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ASSOCIATION OF JUSTICE COUNSEL
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Press Clippings for the period of April 7 to 13th, 2015
Revue de presse pour la période du 7 au 13 avril, 2015

Here are articles and opinion pieces that might be of interest to AJC members
Voici quelques articles et textes d'opinion qui pourraient intéresser les membres de l'AJJ

The AJC in the News – L'AJJ fait les manchettes

Should prosecutors be able to run for political office?

By Yamri Taddese, Law Times, Monday, April 13th

An Ottawa federal prosecutor is seeking judicial review of a Public Service Commission decision that bars her from running for political office.

Emilie Taman now has the support of the Association of Justice Counsel in her challenge of the decision. It cited the need for impartiality in precluding her from running in the upcoming federal election. Sources say Taman is seeking the NDP nomination in Ottawa-Vanier.

Association president Len MacKay says the union's concern is the commission's decision could set a precedent for a blanket ban on prosecutors who want to seek leaves of absence to pursue politics.

"We have taken up this application on her behalf to help protect her individual rights and freedoms, but of great concern to us as well is what precedent might be set by the process that was followed in Ms. Taman's case," says MacKay.

"In particular, it would appear that senior management strongly recommended that the prosecutor not be granted leave to run for office because of the impact on her impartiality."

MacKay says Taman's managers argued there was no way to protect the perception of Taman's impartiality given her position and job description.

According to the association, the government could use the same reasons to deny any federal prosecutor the ability to run for office. The perception of impartiality is "a perfectly valid concept," says MacKay.

"The problem we have, though, is if you look at the [commission's] decision and the way they described the applicant's duties, that description applies to virtually every prosecutor in the county, both provincial and federal," he says.

The concern, then, is the bigger picture, he adds.

"Our concern is that this would amount to a blanket prohibition on at least federal prosecutors. We see it as a bigger battle as well."

In her application for judicial review, Taman, a daughter of former Supreme Court of Canada justice Louise Arbour, is seeking to set aside the commission's decision and a declaration that it violates the Constitution.

The commission "based its decision without regard for the material before it, by rendering a decision without regard to the specific duties performed by the applicant; instead, the [commission] based its decision on broad principles of prosecutorial discretion and the mandate of the entire office of the director of public prosecutions," the application says.

When reached via e-mail, Taman declined to comment on the matter.

MacKay says Taman's job is to handle prosecutions and notes her duties are "relatively routine." However, there are cases where it would be legitimate to deny a federal prosecutor leave to run for office, he says.

"I could probably put together a particular prosecutor job description where we would be reluctant to perhaps take this battle on," adds MacKay, noting that would include "politically sensitive" jobs that involved dealing almost entirely with the Elections Act or the Lobbying Act.

In 2004, another public prosecutor, Maureen Harquail, challenged a decision by the commission denying her leave to seek a nomination in that year's federal election. By the time Federal Court had dealt with the matter, however, the election had come and gone and the application was moot. Still, the court found problems with how the commission had arrived at its decision.

The commission ended up granting Harquail leave to run in the subsequent election and she's again running as a Conservative candidate in Don Valley East in this fall's federal vote.

"It's a shame that 10 years later, we're going through the same kind of arguments," says Harquail, who's now general counsel at the Ontario Racing Commission.

“Frankly, that was one of the main reasons why I left the Department of Justice. I didn’t want to go through this kind of battle every time I wanted to seek a nomination. I’ve been able to pursue a political life working with the Ontario government and it’s been a much easier process,” she adds.

Harquail says she understands the concept of impartiality but feels that principle should apply to people holding more senior roles within the public prosecutor’s office instead of stopping “line prosecutors” from putting their names on the ballot.

“I’m very passionate about the ability of a public servant to seek office and to serve the public in another way,” she says. “To limit someone’s ability to put their name on a ballot, I mean that’s what our country is made of. It’s democracy and to not be able to put your name on a ballot, that’s a big problem for me.”

Harquail says her duties in 2005, when the commission granted her leave to seek office, were the same as the work she was doing when it found otherwise a year earlier. Asked if she thinks her Federal Court challenge of the first decision influenced the second outcome, she says, “Who knows?”

In 1997, current Justice Minister Peter MacKay ran into the same hurdle when he sought leave from his job as a Crown to pursue a Progressive Conservative nomination in Halifax.

