

**Striking the Right
Balance:
Implications of
Expanding
Executive Powers for
Canadian
Democracy**

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Striking the Right Balance: Implications of Expanding Executive Powers for Canadian Democracy

by the

Alberta Civil Liberties Research Centre

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Executive Summary

Canada is a country founded upon the rule of law, as the *Canadian Charter of Rights and Freedoms* (“*Charter*”) and our unwritten constitution tell us. But claiming its establishment in these ways masks its underlying vulnerability. The rule of law in Canada is not immune to attack. In recent years, it has come under threat as political bodies implement their agenda in ways that undermine the separation of powers and either restrict, avoid, or influence judicial oversight.

The judiciary is charged with upholding the rule of law; it must ensure that our elected officials act in accordance with legal authority. Given this role, there is a healthy tension at the heart of the judiciary’s relationship with the legislative and executive branches of power. This dynamic, fed by a robust and independent judiciary, is essential to maintaining Canada’s modified approach to the separation of powers.

The tripartite balancing act received a jolt with the 1982 passage of the *Canadian Charter of Rights and Freedoms*. This constitutional amendment vastly enhanced the scope of judicial intervention into executive and legislative action, and forced a permanent change in how these bodies interact with one another.

Since this time, the executive branch has made various efforts to advance its agenda while minimizing judicial interference. These efforts have grown progressively more bold and problematic, particularly in the wake of the terrorist attacks of September 2001. This paper seeks to examine these strategies and their impact upon the rule of law and the separation of powers. It does so through an examination of three executive policies, their reception, and how they interact with the judicial and legislative branches.

We caution readers against pinning the troublesome expanse of executive power on one government as opposed to another. The trend to increase executive power is not unique to any one government. Old habits die hard, and the desire to expand executive power spans the political spectrum.

Through this inquiry, we seek to demonstrate that the rule of law is only as strong as the Canadian people demand. Small or seemingly trivial intrusions into our basic principles create cracks in our foundation. Without diligence and attention, these cracks fester and spread. If we wish to maintain our rule of law, we must collectively act to protect it.

Introduction

Who gets to decide the policies, laws, and practices that govern our lives? Generally speaking, we believe our elected Members of Parliament bear responsibility for creating the rules that shape Canadian life. This, however, is far from the whole story. Canada's executive effectively controls federal legislative priorities. Once this agenda is put into place, it is often subject to review, modification, or invalidation by our unelected judiciary.

These three branches of power¹ – legislative, executive, and judicial – interact to form and implement the laws that shape our country. Where this balance amongst the branches' roles is appropriately struck is, however, not without controversy. Since Canada's inception, there has been a healthy tension between the three branches as each seeks to improve Canada and the life of its people. New challenges have borne witness to the deterioration of this relationship towards one of guarded skepticism, and at times, outright hostility.

The 1982 passage of the *Canadian Charter of Rights and Freedoms*² undoubtedly plays a role in this attitudinal shift. As discussed in the sections below, the *Charter* enhanced the Government of Canada's obligations regarding the rule of law, and in doing so, upended the historical deference afforded by the courts to the executive and Parliament.

This shift in power dynamics has elicited a troubling response from the political branches of power. Particularly since the 2001 terrorist attacks in the United States, the executive has—both discreetly and at times loudly—been working to increase the scope of its authority while diminishing its accountability to the judicial and legislative branches.

¹ The executive, legislature and judiciary are sometimes described as the three branches of *government*. The word *government*, however, is often used in reference to the executive branch only. This paper chooses to use the phrase branches of *power* to avoid any confusion between the two uses.

² *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [The *Charter*].

This paper explores the impact of this executive approach on the separation of powers and the rule of law. In completing this task, the paper will proceed in three parts. Part One explains the separation of powers and how it operates in Canada. Part Two explores the role of the judiciary in defending the rule of law and the resulting tensions spawned as a consequence of carrying out this duty. In Part Three, we examine the Canadian executive's approach to this tension, and how it impacts the rule of law and the separation of powers. This analysis is conducted through the lens of three recent executive priorities. In a concluding section, this paper highlights what this trend means for Canadian democracy and the rule of law, and why Canadians should take action to protect it.

PART ONE: FOUNDATIONS OF DEMOCRACY - THE SEPARATION OF POWERS

*“Nor is there liberty if the power of judging
is not separated from legislative power and executive power”
-Baron de Montesquieu, Spirit of Laws 1748³*

A. What is the Separation of Powers?

The separation of powers doctrine can be traced back to the 18th century political philosopher Baron de Montesquieu.⁴ It is a model of government whereby the power of the state is divided into three branches—a legislature, an executive, and a judiciary. Each of these branches possesses separate and distinct powers reflective of their core competencies:

- the legislative branch makes policy choices, enacts laws and collects money needed to operate the government;
- the executive branch implements and administers the policies and laws enacted by the legislative branch;

³ Anne M Cohler et al, eds, *Montesquieu: The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) at 157 [*Montesquieu*].

⁴ The Honourable Chief Justice John D Richard, “Separation of Powers: The Canadian Experience” (2009) 47 Duq L Rev 731 at 731 [*The Canadian Experience*].

- the judicial branch maintains the rule of law by interpreting and applying the law to controversies brought before it.⁵

This separation seeks to preserve freedom through diffusing power.⁶ Historically speaking, when unlimited power is concentrated in one body, that consolidation leads to corruption and tyranny. When no single branch is vested with enough control to dominate the others, accountability is created.⁷ The divided powers operate as a ‘check’ on one another, as each branch is held responsible to the other two heads of power.⁸

Separating the power of the state also fosters a more enhanced understanding of democracy. Democracy means more than simple majority rule.⁹ It ensures that decisions are made in accordance with our democratic values. By incorporating unelected bodies, the separation of powers seeks to safeguard our longstanding democratic values from ever shifting popular opinion and the tyranny of the majority.¹⁰

The conception of separation of powers differs between republican democracies (e.g., France and the United States) and parliamentary democracies (e.g., Britain), and it differs even between parliamentary democracies. In the current political environment, the clearest example of a strict separation of powers system is located in the United States. There, the executive (the president) operationalizes the laws passed by Congress (the legislature). Each body fulfils its own agenda and operates separately from the other. Both branches operate independently from the

⁵ *The Canadian Experience* at 739-745; *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 paras 27, 30.

⁶ Lorne Sossin, “The Ambivalence of Executive Power in Canada” 52 at 58 in Paul Craig & Adam Tomkins eds, *The Executive and Public Law: Power and Accountability in Comparative Perspective* (New York: Oxford University Press, 2006) [Sossin].

⁷ Sossin at 58.

⁸ *The Canadian Experience* at 732.

⁹ Wayne MacKay, “*The Legislature, the Executive and the Courts: The Delicate Balance of Powers or Who is Running this Country Anyway?*”, (2001) 27 *Dalhousie LJ* 37 at 42-43 [MacKay]; *Reference re Secession of Quebec*, [1998] 2 SCR 717 at para 68 [Quebec Secession Reference].

¹⁰ MacKay at 43, 44.

judiciary, who reviews law and executive action. Each branch, to varying degrees, is accountable to the other two for its actions.

In addition, while Canada is a parliamentary democracy, our method of choosing party leader differs greatly from Britain's and this impacts the concentration of power in the executive in Canada. The Canadian approach to the separation of powers is discussed below.

B. A Partial Split: The Canadian Approach to Separation of Powers

Canada operates a modified version of the separation of powers doctrine. Our Constitution's written and unwritten principles contain some checks and balances between the major branches,¹¹ but "the Canadian Constitution does not insist on a strict separation of powers."¹²

Our primary departure lies with the significant overlap between the executive and the legislative branches of power. Canada's federal legislative branch includes our elected Members of Parliament (the House of Commons), appointed Senators (the Senate), and, in a symbolic role, the Monarch as represented by the Governor General. Canada's federal executive is drawn from Members of Parliament in the House of Commons. It includes the ruling political party's leader (the Prime Minister), his or her appointees (Cabinet Ministers), and the Monarch as represented by the Governor General (again in a symbolic role).

¹¹ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 at ss 38, 55, 56, 57 [Constitution]; *The Charter* at s 33; online: Joseph E. Magnet, "Constitutional Law of Canada" (2013) online: <http://www.constitutional-law.net/index.php?option=com_content&view=article&id=24&Itemid=38> "Parliament is checked by the power of the executive to call the House of Commons into session (s 38) and by the power of the judiciary to declare laws enacted unconstitutional. Parliament is also checked by power in the executive to reserve Bills passed by the Houses of Parliament and to disallow laws enacted (ss 55-7). The Judicial branch has constitutional power to try all cases, to interpret the laws in those cases and to declare any law or executive act unconstitutional. The judiciary is checked by power in the executive to appoint its members; by power in the legislature to enact amendments that overturn judicial decisions, including many constitutional decisions (*Charter of Rights*, s 33); and also by the combined power of the executive and legislative branches to remove judges."

¹² *Quebec Secession Reference* at para 15.

