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ASSOCIATION OF JUSTICE COUNSEL
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Press Clippings for the period of April 13th to 20th, 2015
Revue de presse pour la période du 13 au 20 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

Analysis: Federal budget likely to squeeze programs (and public servants) even more

Kathryn May, Ottawa Citizen, April 19, 2015

Canada's public service has come through six years of restraint smaller and with fewer benefits, leaving some bureaucrats wondering — on the eve of Tuesday's federal budget — how much more they can handle before the programs and services they deliver unravel.

Federal departments have been absorbing cuts and operating freezes since 2010. Last year, they faced a $13.9-billion reduction and are swallowing another $500-million cut this year. Over six years, departments have seen $45.8 billion cut from planned spending.

About 26,000 jobs have been cut, and the axe is poised to fall on as many as 8,900 more in the next several years.

Some managers say further operating freezes in Tuesday's budget would be significant blow to "program integrity." That term refers to when operating funds are so squeezed that the ability to deliver programs on time or at the service levels expected is compromised.

They worry the balanced budget legislation that Finance Minister Joe Oliver proposes could have public servants continually managing operating freezes — which means more job cuts as departments scramble to meet wage increases and inflation from existing budgets.

“The balanced budget legislation proposed by the government could well continue a string of budget measures, over the last few years, that puts the onus on the public service to reduce spending through public sector productivity measures,” said Sahir Khan, the former assistant PBO and now a visiting fellow with the Jean-Luc Pépin Research Chair at the University of Ottawa.

The legislation comes as the Conservatives return to surplus after seven years of deficits that added more than $150-billion on to the national debt.

Oliver has explained the legislation will allow governments to run deficits in cases of “extraordinary” events, such as a recession, war or natural disaster that reduces federal revenues by $3 billion. The finance minister would have to explain to a parliamentary committee how the government would return to balance.

Plans to eliminate a deficit would include a freeze on operating spending and a wage freeze for cabinet ministers and deputy ministers.

The impact of cumulative steady cuts is already being felt. The Conservatives’ clashes with veterans over closed offices, for example, are a textbook case of public servants no longer having the capacity to provide programs and services at levels the public expects.

Senior bureaucrats at Veterans Affairs warned for years that the department didn’t have the capacity to handle the needs of veterans leaving the Canadian Forces as its budget and staff declined. Veterans Affairs Minister Erin O’Toole recently announced the department would hire at least 200 employees, half of them case managers to help veterans get the services they need.

The impact of reductions is also surfacing in transportation safety and inspection, Coast Guard stations being closed, lineups at Service Canada offices, and complaints of a shortage of meat inspectors.

Andrew Graham, who teaches public sector financial management at Queen’s University in Kingston, said more across-the-board cuts will “seize up everything” and operating freezes create “the mentality to survive rather than deal with problems.”

He said the Conservatives’ unswerving commitment to balancing the budget is leading to a “scary” deterioration of services, especially critical infrastructure. The government is either “ getting bad advice or getting good advice and ignoring what impact it could have,” he said.

The Conservatives promised in the 2012 restraint budget that the cuts would be “back office” and have no impact on front-line programs and services. But former Parliamentary Budget Officer Kevin Page was stymied in his efforts to get information from departments on the nature of the cuts and impact on service and his successor hasn’t had any more success.

Khan said cutting programs that aren’t working — along with the people and overhead that goes with them — is a more effective way to reduce spending over the long term but

comes with political risks. As a result, governments around the world are resorting to measures like freezing operating budgets and reducing internal services.

But Khan said the plans and results of such measures are often hidden from Parliament and taxpayers. He said finding efficiency savings can be hard to achieve and sustain.

“If the savings are not realized due to poor planning or lack of experience, or both, it could lead to program integrity pressures that show up for citizens and businesses as service-level impacts,” said Khan. “Basically, you can impact a program without a direct cut by leaving a department without adequate operating funds to deliver it.”

Ian Lee, a business professor at Carleton University’s Sprott School of Business, said the government can’t keep relying on prolonged cuts, which suggests it may be getting ready for a “root and branch review” of which programs and services to keep and which could be outsourced. The services provided by Shared Services Canada, the government’s IT arm, could be prime targets for outsourcing.

The big question is whether the budget will take another run at public service pay and benefits.

The $44-billion-a-year wage bill is the single largest operating cost and has been a key piece of the Conservative’s restraint strategy. The government overhauled the rules for collective bargaining, has whacked severance pay, health benefits and pensions, and is now targeting sick leave.

Lee says reforming sick-leave benefits has become such a central issue for Treasury Board President Tony Clement that it has to be highlighted in the budget.

The Conservatives also want to rein in pension costs, which will cause an uproar among public servants. Many, however, say the government will tackle sick leave and disability before it takes on further pension reform, leaving that as a possible election issue.

“I am convinced this budget is unlike any other budget,” said Lee. “It will be the Conservative party’s equivalent of the Liberals Red Book, their campaign platform for the next four years for the economy and the reform of the public service.”

PS union asks court to block new 'invasive' security checks

Kathryn May, Ottawa Citizen, April 19, 2015

The union representing professionals in Canada’s public service is going to court to stop the rollout of a new and “unduly invasive” security clearance process that includes fingerprinting, credit and criminal checks, and a sweeping search of Internet use as the minimum screening for all employees and new hires.

The Professional Institute of the Public Service of Canada is seeking an injunction from the Federal Court of Canada to immediately halt the new security screening system.

The union recently filed a legal challenge alleging the ramped up screening is unconstitutional and violates the Privacy Act and principles of administrative law. But it argues an injunction is needed to stop public servants from the “irreparable harm” of turning over all kinds of personal and sensitive information before that court decision is rendered.

The government gave departments until October 2017 to implement the changes. The new standard coincidentally began days before the killing of a Canadian soldier in Quebec and shooting of sentry Nathan Cirillo at the National War Memorial, which threw the government into a heightened security crisis.

PIPSC, which represents 35,000 scientists and other professionals, has been in uproar over the amount of information the government will be collecting for the “basic reliability status” needed for any public service job. PIPSC argues collection much of that information is unreasonable, unnecessary and unjustified.

The government had the same security screening protocol for 20 years requiring a basic reliability status and an enhanced reliability status. There were also three types of security clearances: confidential, secret and top secret. The “confidential” category is dropped in the new process.

The old policy required fingerprinting and credit and criminal checks, depending on the nature of the work, but they are now blanket requirements for everyone, said Isabelle Roy, PIPSC general counsel. Employees who refuse can be fired.

New security questionnaires and interviews probe employees’ ideology, associations and character. There’s a new “financial assessment” questionnaire for those who need “enhanced” security status.

For the first time, employees who need enhanced reliability status must be screened for their Internet use, such as the websites they visit, social networking sites, videos shared, wikis or blogs. This review will also be done for those needing basic reliability status if something “adverse” is uncovered during initial screening.

The basic reliability status is required for everyone. Those working in security and intelligence, who need frequent and uncontrolled access to law enforcement and criminal intelligence information or offices, need “enhanced reliability status.’

Those with secret and top secret clearance first go through a "enhanced reliability status" screening. Among those with secret clearance are ministers, ministers of state, parliamentary secretaries and their staff.

Secret clearance, along with basic reliability and enhanced reliability status must be updated every 10 years.

Top secret clearances are for those working in classified facilities or IT systems with access to information about a secret plan, policy or project or from another country.

