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

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PS morale at 'all-time low,' but Wouters says it's a good time to be a public servant

MARK BURGESS, The Hill Times, April 28, 2014

Morale in the federal public service is at an "all-time low," public sector unions say, but Canada's top bureaucrat maintains it's a good time to be a public servant for the nimble and motivated who are willing to adapt.

Speaking to a business audience last week at a mayor's breakfast event at Ottawa City Hall, Privy Council Clerk Wayne Wouters said the public sector must become more agile as it gets smaller and some tasks are outsourced to the private sector.

"I wish I was starting my public service career because I think it's a tremendous, tremendous opportunity to serve. I think we're going to find different ways of doing it. We have to. Part of this is staying relevant," he said in his address.

More than 20,000 full-time public service jobs have been eliminated since March 2010 and another 8,900 positions will be cut by 2017, said a report from the Parliamentary Budget Office released April 11 that examined departments' Reports on Plans and Priorities. The cuts would reduce the public service to 2006 levels, it said, when the Conservatives were first elected.

Asked by reporters about the PBO's report after the speech, Mr. Wouters said the government is still in "restraint mode," finding more effective ways of delivering services but confident that the same services would be provided.

“We are modernizing our service delivery network, which we think will be able to provide better service at the end of the day at less cost and be more effective,” he said.

Mr. Wouters talked about Blueprint 2020, his initiative launched last June to reimagine how the public service works and serves Canadians. More than 100,000 public servants have participated in the process, which will be documented in a report this spring, he said.

The level of engagement showed him bureaucrats are eager to contribute in different, more collaborative ways, eschewing the public service’s traditional hierarchical approach. It’s more important to tap into the potential of employees and managers, he said, to collaborate and innovate.

When asked about morale in the civil service, Mr. Wouters said the level of engagement in the Blueprint exercise has informed his perspective.

“I’m very, very positive and hopeful about the future of the public service,” he told reporters. “We still are able to attract a tremendous number of them who want to come and work for us. We have challenges, every organization does. That’s our job, to get at those challenges, to listen to our employees and to react and see what we can do.”

A range of factors—from job cuts to legislation affecting collective bargaining to a diminished role in policy development—has led to what the leaders of two public sector unions said is a demoralized bureaucracy.

“I don’t think it’s any secret that morale is at an all-time low in the public service,” said Debi Daviau, president and CEO of the Professional Institute of the Public Service of Canada, in an interview.

The prevailing mood isn’t the result of any single factor, she said, be it government legislation, the closing of research libraries or thousands of job cuts, but members are anxious for a number of reasons.

“They’re scared that they won’t be able to deliver on their mandates as a result of lack of resources. They’re upset that they can’t deliver on services to Canadians that they know to be valuable and essential to health and safety in many cases. And they’re sick to death of being called ‘lazy,’ ‘non-performant,’ ‘overpaid,’ ‘overcompensated’ people,” she said.

Treasury Board President Tony Clement (Parry Sound-Muskoka, Ont.) has riled the unions with comments questioning the work ethic in the public service and suggesting bureaucrats are underperforming. The Parliamentary Budget Office challenged his public-sector sick-day numbers after Mr. Clement used the occasion of National Public Service week last June to crack down on “unwarranted absenteeism.”

The popular perception is “of a bloated, overpaid, underperforming bureaucracy,” a report from think-tank the Public Policy Forum (PPF) said in a report released last month, which leads political leaders to cut spending rather than innovate.

How bureaucrats feel about their work and how the public views them will be important to the public sector's ability to attract and develop talent, the report said.

"Public servants take pride in the fact they work for a public institution and they believe they're working in the public good," said David Zussman, Jarislowsky Chair in Public Sector Management at the University of Ottawa. "I suspect when they see their bosses questioning the validity of some of their work or their behaviour, I'm sure this has some impact on them, but how much impact I don't know."

Robyn Benson, president of the Public Service Alliance of Canada, said public servants have already lost colleagues, sometimes after competing with them to keep their jobs, and are constantly worrying about the next set of cuts.

"It's very discouraging to look at our members and know that they are trying to do their very, very best with limited resources, not knowing when the next shoe is going to drop, not knowing what the government is going to cut next, and not knowing when Mr. Clement is going to say harsh things about them," she said in an interview.

Ms. Daviau said Mr. Wouters is committed to a strong public service and has the right goal with the Blueprint, but she said other renewal initiatives have fallen short.

"Unless you incent the workplace to be innovative and productive and creative, no words on a paper or plan is going to make it that way," she said.

Mr. Zussman said factors outside of cuts and political criticism could be affecting morale, though he also said there aren't very good indicators of morale in the public service anymore, since surveys that asked those questions haven't circulated in years.

A risk-free environment was taking hold before the Conservatives came to power, he said. Following the Gomery Commission's findings on the former federal Liberal government's sponsorship scandal, more and more rules were piled on that made it harder for public servants to take any initiative. The Conservative government's determination not to make mistakes when it was elected with a minority government in 2006 added to this risk-averse culture.

"We have more rules around accountability, more processes around accountability, and I think to a large extent this has had an impact on morale," he said.

The PPF report said the saturated media environment has heightened the government's risk aversion, and mistrust between elected officials and public servants has created tensions.

"Under current oversight regimes, the traditional role of providing policy advice has evolved into risk management in a highly-controlled environment, with zero tolerance for error," the report said.

The cuts and more recent concerns over job security are just the latest hit, Mr. Zussman said, and Blueprint 2020 is a way to address the "web of rules" inhibiting bureaucrats.

Ms. Daviau said the reduction of resources, in addition to job cuts, has also had an impact. Public servants have less access to research materials and to senior government representatives, and are prohibited from speaking publicly about their work.

“There is no avenue left for professional subject matter experts to feed evidence into the policy decision making,” she said. “That’s a tough pill for people who really believe in their work to swallow.”

Mr. Wouters talked about the new diversity of inputs decision-makers have at their disposal, whereas ministers used to be a captive audience, and the PPF report described the increasing role of interest groups, private consultants, and think-tanks in that arena.

“I don’t think that’s a morale issue. That’s just reality,” Mr. Zussman said. “Public servants are used to working in the real world. They just have to work with more people. They have to be more transparent, they have to be more collaborative, but that doesn’t in my mind drive down morale. You can have a monopoly on policymaking and have a very unhappy organization. I don’t think they’re necessarily correlated.”