The interaction between the executive and the legislature is the foundation of a relationship known as responsible government. This means that the executive can only remain in power and fulfil its agenda while it has support from a majority of the elected Members of Parliament. If that support is lost, the executive falls and a new election is called. The continued operation of the government depends on legislative support of the executive agenda.

The concept of responsible government gives the impression that the executive serves at the mercy of the legislature. While this is technically true, in regular operations it is the executive that actually controls the legislature. Canada's executive dictates the legislative agenda and drives the laws to be prioritized and passed in Parliament. As explained by one expert:

The executive sets the legislature's agenda for the legislature, formulates its policy option choice set, then determines the legislature's choice among the alternatives specified and directs their implementation. Executive dominance thus effectively reverses the parliamentary principle of formal executive responsibility to the legislature.¹³ [citations omitted]

As a result of this arrangement, "a very small group of very powerful individuals [the executive] shape the policy and politics of the country."¹⁴ Indeed, "Canada has one of the most centralized and powerful executive branches in the common law world."¹⁵ This control is effectively absolute when the ruling party in the House of Commons has a majority government (meaning, it has more Members of Parliament than all opposition parties combined). There, the executive may dictate to its own party members in the legislature what laws to prioritize and pass.¹⁶

¹³ David Laycock, "Understanding the impact of executive dominance on political parties: lessons from the Canadian Case", (International Political Science Association Joint panel RC08/RC03, Montreal, 23 July 2014) online: <http://paperroom.ipsa.org/papers/paper_31695.pdf>.

¹⁴ *Sossin* at 52.

¹⁵ *Sossin* at 88.

¹⁶ For more interesting discussion of the close relationship between the executive and the legislature see Peter Hogg & Cara Zwibel, "Rule of Law in the Supreme Court of Canada" (2005) 55 U Toronto LJ 715 at 726 [*Hogg & Zwibel*], discussing the case of *Wells v Newfoundland*, [1999] 3 SCR 199.

C. The Role of the Canadian Judiciary and The Rule of Law

This executive/legislature fusion places significant pressure on the judicial branch. The judiciary is charged with ensuring respect for the rule of law. The rule of law is a layered and complex concept that resists a singular definition.¹⁷ At its core, it is a restraint on arbitrary exercises of power.¹⁸ In its most basic form, the rule of law possesses three fundamental elements:

(1) a body of laws that are publicly available, generally obeyed, and generally enforced; (2) the subjection of government to those laws (constitutionalism); and (3) an independent judiciary and legal profession to resolve disputes about those laws.¹⁹

In other words, no one is above the law. The promulgated laws in a country bind us all equally;²⁰ these laws must be reasonably predictable and enforced uniformly.²¹

An example of the application of the rule of law in a recent Alberta legal case may be found in *Pembina Institute v Alberta (Environment and Sustainable Resources Development)*.²² Pembina is a non-profit environmental research and policy analysis organization, interested in ensuring a clean, safe environment. They were joined in the case by a group of residents who live in and around Fort McMurray—the Alberta Wilderness Association and the Toxics Watch Society of Alberta (known collectively as the “Oil Sands Environmental Coalition (OSEC)”). Southern Pacific Resource Corp. applied for approval of an oil sands extraction project. As required, they submitted an Environmental Impact Assessment (“EIA”) of some of the impacts of the project. The *Environmental Protection and Enhancement Act* allowed for those who are “directly affected” by a proposed project to submit a Statement of Concern in response to the

¹⁷ For a full account of the history of the rule of law, see Jack Watson, “You Don’t know What You’ve Got ‘Til It’s Gone: The Rule of Law in Canada – Part I” (2014) 52 Alta L Rev 689 [Watson I].

¹⁸ Hogg & Zwibel at 717.

¹⁹ Hogg & Zwibel at 718.

²⁰ Watson I at 704.

²¹ Jack Watson, “You Don’t know What You’ve Got ‘Til It’s Gone: The Rule of Law in Canada –Part II” (2015) 52 Alta L Rev 949 at 955 [Watson II].

²² *Pembina Institute v Alberta (Environment and Sustainable Resources Development)*, 2013 ABQB 567.

EIA. A Briefing Note of the Department of the Environment indicated that Pembina and the group of concerned agencies was no longer able to file a Statement of Concern because it had withdrawn from the Cumulative Environmental Management Association (a group that advised provincial and federal governments about the cumulative environmental effect of regional development on air, land, water and biodiversity), and had been publishing negative comments in the media about the oil sands. Pembina (and others) applied to the Court of Queen’s Bench of Alberta (“ABQB”) to review the decision that they were no longer “directly affected”, arguing, among other things, that the decision was unreasonable. The ABQB held that four principles of natural justice had been breached by this exclusionary decision: the right to a fair and open procedure; the right to be heard; the right to be provided with evidence that the decision-maker had considered proper reasons; and lack of indicators that decisions made were free from a reasonable apprehension of bias. When the Government changed its definition of who was “directly affected” in order to exclude OSEC and Pembina from filing a Statement of Concern, the ABQB found that this indicated that these agencies were targeted—a clear indication of bias. The ABQB noted that this aspect of the Government’s decision indicated an apprehension of bias that was almost as direct as that of the Premier of Quebec when telling the Quebec Liquor Commission to revoke a restaurant owner’s liquor licence because the owner was a Jehovah Witness. This had occurred in the leading Canadian common law case on the rule of law: *Roncarelli v Duplessis*.²³

There are different philosophical views about the ultimate purpose of the rule of law. For example, in addition to the legal interpretation of the rule of law provided in *Roncarelli*, there are those who believe that a robust rule of law functions on a deeper level to minimize abuses of power in our society.²⁴

²³ *Roncarelli v Duplessis*, [1959] SCR 121, 1959 CanLII 50 (SCC) [*Roncarelli*].

²⁴ See, for example, “What is the Rule of Law?” (Chapter 3) in Jane E. Stromseth, Rosa Brooks & David Wippman, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge, U.K.: Cambridge University Press 2006).

No matter what their philosophical view, most everyone agrees that a healthy and robust rule of law is essential to Canada's stability and success. When everyone knows the rules in advance, people can invest, open businesses, start families, pay taxes, and perform other tasks without fear of arbitrary state power.²⁵ Given this infusion into every day life, the rule of law does not just exist on paper—it is an ideal that is embedded in the collective psyche of a nation.

A more robust and substantive understanding of the rule of law recognizes the gravitational force that grounds the rule of law. It accounts for the understanding that the rule of law draws its strength not from force, but because it embodies a concept that takes hold within individuals. People in Canada respect the rule of law not merely because it is imposed on them, but because they believe it is morally just and fair.²⁶

The judiciary safeguards the rule of law through interpreting Canada's laws (constitutional, legislative, regulatory, and common-law) in specific contexts brought before them.²⁷ At times, this calls for review of executive and legislative exercises of power. Decision-makers who invoke the rule of law oversee those exercises of power and will invalidate them should they contravene the boundaries set forth in higher law – primarily, the Canadian Constitution.²⁸

In order to fulfill its mandate, the judiciary jealously guards its independence from the legislative and executive branches.²⁹ Without independence, judges cannot adequately safeguard the rule of law and freely render decisions that might be critical or restrictive of other branches of government.³⁰ In addition, an independent judiciary “assures the public that the rule of law exists, and is effective, and that it guarantees

²⁵ *Hogg and Zwibel* at 716.

²⁶ *Watson I* at 702, 703.

²⁷ *Watson I* at 704.

²⁸ *The Constitution Act, 1867*, 30 & 31 Vict c 3 [Constitution]; the *Charter*.

²⁹ *Watson II* at 962.

³⁰ Mark Rieksts, “Parliamentary Democracy 101” *LawNow*, 34:2 (1 November 2009) online: <<http://www.lawnow.org/parliamentary-democracy-101/>>.

each individual equal justice under the law and that all actions of government will be lawful.”³¹

This dynamic has spawned a healthy tension—grounded in mutual respect—between the legislative/executive branches and the judiciary. With this tension in mind, we next turn to consider the limits of judicial intervention. As explored below, while no one is above the law, discerning the appropriate boundaries of judicial intervention in political life has never been straightforward.

PART TWO: STRIKING THE RIGHT BALANCE

“We are under a Constitution, but the Constitution is what the judges say it is”³²

– Charles Evans Hughes

A. The Impact of the *Charter*

While judicial power to enforce the rule of law was not always explicit in our *Constitution*, it was always implied by virtue of our roots in the United Kingdom’s system of governance.³³ As such, Canadian courts have always had some power to intervene in legislative or executive action to ensure it adhered to the *Constitution*. However, prior to the changes made to our *Constitution* in 1982, Canadian courts were reticent to exercise their power.

Historically speaking, Canada’s judiciary has been deferential to the political branches of power. The judiciary would review jurisdictional disputes within the legislative branch for adherence to Constitutional limits on the division of legislative power.³⁴ It would also review some executive action to ensure that discretionary decision-making was not exercised arbitrarily.³⁵ As noted by Justice Rand in *Roncarelli*,

³¹ *Watson II* at 978.

³² Speech before the Chamber of Commerce, Elmira, New York (3 May 1907); published in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908), p. 13 online: <https://en.wikiquote.org/wiki/Charles_Evans_Hughes>.