Lie detector tests will now be mandatory for top security clearance. Top secret clearance is renewed every five years.

Unions were not briefed on the implementation and claim Treasury Board has never explained the need for the overhaul.

Along with a criminal check, the basic reliability status also requires a "law enforcement inquiry." This entails gathering information from police databases, convictions under Youth Criminal Justice Act, and any records of peace bonds, restraining orders and mental health incidents — whether they resulted in charges or not.

The enhanced reliability status needed for secret and top secret clearances that used to require criminal checks now need more penetrating "law enforcement record" checks. These will show if employees were suspected of a crime, associated with known criminals, or could be 'induced" into organized crime. PIPSC said the definition of "association" is far too broad, including collegial relationships or going to an event with someone.

Security questionnaires and interviews are new for enhanced reliability status and top-secret clearance. Employees will be questioned about personal finances, drug or alcohol use, whom they associate with, and use of computers and online presence to gain insight into their ideology, associations and character.

There is also a new "financial assessment questionnaire" for enhanced reliability status, but Treasury Board has yet to release the questions it will ask.

On top of all that, public servants are expected to volunteer any change in their finances, such as bankruptcy or new wealth. Those in security and intelligence must keep the employer informed of any legal or personal changes, such as marital status.

PIPSC turned to the courts after its initial grievances over the changes were thrown out. By law, the Public Service Labour Relations and Employment Board can't hear grievance if the measures are "in the interest of the safety or security of Canada."

Roy said the union has already had cases under the old security policy being used to get around the disciplinary or termination process. This could be particularly worrying for a long-term employees not getting along with a boss, who the government feels are out of step with its agenda, because of people they once associated with, a bad debt, or being treated for mental illness years earlier that surfaced under the new process.

“Why does the government want to know what’s on the Twitter account or Facebook page of someone who needs a basic reliability check to be a receptionist or work at an IT help desk?” asked Roy.

The public service hires its employees based on the merit system but abolished “best qualified” to give managers discretion to pick the “best fit” among those who meet the jobs requirement. “All of a sudden a new check finds something and you are not the right fit,” said Roy.

Roy said employee who get caught in such scenarios have little recourse. They can’t file a grievance and would have to take their case to the courts.

All Treasury Board policies are supposed to be assessed to determine if they comply with the Privacy Act. The union is pressing for the assessment of the new process to determine if the Privacy Commissioner raised objections.

Invasive security policies have been subject of much labour litigation in recent years and the results very widely depending on the nature of the work.

L'AFPC craint un «gel»

PAUL GABOURY, Le Droit, le 17 avril 2015

À quelques jours du budget fédéral, qui sera déposé mardi par le ministre des Finances Joe Oliver, l'Alliance de la fonction publique du Canada (AFPC) craint l'imposition d'un autre gel des budgets de fonctionnement des ministères et organismes.

«Avec un gel des budgets de fonctionnement des ministères, et la pratique imposant aux organisations d'assumer les hausses salariales, à chaque fois que nous obtenons, par exemple 3% par année pendant trois ans, c'est comme si on annonçait des coupures de 9% dans chaque ministère. C'est du chantage. C'est comme si on devait négocier avec un fusil sur la tempe», dénonce le vice-président exécutif régional de l'AFPC, Larry Rousseau.

«Pendant les négociations, on se demande qui va manger la claque parmi nos membres si nous demandons une augmentation salariale. C'est vraiment rire du monde» ajoute-t-il.

«Sur le qui-vive»

Même s'il admet que tout le monde est «sur le qui-vive» à la veille de ce budget, M. Rousseau ne croit pas que le gouvernement annoncera d'importantes abolitions de postes

dans la fonction publique autres que celles déjà connues, le gouvernement Harper préférant y aller «à petits coups».

«On dit souvent que l'oiseau fait son nid petit à petit. Mais le gouvernement est en train de le défaire petit à petit. C'est sa manière» souligne le dirigeant syndical. Mais à force de couper l'oxygène, il va finir par tuer le patient.»

Ravignat craint pour la fonction publique

PAUL GABOURY, Le Droit, le 15 avril 2015

Le critique néo-démocrate pour le conseil du Trésor, Mathieu Ravignat, craint que les fonctionnaires fédéraux soient encore ciblés par d'autres mesures de compressions, mardi prochain, dans le budget qui doit permettre au gouvernement Harper d'atteindre l'équilibre budgétaire.

«Ça me surprendrait qu'il y ait de bonnes nouvelles. Comment équilibrer le budget alors qu'on ne connaît pas réellement l'impact qu'aura le prix du pétrole? Ils vont être obligés de couper de l'argent quelque part. J'ai peur que ce soit dans la fonction publique», s'est inquiété hier le député de Pontiac.

Les craintes du député Ravignat sont basées sur le contexte budgétaire actuel et l'idéologie défendue par le gouvernement.

«Je n'ai pas nécessairement de signes spécifiques. Mais si on regarde le contexte et l'idéologie de ce gouvernement, il ne serait pas surprenant de voir des coupures additionnelles. Mais c'est spéculatif», a-t-il admis.

Les conservateurs «doivent» 2,7 millions$

Par ailleurs, le député Ravignat a tourné en dérision la mesure gouvernementale visant à imposer une coupure de salaire de 5% aux ministres fédéraux lorsque l'équilibre budgétaire n'est pas atteint.

La mesure a été annoncée la semaine dernière dans le projet de loi rendant obligatoire l'atteinte de l'équilibre budgétaire, déposé par le ministre des finances, Joe Oliver.

Selon les calculs du NPD, c'est une rondelette somme de 2,7 millions$ que les conservateurs devraient rembourser si la mesure était appliquée rétroactivement à 2006, année de l'arrivée des conservateurs. Le premier ministre devrait à lui seul 100000$, Bev Oda 58000$ et Jim Prentice 35000$. «Nous sommes toujours sceptiques quant à leurs

véritables intentions. Mais prenons les conservateurs au mot. S'ils croient réellement en cette loi, qu'ils l'appliquent à leur bilan fiscal», a indiqué le député Ravignat.

Cette mesure a été mise en doute par tous les experts et par le directeur parlementaire du budget, a mentionné le député Ravignat.

Le premier ministre Harper devrait montrer l'exemple s'il veut que les gens le prennent au sérieux, estime le député du Pontiac. «C'est lui qui a décidé de couper les impôts des grandes entreprises et qui a affiché un déficit record de 56 milliards$ en 2009-2010. Il a une belle occasion de s'excuser de sa mauvaise gestion. M. Harper, vous nous devez près de 100000$», a plaidé le député Ravignat.

Alberta public servants allege political intimidation

Memo orders workers to disclose campaign work, even on their own time

By Charles Rusnell and Kim Trynacity, CBC News Alberta, April 14, 2015

Some public servants say they are effectively barred from participating in political campaigns by a new directive that requires them to disclose any political activity, even on personal time.

Earlier this month, several government departments sent out guidelines to staff about political participation during the provincial election.

One directive, an April 7 memo to Alberta Justice employees, states, "if you are volunteering, even if it is just on your own time, please let your supervisor know."

But the emailed memo from acting deputy minister Kim Armstrong included an attachment which states, "the (deputy minister) must be notified in advance of any political activity by a member of the public service."

One Alberta Justice employee said that directive is new, and goes further than previous election directives. She spoke on the condition of anonymity because she feared being fired.