After a rejection by the prosecution services in Halifax and his subsequent challenge of that decision, the matter concluded in a settlement that permitted MacKay’s political pursuit and promised a review of the statute.

Len MacKay, then a provincial prosecutor in Halifax, was part of the committee that reviewed the legislation and made a recommendation that would effectively grant prosecutors the right to run for office if they seek a leave of absence.

OTTAWA CITIZEN

Treasury Board won't squeeze health workers on strike action

Kathryn May, Ottawa Citizen, April 12, 2015

Treasury Board has backed down on a decision that would have forced federal doctors, nurses and other medical professionals working in the public service to go on strike in the event of a breakdown in contract talks.

The Professional Institute of the Public Service of Canada (PIPSC), which represents 3,400 health professionals across the country, returns to the bargaining table this week with Treasury Board's agreement that it will allow these workers access to arbitration if needed, rather than pushing them into striking against their will.

Most of these employees work for Health Canada, the Public Health Agency of Canada, Correctional Services Canada and the Department of National Defence in areas of public health, or provide care for inmates, veterans and northern communities.

PIPSC president Debi Daviau said she believes Treasury Board reversed its position because of a recent Supreme Court of Canada decision that changed the landscape for labour rights and collective bargaining in Canada. The ruling also calls into question the constitutionality of the Conservatives' sweeping reforms in Bill C-4 to collective bargaining in the public service.

"We welcome the government's decision to step back from the absurd position in which they had placed public health professionals. It's unfortunate it took a ruling by the Supreme Court to get this result," said Daviau.

"This decision should spell the beginning of the end for this government's wrong-headed labour relations agenda."

In this case, the two sides were at loggerheads over Treasury Board's interpretation of a "transitional" provision in the legislation the Conservatives passed to revamp bargaining in the public service.

PIPSC rejected Treasury Board's position that because of the "transition" rules governing this round of bargaining, these professionals — who are largely considered essential workers and have never been on a picket line — must follow the strike route if contract talks hit a stalemate.

PIPSC argued these workers should have access to arbitration, rather than being pushed into a strike they don't want. Treasury Board finally agreed.

Although Treasury Board changed course for health workers, the government still hasn't indicated whether it intends to amend its Bill C-4 reforms in light of the Supreme Court decision or whether it will continue fighting the constitutional challenge previously filed by the giant Public Service Alliance of Canada (PSAC).

In a recent ruling, the Supreme Court affirmed workers' right to strike when it granted an appeal by the Saskatchewan Federation of Labour of the province's controversial essential services law, which restricted which workers could strike.

The federal Conservatives' own massive changes to collective bargaining in the public service, passed in Bill C-4, are almost identical to the Saskatchewan legislation that the Supreme Court overturned — particularly the provisions dealing with essential services.

Until now, Treasury Board President Tony Clement has said the government is still studying the Saskatchewan decision and has not commented on its impact on the look-alike federal legislation.

"Hopefully, the government will act responsibly and not put unionized employees and taxpayers to the expense of defending principles already well-established by the courts," said Daviau.

The top court said the Saskatchewan law, which gave the government the unilateral right to decide which employees are essential, is unconstitutional. The decision also found that employees can't effectively bargain if there isn't a fair and impartial dispute resolution mechanism — such as arbitration — to help solve negotiating impasses.

Unlike Saskatchewan, the federal law allows unions access to arbitration, but only in cases where 80 per cent of employees have been designated essential. The government also has the "exclusive" right to decide which workers are essential.

Since the ruling, the 17 federal unions have assembled a joint defence fund and hatched a plan on how they will challenge the Conservatives' legislation in light of the Supreme Court ruling, said Isabelle Roy, PIPSC general counsel.

They have agreed to file a formal complaint to the International Labour Organization (ILO) challenging the legality of the Conservatives' carte blanche power to determine which workers are essential. The ILO had previously ruled that workers cannot mount an effective strike when more than half of them are designated essential.

The two big unions, PIPSC and PSAC, are each launching separate but "complementary" lawsuits to challenge the constitutionality of the C-4 reforms, said Roy.

That's because the impact of the reforms varies among unions depending on the type of workers they represent, the work they do and whether they historically opted for arbitration or the strike to resolve past contract disputes.

