

# **The Executive Branch: Defender of Canadian Liberties**

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**Simon V. Potter and Emily MacKinnon**

*Remarks prepared for and delivered at the  
Canadian Bar Association's  
**National Constitutional  
and Human Rights Conference***

Ottawa, Canada  
June 27, 2014

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## I. INTRODUCTION

It is common wisdom that all three branches of government are bound by the *Charter of Rights and Freedoms*.<sup>2</sup> All of their decisions or measures or orders or regulations or legislation must be able to withstand *Charter* scrutiny, just as they must conform to Canada's Constitution, even leaving the *Charter* to one side.

Broadly speaking, the role of the legislature is to decide upon and enunciate policy. The judicial branch obviously has the responsibility of interpreting and applying the law – a primary aspect of which is ensuring that our guaranteed freedoms receive the protections foreseen in the *Charter*.<sup>3</sup>

Common wisdom holds that the role of the executive is to apply policy as enunciated by the legislature. Our purpose here is to argue that the Canadian Constitution and the *Charter* go farther and impose a duty on the executive branch to ensure that the *Charter* is respected. We argue that this duty includes a duty to ensure general respect for and confidence in the judicial branch, and that this constitutional duty is much older than the *Charter*.

After exploring these issues in the abstract, we ask ourselves whether there is cause for concern that the executive branch does not always take its constitutional responsibilities seriously enough.

## II. THE DUTY OF THE EXECUTIVE

### A. *The texts themselves*

In Canada's constitutional documents, there is little question that reference to “government” includes the executive branch. In fact, reference to “government” typically *means* the executive branch.<sup>4</sup> The *Charter* explicitly binds the “government”, and precisely what that means for the executive was settled early in the life of the *Charter*, when the Court held that “decisions of the

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<sup>1</sup> Both of McCarthy Tétrault. This paper was prepared for and delivered at a conference of the Canadian Bar Association and Mr. Potter is a past-President of the CBA. These remarks are not necessarily the thoughts of the CBA or of any CBA President. Ms. MacKinnon is a past clerk of the Supreme Court of Canada. These remarks are not necessarily those of any other Supreme Court clerk, past or present.

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>3</sup> *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at 469-70, *per* Dickson C.J. See also *R. v. Power*, [1994] 1 S.C.R. 601, at 620.

<sup>4</sup> Canada, Department of Justice, “The Canadian Constitution” (April 30, 2014), online: <http://www.justice.gc.ca/eng/csj-sjc/just/05.html>.

federal cabinet are reviewable by the courts under the *Charter*, and the government bears a general duty to act in accordance with the *Charter's* dictates.”<sup>5</sup>

Indeed, the *Charter* makes no sense if it is understood to mean that, while citizens may have rights, they can be ignored by the executive – or that the executive may go about its business as if the *Charter* did not exist, and react only when brought up short by the judicial branch. The rule of law, if it binds the government, binds the executive. Thus, as the Court said in *Suresh* and again in *PHS*, when a cabinet minister goes about exercising a discretion granted to him by the legislature, he must do so in accordance with the *Charter*.<sup>6</sup>

Even prior to the *Charter*, the Canadian constitution both provided and defined a democracy circumscribed by the rule of law. That system relies (within both the federal and the provincial spheres) on three branches of power, each balanced by the others, all bounded by the rule of law, and each respectful of the other. The separation of powers envisioned by the Canadian constitution is not always watertight and, as the Court itself has observed, judicial functions may be shared with non-judicial bodies.<sup>7</sup> Thus, but not for this reason alone, it is not only the judiciary, but the executive and the legislature as well, which are obliged by their very definitions and by their very origins to ensure compliance with the Constitution.

### **B. The Charter dialogue**

The dialogue theory of the interaction among the three branches is often reduced to a “conversation” between the legislature and the judiciary. But the tripartite structure of Canadian constitutional democracy requires that the executive branch play an equal role in this exchange, and an equally respectful role.

Indeed, as legislative initiative and direction is increasingly controlled by the executive, it is increasingly, not decreasingly, necessary that the dialogue involve the executive branch. For, in practice, it is the central agencies of the Canadian government – the Prime Minister’s Office, the Privy Council Office and, arguably to a lesser extent, Cabinet – that control Parliament.<sup>8</sup> The integration between the executive and the legislature, as described by the SCC in *Blaikie* (albeit in reference to a provincial executive),<sup>9</sup> requires the executive’s participation in the dialogic process that seeks to ensure, over time at least, the constitutionality of government actions.