"There is absolutely no legitimate reason that the government as a whole, or a deputy minister of a department, would need to know if an individual employee is volunteering on a campaign on their own time," the employee said.

"Obviously, if you are volunteering for a campaign and you want to do so during work hours, you need to take a leave of absence or vacation days," she said. "That makes perfect sense, because you shouldn't be campaigning while getting paid your salary.

"But there is absolutely no legitimate reason for them to know if I am volunteering for the (New Democrats), the Wildrose, or whomever.

"The reason that they have done this, I firmly believe, is because they are trying to put a chill on the possibility of any civil servants volunteering for any of the opposition parties."

Campaigning puts job at risk

After receiving the memo, the employee decided not to volunteer for an opposition party during this election.

"It was very clear to me that I would be potentially putting my job at risk if I were to be known to be campaigning for anybody other than the Tories," she said.

Marlin Schmidt, the NDP candidate in Edmonton Goldbar, said as a public servant he routinely received reminders at the beginning of election campaigns outlining the "do's and don'ts."

This time, he noticed the additional requirement of "informing your supervisor.

"That's an entirely new requirement that I haven't seen before," said Schmidt, a government geologist for the past seven years, who is on a leave during the campaign.

"This is a significant limitation to a person's participation in the democratic process that would prevent a lot of people from participating (in a campaign) for fear of retribution."

Code of conduct reminder

A spokesman for the Alberta Public Service Commission said the directive is a reminder to public servants to observe the code of conduct.

Kim Capstick said staff are asked to inform their deputy minister any time they volunteer for an activity, not just a political activity.

"That clause is in place to ensure the public servant is protected from any kind of accusation of misappropriation of information after the fact," Capstick said. "It is just meant for the deputy head to have an awareness and monitor for inappropriate activity, or what could be perceived as inappropriate activity".

Capstick said it doesn't restrict political activity, but instead reflects the code of conduct that encourages volunteering and community engagement.

She said public servants are not required to disclose the party for which they intend to work.

But another long-time Alberta Justice employee pointed out that it would be easy to determine if he is working as a volunteer for the Tory party. And by deduction, it would therefore be equally easy to figure out if he was working for an opposition party.

The employee said he has no intention of complying with the directive.

Schmidt said if he were not running, and received the memo, he would ignore it.

"It is implied here that you are seeking permission for political activity. That is an unfair restriction on somebody's fundamental human rights."

Alberta rescinds order for public servants to report political activity

Conservative Leader Jim Prentice calls directive from senior bureaucrats 'ridiculous and offensive'

By Charles Rusnell and Kim Trynacity, CBC News Alberta, April 14, 2015

The Alberta government has backed away from a controversial directive that required public servants to report political activity during the current provincial election, even if it was on their own time.

Conservative Leader Jim Prentice reacted angrily to a CBC News story published Tuesday morning about the government-wide directive.

"This morning, CBC News brought to our attention an issue involving the participation of public servants in political activities," Prentice posted on Facebook.

"CBC is absolutely correct to raise this concern. This administrative directive is ridiculous and offensive," he said.

"Anyone who works for the Government of Alberta has the right to volunteer on political campaigns on their own time and I encourage them to do so."

As CBC News reported this morning, some public servants complained they had been effectively barred from participating in political campaigns by a new directive that required them to disclose any political activity, even on personal time.

Earlier this month, several government departments sent out guidelines to staff about political participation during the provincial election.

An April 7 memo to Alberta Justice employees stated that if they "were volunteering, even if it is just on your own time, please let your supervisor know."

But the emailed memo from acting deputy minister Kim Armstrong included an attachment, which told public servants "the (deputy minister) must be notified in advance of any political activity by a member of the public service."

Public Service Commission spokeswoman Kim Capstick initially told CBC News the directive didn't restrict political activity, and that it was simply a reminder to public servants to observe the code of conduct "that encourages volunteering and community engagement."

Capstick said public servants were not required to disclose the party for which they intend to work.

But one public servant pointed out it would be easy to determine if he was volunteering for the ruling Conservative party, and by deduction, if he was working for an opposition party. He said he was ignoring the directive.

An Alberta Justice employee told CBC News she decided not to volunteer for an opposition party because she believed it could negatively affect her career, and even her future employment.

On Tuesday morning, Capstick told CBC News the Public Service Commission wished to clarify its position.

She said government employees would only have to notify their deputy minister of volunteer political activity if it:

- caused an actual or apparent conflict of interest;
- was performed in such a way as to appear to be an official act, or to represent a government opinion or policy;
- interfered - through telephone calls, or otherwise - with regular duties or;
- involved the use of government premises, equipment or supplies, unless such use is otherwise authorized.

"If volunteering falls outside these criteria, there is no need for notification," Capstick said, adding that "this will be clarified with deputy ministers to ensure there is no confusion about the intention of the guidelines."

Court strikes 'blunt instrument' law of mandatory sentencing

Sean Fine, The Globe and Mail, April 14, 2015

The Supreme Court has delivered a major blow to the Conservative government's crime agenda, striking down a mandatory minimum sentence for illegal gun possession in a way that suggests other laws could also fall.

The court ruled 6-3 on Tuesday that mandatory minimum jail sentences of three years for illegal gun possession, and five years for possession by people with repeat weapons offences, amount to cruel and unusual punishment, and are unconstitutional.

The majority ruling highlights how deeply at odds the government is with the country's highest court. Adding salt to Ottawa's wounds, Chief Justice Beverley McLachlin wrote the majority ruling. Prime Minister Stephen Harper clashed publicly with Chief Justice McLachlin last year after a series of major decisions went against his government.

In an election campaign this fall, the government is expected to highlight what it is doing to protect public safety, and the ruling could weaken that argument. Since 2006, the Conservatives have created 60 mandatory minimum jail terms for guns, drugs, sex offences and other crimes, according to the justice department, helping to boost the number of federal prisoners to record heights even as crime rates dropped to 50-year lows. Some of those minimum terms could now be challenged and struck down.

The federal Attorney-General argued that mandatory sentences deter crime, and that in less serious gun-possession cases, prosecutors may opt for a proceeding that carries a maximum penalty of only one year in jail. But the majority was vociferous in rejecting that argument, saying that so much discretion in the hands of prosecutors could lead to wrongful convictions as innocent people plead guilty rather than face more serious proceedings, and usurps the role of judges.

"Sentencing is inherently a judicial function," Chief Justice McLachlin wrote.

Justice Minister Peter MacKay said the government is reviewing the ruling, and will continue to be tough on those who commit serious crimes. But the logic the majority used to reach its decision makes other government laws especially vulnerable.

The court used a controversial principle from the early years of the 1982 Charter: the "reasonable hypothetical" case. In the appeals on which the court was ruling, lawyers for two men convicted by lower courts, including a 19-year-old with a clean record, did not argue that the minimum sentences were unfair to their clients. They argued they could be unfair to others.

The principle stems from a 1985 case, R v. Big M Drug Mart Ltd., in which a company was charged for opening on a Sunday. The court accepted the company's argument that the law discriminated against Jews and Seventh-Day Adventists. Then-chief justice Brian Dickson, an appointee of Liberal prime minister Pierre Trudeau, wrote that the nature of the law matters more than the individual case. Two years later, in R v. Smith, the court struck down a mandatory minimum jail term of seven years for importing illegal drugs, arguing that it could also apply to a hypothetical student driving home from the United States with a single joint.

