy, and for the Chief Justice of Canada as the most senior member of the Canadian judiciary. This is so despite the fact that the discussion in question involved a possible new appointment to the Supreme Court of Canada, a topic well within guidelines for appropriate conversations between prime ministers and chief justices.

The judicial branch is one of the three independent components of Canada's constitutional democracy, the other two being the legislative and the executive branches. Our system can operate effectively only if each component is respectful and courteous in its relations with the others. The courtesy and respect that these relationships require are particularly important for the judicial branch because it must ultimately judge the constitutionality of the conduct of the other two branches and, yet, at the same time, must on a day-to-day administrative level have dialogue with them. Furthermore, the judicial branch, and judges generally, do not have the ability to defend themselves if those very relationships are used as grounds for attack.

The events in April to July 2013 demonstrate the usual and respectful relationship between the judicial branch and the other two branches of government. In April 2013, the Chief Justice, quite properly and according to long-standing tradition, provided her input to the appropriate parliamentary committee about proposed new appointments to the Supreme Court of Canada. In July, she provided her input to the Canadian government. These discussions occurred well before the nomination of Justice Marc Nadon. They were perfectly in line with the sort of courteous discussions which have historically occurred and which Canadians would expect to occur between the judiciary and the executive with respect to judicial appointments.

In contrast, the recent statements by the Prime Minister were made nine months after the conversations in question occurred, long after the Prime Minister could have dealt with any aspect of those discussions if there had been any good-faith reason to do so. The Prime Minister's statements were made only after the government had been a litigant in appeals before the Supreme Canada, leaving the impression that the statements were aimed at the Court as a reaction to the result of the decisions in those appeals -- conduct in which no respectful private litigant should engage.

As recent press reports demonstrate, these circumstances leave us concerned that the Prime Minister's statements may intimidate or harm the ability of the Supreme Court of Canada to render justice objectively and fairly -- even when the government of Canada chooses to be a litigant before it. In addition, the statement threatens to lead to abandonment of the fruitful and necessary respectful relationships between the Supreme Court of Canada and the two other branches of government and a refusal by the Court, and all courts, to have any dealings with the other two branches for fear of retribution to which the judicial branch cannot in any seemly fashion respond fully.

As former presidents of the Canadian Bar Association, we ask the Prime Minister to remedy this situation in a way which will demonstrate to our judiciary and to Canadians

at large that he respects the independence of our courts and will treat with due courtesy the Chief Justice of Canada.¹

In light of the mandate of the International Commission of Jurists (ICJ) under article 3(2) of the ICJ Statute to “advance the independence of the judiciary and legal profession and the administration of justice in full compliance with standards of international law”, we respectfully request that the ICJ (perhaps under the aegis of its Centre for the Independence of Judges and Lawyers) look into this matter and conduct the studies and/or investigations it deems necessary to achieve this objective.

To assist you in your assessment of this matter, we enclose a chronology of the events that ground our request and the supporting documentation cited in the chronology.

Respectfully,

Efrat Arbel, Assistant Professor (Incoming), University of British Columbia Faculty of Law, of the Bar of British Columbia

Brent Cotter, Professor, University of Saskatchewan College of Law, of the Saskatchewan and Nova Scotia Bar

Gerald Heckman, Associate Professor, University of Manitoba Faculty of Law, of the Bar of Ontario

Me Lucie Lamarche, ph.d., Ad. E., Professeure, Faculté de science politique et de droit, Département des sciences juridiques, UQAM; Professeure en congé, Université d'Ottawa

Audrey Macklin, Professor and Chair in Human Rights Law, University of Toronto Faculty of Law, of the Bar of Ontario

Ken Norman, Professor, University of Saskatchewan College of Law, of the Bar of Saskatchewan

Lorne Sossin, Dean and Professor, Osgoode Hall Law School, York University, of the Bar of Ontario

¹ CBA Presidents, [“Harper’s Disrespect for the Supreme Court harms the workings of government”, The Globe and Mail, 6 May 2014.](#)