The consequence of the demoralized public sector, Ms. Daviau said, is that “the best and the brightest are bleeding out now,” with some retiring early and others moving to the private sector.

“Others are just waiting and hoping that the situation improves over the next year or so. That’s the nature of working for the government. Government changes and so does the flavour of the workplace,” she said.

Supreme Court Decision on Senate Reform –
Décision de la Cour suprême sur la réforme du Sénat

thestar.com

Supreme Court rejects Harper government proposals for Senate reform

Tonda MacCharles, Toronto Star, April 25, 2014

OTTAWA — Ottawa cannot act alone to reform the Senate, limit terms or appoint only elected senators, and must have the consent of seven provinces with half the country’s population, the Supreme Court of Canada ruled Friday.

Abolition of the Senate altogether can only be done with the unanimous consent of the federal Parliament and all provinces, the country's top court concluded.

In a landmark defeat for Prime Minister Stephen Harper that could yet set the stage for a referendum by a government frustrated at its failure to unilaterally legislate Senate reform, the high court dismissed nearly every single argument brought before it by federal lawyers.

A referendum is seen by some within the Conservative government as a potential political hammer to pressure reluctant provinces to go along with Senate reform.

The high court decision was a unanimous 8-0 judgment. In a clear sign of the strong judicial consensus, the 52-page ruling was signed by "The Court" as a whole, not penned by any one judge.

The high court agreed with the arguments of most provinces and the Quebec Court of Appeal, that Senate reform as proposed by Harper amounts to fundamental constitutional change to a key federal institution, and would alter the way other constitutional changes are supposed to proceed.

It found that the red chamber to which senators are now appointed at the pleasure of a prime minister and hold a seat until mandatory retirement at age 75 was intended to represent regional interests and to act as a legislative check on the executive.

The court said the Senate is a "foundational political institution" and its design as an unelected body was "not an accident of history."

The judges laid out the history of the Senate, and said it was not meant to have the democratic legitimacy to consistently block the will of the elected chamber in the Commons.

Any move to limit Senate terms or to require senators stand for election is a big change in Canada's overall legal framework, makes senators less independent, more beholden to a prime minister or an electorate, could potentially upset the balance of democratic power in Parliament and affect the way other constitutional changes are made, the court found.

That's because the Senate has the power to delay and even veto other constitutional amendments through withholding consent, so that power — entrenched in the Constitution's prescription for how to change the document — can only be eliminated with the substantial consent of provincial legislatures, the court ruled.

Term limits, even lengthy ones, provide "a weaker security of tenure" and "offer a lesser degree of protection from the potential consequences of freely speaking one's mind on the legislative proposals of the House of Commons."

And an elected Senate would overturn the role of the Senate as a "complementary legislative body, rather than a perennial rival of the House of Commons in the legislative process," the court ruled.

The court allowed only one argument made by the federal government: that Ottawa could unilaterally remove the requirement that senators hold $4,000 worth of property in the province of their appointment, but the Supreme Court said even repealing that requirement would in the case of Quebec senators, require Quebec provincial assent because that province had a special arrangement for Senate representation at Confederation.

The high court agreed with most provinces who argued the Senate as it is today is a part of the original compromise struck between the federal government and the provinces at Confederation in 1867 and entrenched in 1982.

It said past and modern constitutional framers meant to ensure that the country's law-making framework could not be easily changed.

Harper, an advocate of Senate reform since his days as a young Reform party MP, had argued the Conservative government's plans didn't amount to a constitutional change that required provincial consent. The federal government argued as prime minister he would still retain the power to reject even an elected candidate for the Senate. Harper wants term limits as a means to bring more accountability to a cushy seat held by too many who feel entitled for too long.

The court dismissed almost all the federal arguments as "narrow" and "textual."

It said the Canadian Constitution Act of 1982 set out clear rules for making changes to the Senate that reflect "the political consensus that the provinces must have a say in constitutional changes that engage their interests."

"Changes that engage the interests of the provinces in the Senate as an institution forming an integral part of the federal system can only be achieved under" the requirement for substantial provincial consent — in other words, seven provinces representing at least half of Canada's populations.

Liberal MP Stephane Dion said the ruling should jar the Conservatives to the reality that they "cannot unilaterally change the character of the Senate. It's not constitutional . . . it's not respecting the federation."

He said that opening the Constitution to make the desired reforms would inevitably invite protracted negotiation between Ottawa and the provinces on issues that go beyond the Senate.

And he saw little merit in holding a referendum on Senate reform at a time when the economy and job creation should be a priority for the government.

"Do Canadians really want a referendum?" said Dion. "Do we really want this kind of debate while the economy is still shaky?"

He said the Senate can be improved within the existing constitutional framework by making it less partisan, more independent with senators selected in a process that puts less emphasis on party allegiances.

The ruling is a blow to the New Democrats' campaign to abolish the Senate. In the wake of a Senate spending scandal, the NDP has tried to capitalize on public backlash against the red chamber with a campaign to get rid of the Senate altogether.

NDP Leader Tom Mulcair travelled the country arguing it was time to "roll up the red carpet."

But in its ruling Friday, the Supreme Court set a high bar for that happen, saying it would require the consent of all the provinces.

"Abolition of the Senate would fundamentally change Canada's constitutional structure, including its procedures for amending the Constitution, and can only be done with unanimous federal-provincial consensus," the court ruled.

The ruling is not just a road map for how any federal government must proceed with Senate reform, but how Ottawa and the provinces must work together on any constitutional amendments, as it sets out how the constitutional amending formula is to be interpreted.

It's the second major court defeat of the government's plans, and upholds the thrust of another high court ruling on Senate reform in 1980 — before the 1982 Constitution Act was patriated along with clearer rules for making amendments to key institutions and the constitution itself.

Quebec's top court, the Quebec Court of Appeal, ruled last year that Parliament couldn't unilaterally impose term limits or consultative elections but needed substantial provincial consent representing half the population, while abolition would require unanimous consent.

The ruling comes in the form of a series of answers to questions posed in a reference to the court by Harper's government.

After three bills met with loud provincial opposition and failed to move through Parliament, Harper asked the top court to rule whether Ottawa can act alone to reform the troublesome Senate, or if doing so changes an aspect of the country's constitutional framework and requires the approval of provinces, and if so, how many is enough?

When the case was argued last November, the best the Conservative government could do was muster the support of two or three provinces for most of his proposals.