³³ *Hogg & Zwibel* at 719.

³⁴ See, for example, *Citizens Ins. Co. v Parsons* (1880), 4 SCR 215 (SCC), affirmed (1881), 7 AC 96 (PC).

³⁵ *Hogg & Zwibel* at 727.

in Canada, “there is no such thing as absolute and untrammelled ‘discretion’”.³⁶ In order to accord with the rule of law, decisions must be made rationally and in a manner consistent with broader policy objectives.³⁷

This submissive approach drastically changed with the 1982 constitutional amendment that added the *Charter* to our Constitution. The *Charter* is Canada’s constitutionally entrenched bill of rights. It sets forth a vigorous set of individual rights and freedoms that bind the legislative and executive branches.³⁸ To the extent these rights and freedoms are unjustifiably infringed, the *Charter* gives judges the broad authority to remedy the wrong.³⁹ This includes, among other things, the authority to modify or invalidate executive/legislative actions, or even to mandate that the other branches take certain corrective steps.⁴⁰

Legislators can rely on *Charter* s 33, the notwithstanding clause, which permits legislators to pass laws that they acknowledge violate *Charter* rights, as long as they state that the individual law operates “notwithstanding the *Charter*”. While section 33 was quite controversial when it was first proposed, Canadians can and do exert pressure on their political representatives to either use or not use it.⁴¹

Despite the legislators’ power to use *Charter* s 33, the *Charter* fundamentally shifted the balance of power between the judicial, legislative, and executive branches. The judiciary, once firmly in a subordinate role, was now empowered with a vastly expanded mandate. The authority given to the judiciary is particularly influential when considering the interpretive power it bestows. Most bills of rights, including the *Charter*, are broadly worded in general terms. Determining what that law means, and

³⁶ *Roncarelli v Duplessis*, [1959] SCR 121 at 140 [*Roncarelli*].

³⁷ *Roncarelli* at 142.

³⁸ *Charter*, s 32.

³⁹ *Charter*, s 24.

⁴⁰ See, for example, *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at paras 144-150, where the SCC ordered the Minister of Health to grant an exemption from the application of the *Narcotics Control Act* for a safe drug injection site.

⁴¹ Jennifer Koshan, “Peter Lougheed and the Constitution, Notwithstanding” (24 September 2012), *ABlawg*, online: <<http://ablawg.ca/2012/09/24/peter-lougheed-and-the-constitution-notwithstanding/>>.

what it requires in a given situation, involves a significant degree of interpretive flourish. Canada vested this power of interpretation exclusively in the court.

The *Charter* greatly expanded the legal standard by which legislative and executive action is measured. Adhering to the rule of law requires compliance with the rigorous standards set forth in the *Charter*. As explored below, not everyone is pleased with the judiciary's approach to this expanded role.

B. Democratic Dialogue or a Runaway Judiciary?

The judiciary enthusiastically embraced this enhanced responsibility, and the power that came with it. The pre-*Charter* court was characterized by deference on the part of the judiciary towards our elected politicians.⁴² By contrast, the post-*Charter* court drastically increased the frequency, scope, and rigour of judicial intervention in legislative and executive action.

This dramatic shift brought disagreement as to the appropriate role of the judiciary in shaping public policy. On one side of the debate, parliamentary supremacists believe that the *Charter*-era has witnessed a dangerous shift in the separation of powers away from our democratically elected officials and towards unelected judges and special interest groups. In their view, *Charter*-era judges have harnessed the rule of law rhetoric to advance their own power and influence.⁴³ These undemocratic and unaccountable professional elites have given themselves the power to make partisan moral choices that should be left to our democratically elected officials.⁴⁴ Having been captured by special interest groups (dubbed the “Court Party”), the judiciary advances its own agenda on Canadian society in a way that is neither accountable nor democratically legitimate.⁴⁵

⁴² *MacKay* at 38.

⁴³ *Watson I* at 701. David Dyzenhaus, “The Justice of the Common Law: Judges, Democracy and the Limit of the Rule of Law 21” in Cheryl Saunders and Katherine De Roy eds, *The Rule of Law* (Annandale: Federated Press, 2003) at 23.

⁴⁴ Conrado H Mendes, “Is It All About the Last Word?” (2009) 3 *Legisprudence* 69 at 83 [*Mendes*].

⁴⁵ For more on this argument, see FL Morton & Rainier Knopff, *The Charter Revolution and the Court Party* (Toronto: University of Toronto Press, 2000).

On the other side of the debate, judicial advocates argue that the *Charter* represents a clear expression of will by the constituent power (the Canadian people) to hold their government accountable to higher law. As such, the judiciary's expanded use of judicial review is not only appropriate, it is mandated by the rule of law. To the extent the government acts outside of the *Constitution*, those actions are illegitimate and it falls on the judiciary to correct that excess of power.

In their view, an empowered court does not challenge Canadian democracy—it enhances it. Dubbed “dialogue theory”, these adherents believe that an empowered court strengthens democracy because it stimulates increased interaction between the three branches of power. These interactions result in better legislation that is able to satisfy our legislative objectives while respecting our fundamental values. When the courts strike down a law, it is part of a broader conversation that leads to stronger and more tailored legislation that respects the rule of law and individual rights.⁴⁶

Moreover, the *Charter* contains numerous safeguards that ensure the judiciary cannot dominate the conversation with the executive and legislature. These include:⁴⁷

- *Charter* section 1: the authority to restrict *Charter* rights in reasonable and justifiable circumstances;
- *Charter* sections 7, 8, 9, and 12: expressly qualified rights and freedoms build executive discretion into the judicial examination process;
- *Charter* section 15(2): recognition of government ameliorative programs;
- *Charter* section 24(1): the court's flexible approach to remedies, including delayed declarations of invalidity; and
- *Charter* section 33: the power of legislative override.

⁴⁶ Peter Hogg & Allison Bushell, “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)” (1997) 35:1 Osgoode Hall LJ at 75.

⁴⁷ See, for example: *Reference re: Manitoba Language Rights*, [1985] 1 SCR 721.

C. The Executive Response

Successive executives have not fully embraced the empowered judiciary model. By its very nature, the powers of judicial review have the potential to limit executive and parliamentary priorities. The *Charter's* passage greatly increased judiciary's arsenal when undertaking this task. The flipside of this increase was a diminishment of the executive's dominance in Canadian lawmaking. This shifting dynamic has only increased the tension between the branches of power, particularly at the federal level.

The *Charter's* passage has since served as a breeding ground for different political approaches to lawmaking. The executive has adopted different strategies as they seek to fulfil their agenda promises without judicial interference. In recent years, we have witnessed the adoption of certain tactics that have had the effect of influencing, restricting, or avoiding the judiciary altogether. These efforts have occasionally been coupled with attempts to restrict the legislature's already limited ability to monitor executive priorities.

For the reasons discussed in Part Three, some of the adopted strategies should concern Canadians. They have the effect of undermining the separation of powers by consolidating power in the executive, and they restrain the court's ability to monitor the legality of actions taken by decision-makers. These strategies are explored below through an examination of three government agenda items.

PART THREE: THE ENCROACHING EXECUTIVE

The executive and legislative branches have adopted various tactics that have had the effect of hindering the judiciary's powers of review:

- Most directly, the political branches have challenged the judiciary's discretionary power outright through clear legislative enactments. This attempt has met significant resistance. From a government perspective, these attempts have not been successful in achieving their aims. Adaptations on this approach may yield more significant results.

- More creative (or some would say troubling) attempts have been made to confine controversial issues to the executive branch through the expanded use of executive bodies and administrative law functions. This method has the added effect of weakening the rigour of a court's powers of review.
- There has been a more covert, long-term campaign to remake our decision-making bodies themselves by manipulating the process by which decision-makers are appointed.

Efforts to streamline and further restrict the legislature are equally concerning. Canada lags behind other nations in parliamentary monitoring of controversial executive powers.⁴⁸

These strategies threaten separation of powers, because they seek to centralize power and remove the (already limited) checks and balances within the Canadian system. They threaten the rule of law when they move important issues to the fringes of judicial review, as shown in the examples below. In addition, the entire system of judicial review becomes compromised when the methods for appointing decision-makers is manipulated to further ideological objectives of the current governing power.

These efforts and their effects are evident in examining three executive priorities over the past several years: remaking the criminal law, responding to terrorism, and reshaping our decision-makers. The following paragraphs explore these issues through the lens of these priorities.

⁴⁸ Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015) at 404 [*False Security*]: "Canada is alone among its "Five Eyes" partners (the United States, the United Kingdom, Australia, and New Zealand) in not giving any parliamentarians (other than ministers) routing access to secret information. Indeed, it is close to along Western democracies in this respect.

A. Criminal Law and Direct Challenges to Judicial Discretion

i. Cracking Down on Judicial Discretion

During the previous Parliament, several laws were passed to advance the executive's tough-on-crime agenda. These laws sought to directly limit a judge's discretionary powers to release criminals (or those charged but not yet convicted or acquitted of crimes) from custody by cracking down on the conditions of their release. These clear articulations met significant resistance from the judiciary. In a close trilogy of cases, the Supreme Court of Canada struck down or otherwise undermined three key pillars of this agenda.