Chronology of events relating to statement by the Prime Minister of Canada and Minister of Justice regarding the conduct of the Chief Justice of Canada²

April 22, 2013	<p>On April 22, 2013, as a courtesy, the Chief Justice met with the Prime Minister to give him the retirement letter of Justice Fish, a Supreme Court judge appointed from the province of Québec. As is customary, they briefly discussed the needs of the Supreme Court of Canada.</p> <ul style="list-style-type: none"> • Supreme Court of Canada, News Release, May 2, 2014 (Tab 1)
July 29, 2013	<p>Chief Justice McLachlin met with the Parliamentary committee regarding the appointment of Justice Fish’s successor. She provided the committee with her views on the needs of the Supreme Court.</p> <ul style="list-style-type: none"> • Supreme Court of Canada, News Release, May 2, 2014 (Tab 1)
July 31, 2013	<p>The Chief Justice’s office called the Minister of Justice’s office and the Prime Minister’s Chief of Staff, Mr. Novak, to flag a potential issue regarding the eligibility of a judge of the federal courts to fill a Quebec seat on the Supreme Court. Later that day, the Chief Justice spoke with the Minister of Justice, Mr. MacKay, to flag the potential issue. The Chief Justice’s office also made preliminary inquiries to set up a call or meeting with the Prime Minister, but ultimately the Chief Justice decided not to pursue a call or meeting.</p> <ul style="list-style-type: none"> • Supreme Court of Canada, News Release, May 2, 2014 (Tab 1)
October 3, 2013	<p>Prime Minister Harper announces the appointment of Justice Marc Nadon (of the Federal Court of Appeal) to the Supreme Court of Canada</p> <ul style="list-style-type: none"> • Office of the Prime Minister of Canada, News Release, 3 October 2013 (Tab 2)
October 8, 2013	<p>Newly appointed Supreme Court Justice Marc Nadon steps aside temporarily from his duties at the Supreme Court pending adjudication of a legal challenge to his appointment brought by lawyer Rocco Galati</p> <ul style="list-style-type: none"> • Sean Fine, “Justice Nadon steps aside from Supreme Court until legal challenge is resolved”, The Globe and Mail, 8 October 2013 (Tab 3)
March 21, 2014	<p>The Supreme Court of Canada rules that Justice Marc Nadon is ineligible to sit on the Supreme Court under provisions of Canada’s Supreme Court Act, R.S.C. 1985, c. S-26.</p> <ul style="list-style-type: none"> • Reference re <i>Supreme Court Act</i>, ss. 5 and 6, 2014 SCC 21 • http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13544/index.do (Tab 4)
May 1, 2014	<p>Journalist John Ivison reports that senior conservatives were “incensed” that the Supreme Court had recently delivered a string of decisions unfavorable to the government and rumours alleging that the Chief Justice had “lobbied” against Justice Nadon’s appointment. When he sought confirmation of the rumours, the Supreme Court’s Executive Legal Officer denied them.</p> <ul style="list-style-type: none"> • John Ivison, “Tories incensed with Supreme Court as some allege Chief Justice lobbied against Marc Nadon appointment”, The National Post, 1 May 2014 (Tab 5)

² See also the [Canadian Press, Marc Nadon's failed journey to the Supreme Court”, CBC News, 8 May 2014](#) for a useful timeline.