That the executive must participate in this dialogue is apparent also in matters of foreign affairs. While foreign affairs are quite thoroughly the province of the executive, there is no doubt that the executive cannot disregard the *Charter* in conducting affairs abroad. Ensuring this *Charter*

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<sup>5</sup> *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at para. 3.

<sup>6</sup> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 at paras. 117, 128, 150-153; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at paras. 32, 38, 122-130.

<sup>7</sup> *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 10, *per* Lamer C.J., concurring; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at 728; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at 601.

<sup>8</sup> Donald Savoie, *Governing From the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999) at 5, 87; Joseph Magnet, “Separation of Powers in Canada” (2007), online: Constitutional Law of Canada <http://www.uottawa.ca/constitutional-law/Division%20of%20Powers%20Topics%20-%20Separation%20of%20Powers.htm>.

<sup>9</sup> *Blaikie v. A.G. Quebec (No. 2)*, [1981] 1 S.C.R. 312.

compliance involves a dialogue with the judiciary. As the Court explained in the second Omar Khadr appeal, *Khadr II*:

In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* or other constitutional norms.<sup>10</sup>

The executive has an obligation to prevent – and to remedy – *Charter* breaches even in foreign affairs. Granted, this obligation is not necessarily one that the Court can enforce. In *Khadr II*, the Court went on to say:

The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options.<sup>11</sup>

Thus, the executive has a constitutional duty to self-police in this area – a duty which necessarily accords with the executive’s more general obligation, its constitutional obligation, to conduct itself in accordance with the *Charter*.<sup>12</sup> This duty to self-police, whatever the difficulty of judicial enforcement, also exists in other areas.

### ***C. The special case of the Attorney General***

The role of Attorney General merits closer examination. As Chief Law Officers of the Crown and Ministers of Justice, Attorneys General have particular ties – and obligations – to all three branches of government. One of their most central obligations involves ensuring the constitutionality of government acts. This obligation has been partially codified: legislation demands that the Attorney General satisfy himself or herself of the *Charter*-worthiness of proposed legislation.

The legislative codification of this obligation, though, is not as robust as it once was. Originally, s. 3 of the *Canadian Bill of Rights* required all bills to be scrutinized for consistency with its protections for fundamental rights.<sup>13</sup> Any inconsistency had to be reported to the House of Commons. Since 1985, however, scrutiny has only been required of government bills.<sup>14</sup> The same limitation is contained in s. 4.1 of the *Department of Justice Act*, which requires that only government bills be examined for consistency with the *Charter*, allowing private members’ bills

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<sup>10</sup> *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at para. 36 [*Khadr II*] [citations omitted].

<sup>11</sup> *Ibid.* at para. 37 (citations omitted).

<sup>12</sup> This is relevant, for example, to any discussion of the Prime Minister’s obligations to ensure a judiciary which reflects a sufficient measure of diversity to merit public confidence. Just because the constitutional obligation would not easily be enforceable by the courts does not mean that the constitutional obligation is not there.

<sup>13</sup> *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 3, amended by *Statutory Instruments Act*, 1971, s. 29.

<sup>14</sup> *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 3. Regulations are scrutinized pursuant to the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 3.

to pass by unexamined and unreported.<sup>15</sup> (And in 2002, Janet Hiebert wrote presciently of “an emerging political culture that assumes that no report should be made.”<sup>16</sup>) Perhaps it is a coincidence that the current government has pushed through more private members’ bills than any other government in Canadian history.<sup>17</sup> If this is an attempt to circumvent this scrutiny, then the Attorney General has by that policy of the executive been pushed off his post.

Whatever the legislation may say by way of codification, the Attorney General has an obligation to oversee the legality of legislation and regulation. Just last year, the Supreme Court of Canada held that “[a]s Chief Law Officer of the Crown, the Attorney General has special responsibilities to uphold the administration of justice.”<sup>18</sup> Surely upholding the administration of justice includes refraining from enacting unjust laws.