First, the Supreme Court of Canada ruled that certain mandatory minimum sentence provisions in the *Criminal Code of Canada*, such as a five-year mandatory minimum sentence for possession of a loaded, prohibited firearm, constituted cruel and unusual punishment.⁴⁹ The scheme's safeguard, which gave Crown prosecutors discretion to avoid the mandatory sentencing provision, threatened the separation of powers and was inadequate:

Sentencing is inherently a judicial function...The Crown's submission [that they can control when the mandatory minimum applies] is in effect an invitation to delegate the courts' constitutional obligation to the prosecutors employed by the state...⁵⁰

Moreover, even though the application of the law was neither cruel nor unusual in the accused's specific case, it could be cruel and unusual in other reasonable hypothetical situations. Therefore, allowing it to stand would violate *Charter* s 12, and thus, undermine the rule of law.⁵¹

⁴⁹ *R v Nur*, [2015] 1 SCR 773 [*Nur*].

⁵⁰ *Nur* at para 87.

⁵¹ *Nur* at paras, 51, 78, 79. See also *R v Ferguson*, [2008] 1 SCR 96. For more discussion, see Jordan Casey "R v Nur: The Battle of Two Approaches to Challenging a Mandatory Minimum Sentence Under s. 52 of the Constitution Act, 1982" (16 April 2015) online: < <http://www.thecourt.ca/2015/04/16/r->

Second, the Supreme Court diminished the effect of a law that was aimed at severely restricting a judge's discretion to give enhanced credit to prisoners for time served before trial.⁵² The judge's inherent discretion proved too difficult to contain. The unanimous Court held that a variety of (relatively commonplace) circumstances could permit a judge to resort to the enhanced credit regime. This effectively undermined the limiting intent of the provision. The Supreme Court of Canada heard a constitutional challenge to this regime in 2016 in *R v Safarzadeh-Markhali*.⁵³ Certain restrictions on credit for time served were held to be unconstitutional.

Finally, the *Abolition of Early Parole Act*⁵⁴ sought to remove early parole eligibility for certain offenders. The Supreme Court of Canada held this was unconstitutional because its retroactive effect amounted to double punishment for previously convicted offenders.⁵⁵

In each of these three cases, the political branches sought to restrict judicial intervention through expressing clear legislative language. Notwithstanding this clear language, courts successfully resisted the attempts to confine their core competencies and duties regarding the rule of law.

From the executive branch of the government's perspective, this strategy has not been particularly successful in achieving its aims. Critics of the empowered judiciary argued that this was an inappropriate and unnecessary intrusion of the courts into law making. Advocates argued that the rule of law demanded these interpretations, and that the legislature is free to enact responsive legislation that respects the Constitutional concerns raised by the court.⁵⁶

v-nur-the-battle-of-two-approaches-to-challenging-a-mandatory-minimum-sentence-under-s-52-of-the-constitution-act-1982/>.

⁵² *R v Summers*, [2014] 1 SCR 575; *R v Carvery*, [2014] 1 SCR 605.

⁵³ *R v Safarzadeh-Markhali*, 2014 ONCA 627, 2016 SCC 14.

⁵⁴ *Abolition of Early Parole Act*, SC 2011, c 11.

⁵⁵ *Canada (Attorney General) v Whaling*, [2014] 1 SCR 392.

⁵⁶ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law Inc, 2001) at Ch 10.

We have yet to see what action, if any, the newly elected government (October 2015) will take to respond to these specific judicial pronouncements. We have seen more elaborate and circuitous avenues explored in other areas of the criminal law that seek to avoid this level of scrutiny. One such attempt is embodied in the legislative response to terrorism.

ii. Criminal Response in Terrorism

The most striking features of the executive's anti-terrorism response have taken place outside the criminal sphere. This non-criminal approach will be explored in depth in the following section. However, there have been some attempts to amend the criminal law to hinder judicial modes of inquiry in criminal court. Particularly, instead of directly attacking judicial discretion to deal with suspected terrorist, Canada restricts a judge's exposure to the full facts, evidence, and context of a dispute.⁵⁷

Terrorism cases are very rare in Canadian criminal law. When they do come before the court, trial judges are not allowed to view sensitive classified evidence. Instead, a Federal Court judge decides what evidence can be shielded from disclosure in a trial. Once this decision has been made, the trial judge decides whether the Federal Court's ruling to withhold evidence should halt the prosecution because it has rendered any trial unfair.⁵⁸ For example, in *R v Ahmad*,⁵⁹ ten people were scheduled to be tried before the Ontario Superior Court of Justice, accused of plotting terrorist attacks. The Supreme Court upheld the constitutionality of the limited information disclosure scheme, even though it noted that in some cases the only way to have a fair trial is to have no trial at all.

This two-court structure has been held to be constitutional, given the trial judge's ability to discontinue compromised proceedings.⁶⁰ Nonetheless, the two-court solution divorces judges from relevant context and can lead to unfair hearings. This

⁵⁷ *Canada Evidence Act*, RSC 1985, c C-5, s 28.

⁵⁸ *False Security* at 306.

⁵⁹ *R v Ahmad*, 2011 SCC 6 [*Ahmad*].

⁶⁰ *False Security* at 307, discussing *Ahmad*.

unusual structure restricts the ability of all judges involved to fully understand the case in front of them. Federal Court judges do not have the full benefit of trial proceedings when asked to decide on the admissibility of sensitive evidence, or its impact on the trial's fairness. The trial judge has no ability to assess the secret evidence when determining if trial fairness has been compromised. This removal of authority raises questions about natural justice, and with that, the rule of law. Without factual context, decisions regarding trial fairness will be incomplete.

B. Terrorism, the Rule of Law and Democracy: The Threat from Within

As in many countries, the Canadian executive's response to the terrorist attacks of 9/11 was a sweeping effort to centralize its power, expand its discretion, and restrict or circumvent the judiciary's ability to police its actions. This was originally accomplished by funnelling the bulk of our terrorism response through administrative regimes. This permitted the executive to maintain greater control and discretion, while restricting, where possible, the court's watchful gaze. The most recent additions to the anti-terrorism regime have continued and expanded this trend through more troubling avenues. These additions also escalate matters by restricting Parliament's already limited ability to monitor and debate the executive's actions.

The centrepiece of the new anti-terror approach, Bill C-51, is currently in a state of flux. Canada is now under the leadership of a new government, which campaigned on a promise to repeal its "offensive" or "problematic" provisions.⁶¹ To this end, the current executive has provided a basic framework of which provisions it views as falling within this category, and therefore, which will be altered after a consultation process occurs.⁶²

Many of the provisions of Bill C-51 discussed below do not fall within those "offensive" provisions singled out by the new government. Specific mention will be made of those provisions that have been targeted by the new government. Other

⁶¹ See, Liberal Party of Canada's October 2015 election campaign promise re: Bill C-51, online: <<https://www.liberal.ca/realchange/bill-c-51/>> [Bill C-51].

⁶² Bill C-51.

provisions discussed below either predate or fall outside the bill's parameters altogether. There is no indication that these laws are subject to change. On this point, we caution readers against pinning the troublesome expanse of executive power on one government as opposed to another. The trend to increase executive power is not unique to any one government. Old habits die hard, and the desire to expand executive power spans the political spectrum.

i. Administrative Law and the Separation of Powers

The Constitution permits our executive to perform some adjudicative functions. The operation of this power is known as administrative law. Administrative agencies are created by statute and handle disputes that would otherwise end up in court. The courts' ability to intervene and to what extent are also dictated by statute.

Administrative entities are unquestionably essential to the functioning of Canada, and indeed to all complex modern governments. They also, however, create a conflict of interest between the executive, which creates these bodies to fulfil its policy mandate, and the administrative adjudicators, who need to be impartial and independent in order to fairly decide cases.⁶³

This conflict is handled through various mechanisms designed to preserve the adjudicators' independence: adjudicators are appointed for specific terms and generally enjoy security of tenure during that term; they must provide reasons for their decisions and comply with rules for procedural fairness; and perhaps most importantly, no matter what a statute says, courts retain supervisory jurisdiction to ensure the decisions rendered by these bodies are reasonable.⁶⁴ Given these safeguards, administrative bodies have long been accepted as a constitutional exercise of quasi-judicial executive power.

Despite these safeguards, however, administrative bodies do not enjoy the same guarantees of independence and impartiality afforded to courts. The guarantee

⁶³ Ron Ellis, *Unjust By Design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013) at 36 [Ellis].

