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By Email: Gerald.Heckman@umanitoba.ca

Geneva, 23 July 2014

Dear Dr Heckman,

I write in reply to your letter of 9 May 2014 sent to us on behalf of a group of lawyers and legal academics in Canada, in which you expressed concerns about certain statements by the Prime Minister and the Minister of Justice regarding Chief Justice Beverly McLachlin, in the context of the appointment of Justice Marc Nadon to the Supreme Court of Canada.

Following receipt of your letter, the International Commission of Jurists (the ICJ) wrote to the Prime Minister's Office at the end of May seeking any information or views from the Government on this matter, but we have not received a reply. We have therefore based our review on the information provided in your letter of 9 May as well as the further information you provided on 6 June.

Below, the ICJ sets out its understanding of the relevant facts, describes relevant provisions of international human rights instruments on the independence of the judiciary and the rule of law, and analyzes the facts in relation to the international standards.

Relevant facts

Our analysis and conclusions are based on the following understanding of the facts:

On 22 April 2013, Chief Justice McLachlin met with Prime Minister Stephen Harper to present the retirement letter of Supreme Court Justice Morris Fish. In the course of the appointment process initiated for his replacement, the Chief Justice attended a consultation session held by the relevant Parliamentary Committee on 29 July 2013, in which she provided her views on the needs of the Court. On 31 July 2013, the Chief Justice called the Office of the Minister of Justice and the Prime Minister's Chief of Staff reportedly seeking to provide information about eligibility requirements within the law.[1]

[1] Supreme Court of Canada, Press Release, 2 May 2014, URL: <http://scc-csc.lexum.com/scc-csc/news/en/item/4602/index.do> (accessed 8 July 2014).

On 3 October 2013, Justice Marc Nadon, previously a Federal Court Judge, was appointed to the Supreme Court of Canada.[2] Such appointments are formally made by the Governor General. As a matter of constitutional custom, however, the Governor General is bound to appoint the person named in advice from the Prime Minister. Although not prescribed by Canadian law, in practice the Prime Minister chooses from a list of names provided by the Minister of Justice, based on a process of consultation.

The appointment of Justice Nadon was challenged before the Supreme Court by a member of the public. The Supreme Court of Canada ruled on 21 March 2014 that Marc Nadon was ineligible to appointment to the Supreme Court as he did not meet certain requirements set out in the Supreme Court Act.

On 1 May 2014, an article in the National Post newspaper reported "frustration" within senior levels of Government, following a series of rulings by the Supreme Court unfavourable to the Government, including regarding the appointment of Marc Nadon. It further reported that: "Rumours about Beverley McLachlin, the Chief Justice, are being shared with journalists, alleging she lobbied against the appointment of Marc Nadon to the court (an appointment later overturned as unconstitutional)". The article stated that the Executive Legal Officer for the Supreme Court, responding to the allegations, said that the Chief Justice did not lobby against the appointment but was consulted about the Government's short list and the needs of the Court by a Parliamentary Committee. The Executive Legal Officer is reported to have stated as follows:

> "The question concerning the eligibility of a federal court judge for appointment to the Supreme Court under the Supreme Court Act was well-known in legal circles. Because of the institutional impact on the Court, the Chief Justice advised the Minister of Justice, Mr. [Peter] MacKay, of the potential issue before the government named its candidate for appointment to the Court. Her office also advised the Prime Minister's chief of staff, Mr. [Ray] Novak. The Chief Justice does not express any views on the merits of the issue."[1]

The article also reported that the Executive Legal Officer denied that the Chief Justice had been critical of the Government but that, to the contrary, she had "stated publicly on several occasions that mutual respect between the branches of government — and their respective roles — is essential in a constitutional democracy".[3]

On the evening of 1 May 2014, the Prime Minister's Office (PMO) issued a public statement responding to the reported comments from the Chief Justice's office. The PMO statement reportedly included the following:

> "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... 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 wishes 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."[4]

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[2] Office of the Prime Minister of Canada, "PM Announces Appointment of Justice Marc Nadon to the Supreme Court of Canada", 3 October 2014, URL: <http://pm.gc.ca/eng/news/2013/10/03/pm-announces-appointment-justice-marc-nadon-supreme-court-canada> (accessed 9 July 2014).