Ontario and Saskatchewan agreed the federal government could unilaterally set limits on Senate tenure as long as a term was nine or 10 years or more — the equivalent of more than two election cycles — to ensure independence from an appointing prime minister.

Only two — Alberta and Saskatchewan — agreed Harper alone could legislate a framework for "consultative, non-binding" Senate elections; B.C. said it would require the approval of seven provinces and half the population. But others argued such a substantial change needs nothing less than unanimity.

And Alberta, Saskatchewan and B.C. were the only three to back Harper's argument that Senate abolition would not require unanimous consent, but could use the "general amending formula" for constitutional change that needs seven provinces with 50 per cent of the population.

Friday's decision, coming less than six months after the judges heard the case, is an unusually quick ruling.

It also comes four weeks after the Supreme Court of Canada decided in another reference case that the prime minister could not make unilateral changes to the composition of the high court itself, that changes to fundamental federal institutions like the Supreme Court require the unanimous consent of the provinces.

Supreme Court rejects Harper government's Senate overhaul plan

SEAN FINE, The Globe and Mail, April 25, 2014

The Supreme Court of Canada has unanimously rejected the Conservative government's attempt to transform the Senate into an elected body, and to set term limits of nine years, saying that such basic changes require the consent of at least seven provinces and half of Canadians.

The court also nixed the possible abolition of the Senate without the consent of all provinces, the House of Commons and the Senate — probably impossible for the foreseeable future. Prime Minister Stephen Harper has said that if he cannot democratize the Senate he would demolish it. His government had asked the court if abolition could occur with the consent of seven provinces and half of the country's population.

A man casts his vote for the 2011 federal election in Toronto in this May, 2011 photo. Elections Canada is going to audit contributions made during the 2011 federal election campaign to nomination contestants, riding associations and candidates affiliated with the same parties.

"The Senate is one of Canada's foundational political institutions," the court said. "It lies at the heart of the agreements that gave birth to the Canadian federation," and can only be changed in accordance with Canada's procedures for amending the constitution — not by Parliament acting alone.

The court had been expected to deliberate for a year, perhaps even two, but in the end it found the complex questions on Senate reform simple enough to answer in just six months.

Political scientist Peter Russell, an authority on the Senate and Supreme Court, applauded the ruling's explanation of the "constitutional architecture" of Canada. "I thought the way the court spelled out that we are a constitutional democracy, it was almost like giving the alphabet to first-graders," he said in an interview.

"Reading between the lines, they're saying to a government that seems to have acted as if there were no constraints — as long as it has a majority in the House of Commons, it can do what it wants — 'that's not our system.'"

He said the court's message was that "you don't approach the Constitution as if it was a lawyer's contract. You approach it as the framework for a great nation."

The government had derided the Senate as an institution that never lived up to the dreams of Canada's founders for independent review of legislation. It had urged the Supreme Court to consider the practical difficulties of trying to democratize the Senate in a country in which constitutional talks with the provinces are widely seen as more trouble than they're worth. The government told the court the choice was between "meaningful action and 135 more years of talk."

But the Canadian Constitution says clearly that any changes to the Senate's powers or means of selection are beyond the power of a single elected government to change. Instead, it explicitly requires the consent of seven provinces with 50 per cent or more of the population.

The government argued that the selection method of senators would in a legal sense remain the same, because the elections would be non-binding, and the prime minister would have the discretion not to appoint the winners. Mr. Russell said that argument made "our judges look like potential idiots."

It was the Harper government's fifth unanimous or near-unanimous defeat at the hands of the Supreme Court in the past month, all involving major files – the appointment of a new Supreme Court judge, the tough-on-crime agenda and now, Senate reform. It was also the third straight defeat in a reference case, in which the government poses questions to the court for an advisory opinion.

The court's decision is a clear loss for the Conservative government, but it may have a silver lining. Facing months of scrutiny over the Senate expense controversy, Mr. Harper sought last November to deflect blame for the beleaguered institution onto the judiciary, which he said was blocking the government's attempts at Senate reform. The ruling provides another opportunity for Mr. Harper to suggest to Conservative supporters that the government's hands are essentially tied when it comes to fixing what's wrong with the Red Chamber.

The decision does not say that reform is impossible, however. Rather, it lays out a roadmap for making each of the reforms the government put forward – most of which

require consultation and agreement from at least seven of the provinces representing 50 per cent of the population.

Mr. Harper has suggested he has little appetite for engaging in a constitutional debate with the provinces, though, which the court indicated would be a requirement for making the changes the government has proposed. Some members of the Conservative government have floated the possibility of a referendum on Senate abolition, but such a vote would at most serve to put pressure on provincial governments and would not give Ottawa the power to enact any changes.

Mr. Harper has never been a supporter of the Senate and was publicly demanding reform or abolition as far back as the 1980s. As Prime Minister, he waited more than two years before appointing anyone to the Red Chamber, before moving quickly to fill a series of vacancies in late 2008. Three of the new Conservative senators appointed that year would later be suspended amid a damaging controversy over their expenses.

The case has wide implications – for the Senate's future, and for broader questions of federalism. Provinces such as Ontario and Quebec argued that the Senate was part of the original bargain of Confederation, and that Canada's history is one of a delicate balance between the federal government and the provinces. New Brunswick said it joined Canada because it was reassured that the Senate would give it a stronger voice, as a counterbalance to the House of Commons, in which representation by population gives the big provinces the biggest numbers. In the Senate, the regions have roughly equal representation. Senators may sit till 75.

Chief Justice Beverley McLachlin said during the hearing that the key issue was how the government's proposals would affect the Senate's essential or enduring features.

Harper's judicial losing streak reveals the limits of government action…

SEAN FINE, The Globe and Mail, April 27, 2014

Prime Minister Stephen Harper's guiding philosophy of governing without worrying about activist judges has run smack into the Supreme Court of Canada.

Five overwhelming losses in little more than a month, all of them in areas dear to the Conservative government's heart, leave Mr. Harper with a tough choice: Make a political

issue of being opposed by unelected judges or modify his agenda (and perhaps his governing style) so it will pass legal muster.

In all five cases, including Senate reform on Friday, three tough-on-crime laws and even Mr. Harper's choice for a Supreme Court judge, only one supportive voice was raised on the court, and just once. And this from a court whose eight members include five appointed by Mr. Harper.