The showdown between health workers and Treasury Board highlights some of those differences, said Roy.

PIPSC represents professional workers many of whom have never been on a picket line and don't want to strike. In the past, the health workers have largely been essential workers and unable to legally strike so opted for arbitration to resolve labour disputes.

Before C-4, the union could pick whether it wanted access to arbitration or conciliation and strike in the event of an impasse. The government took that away and it now decided who would have access to strike or arbitration.

PSAC generally picked the strike route as its chosen way to resolve disputes. Border guards have always opted for strike but the government will likely designate 80 per cent of them essential and they will have to seek arbitration if talks break down.

With the new rules, however, the arbitrator must consider the government's economic and fiscal policy as the "predominate factor" when proposing settlements.

This is the first round of bargaining with the new legislation and the big issue is sick leave. The Conservative government wants to replace the existing sick leave with a short-term disability plan.

Alberta court strikes down labour laws that take away right to strike

Global news, The Canadian Press, April 2, 2015

EDMONTON — An Alberta court has struck down two provincial labour laws that took away the right to strike for thousands of public sector workers.

Justice Denis Thomas of Court of Queen's Bench ruled that section 96 of the Labour Relations Code and section 70 of the Public Service Employee Relations Act violate the charter.

Thomas gave the government until April 1, 2016 to rewrite the offending sections.

The Alberta Union of Provincial Employees had challenged the sections, and say the ruling is a victory for government workers.

Union lawyer Pat Nugent says the Alberta government did not oppose the judgement.

In January, the Supreme Court of Canada struck down a controversial Saskatchewan law that prevented public-sector employees from striking, saying it was unconstitutional.

The high court also gave the Saskatchewan government one year to change its laws.

"The Saskatchewan ruling brought into question Alberta's legislation, some of which dates back to the 1970s," said Nugent.

Alberta Justice spokesman Dan Laville said the government is aware of the judge's decision.

"Minister (Ric) McIver will be speaking with labour groups as part of the process to address the existing Public Service Employee Relations Act and the Labour Relations Code.

"This work will result in essential services legislation in the future."

Victim surcharge constitutional, appeal judge rules

Andrew Seymour, Ottawa Citizen, April 10, 2015

The federal government's mandatory victim surcharge isn't a "bad law" and must be imposed, an appeal court judge has ruled in the latest battle over the contentious fee intended to help victims of crime.

Ontario Superior Court Justice Bruce Glass of Cobourg ruled this week that the mandatory victim surcharge is a "far cry" from being a grossly disproportionate punishment that violates the charter rights of the destitute offenders who might have to pay it.

Glass found that even the poorest criminals should be able to pay the fee that amounts to 30 per cent of any fine or $100 or $200 per offence — if they are given enough time to pay and either save up slowly or pay it back in small instalments.

"If a person does not choose to set aside money or pay in instalments when given reasonable time to pay, the individual becomes the author of their own misfortune when they come to the end of the period given to pay the surcharge," Glass wrote in his seven-page decision.

Glass's decision overturned the ruling of an Ontario court judge that excused four offenders from paying the surcharge because it was unconstitutional. The judge who made the original ruling found the surcharge was a "broad brush punishment" that violated Charter rights intended to protect life, security and liberty because offenders could face jail if they didn't pay.

One of the offenders is a legally blind recovering alcoholic with mental health issues who is left with $31 a month after her Canada Pension Plan money is put toward her rent.

Another man had $170 per month remaining from his Canada Pension and disability pension to pay for food, clothing, utilities and incidentals after his rent and medication were deducted.

Glass calculated that three of the four offenders who owed $200 in surcharges could save just $1.92 per week if they were given two years to pay their surcharges. The fourth offender, who owed $300, would need to save $2.88 a week, Glass found.

“From that perspective, this is not grossly disproportionate for any of the four defendants in this case before me nor for anyone in general,” wrote Glass.

The decision is the first from Ontario’s Superior Court to deal with the constitutionality of the surcharge itself and is binding case law on judges in the lower Ontario Court of Justice.

However, defence lawyers said it will do little to slow constitutional challenges to the law in Ottawa’s courthouse, which have mainly centred on a different section of the Charter that deals with cruel and unusual punishment.