[3] Ibid.

[4] Mark Kennedy, "Harper refused 'inappropriate' call from chief justice of Supreme Court on Nadon appointment, PMO says", *National Post*, 1 May 2014, URL: <http://news.nationalpost.com/2014/05/01/harper-refused-inappropriate-call-from-chief-justice-of-supreme-court-on-nadon-appointment-pmo-says/> (accessed 9 July 2014); Tonda MacCharles, "PM refused to take 'inadvisable, inappropriate' call from chief justice,

On 2 May 2014, the Chief Justice issued a statement through a Press Release from the Executive Legal Officer that: "At no time was there any communication between Chief Justice McLachlin and the government regarding any case before the courts". In addition to noting the meeting with the Prime Minister on 22 April 2013 and the Committee on 29 July, the Press Release recorded that:

> "On July 31, 2013, 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. The Chief Justice had no other contact with the government on this issue."[5]

In the Press Release, the Chief Justice is quoted as follows: "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 Justice to be consulted during the appointment process and there is nothing inappropriate in raising a potential issue affecting a future appointment."[6]

On 2 and 5 May 2014, the Minister of Justice reportedly stated as follows:

> "Clearly there was an issue over a pending appointment and after having spoken to the chief justice, it was my considered opinion that that call shouldn't take place. ... It was ultimately (Prime Minister Harper's) decision whether he spoke to her or not, but I just felt as justice minister that it was not an appropriate call."[7]

> "My office was contacted by the office of the Chief Justice. After I spoke with her on that call I was of the considered opinion that the Prime Minister did not need to take her call. Neither the Prime Minister nor I would ever consider calling a judge where that matter is or could be before the court of competent jurisdiction."[8]

PMO says", *The Star*, 1 May 2014, URL: <http://www.thestar.com/news/canada/2014/05/01/pm_refused_to_take_inadvisable_inappropriate_call_from_chief_justice_pmo_says.html> (accessed 9 July 2014); Sean Fine, "Harper alleges Supreme Court Chief Justice broke key rule with phone call", *The Globe and Mail*, 1 May 2014, URL: <http://www.theglobeandmail.com/news/politics/harper-alleges-supreme-court-chief-justice-broke-key-rule-with-phone-call/article18382971/> (accessed 9 July 2014).

[5] Supreme Court of Canada, Press Release, 2 May 2014, URL: <http://scc-csc.lexum.com/scc-csc/news/en/item/4602/index.do> (accessed 8 July 2014).

[6] Supreme Court of Canada, Press Release, 2 May 2014, URL: <http://scc-csc.lexum.com/scc-csc/news/en/item/4602/index.do> (accessed 8 July 2014). See also "Harper, McLachlin issue conflicting statements in unprecedented battle between a prime minister and chief justice", *National Post*, 2 May 2014, URL: <http://news.nationalpost.com/2014/05/02/harper-mclachlin-issue-conflicting-statements-in-unprecedented-battle-between-a-prime-minister-and-chief-justice/> (accessed 8 July 2014).

[7] "Harper, McLachlin issue conflicting statements in unprecedented battle between a prime minister and chief justice", *National Post*, 2 May 2014, URL: <http://news.nationalpost.com/2014/05/02/harper-mclachlin-issue-conflicting-statements-in-unprecedented-battle-between-a-prime-minister-and-chief-justice/> (accessed 8 July 2014).

[8] Sean Fine, "MacKay repeats allegations against top court judge", *The Globe and* Mail, 5 May 2014, URL: <http://www.theglobeandmail.com/news/politics/mackay-repeats-

International human rights standards on the independence of the judiciary

Canada is under an international legal obligation to ensure the independence and impartiality of the judiciary, including under Article 14 of the International Covenant on Civil and Political Rights, a human rights treaty to which Canada has been party since 1976.[9] Additional international instruments reflect and elaborate on this obligation. These include the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles),[10] the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (Commonwealth Principles),[11] and the Bangalore Principles of Judicial Conduct (Bangalore Principles).[12]

The UN Basic Principles state among other things as follows:

> "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
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> "2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
>
> ...
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> "8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
>
> ...
>
> "17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge."