Attorneys General themselves have agreed. Attorney General of Ontario Ian Scott saw the Attorney General as “defender of the Constitution”.<sup>19</sup> In 1987, he went so far as to raise the possibility that an Attorney General might have a duty to use legal proceedings to stop a cabinet colleague from contravening – or causing a contravention of – the *Charter*.<sup>20</sup>

Indeed, the Attorney General of Canada so swears upon taking up the post. The Oath of the Members of the Privy Council, taken by all members of Cabinet, requires them to swear as follows: “I will in all things ... faithfully, honestly, and truly declare my mind and my opinion.”<sup>21</sup> For the Attorney General, this Oath invokes a special obligation to ensure that executive action respects the Constitution and the rule of law.

#### ***D. Rule of law and public confidence in the judiciary***

A necessary corollary of the rule of law is public confidence in the judiciary: it is the judiciary that interprets the law by which all three branches are bound. Without public confidence in the judiciary to fulfil this role, the rule of law loses meaning.

Because all three branches are constrained by the rule of law, all three branches are obliged to uphold the public’s confidence in the judiciary. From this springs the requirement that neither the executive nor the legislative branches may interfere with the independence of the judiciary. As the Court has said, there is a constitutional need “to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government.”<sup>22</sup>

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<sup>15</sup> *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1.

<sup>16</sup> Janet L. Hiebert, *Charter Conflicts: What is Parliament’s Role?* (Montreal: McGill-Queen’s, 2002) at 10.

<sup>17</sup> Bruce Cheadle, “Tories back record number of private member’s bills”, *The Globe and Mail* (May 8, 2013), online: <http://www.theglobeandmail.com/news/politics/tories-back-record-number-of-private-members-bills/article11797023/>.

<sup>18</sup> *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 at para. 35. See also para. 133, *per* Fish J. (dissenting): “Attorneys General should consider their duty to promote the sound administration of justice”.

<sup>19</sup> Ian Scott, “Text of Remarks to the Association’s Annual Spring Meeting” (1986) 7:6 *Criminal Lawyer’s Association* 24 at 24-25, quoted in Hon. Marc Rosenberg, “The Attorney General in the 21st Century: A Tribute to Ian Scott: The Attorney General and the Administration of Criminal Justice” (2009), 34 *Queen’s L.J.* 813 at para. 95.

<sup>20</sup> Rosenberg, *supra* note 19 at para. 98, referring to Ian Scott, “The Role of the Attorney General and the Charter of Rights” (1987) 29 *Crim. L.Q.* 187 at 197.

<sup>21</sup> Governor General of Canada, “Oaths of office” (April 30, 2009), online: [http://archive.gg.ca/media/fs-fd/p3\\_e.asp](http://archive.gg.ca/media/fs-fd/p3_e.asp).

<sup>22</sup> *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35 at para. 22 [*Ell*].

Independence of the judiciary is the prerequisite to generalized confidence in the judiciary. It is not only the independence but the generalized confidence and respect which must be fostered.

This duty lies particularly heavily on the Attorney General of Canada.

He bears this duty first as a lawyer: we know from *Krieger* that Attorneys General are subject to their law society's code of professional conduct,<sup>23</sup> and it is trite that this brings with it the obligation neither to cause the administration of justice to be brought into disrepute nor to cause respect in that administration to be undermined. The Attorney General of Canada bears this duty additionally as a member of the executive charged with the particular role of ensuring compliance with the rule of law.

### **III. HOW ARE WE LIVING UP TO THESE CONSTITUTIONAL OR QUASI-CONSTITUTIONAL EXPECTATIONS?**

#### ***A. The Attorney General's opinions***

If it is so, as is alleged in the action brought by lawyer (and former Department of Justice General Counsel) Edgar Schmidt against the Attorney General of Canada in the Federal Court,<sup>24</sup> that the Attorney General's instructions are now not to give an opinion as to the *Charter*-worthiness of legislation, but merely to guess whether there is any chance at all that the legislation would survive a *Charter* attack, then the executive has abandoned an important facet of its constitutional role, and has forced the Attorney General to abandon his constitutional duty.

Such instructions would speak of a desire to take away as many freedoms as possible and as much of each as possible. Surely, the constitutional protection we expect from our executive requires that it do the very opposite.