Several judges in Ottawa who refused to apply the surcharge had, up until recently, relied on a separate decision of Ottawa Judge David Paciocco that found the surcharge to be a “roving punishment” that was cruel and unusual, but had to stop after the Ontario Superior Court ruled the practice improper.

Trevor Brown, president of the Defence Counsel Association of Ottawa, said the new decision makes no mention of Paciocco’s ruling and defence lawyers will continue citing Paciocco’s decision while bringing constitutional challenges to the law under that section of charter.

While Glass didn’t address Paciocco specifically, he did touch on the findings peripherally.

In his decision, Glass agreed with the provincial Crown attorney’s office that the surcharge was a consequence of a crime, much like an order requiring an offender to provide his DNA, and not a punishment.

Legal Aid Ontario lawyers who represented the four accused argued that the victim surcharge was for all intents and purposes a form of punishment akin to a fine. But Glass disagreed with the lawyers that because the surcharge flows from a criminal conviction it is part of an “overall sanction package” for breaking the law.

“It flows from the conviction for a crime, but it is not a sanction in its own right,” he wrote. “Rather, it is quite simply what the Crown has described it to be, which is a sum of money established to be a consequence of breaking the law.”

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Les salaires de milliers de fonctionnaires seront révisés

Michel Corbeil, Le Soleil, le 9 avril 2015

(Québec) Directive mal interprétée... des milliers de fonctionnaires, embauchés depuis mai 2012, touchent peut-être un salaire trop élevé qu'ils devront rembourser. Des milliers d'autres pourraient être sous-payés, ce qui leur vaudrait une compensation.

C'est ce qui ressort d'un rapport de la Commission de la fonction publique (CFP), rendu public, mercredi. Il laisse entendre que les sommes individuelles en jeu sont importantes.

L'analyse suggère que les ministères et les organismes soumis à la Loi sur la fonction publique ont mal interprété une note du Conseil du trésor. Ce sont surtout les «occasionnels» syndiqués qui en feraient les frais.

La règle a été adoptée le 28 mai 2012 et touche «l'attribution de la rémunération des fonctionnaires». Elle vise à reconnaître l'expérience et la scolarité des postulants à des concours de recrutement pour rendre la fonction publique plus compétitive et plus attrayante par rapport aux autres employeurs.

La Commission a fait enquête dans un ministère (Développement durable, Environnement, Faune et Parcs) et deux organisations (Financière agricole et Régie du logement). En analysant 77 dossiers, l'application de la directive a été jugée «incorrecte» dans le tiers des cas.

«Plus de la moitié des erreurs avaient des conséquences financières.» Plus précisément, «neuf employés auraient obtenu des sommes versées en trop pour un total estimé [...] de 42 000 $» : la plus haute somme individuelle, 11 000 $. Par contre, six fonctionnaires ont été privés de près de 30 000 $. Dans un cas, le montant atteint 18 000 $.

Vaste opération

La vérification porte sur des personnes recrutées sur une période de 14 mois, se terminant le 31 mai 2013, dans la première année d'application de la mesure. Les sommes ont continué de grossir, faute de correctifs. La CFP croit qu'il ne s'agit pas de cas isolés. Au contraire.

La Commission recommande au ministère en cause de réévaluer pas moins de 600 dossiers. Or, au cours des mois suivants, de nouvelles vérifications lui ont fait «remarquer les mêmes erreurs» ailleurs dans la fonction publique.

Au Secrétariat du Conseil du trésor, la Commission demande de conduire une vaste opération sur l'application de la directive. En se fiant sur le résultat obtenu dans un ministère de taille moyenne, celui du Développement durable, elle estime que «des milliers de dossiers» seront révisés.

Le président de la Commission, Marc Lacroix, a indiqué au Soleil qu'il refuse «d'extrapoler» que ce soit autant de dossiers problématiques. Par contre, si le ratio d'erreurs constaté devait se maintenir dans les autres organisations de la fonction publique - comme le craint la CFP -, le total sera impressionnant.

«Dans un souci de justice et d'équité», l'organisme de surveillance prie le Secrétariat du Conseil du trésor «de régulariser rapidement» la situation. «Nous sommes au coeur du lien de confiance entre l'employeur et l'employé», a fait valoir Marc Lacroix.