Several provinces intervened in the gun-possession cases to argue for a restricted use of the reasonable-hypothetical case, and British Columbia wanted it scrapped. But the court said it was foreseeable that an otherwise law-abiding gun owner who stored a firearm in a dwelling contrary to the terms of his licence could go to prison for three years. The minority said striking down the 2008 law based on such a hypothetical case lacked common sense; it accepted prosecutorial discretion as a safeguard.

The ruling revealed that judicial activism remains controversial within the court. The minority wrote, under the heading "Respecting Parliament," that gun crime is a grave concern, and "it is not for this Court to frustrate the policy goals of our elected representatives, based on questionable assumptions or loose conjecture." Justice Michael Moldaver, a former Toronto defence lawyer considered the court's leading conservative on crime, wrote for the minority, joined by Justice Marshall Rothstein and Justice Richard Wagner.

Françoise Boivin, the New Democratic Party's justice critic, said the party supports serious sentences for serious gun crimes, but added that Mr. MacKay "needs to explain why there's a clear pattern of this government ramming through obviously flawed bills that just don't stand up."

The ruling sent a message to the government that a U.S.-style approach to criminal justice may not fit with Canadian legal traditions – even when the mandatory jail term is just three years.

"The majority decision is a rejection of American-style access to criminal justice where there's a huge amount of discretion in the hands of the prosecutor," Vancouver lawyer Eric Gottardi, chair of the criminal-justice section of the Canadian Bar Association, which represents 38,000 lawyers, said in an interview.

It is also yet another demonstration of the gulf between the government and the court. "There's a mismatch in the works between some of the government's operating assumptions about how punishment should be delivered in legislation, and some of the core principles of sentencing and punishment that have developed over the years," Osgoode Hall law professor Jamie Cameron said in an interview.

OTTAWA vs. THE COURTS

Canada v. Federation of Law Societies of Canada, Feb. 13, 2015:

- A federal law passed by a Liberal government and expanded by Conservatives in 2006 required lawyers to report certain financial transactions involving their clients.

- Ruling: 9-0 that the law was unconstitutional because it treated lawyers as unwitting agents of the state.

R v. Carter, Feb. 6, 2015:

- A federal law predating the Conservatives made it a crime to help another person die by suicide. The federal government defended the law in court.

- Ruling: 9-0 that the law violated the rights of chronically ill, suffering people to have a say over their "passage into death."

R v. Summers, April 11, 2014:

- Under the Truth in Sentencing Act, the government tried to stop judges from routinely giving extra credit to offenders for the time they serve in custody before sentencing.

- Ruling: 7-0 that judges have discretion under the act to routinely give 1.5 days credit for every day served.

R v. Khela, March 27, 2014:

- A prisoner wanted to challenge his transfer to a maximum-security jail from a medium-security one. The federal government said he had to go through a slow process that involved the Federal Court.

- Ruling: 8-0 that prisoners' ancient right to habeas corpus gives them prompt access to superior courts in whatever province they are in.

R v. Whaling, March 20, 2014:

- The government took away access to early parole from non-violent, first-time federal offenders, including those already sentenced.

- Ruling: 8-0 that the law must not be applied retroactively.

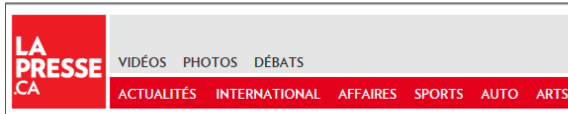
Canada v. Bedford, Dec. 20, 2013:

- Three separate laws banned living off the avails of prostitution, keeping a bawdy house and street soliciting. The laws predated the current government but it defended them in court.

- Ruling: 9-0 that the laws violated sex-workers' rights by endangering their lives.

Canada v. PHS Community Services Society, Sept. 30, 2011:

- The government tried to close a supervised-injection clinic for drug addicts.
- Ruling: 9-0 that the government's stated war on drugs does not justify policy decisions that could contribute to the deaths of addicts.



La Cour suprême invalide des peines minimales obligatoires

Hugo de Granpré, La Presse, le 14 avril 2015

La Cour suprême du Canada a invalidé mardi deux peines minimales obligatoires imposées par le gouvernement Harper en 2008, les jugeant inconstitutionnelles, parfois «draconiennes» et remettant même en question leur efficacité pour dissuader les délinquants de commettre des crimes.

Dans un jugement à six juges contre trois, la Cour a tranché que les peines minimales de trois et cinq ans pour des crimes relatifs à la possession d'une arme à feu pouvaient représenter des peines cruelles et inusitées et contrevenir à la Charte canadienne des droits et libertés.

Il s'agit d'un coup dur pour la réforme de la «loi et l'ordre» entreprise par Stephen Harper. Depuis son arrivée au pouvoir en 2006, plusieurs des projets de loi présentés par son gouvernement prévoyaient de telles peines.

«La preuve empirique indique que, dans les faits, les peines minimales ne sont pas dissuasives», a écrit la juge en chef Beverley McLachlin au nom des six juges majoritaires.

«Cinq ans d'emprisonnement constitueraient une peine draconienne, une peine qui dépasse largement ce qu'[exige] la protection du public», a ajouté la juge McLachlin.

La Cour se penchait sur deux appels dans les causes ontariennes Nur et Charles, qui ont contesté la constitutionnalité des peines minimales de trois (première infraction) et cinq ans (récidive) pour des infractions de possession prohibée ou restreinte, chargée ou avec des munitions à proximité.

Ottawa a modifié l'article en question, l'article 95 du Code criminel du Canada, en 2008 dans le cadre d'un projet de loi omnibus de durcissement de la justice criminelle. La peine minimale contenue à cet article était d'un an depuis 1998.

Hussein Nur et Sidney Charles, qui ont été arrêtés avec des armes prohibées, ont plaidé coupables à l'infraction prévue à l'article 95 du Code criminel, mais ils ont contesté le principe de la peine minimale disant qu'elle était disproportionnée et inconstitutionnelle.

Le juge Moldaver a rédigé les motifs des trois juges dissidents: «L'article 95 représente la solution que le législateur a apportée après mûre réflexion au problème urgent que constituent dans nos collectivités les crimes violents perpétrés avec des armes à feu», a-t-il écrit.

«Je ne vois aucune raison de remettre en question cette mesure législative sur le fondement d'hypothèses qui ne s'appuient ni sur l'expérience ni sur le bon sens.»

Ce n'est pas la première fois que la Cour suprême invalide des pans de la réforme du droit criminel du gouvernement Harper. Il y a un an, elle s'est inscrite en faux contre la Loi sur l'adéquation de la peine et du crime, adoptée par le gouvernement fédéral en 2010. Cette loi abolissait le principe selon lequel le temps passé en détention avant le prononcé de la sentence était compté en double dans le calcul total de la sentence.

Deux semaines plus tôt, la Cour avait maintenu l'inconstitutionnalité de la libération au sixième de la peine, une mesure adoptée dans la foulée de scandales financiers comme celui d'Earl Jones.

Ces dossiers s'ajoutent à d'autres revers du gouvernement Harper devant le plus haut tribunal du pays, dont ceux dans le dossier de la réforme du Sénat et celui de la nomination du juge Marc Nadon.

No empirical evidence

In a split decision, the top court strikes down mandatory minimums for specific firearms offences and leaves some questions unanswered.

By Justin Ling, National, The Canadian Bar Association Website, April 14, 2015

A split decision from the Supreme Court on Tuesday morning heralded bad news for the Conservatives' tough-on-crime agenda, and signals a tough path ahead for Harper's mandatory minimum sentencing regime. Yet, there are also concerns that the Court just struck a needlessly broad precedent.