It has been a rapid-fire education in the limits of government action – or a comeuppance – with few parallels in Canadian history, some legal observers say.

Mr. Harper's losing streak "highlights a judicial-legislative clash in ways that have not been highlighted in the recent past, and perhaps ever," Wayne MacKay, a constitutional specialist at Dalhousie University's law school in Halifax, said in an interview.

The cases amount to a test of Mr. Harper's long-held views on the proper relationship between elected politicians and appointed judges. Ten years ago, when Mr. Harper was in opposition, the man who went on to be his first justice minister described how legislators had allowed unelected judges to deprive them of their self-confidence.

"The Charter of Rights has brought about a mindset, a culture or a way of thinking among legislators that in practical terms limits the democratic institutions to act proactively or indeed to react to serious situations," Vic Toews told a pro-life conference in Winnipeg.

That speech points to Mr. Harper's more aggressive mindset. His own public criticisms of judicial activism convey the view that the Supreme Court has wrongly asserted its supremacy over Parliament, and should be challenged on it.

Dennis Baker, a political scientist at the University of Guelph, said Mr. Harper's views are not disrespectful of the Supreme Court. "It's being aggressive about Parliament's ability to make laws. Sometimes that means pushing up against constitutional boundaries. There has been no instance of the government defying a court or not accepting a decision."

Others, such as Prof. MacKay, cast Mr. Harper's views in a negative light.

"My personal, obviously biased view [as a law professor] is he doesn't adequately respect and value the role of the courts in a checks and balances system. It's almost a kind of arrogance. 'I know what is best; I'm acting on behalf of the people of Canada and therefore, why should unelected, appointed bodies be able to block my vision of what is best for Canada?' "

Either way, though, what unites all five cases in the Harper losing streak is that "there are certain limits that you cannot cross, because we have a Constitution within which you must operate," Prof. MacKay said.

The court that has handed such stinging defeats to Mr. Harper is hardly a bunch of activists. Mr. Harper has mostly appointed conservative jurists whose tendency is to defer

to government, such as Justices Marshall Rothstein, Michael Moldaver and Richard Wagner. “I don’t think any of these cases indicate an activist judiciary,” said Joel Bakan, a professor at the University of British Columbia’s law school.

“The decisions are not at all controversial when you look at them from a legal perspective. What they indicate is a government that has overreached in its power. The Harper government has gone after some very ancient and rooted common-law protections.” In one case, the government imposed retroactive limits on parole. In another, judicial discretion over sentencing was constrained. In a third, habeas corpus, the right of prisoners to go before a judge and protest against the conditions of their confinement, was restricted.

The question for Mr. Harper is where to go next, as his policy agenda runs aground. He could become more conciliatory, as in last week's climb down on the proposed Fair Elections Act, which might ultimately have been challenged at the Supreme Court. Or he could make the Supreme Court’s rejection of his policies a political issue.

But that, too, seems not to be a winning strategy, said Roger Gibbins, senior fellow at the Canada West Foundation, a think tank focused on the West.

The Conservative government could “run against the Supreme Court in the next election,” he said, but “it’s not clear that this is a wedge issue” because no single issue is truly a flashpoint between the public and the court.

The losing streak “reinforces a public perception that this is a government that is not consultative, that tends to stake out a position and bull ahead on it,” Dr. Gibbins said.

Chief Justice Beverley McLachlin speaks of a “dialogue” between Parliament and the judiciary, but the five cases appear to leave little room for a government reply. On Senate reform, for instance, Ottawa has no appetite for opening constitutional talks with the provinces. (Perhaps most Canadians share that reluctance.) On sentencing, where the Supreme Court urged the federal government to be open about what it is trying to do, it may be hard to address the principle of proportionality without receiving another rebuke from the judiciary. The cases may prove more dead end than dialogue.

Harper v. the Supreme Court: Five recent losses for the PM

SEAN FINE AND CHRIS HANNAY, The Globe and Mail, April 25, 2014

The Conservative government has absorbed several defeats at the hands of the Supreme Court of Canada, including many in the area of justice. Here are the five latest big losses for the Harper government.

Senate reform

In the Matter of a Reference by the Governor in Council concerning reform of the Senate, April 25: The Conservative government asked the top court whether the federal Parliament could make the Senate an elected chamber, impose term limits or abolish it all together.

Ruling: 8-0 that elections and term limits would require the consent of seven provinces, representing half the country's population, and abolition would require the unanimous consent of provinces.

Pre-sentencing credit

R v. Summers, April 11: 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.

Prisoner transfer

R v. Khela, March 27: 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.

Justice Nadon

Reference re Supreme Court Act, March 21: Prime Minister Stephen Harper appointed Justice Marc Nadon to the court, to fill a Quebec vacancy. The question was whether, as a judge on the Federal Court of Appeal, he was eligible to represent Quebec.

Ruling: 6-1 that he was ineligible because he did not have the special qualifications required for Quebec judges on the Supreme Court.

Early parole

R v. Whaling, March 20: The government (Justice Minister Peter MacKay pictured above) 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.

Has the Supreme Court made Harper an accidental reformer?

ROBERT LECKEY, contribution to The Globe and Mail, April 25, 2014

With Friday's Senate reference, Prime Minister Stephen Harper has chalked up another loss before the Supreme Court of Canada. For Court watchers, constitutional disputes involving the Harper government will form a key part of Chief Justice Beverley McLachlin's record. From another angle, the disputes our Prime Minister has sent to the Court give him an unintended legacy as a constitutional reformer.

The contrast appears stark between Mr. Harper and his Conservative predecessor, Brian Mulroney. Mr. Mulroney rolled up his sleeves and threw himself into constitutional reform. He met with provincial premiers for days and nights to reach accords at Meech Lake and Charlottetown.

Mr. Harper avoids first ministers' conferences. He shows little appetite for talks with provincial premiers on anything, let alone constitutional reform.

This inclination to avoid working with the provinces underlay several constitutional questions that Mr. Harper has referred to the Supreme Court. Create a national securities regulator? Mr. Harper asked the Court if the Parliament of Canada could act alone. The judges told him no.

Make an appointment to the Supreme Court that might be illegal and that Quebec would foreseeably reject? The Court declared it invalid. While on the subject, the judges added that modifying the Supreme Court's composition is a constitutional amendment and requires provincial consent.