Such instructions would force the onus of ensuring constitutional compliance away from government and entirely onto the individual – the person who is meant to be protected, not burdened, by the rule of law, and who is ill-suited to hold to account the bottomlessly-pocketed state. With an executive failing to exert itself to ensure constitutional compliance, and indeed finding ways to protect its blissful ignorance, many unconstitutional acts will slip through which should be filtered, and many will go unchallenged – though rights will have been violated.

If the instructions are what plaintiff Schmidt says they are, one can only with difficulty imagine that this was not the very objective of those instructions. This would hardly accord with any conception of the executive branch's obligation to avoid unnecessary impingement on guaranteed liberties.

It would also place the Attorney General in an invidious position in relation to his duty to advise. A lawyer cannot be giving advice as to the legality or illegality of a measure if he or she can recommend against it only by concluding there is no imaginable defence of it. Such a conclusion would require an unimaginative lawyer indeed – particularly given the robust role played by s. 1

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<sup>23</sup> *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65 [*Krieger*].

<sup>24</sup> *Schmidt v. A.G. Canada*, Ottawa T-2225-12 (FCTD) (Statement of Claim), online: [http://charterdefence.ca/uploads/3/2/1/7/3217767/statement\\_of\\_claim\\_2012-12-14.pdf](http://charterdefence.ca/uploads/3/2/1/7/3217767/statement_of_claim_2012-12-14.pdf).

of the *Charter* in saving impugned legislation, and the deference it has brought in favour of the executive and legislative branches.

In fact, given the role of s. 1, one wonders why the executive would feel it necessary to so severely clip the Attorney General's wings. Courts afford great deference to government decisions to infringe individual liberties, balancing contextual factors only to choose "the *degree* of deference to be accorded to the particular means chosen by Parliament to implement a legislative purpose."<sup>25</sup>

Granting such deference, however, ought to require that the government undertake a reasoned balancing exercise in the first place. Perhaps it is so that "[t]he Court should not substitute judicial opinion for legislative choice in the face of a genuine and reasonable attempt to balance ... fundamental value[s]"<sup>26</sup> but this is surely so only if the legislature has indeed made such an attempt.

If Schmidt and Hiebert are right and the government is turning a blind eye to the unconstitutionality of its legislation, then perhaps it is time for courts to be a little less deferential, and a little more judgmental, when considering the Attorney General's eventual defence of a statute under attack.

## **B. The dialogue**

### **a) Statements by the Cabinet**

The constitutional dialogue is meant to be respectful. It is meant to engage the government in a good faith effort to make its measures comply with what the judicial branch says the *Charter* requires. But, if the executive is abandoning its obligation to ensure constitutional compliance, then it is interested in neither a respectful nor a good faith dialogue but is, rather, withdrawing from it entirely.

In the first case concerning Omar Khadr to come before the Supreme Court of Canada, the Attorney General of Canada had been instructed to argue that the executive branch is immune from judicial scrutiny for its executive acts committed abroad, even if Canadians' *Charter* rights are violated.<sup>27</sup> In the second case brought by Khadr, while conceding that executive acts were reviewable for *Charter*-compliance, the Attorney General argued that the Court could do nothing about it:

The government argues that courts have no power under the Constitution of Canada to require the executive branch of government to do anything in the area of foreign policy. It submits that the decision not to request the repatriation of Mr. Khadr falls directly within the prerogative powers of the Crown to conduct foreign relations.<sup>28</sup>

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<sup>25</sup> *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 at para. 111 [*Harper SCC*] [emphasis added and citations omitted].

<sup>26</sup> *Harper v. Canada (A.G.)*, 2002 ABCA 301 at para. 270, *per* Berger J.A., dissenting, *aff'd Harper SCC*, *supra* note 25 at para. 111.

<sup>27</sup> *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28.

<sup>28</sup> *Khadr II*, *supra* note 10 at para. 33.

These wholly disturbing assertions were both rejected by the Court.<sup>29</sup> But the mere fact that the executive made them suggests an absence of any real desire to participate in the constitutional dialogue.

Indeed, other statements by Cabinet members have suggested not only an absence of the requisite faith, but an absence of respect and even a desire to undermine public respect. On February 11, 2011, Minister of Citizenship, Immigration and Multiculturalism Jason Kenney delivered a speech about the constitutional dialogue.<sup>30</sup> In a declared aim to be “constructive”, he said that, even though his department typically gets things right, the large number of immigration cases before the Federal Court shows that “the integrity of the decisions made by the decision makers in my Department is being questioned too often without sufficient justification.”