A decision in R. v. Nur was rendered from the top bench after five months of deliberations.

The case before them was a complex one: two appeals were before them. Neither of the sentences were found to be unconstitutional, but defence counsel nevertheless argued that they could have been, if it were applied in a certain scenario. In other words, the hypothetical impact of the laws in question could have a grossly disproportionate impact on someone in a thoroughly unlucky situation.

The case stems from an Ontario Court of Appeal decision declaring s.95(1) of the Criminal Code — making the possession of a non-licensed restricted or prohibited loaded weapon an offence carrying a mandatory minimum of three years — unconstitutional. But as National reported after that decision, it wasn't that the mandatory minimum was itself the heart of the issue, it was the hybrid nature of the offence.

S.95(1) could have applied to someone failing firearms regulation — namely, that they forgot to re-register a weapon — as much as it could have caught someone in possession of a stolen or smuggled firearm.

To that end, the top court had to struggle with how to treat laws that have never necessarily been applied in an unconstitutional manner, but could under different circumstances.

The Attorney General, arguing the case before the Supreme Court, rejected the exercise entirely, telling the justices that s.95(1) "requires the offender to knowingly possess a loaded, or readily loaded, prohibited or restricted firearm without licence or authorization. It is criminal conduct with a significant risk of harm to public safety."

The Supreme Court didn't see it that way. The majority — LeBel, Abella, Cromwell, Karakatsanis and Gascon, with Chief Justice Beverley McLachlin writing the decision — wrote: "the bottom line is that s. 95(1) foreseeably catches licensing offences that involve little or no moral fault and little or no danger to the public."

As such, they found that the mandatory imprisonment is disproportionate to the possible activities that could be caught under the Code.

The three dissenting judges, with Justice Michael Moldaver taking the pen, found that the hypothetical was too far-fetched to justify striking down the penalty.

"The hypothetical licensing-type cases relied upon by the majority are not grounded in experience or common sense," Moldaver wrote.

He notes that defence counsel was not able to find a single case where such a offence — one where a hapless gun-owner unwittingly contravened the regulations — netted jail time. In the only case on the books, the Crown opted to proceed with a summary conviction.

The minority raised two defences of the law as written: it serves a public policy objective, to reduce gun crime, as intended by Parliament; and it was written to encourage prosecutorial discretion.

“This certainly looks like a pragmatic solution to the problem,” says Michael Plaxton, an associate law professor at the University of Saskatchewan. “But I am far from convinced that it can really be squared with the Court's prior rulings rejecting the use of constitutional exemptions,” referring to a court remedy tailored to a specific situation where a law can be constitutional in most of its applications but occasionally not.

Plaxton says the top court has long been loathe to properly analyze or appeal prosecutorial discretion, as well as its possible abuses, and that leaving that sort of broad power to decide whether a prospective offender is merely guilty of a regulatory infraction or instead of a a Criminal Code offence is perhaps too broad.

“Having said that, the majority opinion does not seriously answer some of the more nagging questions that have surrounded the use of 'reasonable hypotheticals,'” Plaxton adds. He says the court did too little to place parameters on just what constitutes a strenuous or unreasonable hypothetical.

“We know that hypotheticals can't be ‘far-fetched’ but do we know much more than that? We know, now, that the hypothetical offender need not commit the offence in anything like the way in which the actual offender did. We know, now, that the hypothetical does not need to draw exclusively on reported cases. We know, now, that the hypothetical does not need to presuppose some theory of what responsible prosecutorial decision-making would look like. We know that some personal characteristics can be attributed to the hypothetical offender but not others. Which ones?” Plaxton wrote to National.

“I understand the majority's keenness not to obscure the central question by focusing on all manner of seemingly-academic forays into 'what makes a hypothetical reasonable' but I'm not sure we get enough guidance,” he says.

Carissima Mathen, law professor at the University of Ottawa, told National that the decision carves a path for future mandatory minimums to meet a similar fate. She notes that this is the first of its kind to be struck down as unconstitutional, and the changes to how the court deals with standing could mean that it won’t be the last.

“The Court said that the standing rule should be broadly construed so that laws are subject to the fullest possible review, as required by the Constitution’s supremacy clause,” she says.

One of the most important indications that the Supreme Court may opt for similar decisions in the future — especially armed with a newfound understanding that a hypothetical need not ‘likely,’ but simply ‘reasonably foreseeable’, as Mathen notes — is that McLachlin quite flatly states in her decision that “empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes.”

Mathen says that’s critical for the future of the sentencing provisions.

“I think the majority’s statement that there is no empirical evidence establishing a deterrent effect of mandatory minimums on gun crime is very significant and could feature in subsequent cases,” she says.

Plaxton says that's "breathtaking."

"To say, point-blank, that mandatory minimum sentences don't deter crimes is to deliver something of an eye-poke to the Harper administration," he says. "The majority even hints that it was close to finding that there is no pressing and substantial objective — which would be a first."

Minister of Justice Peter MacKay released a statement following the decision, reading: "we are reviewing today's Supreme Court of Canada decision to determine its impacts and the most appropriate next steps towards protecting Canadians from gun crime and ensuring that our laws remain responsive. Our Government will continue to be tough on those who commit serious crimes and endanger our communities."

Quebec town can't have prayers at council meetings, top court rules

Ingrid Peritz, The Globe and Mail, April 15, 2015

The Supreme Court has ruled that a Quebec town must stop reciting a prayer at the start of city council meetings, in a ruling that spells out the limits on faith in the public sphere in Canada.

The court decision comes down against the city of Saguenay, whose mayor, Jean Tremblay, began council meetings with a prayer. The case was sparked after a non-believing citizen complained.

"The recitation of the prayer at the council's meetings was above all else a use by the council of public powers to manifest and profess one religion to the exclusion of all others," the Supreme Court ruling reads. "A neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity, and it helps preserve and promote the multicultural nature of Canadian society."

The judgment ends a nine-year legal saga that became a flashpoint over religion, individual rights and the responsibilities of elected leaders in matters of faith.

Wednesday's ruling will have an impact in dozens of cities and towns across Canada that engage in the practice of reciting a prayer before the start of council meetings.

The court decision was sparked by a complaint from a citizen in the city of Saguenay in 2006. Alain Simoneau said city council, led by Mr. Tremblay, was violating his freedom

of conscience by beginning council meetings with a prayer. Mr. Simoneau, backed by a Quebec pro-secular group, also complained about the presence of a crucifix and a two-foot-high statue of the Sacred Heart in the council chambers.

Mr. Simoneau won his case before a Quebec human-rights tribunal and was awarded $30,000 in damages. The tribunal ruled that the prayer sent a message to atheists and religious minorities that "in the public sphere, there is still a gap between them and the dominant religious culture conveyed by the political authorities."

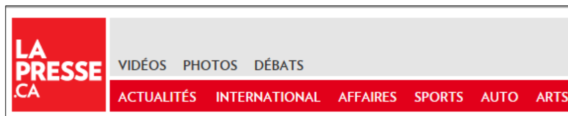
But the case was overturned by the Quebec Court of Appeal and was taken by the pro-secular Mouvement laïque Québécois to the country's top court.