⁶⁴ See generally, Sara Blake, *Administrative Law in Canada*, 5 ed, (Toronto: Lexis Nexis, 2011).

of independence before tribunals is not a constitutional right, as it is with courts. Rather, it is a common law protection that is vulnerable to modification or truncation by its governing statute.⁶⁵

Furthermore, even with the judiciary's supervision of these bodies, most administrative decisions never make their way to a judge. As such, absent judicial review, or limits on discretion imposed directly by an empowering statute "agencies of the executive are largely unimpeded in the practical sense."⁶⁶

ii. Administrative Law as Anti-Terror Law

It is this functional, but fallible, scheme that has borne the brunt of Canada's response to terrorism. Rather than relying on the robust criminal legislation developed to tackle terrorism, our government opted to deal with this threat through the much more lenient avenue offered by administrative schemes, including, most often, the immigration system.⁶⁷

Ministerial discretion is the bedrock of these administrative schemes. Decisions are often made behind closed doors. When formal adjudicative proceedings do occur, they follow different rules than a court. The following paragraphs explain the shortcomings embedded in these administrative schemes, and the impact they have on the separation of powers and the rule of law.

iii. Evidentiary Shortcomings in Administrative Legal Schemes

Evidentiary requirements are significantly weakened in many administrative schemes that address terrorism. This is evident from examining the standard of proof applicable in these regimes, as well as the government's broad ability to admit or exclude evidence, and the restricted *Charter* recourse available to persons subjected to these regimes.

⁶⁵ *Sossin* at 76, discussing *Ocean Port Hotels Ltd v BC*, [2001] 2 SCR 781 at para 25.

⁶⁶ *Watson II* at 971.

⁶⁷ In this regard, Canada has lagged behind all of its closest allies in terrorism criminal prosecutions. See: *False Security* at 65, 278.

a. Standard of Proof

The standard of proof in immigration proceedings is lower than what one would encounter in other areas of the law. Individuals can be deported on the basis that there are “reasonable grounds to believe” that they pose a danger to the security of Canada. This is a standard lower than the balance of probabilities (which is used in the civil court system), and far lower than the criminal standard of proof, which demands guilt is proven beyond a reasonable doubt.

Civil and criminal matters require a different standard of proof because of the consequences of the matters. If you are held liable in a civil proceeding (beyond a balance of probabilities) you are likely to be ordered to pay money damages. On the other hand, if you are found guilty in criminal proceedings (beyond a reasonable doubt), you may face significant personal consequences, up to serving life in prison. The higher standard of proof addresses the more serious consequences for criminal matters. The even lower standard of proof for immigration matters means that it will be easier to find that a person should be deported.

Government ministers are given the authority to revoke or cancel a person’s passport based on the same standard, if they reasonably believe it is necessary to do so for the national security of Canada.⁶⁸ More disturbingly, persons may be placed on Canada’s notoriously secretive no-fly list based only on a “reasonable suspicion” that the person will engage in an act that will threaten transportation security. Reasonable suspicion is the lowest standard of proof known to Canadian law.⁶⁹

b. Evidentiary Restrictions

In immigration administrative proceedings, evidence is regularly withheld from certain named persons. The presiding government minister is entitled to ask the administrative adjudicator for permission to withhold any piece of evidence.⁷⁰

⁶⁸ *False Security* at 79, 182 Canadian Passport Order SI/81-86, s 4, 10.1, 11.1

⁶⁹ *False Security* at 186.

⁷⁰ *Immigration and Refugee Protection Act*, SC 2001, c 27 ss 86, 86.1.

Informers (or more often, the Crown) who gather information against a named person can veto disclosure of their identity. This effectively removes the named person's ability to cross-examine that person, or test their credibility.⁷¹

While these administrative proceedings occur under the overarching powers of judicial review, it is not unheard of for a person suspected (but not proven) to have ties to terrorism to be deported from Canada without ever coming into contact with a judge.⁷²

Take, for example, the recent case of *X (Re)*.⁷³ There, the Immigration and Refugee Board of Canada (IRBC) held that the person concerned (Mr. Malik) was inadmissible to Canada because he had expressed terrorist aspirations.⁷⁴ The evidence against Mr. Malik was allegedly gathered on audio recordings collected by an undercover RCMP officer. These recordings were never disclosed to Mr. Malik, his lawyer, or the IRBC. Only typed notes describing the officer's interactions with Mr. Malik were provided.⁷⁵ Without providing the sourced incriminating evidence, Mr. Malik's lawyers could not verify the notes or test the officer's credibility.⁷⁶ Mr. Malik was deemed inadmissible by the Board, and was soon thereafter deported to Pakistan. At no point was Mr. Malik's case, or the fairness of the procedure used against him, reviewed by a judge. His entire process, from investigation to prosecution and ultimate

⁷¹ *False Security* at 68.

⁷² *False Security* at 70.

⁷³ *Re X*, 2015 CanLII 66230 (CA IRB).

⁷⁴ Colin Perkel, "Jahanzeb Malik ordered out of Canada" *CBC News*, (5 June 2015) online: <<http://www.cbc.ca/news/canada/toronto/jahanzeb-malik-ordered-out-of-canada-1.3102070>>; The Canadian Press, "Move to deport Jahanzeb Malik is 'absurd,' lawyer says" *CBC News* (12 March 2015) online: <<http://www.cbc.ca/news/canada/toronto/move-to-deport-jahanzeb-malik-is-absurd-lawyer-says-1.2993181>>.

⁷⁵ Jacques Gallant, "Suspected terrorist asked him how to make explosives, officer testifies" *Toronto Star* (20 May 2015) online: <<http://www.thestar.com/news/crime/2015/05/20/suspected-terrorist-said-he-could-make-a-bomb-officer-tells-hearing.html>>; The Canadian Press, "Jahanzeb Malik, man accused of Toronto bomb plot, decides to stop testifying" *CBC News* (12 May 2015) online: <<http://www.cbc.ca/news/canada/toronto/jahanzeb-malik-man-accused-of-toronto-bomb-plot-decides-to-stop-testifying-1.3071389>>.

⁷⁶ Mark Rieksts, "Parliamentary Democracy 101" *LawNow*, 34:2 (1 November 2009) online: <<http://www.lawnow.org/parliamentary-democracy-101/>>.

deportation, was handled by one branch of power—the administrative as part of the executive branch—without any check on the evidence used against him.

c. Restricted Charter Review

When these proceedings do find their way before a judge, evidentiary rights remain extraordinarily restricted. This is the case for two primary reasons. First, the ministerial discretion at the heart of administrative law dictates that administrative boards are entitled to a presumption of deference from courts. This means that, in many cases, judges are restricted in how closely they can scrutinize the evidentiary findings of the board.⁷⁷ Second, the *Charter's* protections under the umbrella of immigration law are notably weak. Persons subject to the *Immigration and Refugee Protection Act*⁷⁸ encounter many rights restrictions that Canadian citizens do not. The *Charter* is much more limited in what it can do for persons who are not citizens.⁷⁹ As a result, evidentiary restrictions are permitted in this area that one does not encounter in other legal forums.

More notably, a document known as a security certificate may be issued in immigration admissibility proceedings before a judge. This document prevents the person named in that certificate from knowing what evidence is being used against them. A special lawyer (“special advocate”) reviews this evidence, but cannot discuss it with the named person.⁸⁰ Judges must then reach a decision based on evidence the named person does not know and cannot respond to. The discomfort with this regime, and others like it, has led some judges to publicly raise their concerns about being used as a “fig leaf” of injustice.⁸¹

⁷⁷ For a more nuanced discussion of the relationship of deference and discretion between administrative tribunals and courts, see *Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada v Kandola*, 2014 FCA 85.

⁷⁸ *Immigration and Refugee Protection Act*, SC 2001, c 27.

⁷⁹ See the discussion of the *Charter* provisions at footnote 47. Only some *Charter* provisions apply to people who are not Canadian citizens (e.g., ss 2, 7 and 15).

⁸⁰ *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 [*Harkat*].

⁸¹ *False Security* at 66.

Persons who find themselves subject to government no-fly lists or passport revocation also find themselves subject to the security certificate regime. However, these persons are not provided with a special advocate. A person may be placed on a no-fly list or have their passport revoked based on evidence that will not be revealed to them or reviewed by anyone outside the executive.⁸²

iv. The Executive Agency Response

Perhaps one of the most troubling aspects of the recent response to terrorism under Bill C-51 is the expanded mandate for Canadian Security Information Service (CSIS), a government agency operating under the executive head of power.

CSIS has been given 'kinetic' powers, meaning the former intelligence gathering agency may now go out in the real world to 'disrupt' activities that threaten the security of Canada. These kinetic powers are ill-defined, and are now being exercised by CSIS, an entity that does not have constitutional protections of independence guaranteed to police forces. CSIS is much more closely controlled and monitored at a government ministerial level. This means that the highest echelons of government have a closer relationship with directing CSIS's activities than what would be expected with a law enforcement agency.⁸³

The court's relationship with CSIS has yet to be fully explored. With Bill C-51, Parliament has, however, drafted a troubling scheme that intentionally disturbs the separation of powers and disrupts the rule of law. The Government of Canada under Prime Minister Trudeau has flagged this law as being subject to amendment.⁸⁴ Given

⁸² *False Security* at 182, 183, 187.

⁸³ *False Security* at 348.