Le rapport mentionne que le Trésor accepte les recommandations, dont la plus importante confirme que de mauvaises ou de bonnes nouvelles attendent les employés mal évalués. Il entend «apporter les correctifs lorsque requis à l'échelon ou au traitement attribué». Cela signifie de «procéder aux ajustements salariaux ou aux récupérations qui en découlent».

Employés partis

L'influent ministre responsable Martin Coiteux a fait savoir qu'il donnera suite à l'analyse qu'il a reçue. Il ne lui est pas possible de confirmer comment cela se fera, combien de fonctionnaires seront touchés et quels sont les montants en salaires mis en cause. «Nous sommes à évaluer l'impact» de la mauvaise interprétation détectée par la CFP, a laissé entendre l'attachée de presse de M. Coiteux.

Comme la période couvre plus de trois ans, certains employés peuvent avoir quitté leur poste, a donné en exemple Marie-Ève Labranche. De plus, il existe des délais de prescription pour engager des recours. Tout se fera «dans le respect des conventions collectives», a assuré la porte-parole.

Des leaders de syndicats ont été convoqués, mercredi matin, à la Commission de la fonction publique pour prendre connaissance du rapport. La directive au coeur du litige a été adoptée pour modifier une ligne de conduite établie en l'an 2000.

Le gouvernement de l'époque avait décrété «qu'aucune scolarité ou expérience acquise de plus que ce qui était établi nécessaire pour l'emploi n'était reconnue». Les réseaux de la santé et de l'éducation ne sont pas soumis à la directive examinée par la CFP. Une soixantaine d'organismes et 25 ministères sont régis par la Loi sur la fonction publique.

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Adam Dodek: How the Senate can fix itself

Adam Dodek, Contribution to The National Post, April 7, 2015

Once again, the Senate is in turmoil. Mike Duffy's trial is set to begin. The media is reporting that at least 40 current or past Senators have run afoul of the Auditor-General's review of their expenses. Given the way the Senate has historically done business, perhaps we should be surprised that the number is not higher. However, the current crisis also presents an opportunity for the Senate's (re)habilitation. It is an opportunity that is too important for the Senate to miss.

Most proposals for Senate reform focus on what others should do to reform the Senate. In all of these reform proposals, the Senate is the object of reform rather than the instigator. Instead, the Senate must initiate reforms to itself.

The Senate must convert itself into a modern and accountable democratic institution. It must drag itself — kicking and screaming if need be — into the 21st century. There are five initiatives that the Senate can do on its own without constitutional amendment to get onto this track.

To begin, the Senate must actually define and enforce the residency requirements for qualifying for appointment to the Senate. Of course, this is but one aspect of the Duffy scandal: Prime Minister Stephen Harper appointed broadcaster Mike Duffy to the Senate to represent Prince Edward Island even though Duffy had not reportedly lived on the island for over 20 years (he lived in Ottawa), although he had a vacation cottage there.

Strangely, the Senate has addressed the issue of residency for purposes of reimbursement of expenses that the Auditor-General is currently reviewing. But it has not done so for eligibility for appointment to the Red Chamber in the first place. It must.

Second, the Senate should move to ban outside employment and the earning of outside income. Senators earn a good salary ($142,400 minimum), enjoy life tenure and a sweet pension. The work does not appear particularly demanding. Many Senators earn a significant amount of income from outside sources. This does not foster public confidence in the Senate but it does create conflict of interest problems and potentials for abuse in expense claims. It should end.

The Senate should prohibit its members from participating in an electoral campaign or engaging in any fundraising activity

Third, if the Senate wants Canadians to take seriously its role as a chamber of sober second thought, it must move to reduce partisanship. Using the Senate for partisan purposes contributes to its legitimacy deficit and undermines the Senate's independence. Justin Trudeau's plan is a good first step but it needs to go further. The Senate should prohibit its members from participating in an electoral campaign or engaging in any fundraising activity.

Senators should be like the Speaker of the House of Commons: Formally partisan but distant from the most overtly partisan activities in order to retain the confidence of all members and of the public.

Fourth, the Senate should make itself the most transparent body in Canadian government — an admittedly low standard. There is a popular perception that the Senate is full of "fat cats" — lazy loyal politicos who continue to pad their personal wealth on the taxpayer's dime while doing little work.