<p>May 1, 2014</p>	<p>The Prime Minister’s Office (PMO) issues a public statement through Jason MacDonald, the PMO’s communications director, suggesting Chief Justice McLachlin inappropriately tried to call the Prime Minister’s Office about the Quebec vacancy on the Supreme Court. The statement read, in part:</p> <p>“Neither the Prime Minister nor the Minister of Justice would ever call a sitting judge on a matter that is or may be before their court...”</p> <p>“The Chief Justice initiated the call to the Minister of Justice. After the Minister received her call he advised the Prime Minister that given the subject she wished to raise, taking a phone call from the Chief Justice would be inadvisable and inappropriate. The Prime Minister agreed and did not take her call.”</p> <ul style="list-style-type: none"> • Tondra MacCharles, “PM refused to take ‘inadvisable, inappropriate’ call from chief justice, PMO says”, Toronto Star, 1 May 2014 (Tab 6)
<p>May 2, 2014</p>	<p>The Supreme Court of Canada’s Executive Legal Officer issues a press release setting out a chronology of the relevant communications between the Chief Justice and Government of Canada. The Chief Justice issued the following statement in the press release: “Given the potential impact on the Court, I wished to ensure that the government was aware of the eligibility issue. At no time did I express any opinion as to the merits of the eligibility issue. It is customary for Chief Justices to be consulted during the appointment process and there is nothing inappropriate in raising a potential issue affecting a future appointment.”</p> <ul style="list-style-type: none"> • Supreme Court of Canada, News Release, May 2, 2014 (Tab 1)
<p>May 2, 2014</p>	<p>In public comments on the matter, the Prime Minister does not change his position that the Chief Justice had acted inappropriately.</p> <ul style="list-style-type: none"> • CBC News, “Stephen Harper weighs in on spat with Chief Justice Beverly McLachlin”, 2 May 2014 (Tab 7)
<p>May 4, 2014</p>	<p>The Canadian Bar Association calls on the Prime Minister to acknowledge that the Chief Justice has done nothing wrong.</p> <ul style="list-style-type: none"> • Canadian Press, “Lawyers’ association calls on Stephen Harper to acknowledge chief justice did nothing wrong”, Toronto Star, 4 May 2014 (Tab 8)
<p>May 4, 2014</p>	<p>The Prime Minister’s Office refuses to clarify his statements about the Supreme Court, “leaving unresolved an allegation that the Chief Justice behaved improperly.”</p> <ul style="list-style-type: none"> • Sean Fine & Kim MacKrael, “PMO snubs lawyers’ request for clarity on allegation against Chief Justice”, The Globe and Mail, 4 May 2014 (Tab 9)
<p>May 5, 2014</p>	<p>The Minister of Justice repeats the allegations that the Chief Justice acted inappropriately in contacting his office and that of the Prime Minister.</p> <ul style="list-style-type: none"> • Sean Fine, “MacKay repeats allegations against top court judge”, The Globe and Mail, 5 May 2014 (Tab 10)
<p>May 6, 2014</p>	<p>Eleven past presidents of the Canadian Bar Association express concern that the Prime Minister’s statements may intimidate or harm the ability of the Supreme Court to render justice objectively and fairly” and call on the Prime Minister to remedy the situation.</p> <ul style="list-style-type: none"> • CBA Presidents, “Harper’s Disrespect for the Supreme Court harms the workings of government”, The Globe and Mail, 6 May 2014 (Tab 11)

May 6, 2014	<p>The Prime Minister states that he acted appropriately in the matter of communications with the Chief Justice.</p> <ul style="list-style-type: none"> • Sean Fine, “Prime Minister denies disrespecting Chief Justice”, The Globe and Mail, 6 May 2014 (Tab 12)
May 7, 2014	<p>The Council of Canadian Law Deans asks The Prime Minister and Minister of Justice to immediately and unequivocally withdraw any statement that could be understood as impugning the integrity of the Chief Justice and the independence of the Supreme Court of Canada.</p> <ul style="list-style-type: none"> • McGill University, Press Release, “Canadian law Deans worried about Government’s statements regarding Chief Justice”, 7 May 2014 (Tab 13)
May 8, 2014	<p>Absent clarification from the Canadian government, the media continues to speculate on the motivations behind the Prime Minister’s public statements.</p> <ul style="list-style-type: none"> • Leslie MacKinnon, “Harper’s dust-up with the chief justice – pique or strategy?”, CBC News, 8 May 2014 (Tab 14)