Could Ottawa alone change the process for selecting senators and their terms of office? On Friday, the Court said no. Such changes would require the consent of seven provinces representing one-half of the population. It also held that abolishing the Senate would require consent by all provinces.

In these cases, the Supreme Court of Canada blocked efforts by the federal government to act alone. It affirmed that Canadian federalism requires Ottawa and the provinces to work together. Time will tell whether the Court allows Ottawa to destroy data from the old firearms registry over Quebec's protests.

During the Harper years, the Supreme Court's assertions of provincial prerogatives have reshaped the constitutional landscape. They undermine the accounts, especially current in Quebec, by which the Court's federalism judgments have empowered Ottawa at the provinces' expense.

The Court says it has based these decisions on the constitutional text, case law, and principles. But that wouldn't explain the shift towards co-operation between Ottawa and the provinces. Might the judges have recoiled from the Prime Minister's evident disdain for democratic institutions and his distaste for negotiating with the provinces?

To be clear, in rebuffing Ottawa's claims, the Court hasn't reversed decided cases. It has answered questions that have long been open. Mr. Harper may not like the answers he's gotten. But he's the one who put the issues to the Court.

The upshot is that a Prime Minister who dislikes negotiating with the provinces has triggered processes by which the Supreme Court has entrenched the need for such talks. Ironically, a leader who wouldn't touch direct constitutional reform with a bargepole will leave major developments in federal-provincial relations as his heritage.

Robert Leckey teaches constitutional law at McGill University.

'Stuck with status quo' on Senate, says Harper after court's rejection

SEAN FINE, The Globe and Mail, April 25, 2014

The Supreme Court of Canada has unanimously rejected the Conservative government's attempt to transform the Senate into an elected body, and to set term limits of nine years, saying that such basic changes require the consent of at least seven provinces and half of Canadians.

The court also nixed the possible abolition of the Senate without the consent of all provinces, the House of Commons and the Senate — probably impossible for the foreseeable future. Prime Minister Stephen Harper's government had asked the court if abolition could occur with the consent of seven provinces and half of the country's population.

Mr. Harper said he is disappointed in the court's ruling. "Given the Supreme Court has said we're essentially stuck with the status quo for the time being, and that significant

reform and abolition are off the table, I think it's a decision that I'm disappointed with [and] that a vast majority of Canadians will be very disappointed with."

There is no consensus among the provinces on either reform or abolition of the Senate, nor is there a desire "among anyone" to reopen the Constitution and have "a bunch of constitutional negotiations," he added.

However, he said the government will abide by the decision.

"The Senate is one of Canada's foundational political institutions," the court said. "It lies at the heart of the agreements that gave birth to the Canadian federation," and can only be changed in accordance with Canada's procedures for amending the constitution — not by Parliament acting alone.

The court had been expected to deliberate for a year, perhaps even two, but in the end it found the complex questions on Senate reform simple enough to answer in less than six months.

Political scientist Peter Russell, an authority on the Senate and Supreme Court, applauded the ruling's explanation of the "constitutional architecture" of Canada. "I thought the way the court spelled out that we are a constitutional democracy, it was almost like giving the alphabet to first-graders," he said in an interview.

"Reading between the lines, they're saying to a government that seems to have acted as if there were no constraints — as long as it has a majority in the House of Commons, it can do what it wants — 'that's not our system.'"

He said the court's message was that "you don't approach the Constitution as if it was a lawyer's contract. You approach it as the framework for a great nation."

Mr. Russell said that meaningful Senate reform is still possible, and suggested the government could sit down with opposition parties to craft a non-partisan method of selecting senators.

Roger Gibbins, a senior fellow at the Canada West Foundation, a think tank focused on the West, said the ruling's effect will be to postpone Senate reform for decades.

"It's not a surprise, but it's nonetheless disappointing because I think the court has effectively ruled out any meaningful Senate reform for a generation to come. It's too bad we're stuck with the status quo."

He said the ruling gives Mr. Harper a chance to lift the "albatross" of Senate reform from his party's shoulders, and to tell voters "we gave it our best shot, Senate reform will be something for our children and grandchildren to tackle. We're leaving the field."

The government had derided the Senate as an institution that never lived up to the dreams of Canada's founders for independent review of legislation. It had urged the Supreme Court to consider the practical difficulties of trying to democratize the Senate in a country in which constitutional talks with the provinces are widely seen as more trouble than

they're worth. The government told the court the choice was between "meaningful action and 135 more years of talk."

But the Canadian Constitution says clearly that any changes to the Senate's powers or means of selection are beyond the power of a single elected government to change. Instead, it explicitly requires the consent of seven provinces with 50 per cent or more of the population.

The government argued that the selection method of senators would in a legal sense remain the same, because the elections would be non-binding, and the prime minister would have the discretion not to appoint the winners. Mr. Russell said that argument made "our judges look like potential idiots."

It was the Harper government's fifth unanimous or near-unanimous defeat at the hands of the Supreme Court in the past month, all involving major files – the appointment of a new Supreme Court judge, the tough-on-crime agenda and now, Senate reform. It was also the third straight defeat in a reference case, in which the government poses questions to the court for an advisory opinion.

The court's decision is a clear loss for the Conservative government, but it may have a silver lining. Facing months of scrutiny over the Senate expense controversy, Mr. Harper sought last November to deflect blame for the beleaguered institution onto the judiciary, which he said was blocking the government's attempts at Senate reform. The ruling provides another opportunity for Mr. Harper to suggest to Conservative supporters that the government's hands are essentially tied when it comes to fixing what's wrong with the Red Chamber.

The decision does not say that reform is impossible, however. Rather, it lays out a roadmap for making each of the reforms the government put forward – most of which require consultation and agreement from at least seven of the provinces representing 50 per cent of the population.

Mr. Harper has suggested he has little appetite for engaging in a constitutional debate with the provinces, though, which the court indicated would be a requirement for making the changes the government has proposed. Some members of the Conservative government have floated the possibility of a referendum on Senate abolition, but such a vote would at most serve to put pressure on provincial governments and would not give Ottawa the power to enact any changes.

Mr. Harper has never been a supporter of the Senate and was publicly demanding reform or abolition as far back as the 1980s. As Prime Minister, he waited more than two years before appointing anyone to the Red Chamber, before moving quickly to fill a series of vacancies in late 2008. Three of the new Conservative senators appointed that year would later be suspended amid a damaging controversy over their expenses.