“Our courts”, he said, “are sometimes too willing to indulge even the most creative claims.”<sup>31</sup>

He went so far as to say – in a stunning reversal of the principle of the rule of law - that the *judiciary’s* decisions undermine public confidence in the *government*.<sup>32</sup>

Cases in which, seemingly on a whim, or perhaps in a fit of misguided magnanimity, a judge overturns the careful decisions of multiple levels of diligent, highly trained public servants, tribunals, and even other judges. ... [Such decisions] undermine public confidence in the government’s ability to enforce our laws as passed by Parliament, and therefore in the entire system.<sup>33</sup>

This statement is clearly not one designed to show respect for, or to encourage confidence in, the judicial branch. It means, and is meant to convey, that the judicial branch is a meddler, an unwelcome second-guesser of those who should really be trusted.

In response, then-CBA President Rod Snow wrote on February 22, 2011 that the executive “does not ... have the option of publicly reprimanding the judiciary for not supporting its political agenda .... [J]udicial independence is the cornerstone of the rule of law.”<sup>34</sup> Chief Justice McLachlin echoed those thoughts, or at least the latter one, in August of that year: “We live in a

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<sup>29</sup> *Ibid.* at para. 37 [citations omitted]: “The government must have flexibility in deciding how its duties under the power are to be discharged. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government’s foreign affairs prerogative is exercised in accordance with the constitution.”

<sup>30</sup> Hon. Jason Kenney, “Dialogue with the Courts: Judicial Actions and Integrity of Canada’s Immigration and Refugee System”, online: <http://www.jasonkenney.ca/news/minister-kenneys-speech-dialogue-with-the-courts-judicial-actions-and-integrity-of-canadas-immigration-and-refugee-system-given-at-university-of-western-ontario-law-school-february-11-2011/>.

<sup>31</sup> *Ibid.* If plaintiff Schmidt is right, the Attorney General must apparently use all his creativity to come up with arguments which just might save a *Charter* violation, but the individual should not show too much in complaining about it.

<sup>32</sup> *Ibid.* It is absolutely clear that the judicial branch has no obligation to refrain from applying the *Charter* so as to bolster public confidence in the government. It is a much more plausible proposition that the government would bolster public confidence by avoiding measures likely to be overridden.

<sup>33</sup> *Ibid.*

<sup>34</sup> Letter from Rod Snow (February 22, 2011), online: <http://www.cba.org/CBA/submissions/pdf/11-12-eng.pdf>.



society with a strong commitment to the rule of law, and one of the elements of our commitment to the rule of law is a deep, cultural belief in and confidence in the judiciary.”<sup>35</sup>

Minister Kenney did not retract. Events since corroborate the conclusion that the failure to retract was deliberate and not a decision of the Minister alone.

### **b) Increasing use of suspended declarations of invalidity**

The executive’s attitude is clearly reflective of “a passive and reactive role in the articulation of *Charter* values.”<sup>36</sup> The executive’s refusal to play its role in the dialogue upsets the constitutional balance, and prompts constitutionally unanticipated responses from the judicial branch. Among them, we see an increasing reliance on suspended declarations of invalidity.

In 2001, Kent Roach pointed to the Supreme Court of Canada’s increasing use of suspended declarations of invalidity as part of the Court’s effort to further the constitutional dialogue: “[d]elayed declarations of invalidity were once limited to the prevention of constitutional emergencies”, Roach wrote; “now they verge on the almost routine.”<sup>37</sup> Thirteen years later, the situation is no different: suspended declarations have been used by the Court three times in the last two years.<sup>38</sup> In each situation, it must be remembered, the Court had found that the state had impermissibly trampled on fundamental rights, but that the situation should be allowed to continue for a year – to spur dialogue.

According to Emmett Macfarlane, legislatures are more inclined to revisit legislation in a “dialogic” way when faced with a suspended declaration of invalidity.<sup>39</sup> But there is something disquieting about requiring the courts to prod the legislature into that dialogue, especially through a sacrifice of individual rights. Through its reactive posture, and by seeking suspensions of invalidity of invalid law, the government is in effect actively creating and perpetuating *Charter*-illegal harm to individual rights-holders.