Lucie Jobin, head of the Mouvement laïque, said the Supreme Court ruling would be important because it would set out the limits on the space given over to religion in public institutions. It would have implications at a time of increased immigration and religious diversity. "Secularism is a factor in helping social cohesion," she said in an interview Tuesday.

The case for the Saguenay prayer was championed by Mr. Tremblay, an outspoken and religiously devout figure who said Roman Catholicism was part of Quebec's heritage and should be protected. After losing before the human-rights tribunal, Mr. Tremblay set up a toll-free hotline to collect public funds to support his cause. "When [U.S. President Barack] Obama was sworn in, there was a prayer that lasted almost 15 minutes. No one commented. We recite a 20-second prayer and everyone starts crying."

Meanwhile, his opponent, Mr. Simoneau, left Saguenay after suffering from harassment, Ms. Jobin said. "He found it tough," she said.

Saguenay, a city of 145,000, is 200 kilometres north of Quebec City.



Prière: des villes se plient au jugement

Jean-François Bégin, La Presse, le 16 avril 2015

L'impact de la décision de la Cour suprême d'interdire la prière lors des conseils municipaux à Saguenay se fait déjà sentir un peu partout au Canada: des villes, dont Ottawa, ont annoncé qu'elles suspendaient ou abandonnaient carrément cette pratique jugée inconstitutionnelle par le plus haut tribunal du pays.

La Ville de Saguenay, au coeur de ce feuilleton judiciaire qui durait depuis plus de huit ans, devrait les imiter aujourd'hui, quand le maire Jean Tremblay fera connaître sa

réaction. En entrevue à La Presse, la semaine dernière, M. Tremblay avait indiqué qu'il se plierait au verdict de la Cour.

Le jugement unanime, rédigé par le juge Clément Gascon, conclut que la récitation de la prière au conseil constitue «une utilisation des pouvoirs publics par le conseil dans le but de manifester et de professer une religion à l'exclusion des autres».

Or, ajoute-t-il, «l'État ne peut se livrer sciemment à une profession de foi ou agir de façon à adopter ou favoriser une perspective religieuse au détriment des autres».

Dans les minutes suivant le prononcé du jugement, le maire d'Ottawa, Jim Watson, a annoncé que contrairement à l'habitude, la séance d'hier du conseil ne s'ouvrirait pas par une prière.

«Comme la Cour suprême a déterminé que la récitation d'une prière peut contrevenir au devoir de neutralité d'un gouvernement municipal en matière de croyances religieuses, et comme il faudra prendre le temps d'évaluer correctement ce long jugement, le Conseil municipal ne fera pas de prière ce matin et va réévaluer cette pratique pour s'assurer que la Ville d'Ottawa se conforme au verdict», a- t-il indiqué.

Au Québec, les maires de Lévis et de Louiseville ont fait savoir qu'ils abandonnaient carrément la prière. «C'est clair: dans des endroits publics comme la salle de conseil, c'est la laïcité qui doit s'appliquer, a dit le maire de Lévis, Gilles Lehouillier. Notre décision était déjà pas mal arrêtée. On attendait le moment opportun pour l'annoncer.»

Le Mouvement laïque québécois, à l'origine de la plainte à la Commission des droits de la personne du Québec qui a lancé le débat judiciaire en mars 2007, s'est réjoui de la décision. «Elle va aider à définir les obligations des institutions publiques en matière de neutralité de l'État. On voit bien qu'on ne peut pas tenir des exercices de culte public dans une institution publique», a dit son avocat, Luc Alarie. «Même si, dans un village, une ville ou une commission scolaire, la majorité est d'une religion quelconque - catholique ou autre -, elle ne peut pas imposer à l'ensemble des citoyens un comportement qui aurait une signification religieuse.»

D'un océan à l'autre

Même si elle a été rendue en vertu de la Charte québécoise des droits et libertés, la décision s'appliquera d'un océan à l'autre, indique Sébastien Grammond, professeur de droit constitutionnel à l'Université d'Ottawa. «Les principes sont les mêmes. C'est la Charte canadienne qui va s'appliquer ou, dans certains cas, les chartes provinciales», dit-il.

Malgré sa limpidité, le jugement risque de soulever des questions dans son application, estime le constitutionnaliste. «J'ai déjà reçu un appel de la Colombie-Britannique pour me demander si on peut encore inviter un aîné à faire une prière reliée à la spiritualité autochtone! raconte-t-il. Mais la décision nous donne un cadre clair pour réfléchir à ces questions.»

L'Union des municipalités du Québec et la Fédération québécoise des municipalités (FQM) disent n'avoir aucune donnée précise sur le nombre de villes et villages où la prière fait toujours partie du protocole. Mais une chose est sûre: le cas de Saguenay est loin d'être isolé. «C'est sûr qu'il y en a encore, même si ce n'est pas répertorié. Est-ce 25, 30 ou 40%? Je n'en ai aucune idée. Mais si je me fie aux chiffres qu'on entend, du côté du Saguenay-Lac-Saint-Jean, une vingtaine la font encore» sur 60 municipalités, dit le président de la FQM, Richard Lehoux.

La Canadian Secular Alliance, intervenante au dossier en Cour suprême, estime que la moitié des conseils municipaux ontariens font encore la prière.

Supreme Court Ruling On Prayers At Council Will Impact Whole Nation: Experts

Diana Mehta, Canadian Press, Huffington Post, April 16, 2015

TORONTO - A ruling from the country's top court halting the practice of prayers at municipal council meetings in a Quebec community will likely have rippling effects that reach far beyond that province, observers said Thursday.

In a unanimous judgment, the Supreme Court of Canada said the reading of a Catholic prayer at council meetings in Saguenay, Que., infringes on freedom of conscience and religion.

As a number of municipalities scrambled to analyze the ramifications of the decision, observers predicted the high court's ruling would pave the way for changes throughout the country in due time.

"It is a heck of a decision," said University of Ottawa law professor Gilles Levasseur.

"It means the concept is applicable across Canada."

The court ruling ended an eight-year legal fight that pitted an atheist and a secular-rights organization against the mayor of Saguenay.

Levasseur noted that the consequences of the court decision stretched much further.

"The Supreme Court starts first with explaining the notion of neutrality of the state and then jumps into the specifics," Levasseur explained, adding that it would likely take two to three years for the decision's full impact to be realized.

In time, the decision could also lead provincial school boards and hospital boards to rethink the recitation of any prayers in their operations, Levasseur added.

"It doesn't mean that they cannot express a recital about society, goodness of people and commitment to what we want to do," he said.

A number of municipalities suspended their practice of reciting a prayer before council meetings in wake of the Supreme Court ruling as they reviewed the judgment, while others said they'd do away with recitation of the Lord's Prayer ahead of meetings altogether.

There were some, however, who clearly said they wouldn't put an end to the practice.

The mayor of Oshawa, Ont., east of Toronto, said he still planned to recite the Lord's Prayer before the start of council meetings — a practice that had gone on in the city for as long as he could remember.

Mayor John Henry explained that before proceedings begin, he asks those in the council chamber to join him "in a moment of personal reflection or the Lord's prayer," followed by a singing of O Canada.

"You can choose to say it, not say it, you can participate or not participate, you can reflect on something in your life," he said.

"Canada is one of these countries where you have a number of options — you have freedom of religion or freedom not to practice religion. People from around the world dream of coming to this country to do both."

Henry noted that he hadn't received any complaints about the council's practice so far, but if an Oshawa resident did want to contest the matter, they could do so.