The case has wide implications – for the Senate's future, and for broader questions of federalism. Provinces such as Ontario and Quebec argued that the Senate was part of the original bargain of Confederation, and that Canada's history is one of a delicate balance between the federal government and the provinces. New Brunswick said it joined Canada

because it was reassured that the Senate would give it a stronger voice, as a counterbalance to the House of Commons, in which representation by population gives the big provinces the biggest numbers. In the Senate, the regions have roughly equal representation. Senators may sit till 75.

Chief Justice Beverley McLachlin said during the hearing that the key issue was how the government's proposals would affect the Senate's essential or enduring features.

Opinion: Will Ottawa consult Quebec on Nadon's replacement?

BY IRWIN COTLER, SPECIAL TO THE Montreal GAZETTE, APRIL 27, 2014

A year ago last week, Supreme Court of Canada Justice Morris Fish announced he would be retiring effective Aug. 31, 2013, in advance of his 75th birthday, mandatory retirement age for judges of the court. One full year later, his seat remains to be filled.

While a successor to Justice Fish was nominated in the person of Marc Nadon — who was subsequently found ineligible for appointment by a majority of the high court last month because he was not currently a member of the Quebec Bar — the government has yet to announce how it will proceed in this regard. This is cause for concern, particularly for Quebecers.

The central issue of Justice Nadon's eligibility turned on whether he met the criteria of Sec. 6 of the Supreme Court Act, which guarantees three of the court's nine seats to Quebec. As the court put it, "The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights."

As the vacancy left by Justice Fish remains, it is hard to see how Quebec's distinct legal traditions and social values are adequately represented on the court. Accordingly, the government should announce its plan to nominate a successor with all deliberate speed. Regrettably, the government has said little about prospective steps, and even refused at first to rule out the reappointment of Justice Nadon by other means.

It seems evident that the court will finish its spring term having sat an entire year without a full complement of judges from Quebec. This is not unimportant, considering the court's recent study and ruling Friday on the Senate reference, and recent work on other issues tied directly to the question of Quebec representation in Ottawa. Indeed, the court functions best with a full bench, and it is the government's responsibility to ensure vacancies are not prolonged.

Query: Will the minister of justice ensure a replacement for Justice Fish is in place for the fall and, if so, will Parliament meet the candidate prior to its summer recess in June? Justice Nadon, it should be recalled, was announced to the public a week before the court's fall term was to begin and when appearing before Parliament's ad hoc committee expressed doubts as to whether he would be prepared to sit when the court's work resumed.

Surely, Justice Fish's replacement should be appointed with enough time to adequately prepare herself or himself for the start of the court's term. Moreover, a transparent appointment process should forthwith be established so that we will know who is being consulted, what personal and professional selection criteria have been established, what factors are being considered, and who is involved in the selection.

In this regard, it is important to ask if, inter alia, Quebec's justice minister will be consulted. Specifically, as a result of the Quebec election and change in the provincial government, a new Quebec justice minister was sworn in last week. While we ought to assume that the federal government will consult with her as per tradition, it has not indicated whether such discussions will occur or are even on the radar, let alone all the other necessary consultations that will need to be undertaken in Quebec and beyond.

In summary, Quebec remains under-represented on the nation's highest tribunal and, as far as has publicly been revealed, no plan exists to remedy this situation. The government needs to indicate whether it will seek the opinion and input of Quebec's new justice minister and other requisite Quebec officials, by what process it will seek to fill this vacancy, and most importantly, when?

Irwin Cotler is the Member of Parliament for Mount Royal and a former federal justice minister and attorney general. He is Emeritus Professor of Law at McGill University.

Did the Supreme Court just kill Senate reform?

What today's ruling means for the Conservatives, New Democrats and Liberals (and the country)

Emmett Macfarlane, MacLean's, April 25, 2014

That terrible screeching noise you heard this morning were the wheels of Senate reform in Canada grinding to a halt.

That might sound critical of the Supreme Court's reference opinion, but in truth there is nothing surprising in the judges' ruling today, rooted as it is in the constitutional amending formula we have instead of the one the federal government (and others) might wish we have. The Court has mandated that substantial provincial input is required for the two key elements of the Harper government's reform agenda, consultative elections and term limits, and has correctly noted that unanimity is required in order to abolish the upper chamber.

Fundamentally, this decision was about who gets to write the rules to the game—the game, in this case, being democracy and government. The Court needed to find the right balance with respect to the amending formula: reading them too narrowly might let the federal government make changes unilaterally in cases where the provinces should have substantial input; reading them too broadly risks making it too difficult to change the Constitution even when there is a pressing need to do so.

In one sense, the Court's decision is a triumph for federalism and for the principal that provinces are co-equal partners in Confederation: any constitutional changes that have implications for them requires the consent of at least two thirds of their legislatures, representing at least 50 per cent of the Canadian population, and in some cases unanimity.

In another sense, today's ruling may help to cement Canada's troubling constitutional stasis. Where the general amending formula—the 7/50 rule described above—is required for any changes to the "powers" of the Senate and "the method of selecting Senators," section 44 grants the federal Parliament exclusive power to amend the Constitution in relation to the Senate generally. The Court determined that section 44 is "limited," and constitutes a mere exception to the general rule that allows Parliament to "maintain or change the Senate without altering its fundamental nature and role."

Short term limits would undoubtedly change the fundamental nature of the Senate, by altering the extent to which senators exercise their independence and how they approach their basic role. But the Court explicitly acknowledges that longer term limits might not have this impact:

It may be possible, as the Attorney General of Canada suggests, to devise a fixed term so lengthy that it provides a security of tenure which is functionally equivalent to that provided by life tenure. However, it is difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure (para. 81).

In other words, the Court was unwilling to engage in a line-drawing exercise (the sort of one, it must be noted, that it routinely engages in) in order to provide Parliament with the leeway to implement reform on its own. Nor do the judges bother to elaborate on why the imposition of mandatory retirement for senators without provincial input was permissible but a lengthy term limit is not, beyond vague reference to the "professional life" of a senator.

This is arguably the weakest part of the Court's opinion, and its effect is to reduce Parliament's role under section 44 of the amending formula to virtual obsolescence.

The federal government was on much shakier ground in its assertion that advisory elections did not constitute a change to the method of appointing senators. The argument centred on the notion the prime minister still retained discretion to refuse to appoint an "elected" senator, but the judges gave short thrift to that line of reasoning: "It is true that, in theory, prime ministers could ignore the election results and rarely, or indeed never, recommend to the Governor General the winners of the consultative elections. However, the purpose of the [proposed reform] is clear: to bring about a Senate with a popular mandate" (para. 62).