Principle IV(d) of the Commonwealth Principles states as follows:

> "Interaction, if any, between the executive and the judiciary should not compromise judicial independence."

The Bangalore Principles state in part as follows:

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allegations-against-top-court-judge-defies-calls-to-withdraw/article18476754> (accessed 9 July 2014).

[9] International Covenant of Civil and Political Rights, 999 UNTS 171.

[10] United Nations Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 (1985) and 40/146 (1985), available at URL: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (accessed 9 July 2014).

[11] Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003, available at URL: <http://secretariat.thecommonwealth.org/document/181889/34293/35468/37744/latimerhouse.htm> (accessed 9 July 2014).

[12] Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, and annexed to ECOSOC resolution 2006/23 (2006).

Preamble: "WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of utmost importance in a modern democratic society."

...

"1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

"1.3 A judge shall not only be free from inappropriate connections with, and influenced by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

...

"1.6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

...

"2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

...

"4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

...

"4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

...

"4.11 Subject to the proper performance of judicial duties, a judge may:

"4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

"4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

"4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

"4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties."

The Commentary to the Bangalore Principles states:

"There are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge. However, even on these matters, a judge should act with great restraint. While a judge may properly make public representations to the government on these matters, the judge must not be seen as "lobbying" government or as indicating how he or she would rule if particular situations were to come before the court. Moreover, a judge must remember that his or her public comments may be taken as reflecting the views of the judiciary; it may sometimes be difficult for a judge

to express an opinion that will be taken as purely personal and not that of the judiciary in general."[13]

Analysis of the facts in relation to relevant international standards

The ICJ takes the view that the events at issue in the present matter do not take place in a context where judges are generally or systematically deprived of many of the safeguards for the independence of the judiciary as enshrined in internationally law and standards or are vulnerable in practice to interference or arbitrary removal by the executive, such as the ICJ has found in many of its countries of focus.

Although the law related to the procedure for the appointment of judges to the Supreme Court of Canada appears to prescribe an opaque executive-centered procedure, the ICJ understands that, in practice, particularly in recent decades, the procedure has become a more transparent and inclusive, involving roles for members of the other branches of the government, including the Chief of Justice of Canada. Movement in this direction is consistent with international standards governing the independence of the judiciary.[14]

The ICJ has been provided with no evidence that the Chief Justice had any intention in contacting the Minister of Justice and the Prime Minister's Office other than to alert them to the possibility that a legal issue could arise with the nomination of a Justice of the Federal Court in relation to the eligibility requirements of the Supreme Court Act. The ICJ has not been provided with evidence that suggests that the Chief Justice either intended to or expressed a view on the merits of that legal issue or the merits of any individual. The ICJ understands that, at the time the Chief Justice made the calls on 31 July 2013, the issue of eligibility potentially affected several candidates on a long short list under consideration, although even if it related to only one candidate this would not affect our conclusions. Nothing in international standards would render such contact inappropriate. While the eligibility of a particular candidate appointed could have potentially come before the Supreme Court (which indeed in the end it did), simply reminding officials of the requirements of applicable law would not in the ICJ's view constitute "a comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process" (as expressed in Principle 2.4 of the Bangalore Principles).

The ICJ also considers that the brief, measured and factual statements attributed to the Chief Justice's Office in the National Post newspaper article of 1 May 2014 were consistent with international standards and within the scope and role of her office in defending the public confidence in the judiciary in light of the allegations she had been informed were then being made public, i.e. alleging that she had lobbied against a particular nominee. Further, in our view, the reported comments from the Chief Justice's Office contained no implied or express criticism of the actions of the PMO or Minister of Justice. To the contrary, the comments expressly re-affirmed that she

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[13] United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007 (adopted by Judicial Group on Strengthening Judicial Integrity, and published by United Nations Office on Drugs and Crime), page 96, paragraph 138, available at URL: <www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf> (accessed 9 July 2014).

[14] The ICJ has also not been asked to conduct, nor has it conducted, a review as to the compatibility of judicial appointment procedures in Canada with international standards. The UN Special Rapporteur on the independence of judges and lawyers, and the ICJ, view independent appointment bodies and clearly prescribed procedures for consultation as the best model for ensuring independence of the judiciary (see for instance Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/11/41 (2009), paras 23-34). Indeed, the ICJ believes that some of the controversy that arose in the present matter might have been avoided had such a body and procedures been in place in the present case.

made no criticism of the Government and emphasised the need for respect between the different branches of government.