⁸⁴ Jim Bronskill, "Justin Trudeau's promised overhaul of C-51 tops incoming security to-do list" *CBC News* (3 November 2015) online: < <http://www.cbc.ca/news/politics/liberal-transition-security-rethink-1.3301260>>; Liberal Party of Canada, Bill C-51, online: < <https://www.liberal.ca/realchange/bill-c-51/>>:

"We will repeal the problematic elements of Bill C-51, and introduce new legislation that better balances our collective security with our rights and freedoms. Canadians know that in Canada, we can both improve our security while protecting our rights and freedoms We will introduce new legislation that will, among other measures:

the severity of this provision however, it bears discussion nonetheless. The contours of this new amendment remain unclear and undefined, and at the time of this paper's writing, the provision remains in full effect.

Bill C-51 creates a system whereby CSIS can obtain pre-emptive *Charter* violating warrants if the government "reasonably believes" that CSIS is going to breach a *Charter* right.⁸⁵ Instead of ruling on the punishment for *Charter* breaches, judges are asked to pre-approve and condone an upcoming *Charter* violation.⁸⁶

This reversal collapses the role of the separate powers in Canada. As explained by experts Kent Roach and Craig Forcese:

[The] CSIS warrant is an astonishing rupture with the foundational expectations about both the rule of law and the role of the judiciary. In our constitutional system, it is for Parliament to prescribe by law the limits on *Charter* rights and for the Courts to protect those rights and to determine if limits on those rights are reasonable. Parliament should not avoid democratic responsibility by writing anyone—even judges—a more or less blank cheque to authorize violations of *Charter* rights.

This scheme also "runs roughshod over common expectations about the separation of powers."⁸⁷ It places judges in an executive role, whereby they authorize and oversee illegal CSIS conduct. In taking this step, the judiciary can no longer fulfil the role of an independent and impartial adjudicator demanded by our *Constitution*. Furthermore, it also draws the judiciary into the role of legislating. It is Parliament's job to weigh external policy considerations to limit *Charter* rights (for example, as provided under *Charter* s 1), not the court's.⁸⁸

There is little oversight of these CSIS warrants. Given that the subject of the warrant does not know of the impending *Charter* violation, hearings are by necessity one-sided. While this is true in all warrant cases, most criminal warrants will ultimately

-
- guarantee that all Canadian Security Intelligence Service warrants respect the Charter of Rights and Freedoms ..."

⁸⁵ *False Security* at 261.

⁸⁶ Judges are able to refuse to do this.

⁸⁷ *False Security* at 266.

⁸⁸ *False Security* at 266.

be reviewed and monitored in a criminal trial. This is not so with CSIS warrants, which rarely result in criminal proceedings.⁸⁹

In short, this structure creates an apparatus with a smoke screen of fairness through the mechanism of judicial approval. At its core, however, it involves secretive actions and proceedings with little to no actual oversight regarding the executive action taken.

v. The Silenced Parliament

The discussion above outlines how the executive's approach to terrorism limits, or even avoids, judicial oversight of Canada's anti-terrorism legislation. This isolation is not, however, limited to the judiciary. It also flows into the executive's dealings with the legislature.

Canada is alone among its closest allies⁹⁰ in refusing to provide its elected officials (apart from those in the executive) with access to secret information related to national security. This means that if our parliamentarians wish to review Canada's no-fly list, they must do so without basic information such as the number of persons placed on that list.⁹¹ As such, in Canada, "[t]here is no real independent counterweight to executive government in assessing the risks we face and assessing our responses to them."⁹²

Our legislative branch also lags behind other democracies in reviewing the activities of Canada's security agencies. According to the executive, providing Members of Parliament with this information risks security and redundancy.⁹³ Canada's allies have uniformly approved parliamentary review without resulting breakdown in secrecy. On the point of redundancy, Canada's Security Intelligence

⁸⁹ *False Security* at 78.

⁹⁰ United States, United Kingdom, Australia and New Zealand. Indeed, it is nearly alone among the western world in this respect, see *False Security* at 404.

⁹¹ *False Security* at 418.

⁹² *False Security* at 111.

⁹³ *False Security* at 399.

Review Committee (SIRC) is entirely comprised of five executive appointed part-time members and a small staff.⁹⁴

The schemes outlined above are significant and describe alarming restrictions on the rule of law and the separation of powers. By and large, terrorism is a topic that does not lend itself to public sympathy or demands for fairness for those suspected of such activities. In this context, the Canadian people may be more willing to let a few matters slide in the belief the government making us more safe. However, it is in these extreme situations that the rule of law is either forged or dismantled. The review of a rigorous and empowered judiciary is most important in these unpopular cases where the executive feels most comfortable acting pre-emptively or cutting evidentiary corners. By resorting to the regimes outlined above, this oversight is tenuous and the review is blunted. Without strong review, excesses in power that are introduced for emergencies may find themselves normalized and integrated into our mainstream legal system.

C. Remaking our Decision-Makers

Canada's fight against terrorism has revealed the impact of what an increasingly centralized executive can do to the separation of powers and the rule of law. Given the apparent newness of this threat and its international contours, the anti-terror movement provided fruitful ground for reshaping the power dynamic between the three branches of power—executive, legislative and judicial.

It would be a mistake, however, to assume this is the only arena where there is movement in the executive to influence the dynamic with the other branches of power. Past and present executives have been more quietly working to alter the make-up of our various decision-making bodies to align them with their views. This is occurring on two fronts. First, there are attempts to shift the makeup and mind-set of the judiciary to serve a particular agenda. This directly threatens the rule of law. Second, political appointments to our adjudicative tribunals are unfortunately not a

⁹⁴*False Security* at 425.

new phenomenon. However, given their expanded presence and scope in Canadian adjudicative systems, this process raises questions about the separation of powers and the rule of law. These efforts are discussed below.

i. If You Can't Beat Them, Join Them: Remaking the Judiciary

The executive is constitutionally mandated with the task of appointing judges of the Superior and Federal Courts.⁹⁵ However, very little guidance is provided as to how these appointments should occur. The decision is one that ultimately falls within the sole and secret discretion of the Prime Minister. Within this context, it is perhaps surprising that there are complaints regarding the politicization and secrecy of judicial appointment process in Canada.

Periodic outcry over perceived patronage or otherwise inappropriate appointments has spawned various reform efforts, including the creation of Judicial Appointment Committees (JACs).⁹⁶ JACs are panels appointed by the Minister of Justice to recommend certain candidates be appointed as judges. These recommendations are non-binding, but highly persuasive.

JACs were supposed to de-politicize the judicial appointment process. This, unfortunately, has not been the case.⁹⁷ JACs have amounted to “little more than window dressing designed to detract attention from continuing complaints about the role of patronage appointments”⁹⁸ Indeed, recently we have witnessed our governments either hijack or avoid JACs altogether to ensure their preferred appointees are selected. In doing so, they have sought to transform the mindset of the judicial branch by installing judges sympathetic to their view of the judiciary.⁹⁹

First, JACs may be entirely avoided by appointing already serving provincial

⁹⁵ Constitution, s 96.

⁹⁶ FC DeCoste, “Howling at Harper” (2008), 58 UNBLJ 121 at 121 [DeCoste].

⁹⁷ See generally, DeCoste.

⁹⁸ Jacob S. Ziegel, “Appointments to the Supreme Court of Canada” (1994) 5 Constitutional Forum 10 at 13.

⁹⁹ Sean Fine, “Stephen Harper’s courts: How the judiciary has been remade”, The Globe and Mail (24 July 2015) online: < <http://www.theglobeandmail.com/news/politics/stephen-harpers-courts-how-the-judiciary-has-been-remade/article25661306/> > [Fine Remade].

court judges. As a matter of course, these judges' views align with the ruling government of the day.¹⁰⁰ In addition, recent executive amendments have altered the composition of JACs to ensure executive government's favorite options would be recommended. These amendments stripped the judicial appointee of his or her normal voting powers, and added an appointee from law enforcement (seen as sympathetic to the then-government's agenda). These changes gave the (then) executive a working majority on the panel.¹⁰¹ These amendments have been widely criticized. According to one expert:

To be clear: [the amendments] cure none of the constitutional diseases that afflicted the former regime; they are in consequence as fulsomely violative of the most basic norms of Rule of Law governance—namely, rule governance, transparency, and the separation of powers—as was the regime they amend; they too render the act of judicial appointment an act of Executive tyranny, of unbridled power plain and simple; and every bit as much as did the former protocol, they too taint root and limb the constitutional legitimacy and moral standing of the judicial branch.¹⁰²

The thin veneer of objectivity possessed by JACs, and *ad hoc* bodies like them, is perhaps most notable as it relates to the highly publicized attempt to appoint Justice Marc Nadon to one of the seats reserved for Quebec on the Supreme Court of Canada.

Justice Nadon was a well-known conservative judge of the Federal Court of Canada.¹⁰³ An *ad hoc* committee of primarily conservative Members of Parliament recommended him among six other Supreme Court appointees to the Prime Minister. Four of those six, including Justice Nadon, were Federal Court judges and as such, were ineligible for the job.¹⁰⁴ Reporters have speculated that the high concentration of

¹⁰⁰ *DeCoste* at 122.

¹⁰¹ *Fine Remade*.

¹⁰² *DeCoste* at 122.