The Court also noted that the "framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives" (para. 57). In effect, consultative elections would create a second House of Commons, a rival to the lower house that would significantly change the way Parliament functions.

What are the implications of this for future Senate reform, and for the government? Simply put, if the Harper government wants to proceed with Senate elections or the imposition of term limits, it must gain the approval of at least seven of the provinces. The prime minister has not shown any interest in intergovernmental negotiations, especially as it pertains to the constitution. Some of the provinces, particularly Quebec, are unlikely to sit down to "open" the Constitution without placing other issues on the table – and few who were around for the constitutional rounds of Meech and Charlottetown have much of an appetite for such a process.

The Court's ruling also splashes some cold water the NDP's way. In the least surprising part of its decision, the Court has made it clear that abolition would require the unanimous consent of the provinces and the federal government.

The NDP's long-standing position has been that the Senate should be abolished, but the party has not always recognized the practical difficulties of doing so. It has even proposed to simply stop funding the Senate, something which, absent constitutional amendment, would ultimately make it impossible for Parliament to function.

The Court's opinion should force the NDP to finally confront reality. The party will need to articulate something resembling a clear—and constitutional—plan if it is to pursue abolition.

Much less clear is what alternative changes might be made to the process of appointing senators without requiring formal constitutional amendment. The prime minister retains discretion to appoint who he sees fit, and is presumably free to consult with whomever he wishes before doing so. The Court explicitly refused to "speculate on the full range of possible changes to the Senate" (para. 4).

Liberal leader Justin Trudeau has proposed changing the culture of appointments to make them less partisan. One suggestion was an advisory committee that might produce names

for the prime minister to selection from. But it is unclear whether this would constitute a formal change in the method of selection. The Court placed great emphasis on the electoral nature of Harper's reform proposals as being something that would both change how the Senate works and effectively bind the prime minister's discretion in selection.

It remains to be seen whether other, less formal changes could be said to have the same impact, but we are left with the potentially absurd state of affairs that a prime minister is free to consult a group of elites or advisers – even behind closed doors – but is not free to consult the people directly when deciding whom to appoint to the Senate. In this case, it may not be an absurdity of the Court's making, but of the Constitution's.

Emmett Macfarlane is an assistant professor of political science at the University of Waterloo. His book, Governing from the Bench: The Supreme Court of Canada and the Judicial Role is published by UBC Press.

Other News – Autres nouvelles

Pierre Poilievre unveils changes to Fair Elections Act after weeks of damaging criticism

John Ivison, National Post, April 25, 2014

OTTAWA — The government has been forced into an embarrassing climbdown on its Fair Elections Act by claims from the opposition and academics that the bill damages Canadian democracy.

Pierre Poilievre, the rookie democratic reform minister, unveiled the changes Friday, after weeks of criticism from MPs on all sides of the House, and in the Senate, at a number of contentious provisions in the bill.

Much of the criticism has centred on the end of vouching, where a person without proof of identity can still vote if they are accompanied by another voter who has the required identification. Critics claimed the move is intended to suppress voting by groups hostile to the Conservatives such as students and aboriginals. A number of academics have signed a petition claiming it infringes on the Charter right to vote.

Pierre Poilievre says support for 'Fair Elections Act' is 'common sense' for regular Canadians in face of wide condemnation

Conservatives' elections bill is 'attack on our democracy,' famed ex-auditor general says

'I misspoke': Tory MP Brad Butt takes back claim about campaign workers stealing voter cards from garbage

Fair Elections Act sure to deprive Canadians of voting rights, U.S. experts warn

The government's amendment will still require people to show identification but, if they don't have proof of address, they can be vouched for by another person who can attest to the voter's address.

Another amendment will make clear that the Chief Elections Officer has the freedom to speak or report on any matter. The original version of the bill has been criticized for placing a gag on Elections Canada's efforts to encourage voter turnout.

"The government will support amendments to expressly clarify that the Commissioner and Chief Electoral Officer can communicate with each other and the public," said Mr. Poilievre.

The bill currently exempts from election spending caps the cost of mail and phone calls to past donors, a provision the opposition says will tilt the field in the favour of the Conservatives when it comes to fundraising. Mr. Poilievre said the proposal is "not particularly important" and has been dropped, as has the clause that called for the winning party to be given the discretion to appoint central poll supervisors.

Critics of the bill said this was a further intrusion of partisanship into the process and created an advantage for the incumbent party.

Mr. Poilievre said telemarketing companies making calls on behalf of political parties would now be required to retain scripts and recordings from election calls for three years, instead of one.

The changes will be welcomed by the Conservative caucus, which has been critical of the way the rollout of the bill has been handled by Mr. Poilievre, labeled "the most dangerous man in Canada" by Avaaz, the left-wing online "campaigning community."

"Nobody was happy with the way Poilievre sold this. The caucus is willing to let him wear the embarrassment since he seemed to screw it up," said one Conservative insider.

Mr. Poilievre was unapologetic. "There will be critics who will still not be satisfied. Some will oppose the bill, no matter what, for their own reasons, and I am at peace with that. The NDP announced its opposition to the bill before it was even introduced and Justin Trudeau plans to repeal even the parts of the bill that his party called for in the first place. That is life. We will stand firm for what is right. The Fair Elections Act is common sense. It is reasonable. And we are moving forward," he said.

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Fair Elections Act: Pierre Poilievre Backtracks On Contentious Issues

Althia Raj, Huffington Post Canada, April 25, 2014

OTTAWA — The Conservative government is flip-flopping on some of the most contentious issues of its electoral reform bill, the Fair Elections Act.

Democratic Reform Minister Pierre Poilievre announced Friday the government will compromise on the issue of vouching by allowing individuals who have ID but no proof of address to be vouched for by another individual. Every voter will still have to show ID with no exception, said Poilievre.

The federal government will also eliminate a contentious provision in the bill that would have given political parties a loophole to spend more than the allowable limit during elections to contact past party donors. Many experts said the loophole benefitted political parties with large databases and could be easily abused as a way to advertise the party's platform or attack its opponents. Critics also pointed out the provision was impossible to police.