A stance like Henry's, however, could leave a municipality vulnerable to potential legal action, said Cheryl Milne, executive director, of the David Asper Centre for Constitutional Rights at the University of Toronto.

"They do need to take another look at what their practices are," Milne said.

"It's not just that we get to do things the same way we've always done until someone complains. I would expect that our governments have a higher duty to ensure that they're not just adhering to the letter of the law, but that in fact they are putting into place the kinds of policies that are inclusive, and that do separate religion from governing."

Taking out a prayer from routine starts to government proceedings doesn't signal an anti-religious stance, Milne noted.

"It just means you're ensuring you're not discriminating against people of other religions," she said. "Freedom of religion is an individual right, the town council doesn't have freedom of religion."

Law society under fire for dismissing complaints against Ezra Levant

Sean Fine, The Globe and Mail, April 16, 2015

The Alberta Law Society is under fire for its dismissal of complaints against a prominent conservative journalist and non-practising lawyer over remarks he made on a television show and website and in a newspaper column.

Ezra Levant, an author and broadcaster with the now-defunct Sun News Network, faced nine charges of misconduct in October, 2012, after the law society's conduct committee referred those charges for a hearing. But the hearing never happened, and 16 months later Mr. Levant applied to a second conduct committee to dismiss the charges.

Mr. Levant, 43, said in an interview that he has been the subject of many complaints to the law society – "I've lost count, more than a dozen" – and all have been dismissed. "There are a number of complainants who have a political axe to grind and the law society found their complaints have no merit." He said he hasn't practised law in years.

The second committee held a meeting without notifying the two Ontario lawyers who had complained about Mr. Levant, and without the record of evidence that was before the first committee, the Alberta Court of Queen's Bench said in a ruling this month. The committee heard from the law society's counsel and from Mr. Levant's lawyer, Robert Hawkes, each of whom cautioned that some charges might violate Mr. Levant's right to free speech, and that others lacked the evidence to convict.

And when the committee withdrew the charges, it did so with an "unsatisfactory and unclear" explanation, Justice Dawn Pentelechuk said.

The law society's handling of the complaints may have amounted to an abuse of process, she said. "It seems arguable that the process followed … is prone to undermine the integrity of the Law Society's disciplinary proceedings and the public's confidence in its ability to protect the public."

She ordered that a full hearing be held on the issue of whether the Alberta Law Society committed an abuse of process. University of Ottawa law professor Amir Attaran and Ottawa lawyer Richard Warman, who made the complaints against Mr. Levant, had asked for a court to review the law society's handling of their complaints. The law society had asked the court to dismiss that request.

The complaints against Mr. Levant date from as far back as 2010, but were treated as confidential under law society rules and came to light this month in the Alberta court ruling.

The Alberta Law Society's code of conduct requires courtesy from lawyers, whether they are practising law or not. "Lawyers should aspire to the highest standards of behaviour at all times and not just when acting as lawyers," the code says.

But law societies in Canada rarely discipline lawyers for conduct outside of the practice of law, except if a lawyer is convicted of a crime, according to Adam Dodek, who teaches at the University of Ottawa law school. "I am not familiar with any case in the last 20 years where a Law Society has sanctioned a lawyer for actions outside the practice of law."

Alison Taylor, the law society's communications manager, said it is not the society's practice to comment on matters that are in front of a court.

Prof. Attaran said the law society's "coddling" of Mr. Levant reminds him of justice in Third World countries. "You can't have a lawyer on national television hiding in a jurisdiction that refuses to discipline him and attacking lawyers elsewhere and undermining the dignity of this profession."

The nine charges sent by the first conduct committee for a hearing included bringing disrespect to the justice system, failing to maintain a civil level of discourse and harassment.

Judges' 'insurrection' against victim surcharge may be 'ending with a whimper'

Andrew Seymour, Ottawa Citizen, April 17, 2015

An Ottawa judge who struck down the Conservative government's mandatory victim surcharge as cruel and unusual punishment in a landmark decision now says he has no choice but to impose it after a ruling from a higher court.

In a decision that appears will bring an end to the steady stream of constitutional challenges to the contentious law, Ontario Court Justice David Paciocco conceded this week that his decision finding the surcharge to be of no force or effect could no longer stand in the face of an Ontario Superior Court ruling that upheld the mandatory fee intended to help raise funds for victims of crime.

The surcharge amounts to 30 per cent of any fine imposed on an offender or $100 or $200 per offence, depending on whether prosecutors proceed by summary conviction or indictable offence.

Critics of the surcharge have argued that its one-size-fits-all approach discriminates against the poor.

But Ontario Superior Court Justice Bruce Glass ruled last week that the surcharge was neither a punishment nor grossly disproportionate, since offenders can be given time to pay. Those findings were contrary to the conclusions Paciocco reached in the Ottawa case of an impoverished aboriginal offender named Shawn Michael that had, until recently, been relied on by some of Paciocco's fellow judges to avoid imposing the surcharge.

Paciocco said he wouldn't normally follow Glass's decision in the Cobourg case of Edward Tinker and three other offenders, but that he didn't have a choice since Glass's conclusions are binding case law. Unless there is a competing decision from the Ontario Superior Court or Court of Appeal for Ontario that strikes the surcharge down, the mandatory fee must be imposed, Paciocco concluded before handing down $600 in surcharges to an unemployed 19-year-old convicted of armed robbery.

Advocates for the poor said they were highly disappointed with the Tinker decision and the impact it will have on the impecunious.

"They are going to be hit with the full victim surcharge," said Jonathan Rudin, program director of Aboriginal Legal Services in Toronto. "All they can ask for is this sort of illusory time to pay."

The Tinker decision also appears to have brought to an end what the Crown once described as an "insurrection" by judges against the highly divisive law that removed their discretion about when to apply the surcharge.

"It is not ending with a bang, it is ending with a whimper. Or a Tinker, I suppose," said Rudin.

In the early days after the surcharge became mandatory, some judges openly defied the law and flat out refused to impose it. Some found creative ways to avoid imposing the surcharge by granting offenders decades to pay or giving them concurrent jail sentences for refusing to pay. Others sided with the government.

Paciocco said he normally wouldn't be persuaded by the decision upholding the surcharge since it lacked an in-depth analysis of several areas that Paciocco dealt with in his ruling in the Michael case.

Paciocco said the Tinker decision didn't consider the effect the surcharge had on those who are poor versus those who are not.

"Many offenders who appear in these courts are addicted, mentally ill. They are often aboriginal offenders who have often accumulated numerous convictions for minor offences and quickly accumulate victim surcharges in the thousands of dollars," said

Paciocco. “The decision in Tinker does not address the impact that it might have to have a sentence hanging over one’s head indefinitely when an individual is unable to pay.”

The Tinker decision has also wiped out a much anticipated appeal of the Michael decision that was set to start on April 20 in Superior Court. Prosecutors told intervenors in the case last week that they were abandoning the appeal because it was no longer necessary given the Tinker ruling.

The Michael case was expected to be the test case for the surcharge, and intervenors and defence lawyers said it felt like the rug had been pulled out from under them.

Defence lawyers said they are now considering an appeal of Paciocco’s ruling Monday, and anticipate there will be an appeal of Tinker.

“Defence lawyers have not given up the victim-surcharge fight,” said Trevor Brown, president of the Defence Counsel Association of Ottawa.