¹⁰³ Justice Nadon gained the attention of the ruling government when he was the only judge out of 12 who found the executive acted blamelessly in their handling of Guantanamo bay detainee Omar Khadr. See Sean Fine, "The secret short list that provoked the rift between Chief Justice and PMO" *The Globe and Mail* (23 May 2014) online: <<http://www.theglobeandmail.com/news/politics/the-secret-short-list-that-caused-a-rift-between-chief-justice-and-pmo/article18823392/?page=all>> [*Fine Short List*].

¹⁰⁴ *Fine Remade*.

federal court nominees demonstrated the government's desire to find a level of conservatism that they could not locate within the Quebec bar.¹⁰⁵

Ultimately, the Supreme Court of Canada ruled that Justice Nadon's appointment was constitutionally impermissible. This sparked an unprecedented public spat between the then-Prime Minister and the Chief Justice of the Supreme Court, in which the executive appeared to solicit public outrage by attempting to undermine or otherwise de-legitimize the Court.¹⁰⁶ After this dismissal, the Prime Minister selected another appointee without any public or parliamentary consultation whatsoever.

The entire Nadon affair—from selection, appointment, refutation, and retaliation—was a direct affront to Canadian separation of powers and the rule of law. The appointment process had been intentionally orchestrated such that a constitutionally ineligible member would be the most likely appointee. The Supreme Court's acknowledgment of this limit was met with a public invitation to denounce and de-legitimize our judiciary in fulfilling their core competency—interpreting the Constitution.

The judicial appointment process, as structured, is inherently problematic when seeking to preserve the separation of powers. Maintenance of this boundary requires an objective and dispassionate appointment process. The executive is granted unbridled power and authority over this process. It has demonstrated not only an unwillingness to be bounded by restraint, but an active effort to manipulate the system to select appointees for political gain. The escalation demands condemnation and reform¹⁰⁷ to preserve the independence of our judiciary.¹⁰⁸

¹⁰⁵ *Fine Short List*.

¹⁰⁶ Karina Roman, "Stephen Harper weighs in on spat with Chief Justice Beverley McLachlin" *CBC News* (2 May, 2014) online: <<http://www.cbc.ca/news/politics/stephen-harper-weighs-in-on-spat-with-chief-justice-beverley-mclachlin-1.2629853>>; Tonda MacCharles, "Stephen Harper urged to apologize for spat with Chief Justice Beverley McLachlin" *Toronto Star* (25 July 2014) online: <http://www.thestar.com/news/canada/2014/07/25/chief_justice_cleared_in_spat_with_stephen_harper_government.html>.

¹⁰⁷ It is not clear how the reform should be enacted. Perhaps the reaction to Mr. Nadon's appointment indicates that the current system is working.

ii. Politicization of Administrative Tribunals

As outlined in Part Two, administrative tribunals are essential to Canada's functioning. Administrative tribunals engage all three heads of power. They form part of the executive branch, the legislature defines the scope of their authority, and the judiciary ensures they adhere to the rule of law. This delicate balance is aimed at preserving Canada's constitutional order and meant to be respectful of the separation of powers.

This balance is especially important given the increasing prevalence and scope not only of the tribunals themselves, but their rule-making power. Increasingly, the "colouring and detailing"¹⁰⁹ of law is being delegated from the legislature to administrative boards. Laws empower those boards to make rules and regulations governing their own operation. This tendency appears "to be a part of a trend towards centralization of power within the executive branch."¹¹⁰ While longstanding and constitutionally permissible, it must be watched closely as it "is arguably a form of transfer of legislative authority to the executive branch".¹¹¹

Given the complex balancing act performed by administrative bodies, problems develop when administrative tribunals are viewed as political tools rather than mechanisms to fairly adjudicate disputes. In this regard, various experts are concerned that the federal government has been increasingly politicizing the public service, and in particular, our administrative tribunal appointees.¹¹² It has been argued that our administrative system has become functionally dependent on its support for the

¹⁰⁸ FC DeCoste, "Political Corruption, Judicial Selection and the Rule of Law" (2001) 38 Alta L Rev 654 [*Political Corruption*].

¹⁰⁹ *Watson I* at 704.

¹¹⁰ *Watson I* at 705.

¹¹¹ *Watson I* at 705, FN 44.

¹¹² Peter Aucion, Herman Bakvis, & Mark D Jarvis, "Constraining Executive Power in an Era of New Political Governance", in James Bickerton and B. Guy Peters eds, *Governing: Essays in Honour of Donald J. Savoie* (Montreal: McGill-Queen's University Press, 2013) at 32.

executive's agenda, and that decision-makers on tribunals are vulnerable because they desire reappointment to comply with executive directions.¹¹³

Unfortunately, this view is not without evidentiary support.¹¹⁴ It is not unusual to see changing governments refuse to reinstall experienced administrative board members, and replace them with political friends.¹¹⁵ For example, the 2006 change in government saw a drastic decline in (primarily Liberal) reappointments to the IRBC. This resulted in an exploding board vacancy rate and significant backlog as the newly elected Conservative government sought to stock the IRBC with adjudicators friendly to their stance. Not surprisingly, decisions more favourable to the ruling government's view increased after the reappointments were complete.¹¹⁶

Administrative tribunals have long occupied a unique, and at times uncomfortable, in our "branched" governmental system. Because of their increasing presence, scope, and authority, the appointment of adjudicators to administrative tribunals requires increased scrutiny and restraint. Outwardly, political appointments not only delegitimize these bodies, they raise foundational questions about how Canada operates as a modern democracy.

Concluding Thoughts

The tyranny of a prince in an oligarchy is not so dangerous to the public welfare as the apathy of a citizen in a democracy.
-Baron de Montesquieu¹¹⁷

The discussion above has examined several aspects of the state of Canadian democracy today. It has sought to highlight how the Canadian system of government is weighted heavily in favour of executive power, and as a result, requires a robust and independent judiciary to check that power. It explained how the *Charter* reinforced

¹¹³ *Ellis* at 37-40.

¹¹⁴ As discussed in *Ellis* at 64.

¹¹⁵ *Ellis* at 37-39.

¹¹⁶ *Ellis* at 64-66.

¹¹⁷ Harry Kawilarang, *Quotations on Terrorism* (Victoria: Trafford, 2004) at 303.

this robust judiciary, and how this shift impacted the executive and legislative branches of power. Most importantly, this paper has sought to explain how concepts fundamental to democracy—the rule of law and the separation of powers—are coming under threat as a result of a post-*Charter* movement to increasingly centralize power in our executive branch of government.

This concluding section hopes to communicate why readers should care about this trend. After all, Canada is a stable and orderly country. The rule of law will not crumble tomorrow if a judicial appointment is made on political grounds. Canada will not descend into chaos if a suspected terrorist is deported without judicial oversight of the process.

However, we cannot allow our comfort with and stability of this system mask its invulnerability. Our system is an enviable one, but it is not infallible. It was made by men and women, and can be equally unmade as much through inattention as intent. The rule of law is a concept that requires constant safeguarding, less it suffers the death of a thousand cuts. As put by John Watson:

The...greatest danger to the rule of law, once established in a place like Canada, arises from the comfort level it bestows. When things are going generally okay, we start to pay less attention to governance topics. This can lead to a lack of awareness as to what the rule of law means, how it works, and worse, *to apathy about the need to actively protect it*. We do not need to be paranoid about government. But we do need to be sensitive to government actions that weaken the institutional braces and bonds of the rule of law in Canadian society.¹¹⁸

In other words, complacency and comfort breed lethargy and decay. Many Canadians may not care that suspected terrorists are given only a truncated version of our justice system. But it is this attitude that threatens the rule of law more than any executive action. What seems today to be a minimal intrusion into the rule of law may, in hindsight, have been the canary signalling a deterioration of this sacred principle in our beloved mineshaft.

¹¹⁸ *Watson I* at 693.

The executive branch of power is not an evil entity from which our judges must rescue the people. Neither, however, are the “seats of power...occupied by angels.”¹¹⁹ By its very nature, when the rule of law is functioning properly it is a thorn in the side of the executive. The executive will naturally seek to avoid judicial scrutiny, while the judiciary will always seek to establish a legal grasp and limit on executive action. Given the importance of a check on power, we must be diligent to ensure that the judiciary is able to establish that grasp to protect the rule of law.

Canadians have been fortunate enough to inherit the rule of law “as a gift from our ancestors”.¹²⁰ This inheritance has given us the ability to defend intrusions into our foundational principles. We do this through demanding respect for the rule of law, and holding our elected representatives accountable for incursions upon the separation of powers. Out of reverence for our roots, and out of hope for a stable and thriving future, we owe it to our country to “pass on to our descendants a rule of law that reflects and protects all of the positive values that our maturing civilization has come to realize.”¹²¹

¹¹⁹ *Watson I* at 694.

¹²⁰ *Watson I* at 696.

¹²¹ *Watson I* at 696.

BIBLIOGRAPHY

LEGISLATION

Abolition of Early Parole Act, RSC 2011, c 11.

Canada Evidence Act, RSC 1985, c C-5.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3.

Immigration and Refugee Protection Act, RSC 2001, c 27.

JURISPRUDENCE

Canada v Kandola, 2014 FCA 85.