However, the ICJ considers that a problem arose when the Prime Minister's Office chose to make a public statement on 1 May 2014 that clearly and publicly criticized the Chief Justice's actions as inappropriate, particularly by repeatedly emphasizing that neither the Prime Minister nor the Minister of Justice "would ever consider calling a judge where that matter is or could be before the court of competent jurisdiction". This was unfairly conflating the issue of the executive seeking to influence a court on the merits of a matter in litigation, with the Chief Justice reportedly seeking to alert the nominating authorities to the content of and the potential existence of an issue under the law, in the course of a nomination process in which consultation already takes place between different branches of government, and before the executive had made a three-person short list or nominated a candidate.

The ICJ considers that the criticism was not well-founded and amounted to an encroachment upon the independence of the judiciary and integrity of the Chief Justice. Even if the Prime Minister and Minister of Justice were of a different view, in the circumstances, the ICJ sees no necessity for them to have aired their opinions on this matter several months after the fact, in public and in a manner that impugned the propriety of the Chief Justice's actions. Such public criticism could only have a negative impact on public confidence in the judicial system and in the moral authority and integrity of the judiciary, and thereby on the independence of the judiciary in Canada. If the Prime Minister or Minister of Justice had concerns with the appropriateness of the Chief Justice's actions and wished to complain about her actions, the UN Basic Principles for instance indicate that the appropriate way to do so would have been a process which at its initial stages would have been "kept confidential, unless otherwise requested by the judge" (Principle 17). If the concerns were not of a character to warrant formal complaint, it is difficult to see why there was a need to air them in the court of public opinion several months after the fact.

The ICJ is hopeful that, in light of the robust traditional and contemporary independence of the judiciary in Canada, and the strong negative public reaction to the Prime Minister and Minister of Justice's comments (including in the letter you sent to us from the Canadian legal community, from eleven past presidents of the Canadian Bar Association), this incident will not have a lasting or significant detrimental effect on the independence of the judiciary or rule of law in Canada. However, the ICJ remains of the view that the Prime Minister and Minister of Justice could best remedy their encroachment upon the independence and integrity of the judiciary by publically withdrawing or apologizing for their public criticism of the Chief Justice.

The ICJ also considers that the Government of Canada should review the law and practice for the appointment of judges in light of contemporary international standards and practice. In this regard, the UN Basic Principles advocate for an open process with prescribed criteria based on merit and integrity, and without discrimination.[15] The UN Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have repeatedly called for the establishment of bodies that are independent from the executive,[16] plural and composed (even if not solely) of judges and members of the legal profession.[17]

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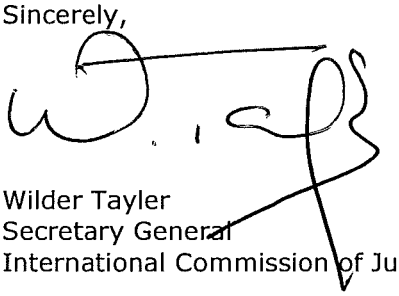
[15] Principle 10 of the UN Basic Principles.

[16] See e.g. Concluding Observations of the Human Rights Committee on: the Congo, UN Doc. CCPR/C/79/Add.118, para. 14; Liechtenstein, UN Doc. CCPR/CO/81/LIE, para. 12; Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 17; Honduras, UN Doc. CCPR/C/HND/CO/1 (2006), para. 16; Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/11/41 (2009), paras 23-34. Also see Draft Universal Declaration on the Independence of Justice (also known as the

We are providing a copy of this letter to the Office of the Prime Minister and the Minister of Justice. Given the publicity in Canada that attended your sending of the communication to us in May, we may also make our analysis and findings available on our website.

Sincerely,



Wilder Tayler
Secretary General
International Commission of Jurists

Singhvi Declaration), Article 11; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 9.

[17] Leandro Despouy, former Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2005/60/Add.4 (2005), para. 5(d), and UN Doc. A/HRC/11/41 (2009), para. 32.