Can’t attend bail court? New app connects criminal lawyers

Jeff Gray, The Globe and Mail, April 12, 2015

It’s a typical occurrence in the life of a criminal lawyer in Canada’s largest city: On the way to a trial in far-off suburban Newmarket, a call comes in from a client jailed overnight and up for a bail hearing the same morning in downtown Toronto.

Being needed in two places at the same time is a universal problem for criminal lawyers across Canada and the United States, most of whom operate solo or in very small firms. Most of the time, they make phone calls and pull in favours to get a friendly fellow lawyer to “stand in” for them at a conflicting bail hearing, “set date” or other procedural court appearance. Sometimes they pay a junior lawyer or a paralegal a fee of $50 to $100 to attend on their behalf.

But a group of legal entrepreneurs has launched a new iPhone app designed to update this informal process for the 21st century’s “sharing economy.” It’s called StandIn Law, and it’s like a version of the taxi app Uber, but for criminal lawyers.

StandIn Law, already being used by invited test lawyers in the Greater Toronto Area and Detroit, works like this: Lawyers or paralegals who sign up will be tracked by location, meaning that if they are near a particular courthouse, another lawyer looking for a stand-in there can immediately contact them through the app.

Court documents or other confidential information must be exchanged via phone or e-mail. But the app automatically sends payment via a credit card, taking a $7.50 transaction fee on top of whatever the stand-in lawyer charges. Hiring lawyers are also asked to rate the performance of their stand-in for the app to display.

In the past, some Toronto area lawyers have been forced to find colleagues for stand-in appearances via messages on the Criminal Lawyers Association's e-mail listserv, although this is now frowned upon, said Anthony Moustacalis, president of the Criminal Lawyers' Association. He says he plans to use the app, and imagines it will be used by many of his colleagues, some of whom pay for stand-ins but many of whom simply rely on informal exchanges of favours.

"My fee is a coffee or a beer when I meet with them again and vice versa," Mr. Moustacalis said, adding that seeing quickly who is available via the app will make things much easier. "Sometimes you phone your stand-in friend, and, oh, they are on vacation this week."

It's the latest in a handful of legal apps developed in recent years aimed at a profession that is notoriously old-fashioned and for the most part wary of new technology. Most court files in Ontario are still kept on paper, and some judges' offices still send out decisions by fax.

"I think, more so than ever, people are starting to become more accustomed to doing more on their phones, and hopefully that comes over to the legal side as well," said Andrew Johnston, a master's student at Osgoode Hall law school who came up with the app concept for a student competition while attending Michigan State University law school last year.

The app itself was created by Toronto developers Tiny Hearts, a product of Ryerson University's Digital Media Zone (DMZ), a startup incubator. Also backing it is Peter Carayiannis, a Toronto lawyer who launched a no-frills law firm called Conduit Law and who is an alumni of Michigan State. He met Mr. Johnston while acting as a mentor for the university app competition.

Other apps targeting lawyers in the U.S. include Shake, which creates legal agreements from templates that can be signed digitally and remotely, and various jury tracking apps that allow litigators to record juror behaviour during a trial in order to guess how a jury is leaning.

Federal Court strikes down fees for electronic documents

Jesse Winter, Ottawa Citizen, April 16, 2015

The Federal Court says the government can no longer charge people fees for the search and processing of electronic government documents covered under access to information legislation.

In his ruling, Justice Sean Harrington said the wording of the Access to Information Act and its regulations are "vague" and that practices under the act "have practically stood still" since the days when computers were rare in the workplace.

The case centred on a request by a citizen for government procedural documents outlining the use of the Social Insurance Number records database. In particular, the court was asked to decide if "electronic records" are considered "non-computerized" records. The distinction is important because, under the act, anything deemed a "non-computerized" record is subject to a fee of $2.50 per quarter-hour of time it takes a government employee to find and prepare the documents for release.

Human Resources and Skills Development Canada, which handled the request, quoted the applicant $4,180 to search for and prepare the documents. The court ruled it can't do that.

The ruling is a small win in a much larger fight to overhaul Canada's antiquated access laws, according to Tom Henheffer, the executive director of Canadian Journalists for Free Expression.

"It's a great but very, very small step in the right direction. You're trying to put tiny little Band-Aids on a system that's basically had all its limbs cut off," he said. "It's ridiculous that the information commissioner would even have to take the government to court over something like this."

The Access to Information and Protection of Privacy Act is a legal tool Canadians can use to get information from the federal government; it's also meant to ensure that individual privacy and government secrets are protected. To use it, any Canadian can file a formal request to departments spelling out the information they want. Government

workers then collect the information, check that it doesn't violate a list of exemptions, and release it. Fees are sometimes charged for labour.

Earlier this month, federal information commissioner Suzanne Legault issued a report calling for a sweeping overhaul of the act. One of her recommendations is that routine procedural documents should be handed over without a requiring a formal Access to Information request, said Nancy Bélanger, a lawyer for the Legault's office.

The act has been widely criticized by Legault and other experts for allowing government departments to unfairly delay the release of information, for not giving Legault's office enough power to enforce the rules of the act, and for not covering new communication technology such as texting and instant messaging. Some have also suggested the fees charged to consumers for data searches are prohibitive.

Bélanger said that Justice Harrington's decision will help reduce the "culture of delay" that characterizes the government's use of access laws.

Access to information expert Ken Rubin agreed, but he added that court cases arguing the semantics of an outdated act are a waste of taxpayer time and money.

"Just get on with opening up and rewriting the act itself. I want to see more basic challenges (to the act) and more basic resolution to these issues," he said.

The government has 30 days to decide whether to appeal the ruling and is reviewing Harrington's decision in order to determine the most appropriate next steps, according to a spokesman from the Attorney General's office.

Former PCO clerk lands new gig at law firm

Kathryn May, Ottawa Citizen, April 20, 2015

Canada's former top bureaucrat Wayne Wouters is joining legal giant McCarthy Tétrault as a strategic and policy adviser.

The career bureaucrat, who led the public service while serving as deputy minister to Prime Minister Stephen Harper and secretary to cabinet for five years, starts his new

posting in Toronto on May 1. As clerk, he provided advice directly to the prime minister on all issues affecting the government.

He joins the ranks of a growing number of senior bureaucrats who have taken their policy-making experience to law firms after leaving government. He will be the firm's only strategic and policy adviser, joining a team of high-profile lawyers including former Quebec premiers Jean Charest and Daniel Johnson.

In an interview, Wouters said the job is the first he's taken on since retiring from the public service six months ago. A longtime volunteer for the United Way, he is also working with United Way Worldwide.

Wouters said the appointment was green-lighted by Conflict of Interest and Ethics Commissioner Mary Dawson. As clerk, he had oversight over many files but direct dealings with business or other interests were left to bureaucrats in departments.

As a former public office holder, he faces a five-year "cooling off" period that prevents him from lobbying, but Wouters said he has no intention of lobbying for clients: "I can't lobby, nor am at all interested in lobbying

Wouters began his public service career in Saskatchewan before coming to Ottawa in 1982 where he gained a breadth of policy and operational experiences in various departments, including four deputy minister portfolios. He spent the last decade at the centre of power as Treasury Board secretary and PCO clerk.

He will be helping to advise clients in the oil and gas, telecommunications, security, power, natural resources industries. He will also be advising those with trade interests, having played a role in establishing key trade agreements with the European Union and Korea.

"I found the firm to be collaborative, keen and focused. I think it will be a lot of fun and I am looking forward to it," said Wouters.