Perhaps it is time to wonder whether, in the context of an executive branch “waiting to be found out” (if plaintiff Schmidt is right) and of a dialogue tinged by the idea that courts are but meddlers, it would not be a greater spur to dialogue to refuse to suspend the declaration of invalidity.

### **c) The prostitution case**

In December 2013, the Supreme Court of Canada struck down the core of Canada’s prostitution laws, primarily on the grounds that the laws criminalized the safest ways of conducting a legal pursuit, prostitution.<sup>40</sup> For prostitutes working on the streets, the criminalization was held to

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<sup>35</sup> Richard Foot, “Chief Justice supports criticism of Kenney”, *National Post* (August 13, 2011), online: <http://news.nationalpost.com/2011/08/13/chief-justice-supports-criticism-of-kenney/>.

<sup>36</sup> Lorne Sossin, Book Review of *Charter Conflicts. What is Parliament’s Role?* by Janet L. Hiebert, (2004) 42 Osgoode Hall L.J. 189 at 196.

<sup>37</sup> Kent Roach, “Remedial Consensus and Dialogue Under the *Charter*: General Declarations and Delayed Declarations of Invalidity” (2001), 35 U. Brit. Colum. L. Rev. 211 at 218.

<sup>38</sup> *Canada (A.G.) v. Bedford*, 2013 SCC 72 [*Bedford*]; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62; *R. v. Tse*, 2012 SCC 16.

<sup>39</sup> Emmett Macfarlane, “Dialogue or compliance? Measuring legislatures’ policy responses to court rulings on rights” (2013) 34 Int’l Pol. Sci. Rev. 39.

<sup>40</sup> *Bedford*, *supra* note 38.

create unsafe pressures on those selling sex. The government asked for 18 months to revisit the issue; the Court gave it 12.<sup>41</sup>

Six months later, the Minister of Justice has now tabled a new prostitution law, which purports to be a dialogic response to the Supreme Court of Canada. The government seeks now to criminalize the customers.<sup>42</sup> But it is hard to imagine that the prostitutes will be anything but even less safe. The government's answer is to add language to the preamble in the hopes that the new law will withstand the inevitable court challenge,<sup>43</sup> and to make public statements explaining that it seeks to make life safer for those engaged in prostitution by encouraging them to give up prostitution.<sup>44</sup>

The substance of the law hardly seems responsive to the Court's decision – nor mindful of the lives and personal security of those the Court found to be endangered. One is left to wonder if this reflects an attachment to dogmatic belief,<sup>45</sup> rather than any real effort to engage in the dialogue which the Court opened with its ruling.

### **C. Judicial appointments**

The executive's regard for the judiciary has of late been the subject of public airing.

In September 2013, the Prime Minister announced the appointment of a supernumerary judge from the Federal Court of Appeal to one of the three Quebec seats on the Court. Pandemonium ensued. Eventually, the legal question of federal judges' eligibility for Quebec seats was settled by the Court itself<sup>46</sup> - amid speculation that the appointment was itself a rude gesture.<sup>47</sup>

That conclusion became all but unavoidable a short time later, when the Prime Minister's Office cast aspersions on the integrity of the Chief Justice of Canada for having alerted the government to the potential problem in the first place – *months* before the appointment was made or any related court challenge was in the offing.<sup>48</sup>

Such astonishing conduct on the part of the PMO is not only unprecedented, it is in our view a clear violation of the constitutional duty we speak of here.

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<sup>41</sup> Presumably because the unconstitutional danger should not be allowed to linger.

<sup>42</sup> Bill C-36, *Protection of Communities and Exploited Persons Act*, 2nd Sess., 41st Parl., 2013, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6646338>.

<sup>43</sup> John Geddes, "How the Justice department sees the new prostitution bill surviving" *Maclean's* (June 13, 2014), online: <http://www.macleans.ca/politics/ottawa/how-the-justice-department-thinks-the-new-prostitution-bill-will-survive/>.

<sup>44</sup> Hon. Peter MacKay, "Prostitution law reflects Canadian values", *Hamilton Spectator* (June 13, 2014), online: <http://www.thespec.com/opinion-story/4573467-prostitution-law-reflects-canadian-values/>.