The Senate must move quickly and boldly to open itself to public scrutiny. It should televise and webcast all proceedings. The House of Lords does and so should the Senate of Canada.

Proceedings and information about the Senate should be instantly available and accessible. The Senate fails to grasp the extent to which the public expects that public business will actually be both open and accessible. To members of the Canadian public, accessible means viewable on their smartphone. If Canadians can bank and watch hockey on their smartphones, they should be able to watch their public representatives in action and access information about them, on a new, yet-to-be created "Senate of Canada App."

The Senate should post the attendance records of every Senator on every vote, every debate and every committee meeting on its website. The Senate should also post the whereabouts of Senators on its website which would be accessible on a Senate of Canada app. This app would show that senators are either engaged in Senate business in the Senate (or elsewhere in Ottawa), in Senate-related business outside of the Red Chamber (for which taxpayers are paying their travel) or private business.

The Senate should post all senators' expenses on its website. Currently, the Senate of Canada only posts a single-line item reporting on all expenses reimbursed to senators by quarter. This is insufficient by any comparative standards. The House of Lords publishes far more detailed information.

Finally, it is now clear that the Senate needs independent oversight. It has failed miserably to regulate the conduct of its members. This is a sad conclusion that gives me no joy to make. The Senate is an independent constitutional body but it must surrender some of its autonomy in the name of preserving its independence and fostering public confidence.

The Senate has utterly failed in terms of expenses and financial expenditures. This failure was so acute that it called in the Auditor-General to review every senator's expenditures. This decision reflected not an acute problem but a chronic one. The problem of lack of oversight will not disappear once the Auditor-General completes his job.

The Auditor-General should either be given continuing jurisdiction to review Senate expenditures or such jurisdiction should be transferred to a strengthened Senate Ethics Officer who would be able to hire the necessary staff to conduct such audits.

National Post

Adam Dodek is one of the founders of the University of Ottawa's Public Law Group. This article is based on an address given at the "Time for Boldness on Senate Reform" conference held by the Centre for Constitutional Studies at the University of Alberta on March 13-14.

Government sick days falling on holidays, storms and sports events

Nova Scotia government workers are allotted 18 sick days each year. The average number taken is 12

CBC News Nova Scotia, April 7, 2015

Nova Scotia government employees found themselves under the weather most often during holidays, storms and major sporting events, according to documents the Canadian Taxpayers Federation obtained under freedom of information laws.

The federation tracked the top 15 sick days taken by provincial employees during the 2013-14 fiscal year. The Winter Olympics in Sochi, Russia took place during that time.

CTF Director Kevin Lacey said the third highest sick day during that period was the day Canada played Latvia in the men's quarter final hockey game.

Canada won the game 2-1 and more than 1,200 provincial government workers called in sick that day.

Of the 15 days listed, only three did not have a major storm, holiday or sporting event associated with it.

"That really does show there is a trend to the number of sick days taken by our government workers," Lacey said. "It shows there is a trend to these sick days and they just don't happen just by accident."

Middle of flu season

The minister in charge of the civil service, Labi Kousoulis, points out that February is in the middle of flu season.

"We do know of unfortunate circumstances when people who are not in the best of shape, they get out and do something strenuous like that without a proper warm up," he said. "They can strain muscles or have hospital visits."

NSGEU president Joan Jessome agrees.

"People get sick. We're an aging population with higher than average illness," she said. "We've got family commitments, kids, weather issues, all kinds of reasons why people are out sick."

"Mental health in the workplace is the number one issue for people missing time. We should probably be looking first at the reasons why people are out versus taking a benefit away from them."

Nova Scotia government workers are allotted 18 sick days each year. The average number taken is 12, compared to eight sick days a year in the private sector, according to Lacey.

Four of the top 15 sick days happened during the Christmas and New Year holidays. August was also a big month for sick days.

Lacey says storm days were popular sick days, but explains it may have more to do with how the collective agreement is written.

Under the contract, government workers don't have to go to work if it is not safe to do so, but that time has to be made up.

Lacey says he thinks many times the day is just being classified as a sick day so the time doesn't have to be made up.

"It's time to get rid of these sick days. If someone outside of government is sick and can't go to work, they don't go," he said.