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44.

Canada (Attorney General) v Whaling, [2014] 1 SCR 392.

Canada (Citizenship and Immigration) v Harkat, 2014 SCC 37.

Citizens Ins. Co. v Parsons (1880), 4 SCR 215 (SCC), affirmed (1881), 7 AC 96 (PC).

Dunsmuir v New Brunswick, 2008 SCC 9.

Ocean Port Hotels Ltd v BC, [2001] 2 SCR 781.

Ontario v Criminal Lawyers' Association of Ontario, 2013 SCC 43.

Pembina Institute v Alberta (Environment and Sustainable Resources Development),
2013 ABQB 567.

R v Ahmad, 2011 SCC 6.

R v Carvery, [2014] 1 SCR 605.

R v Ferguson, [2008] 1 SCR 96.

R v Nadli, 2014 NWTSC 47.

R v Nur, [2015] 1 SCR 773.

R v Safarzadeh-Markhali, 2014 ONCA 627.

R v Summers, [2014] 1 SCR 575.

Re X, 2015 CanLII 66230 (CA IRB).

Reference re: Manitoba Language Rights, [1985] 1 SCR 721.

Reference re Secession of Quebec, [1998] 2 SCR 717.

Roncarelli v Duplessis, [1959] SCR 121.

Wells v Newfoundland, [1999] 3 SCR 199.

SECONDARY MATERIAL: ARTICLES

Aucion, Peter, Bakvis, Herman, & Jarvis, Mark D, “Constraining Executive Power in an Era of New Political Governance”, in James Bickerton and B. Guy Peters eds, *Governing: Essays in Honour of Donald J. Savoie* Montreal: McGill-Queen's University Press, 2013.

DeCoste, FC, “Howling at Harper” (2008) 58 UNBLJ 121.

DeCoste, FC, “Political Corruption, Judicial Selection and the Rule of Law” (2001) 38 Alta L Rev 654.

Dyzenhaus, David, “The Justice of the Common Law: Judges, Democracy and the Limit of the Rule of Law 21” in Cheryl Saunders and Katherine De Roy eds, *The Rule of Law* Annandale: Federated Press, 2003.

Hogg, Peter & Bushell, Allison, “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)” (1997) 35:1 Osgoode Hall LJ.

Hogg, Peter Hogg & Zwibel, Cara, “Rule of Law in the Supreme Court of Canada” (2005) 55 U Toronto LJ 715.

MacKay, Wayne, “The Legislature, the Executive and the Courts: The Delicate Balance of Powers or Who is Running this Country Anyway?” (2001) 27 Dalhousie LJ 37.

McLachlin, The Right Honourable Chief Justice Beverley, "Professional Independence and the Rule of Law" (2007) 23 Windsor Rev. Legal & Soc Issues 3.

Mendes, Conrado, "Is It All About the Last Word?" (2009) 3 Legisprudence 69.

Richard, The Honourable Chief Justice John D, "Separation of Powers: The Canadian Experience" (2009) 47 Duq L Rev 731.

Sossin, Lorne, "The Ambivalence of Executive Power in Canada" 52 in Paul Craig & Adam Tomkins eds, *The Executive and Public Law: Power and Accountability in Comparative Perspective* New York: Oxford University Press, 2006.

Watson, Jack, "You Don't know What You've Got 'Til It's Gone: The Rule of Law in Canada – Part I" (2014) 52 Alta L Rev 689

Watson, Jack, "You Don't know What You've Got 'Til It's Gone: The Rule of Law in Canada –Part II" (2015) 52 Alta L Rev 949.

Ziegel, Jacob S., "Appointments to the Supreme Court of Canada" (1994) 5 Constitutional Forum 10.

SECONDARY MATERIALS: BOOKS

Blake, Sara, *Administrative Law in Canada*, 5th ed, Toronto: Lexis Nexis, 2011.

Cohler, Anne M et al, eds, *Montesquieu: The Spirit of the Laws* Cambridge: Cambridge University Press, 1989.

Critcher Lyons, Renee, *Teaching Civics in the Library: An Instructional and Historical Guide for School and Public Librarians* Jefferson: Mcfarland & Co Inc Pub, 2015.

Ellis, Ron, *Unjust By Design: Canada's Administrative Justice System* Vancouver: UBC Press, 2013.

Forcese, Craig & Roach, Kent, *False Security: The Radicalization of Canadian Anti-terrorism* Toronto: Irwin Law, 2015.

Kawilarang, Harry, *Quotations on Terrorism* Victoria: Trafford, 2004.

Morton, FL & Knopff, Rainier, *The Charter Revolution and the Court Party* Toronto: University of Toronto Press, 2000.

Roach, Kent, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*
Toronto: Irwin Law Inc, 2001.

Stromseth, Jane E., Rosa Brooks & David Wippman, *Can Might Make Rights? Building the Rule of Law After Military Interventions* Cambridge, U.K.: Cambridge University Press 2006.

SECONDARY MATERIALS: MAGAZINES

Rieksts, Mark, "Parliamentary Democracy 101" *LawNow Magazine*, 34:2 (1 November 2009) online: < <http://www.lawnow.org/parliamentary-democracy-101/>>.

SECONDARY MATERIALS: NEWSPAPERS

Bronskill, Jim, "Justin Trudeau's promised overhaul of C-51 tops incoming security to-do list" *CBC News* (3 November 2015) online:
<<http://www.cbc.ca/news/politics/liberal-transition-security-rethink-1.3301260>>.

Canadian Press, The, "Jahanzeb Malik, man accused of Toronto bomb plot, decides to stop testifying" *CBC News* (12 May 2015) online:
<<http://www.cbc.ca/news/canada/toronto/jahanzeb-malik-man-accused-of-toronto-bomb-plot-decides-to-stop-testifying-1.3071389>>.

Canadian Press, The, "Move to deport Jahanzeb Malik is 'absurd,' lawyer says" *CBC News* (12 March 2015) online: <<http://www.cbc.ca/news/canada/toronto/move-to-deport-jahanzeb-malik-is-absurd-lawyer-says-1.2993181>>.

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

Fine, Sean, "Stephen Harper's courts: How the judiciary has been remade", *The Globe and Mail* (24 July 2015) online: <
<http://www.theglobeandmail.com/news/politics/stephen-harpers-courts-how-the-judiciary-has-been-remade/article25661306/>>.

Gallant, Jacques, "Suspected terrorist asked him how to make explosives, officer testifies" *Toronto Star* (20 May 2015) online:
<<http://www.thestar.com/news/crime/2015/05/20/suspected-terrorist-said-he-could-make-a-bomb-officer-tells-hearing.html>>.

MacCharles, Tonda, "Stephen Harper urged to apologize for spat with Chief Justice Beverley McLachlin" *Toronto Star* (25 July 2014) online: <
http://www.thestar.com/news/canada/2014/07/25/chief_justice_cleared_in_spat_with_stephen_harper_government.html>.

Perkel, Colin, "Jahanzeb Malik ordered out of Canada" *CBC News*, (5 June 2015) online: <
<http://www.cbc.ca/news/canada/toronto/jahanzeb-malik-ordered-out-of-canada-1.3102070>>.

Roman, Karina, "Stephen Harper weighs in on spat with Chief Justice Beverley McLachlin" *CBC News* (2 May, 2014) online: <
<http://www.cbc.ca/news/politics/stephen-harper-weighs-in-on-spat-with-chief-justice-beverley-mclachlin-1.2629853>>.

SECONDARY MATERIALS: ONLINE SOURCES

Casey, John, "R v Nur: The Battle of Two Approaches to Challenging a Mandatory Minimum Sentence Under s. 52 of the Constitution Act, 1982" (16 April 2015) online: <
<http://www.thecourt.ca/2015/04/16/r-v-nur-the-battle-of-two-approaches-to-challenging-a-mandatory-minimum-sentence-under-s-52-of-the-constitution-act-1982/>>.

Koshan, Jennifer, "Peter Lougheed and the Constitution, Notwithstanding" (24 September 2012), ABlawg, online: <
<http://ablawg.ca/2012/09/24/peter-lougheed-and-the-constitution-notwithstanding/>>.

Laycock, David, "Understanding the impact of executive dominance on political parties: lessons from the Canadian Case", (International Political Science Association Joint panel RC08/RC03, Montreal, 23 July 2014) online: <
http://paperroom.ipsa.org/papers/paper_31695.pdf>.

Magnet, Joseph E., "Constitutional Law of Canada" (2013) online: <
http://www.constitutional-law.net/index.php?option=com_content&view=article&id=24&Itemid=38>.

R v Nur: The Battle of Two Approaches to Challenging a Mandatory Minimum Sentence Under s. 52 of the Constitution Act, 1982" (16 April 2015) online: <
<http://www.thecourt.ca/2015/04/16/r-v-nur-the-battle-of-two-approaches-to-challenging-a-mandatory-minimum-sentence-under-s-52-of-the-constitution-act-1982/>>.

Speech before the Chamber of Commerce, Elmira, New York (3 May 1907); published in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908), p. 13 online: < https://en.wikiquote.org/wiki/Charles_Evans_Hughes>.