<sup>45</sup> Not to say a touch of hypocrisy: if it is the prostitution itself which is seen as the danger, why not just criminalize prostitution?

<sup>46</sup> *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21.

<sup>47</sup> Andrew Coyne, "Nadon Supreme Court appointment looks so dodgy it must be some clever Harper ruse", *National Post* (January 15, 2014), online: <http://fullcomment.nationalpost.com/2014/01/15/andrew-coyne-was-nadons-head-scratcher-appointment-to-supreme-court-a-master-play-by-stephen-harper/>.

<sup>48</sup> Sean Fine, "The secret short list that provoked the rift between Chief Justice and PMO", *The Globe and Mail* (May 23, 2014), online: <http://www.theglobeandmail.com/news/politics/the-secret-short-list-that-caused-a-rift-between-chief-justice-and-pmo/article18823392/>.

Earlier this month, a short time after the decision by the Supreme Court of Canada that Federal Court judges were ineligible for nomination to Quebec seats on the Court, it was announced that a judge currently of the Federal Court of Appeal would be moved to the Quebec Court of Appeal. It happens that this judge was one of the four Federal Court judges the executive had put forward for the Quebec seat last year.

Is this lateral move a respectful response to the Supreme Court of Canada's decision? Or is it a chess move with a view to obtaining by two nominations what was illegal in one? With another Quebec seat opening up in the Fall of 2014, the question is pertinent – particularly after the Minister of Justice announced that the new Quebec Court of Appeal judge's "wealth of legal knowledge will be welcome at the Supreme Court".<sup>49</sup> A slip of the tongue, to be sure.

Let us leave aside the personalities and the personal qualifications. Setting sights on a particular individual as a good nomination to the Supreme Court of Canada, and then going about naming him somewhere so that he can some time later be qualified to be named to that Court, is a very strange thing. Never mind that the Prime Minister's Office said it would never do precisely this. And never mind that it is a distinct departure from the normal way of just looking at which previously named judges are available when the seat opens up.

It is a great shame that the behaviour of the executive branch in past years makes it now a plausible subject of discussion whether the executive branch has thought of accomplishing indirectly what is clearly unconstitutional directly, and thinks it appropriate to turn the Quebec Court of Appeal into a staging area, a warehouse for PMO-identified eventuals.

Such an approach to things would be seen by many, with some reason, as contemptuous of the current Quebec judges who are eligible for elevation, a message that they are all not good enough and that someone else will be slipped into their ranks to await the upward nod. It is a shame also that the judge himself should be harmed by having his nomination interlaced with this debate and, now, a new challenge before the courts.<sup>50</sup>

Such political tinkering with the judicial appointment process flies in the face of the executive's constitutional obligations. As the Court itself remarked in *Ell v. Alberta*, "[u]nquestionably, the perception that appointment to judicial office is political in nature undermines public confidence in the administration of justice."<sup>51</sup> It is not so difficult to imagine the harm it will do now that it is a legitimate question whether the PMO is not just playing politics, but gaming the system and, in light of the other practices mentioned above, gaming the *Charter*.

## IV. CONCLUSION

We appear to have reached a place where, instead of the respectful collaboration among branches, which our constitution and our *Charter* and our attachment to the rule of law make so

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<sup>49</sup> Laura Stone, "Peter MacKay confirms, then denies, Justice Robert Mainville headed to the Supreme Court", *Global News* (June 16, 2014), online: <http://globalnews.ca/news/1397467/peter-mackay-confirms-then-denies-justice-robert-mainville-headed-to-the-supreme-court/>.

<sup>50</sup> Sean Fine, "New legal battle shaping up over Supreme Court judge", *The Globe and Mail* (June 17, 2014), online: <http://www.theglobeandmail.com/news/politics/new-conservative-supreme-court-judicial-appointment-met-with-scrutiny/article19192558/>.

<sup>51</sup> *Ell*, *supra* note 22 at para. 45.

necessary, the executive branch not only sees the judiciary as an obstacle to progress but portrays it so.

It is beyond the ambit of this paper to say whether the executive branch is right or wrong to see the obstacle. But it is our conclusion that the duty of the executive branch and particularly of the Attorney General is to encourage generalized confidence in the judicial branch, and to engage with all good faith in the dialogue towards a real progress respectful of our liberties and constitutional guarantees.