"We don't have days, it's not counted. Instead, what we should do is look at some of these trends through tracking. If there is an employee who is taking a lot of time off then we should look into why that employee is taking that time off and why on certain days."

Lacey calls on the province to dig deeper into the numbers and deal with an antiquated system.

Labi admits there may be some abuse of the system.

"I would say if you wanted to find abuse of sick days in any organization, you could find it," he said.

Jessome was critical of Lacey's call to do away with sick days.

"That's all he talks about is take it away, take it away, never tries to improve people's lives," she said.

Top 15 sick days

- March 27, 2014 (Day after major snow storm)
- January 23, 2014 (Day after major snow storm)
- February 19, 2014 (Olympic hockey: Canada vs. Latvia, 1 p.m. game)
- March 13, 2014 (Freezing rain storm /school March break)
- January 3, 2014 (First Friday after New Year's holiday)
- February 6, 2014 (Major storm late on February 5, 2014)
- December 27, 2013 (Christmas holidays, Boxing Day sales)
- March 5, 2014
- January 2, 2014 (Day after New Year's holiday)
- March 11, 2014 (School March break)
- December 30, 2014 (Christmas holidays)
- March 4, 2014
- February 20, 2014 (Olympic hockey: Canada vs. USA Women's Gold Medal)
- February 14, 2014 (Olympic hockey: Canada vs. Austria, 1 p.m. game)
- March 3, 2014

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Duffy diary: Peter MacKay claims set up in chopper-fishing flap

Paul McLeod, Halifax Chronicle-Herald, April 8, 2015

Peter MacKay believed he was set up by a former senior Conservative staffer who leaked an embarrassing story about MacKay taking a search and rescue chopper from a fishing vacation, according to evidence entered in the trial of Senator Mike Duffy.

According to Duffy's personal journal, senators were enraged at the story and MacKay privately claimed he was burned by Dimitri Soudas, former director of communications for Prime Minister Stephen Harper.

MacKay, then-Minister of Defence was hounded for months in the fall of 2011 by media reports he was picked up from a private fishing lodge in Newfoundland and Labrador so that he could make his flight at the Gander airport.

MacKay told reporters he was observing a search and rescue demonstration. But documents obtained by media outlets showed the search referred to the flight being done "under the guise" of a search and rescue exercise.

According to Mike Duffy's journal, MacKay later confided in the senator that he believed he was set up by Soudas. The conversation apparently happened at or after a national caucus meeting on May 9, 2012.

"Peter MacKay tells (Mike Duffy), Dimitri Soudas ordered him to fly out of Nfld to do photo op – then leaked the helicopter story to the media," Duffy wrote in his highly detailed daily diary.

In the same calendar entry he mentions that Harper "doesn't like Conrad Black" and notes the NDP are beginning stalling tactics.

The entry was redacted by a black marker but still clearly legible.

A week earlier on May 1, Duffy notes the helicopter story came up at the Senate Conservative caucus meeting.

"7 or 8 Sens express anger at (the Prime Minister's Office)'s media & comms strategy (Newfoundland Senator) Fabian Manning & others enraged by Peter MacKay's handling of Search and Rescue."

MacKay did fly from Newfoundland to London, Ont., for a press event but it's not clear what authority Soudas would have had to make that order.

Soudas was previously director of communications for the prime minister and would later return to the fold as executive director of Conservative Party of Canada. But during the fall of 2011 Soudas was executive director of communications for the Canadian Olympic Committee.

Soudas would later be forced out of his job running the party when he was alleged to have interfered with a nomination race involving his partner, member of Parliament Eve Adams. Earlier this year Adams left the Conservative caucus to join the Liberals.

Reached Wednesday MacKay's office said they would not comment on evidence of an ongoing trial.

Billable hour morphing into alternative arrangements

By Jennifer Brown, InHouse, Canadian Lawyer, March 30, 2015

It may not be in its final hour, but more and more lawyers are conceding the billable hour is being put in its "proper place" and is in steady decline.

However, its replacement requires equal effort from client and law firm for both to be successful.

"The billable hour isn't dead, but from my perspective it's certainly becoming less of a high-water mark in terms of what clients want," said Mark Crane, a partner at Gowling Lafleur Henderson LLP.

Crane was speaking as part of a Canadian Bar Association webinar last Thursday called, "Alternative Billing Arrangements: Is the billable hour dead?"

Crane added that what clients want is more cost predictability, value, efficiency, risk sharing, and transparency.

"You can feel the trend in the marketplace, it's just a matter of figuring out the right balance. It's clear the menu is growing in terms of the different approaches used," he said.

Crane cited numbers from the 2014 Canadian Lawyer Corporate Counsel Survey that indicated while the billable hour is still the No. 1 choice of in-house counsel, more than half don't see as their first choice. There was a considerable drop to 47.3 per cent, compared to 55.2 per cent the prior year, in terms of those who indicated the billable hour was their primary fee arrangement.

Crane discussed a number of alternative fee arrangements including discounted and volume discounts (e.g. 15 per cent on the standard hourly rate, for example, when fees billed exceed $100,000 a year), and blended hourly rates (such as $400/hr blended rate

for all lawyers on a file or $300/hr for associates and $500/hr for partners), as well as fixed and capped fees.

“In terms of where we are in the marketplace, there is a lot of competition and in-house counsel are doing more work in-house. There are alternatives that can be appealing to external counsel and in-house because they have the balance of power in their favour at this stage,” said Crane.

Fixed fees are another option for matters such as a takeover bid when it can be accurately scoped in advance.

For many of the AFA tools to work, they require some prep work and research to be done by both the law firm and in-house counsel.

Also, the challenge for external counsel is to build up their precedent databases and have solid knowledge of the costs of matters, even though they don’t always play out as expected, especially on a file such as a transaction. There is also the move towards using “success fees” for types of legal work that have not traditionally gone that route.

“What you are seeing more of is contingency or success fees. You see it in plaintiff and personal injury litigation but you are also seeing it more generally. It’s more of a challenge for the defendant bar, but we are starting to see success fee arrangements for the defence bar that can be transferred to corporate or transaction side,” said Crane.

Moving to AFAs doesn’t mean law firms have to reduce profit, said Adriana De Marco, a partner with Borden Ladner Gervais LLP.

“We’ve heard about the death of the billable hour for 25 years and it really isn’t dead, but the alternatives are increasing, in part due to the change in the market and internal pressures on clients and increased emphasis on predictability,” she says.

In developing an AFA with a client, De Marco says it is important to accurately scope work.

“It’s a common pitfall that occurs that there wasn’t a mutual understanding of the mandate,” she says. “If you have a wide range of work, it may be that a blended rate makes more sense. It offers a great opportunity to be creative and partner with your client.”

If you have a lack of good historical information it can make developing a pricing arrangement more difficult.

But creating a new fee arrangement should not only be about cutting costs or a race to the bottom. In fact, panelist Tyler Langdon of Cognition LLP stressed it’s not about law firms doing more work for less money.

“If done properly it can have the opposite intent,” said Langdon. “It can increase profitability and increase long-term relationships.”

Langdon emphasized the importance of considering value-based billing in which a portion of the fee is determined subjectively by the client depending on the value they perceive the external firm brought to the matter.

“I think this scares the heck out of a lot of lawyers, but gives you a feedback system and lets you know the client perceives you as giving value,” he said. “The reality is you’re [firms] going to get beat sometimes, but you will start to get it right more often than not.”

Langdon, a former in-house lawyer at McCain Foods for eight years until last July, said firms should want to be known as taking steps forward to alternative fees and process management.

“Be one of those firms people are talking about to help drive your market share and for profitability growth,” he said. “Be proactive. Nobody ever has the time to do this but it’s those who take the time who can leverage it to the max and it becomes mission critical. Start with clients you trust, obsess over value in everything you do and with everyone on your team.”

“To make these alternative fee arrangements successful, there has to be a willingness to look at new ideas such as legal project management and legal process improvement,” said De Marco. “It’s important to have a built-in review mechanism and regular reporting system or meetings to communicate.”

De Marco also recommends evaluating who is the best person to perform the task — senior lawyer, junior lawyer, clerk, or the in-house lawyer/team? She said AFAs offer the opportunity to be “creative about the business of law” and strengthen client relationships and service.

Crane added that it is not just large firms that can make alternative fees work for them.

“There are no barriers — it’s about having a meeting of the minds and adding value to clients and it can be profitable for law firms,” he said. “An AFA doesn’t necessarily mean less revenue.”