The current bill muzzles the head of Elections Canada by preventing him from speaking on anything other than how to vote, where to vote and how to become a candidate. Poilievre said the government will loosen the restrictions to allow the chief electoral officer's to engage in projects such as Student Vote, an electoral education program for primary and secondary school students.

The companies who perform automated calls or run live phone banks for political parties would now be forced to keep records of the scripts they use and a copy of each automated audio message for a period of three years. The Conservative government originally intended to keep records for just one year, not long enough for most investigations into campaign practices to even begin.

Poilievre's announcement came the same day the Supreme Court ruled against his government's Senate reform plans. The court ruled that the prime minister needs the consent of at least seven provinces representing 50 per cent of the population to agree with him if he wants to impose term limits or consultative Senate elections.

If the government wants to abolish the red chamber, it will need the unanimous approval of the provinces.

Many of the amendments Poilievre said the government would make to the bill were suggested by a Senate committee, composed of a majority of Conservative senators. Tory

Senator Linda Frum told HuffPost that Poilievre did not give them instructions but, sources say, the government was consulted on the changes the senators proposed.

The Conservatives have been facing increasing pressure from their own base to change the controversial electoral bill which is almost universally opposed by academics, elections experts, opposition parties and even former auditor general Sheila Fraser. The NDP had also been targeting individual Conservative MPs to urge them to vote against the government's bill.

Rajotte's letter is just one example of constituents speaking out against the many partisan changes in the proposed Fair Elections Act. Several voters wrote to their MPs to express concerns they could be disenfranchised from voting during the next election. One woman from Spruce Grove, Alta., wrote an emotional letter to a senior's group describing how she feared her 97-year-old mother, a former missionary and Tory voter, would be denied her right to vote.

"It is a shame that this government is stealing from those who cannot fight for themselves whether disabled or elderly or simply guilty of poverty and homelessness," she wrote.

"He is betraying her and other elderly Christian Conservatives."

Just 24 hours before today's announcement, Poilievre was describing the opposition against the Fair Elections Act as "quibbles."

"The major disagreements of the bill are very small in number," he told a business audience in Ottawa.

"A lot of Canadians are really asking what the fuss is about. What it really comes down to is a disagreement over ID," he said.

"The opposition believes that we should allow people to vote without even showing a shred of identification. Canadians disagree," the minister added, referencing several public opinion surveys.

"The Fair Elections Act in its final form will require every single voter to produce ID showing who they are before they vote," Poilievre declared.

"Away from the noise in political Ottawa, everyone understands that this is common sense."

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Conservative government backs off controversial electoral reform measures

The Conservatives are backing away from some of the most controversial aspects of their electoral reform package after months of intense criticism.

Alex Boutilier, Toronto Star, April 25, 2014

OTTAWA—Pierre Poilievre said the government is prepared to back away from some of the most controversial aspects of their electoral reform bill, including eliminating voter vouching.

Poilievre, the democratic reform minister, revealed a list of government amendments to Bill C-23 in Ottawa on Friday after months of intense criticism of the government's electoral reform efforts.

They include:

- Allowing voters to sign an oath of residence at the polling station, co-signed with another voter with proper identification — essentially a bolstered version of the vouching Poilievre wanted to do away with. All voters, however, will be required to have some form of identification that includes their name.

The maximum penalty of signing a false oath will be a $50,000 fine and up to five years in prison.

Allowing the chief electoral officer to speak freely to the Canadian public about elections issues. Bill C-23 originally limited the CEO to communicating how, when, and where to vote. Under the amended version, Elections Canada's advertising will still be limited to that information, but the CEO can communicate freely.

Elections Canada can continue to fund voter outreach programs, but only to those who cannot actually vote — primary and secondary school students.

- Closing a proposed loophole that would allow parties to spend an unlimited amount of money contacting former donors during an election campaign. While the calls and letters would be limited to soliciting more donations, critics worried the system was a way around Canada's hard spending cap on election campaigns.
- Voter contact services will be required to maintain scripts and recordings of robocalls for three years, rather than the one-year period proposed in the bill.

Poilievre announced the amendments after months of blistering criticism to the Conservative government's electoral reform package — including from the current and former chief electoral officers, aboriginal groups, students' advocates, representatives for seniors, and a laundry list of academics and elections experts.

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Law Society votes against accrediting controversial Christian law school

The Law Society of Upper Canada has voted against accrediting B.C.'s Trinity Western University law school that bans gay sexual intimacy.

Jane Gerster, Toronto Star, April 24, 2014

In a case pitting equality against religious freedom, the Law Society of Upper Canada has made the unprecedented decision to vote down a controversial evangelical Christian law school.

Society benchers (directors) voted 28-21 Thursday against accrediting B.C.'s Trinity Western University, thereby prohibiting graduates from applying to the Ontario bar. There was one abstention.

It marks the first time the Law Society has refused to accredit a school and the first time law societies across the country haven't come to a consensus. Trinity Western was accredited by the Law Society of British Columbia April 11.

"This decision was a difficult one," Law Society treasurer Thomas Conway told reporters following the vote. "Benchers took this issue very seriously and did not find it easy to reach a decision."

TWU has been dogged by controversy over the school's "community covenant," a five-page document students must sign that includes a promise to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."

The covenant is the topic of more than 1,100 petitions sent to the Law Society of B.C. and the subject of a lawsuit filed against the B.C. government.

In Ontario, benchers debated for hours Thursday and a full day April 10 before voting no. There is no provision for appeal within the society.

The move was heralded by some as a victory for prospective LGBT lawyers, despite assurances from TWU president Bob Kuhn that gays and lesbians are always welcome at the university as long as they abide by the covenant.

Bencher Raj Anand called the idea "legally flawed."

By asking a student to make a false declaration, Anand said, the university was either impugning their good character — an issue when taking the bar — or asking them to live repressed.

"To prevent a student from manifesting his or her own sexual identity is itself a violation of the Human Rights Code," Anand said.

"I don't think we should take even a millimetre step backwards," said fellow lawyer John Campion.

But the decision — which Kuhn equated to "institutional bullying" — will have a "chilling effect" on Christians across the country, he said.

It "will have validated the vitriolic, verbal and written attacks made against my community," he told benchers during debates, before adding that far from protecting public interest, the decision "will have reduced public interest to a tool."

Many benchers, including Howard Goldblatt, were careful to explain their decisions weren't meant as an endorsement of the mountain of hate mail TWU has received, rather a protection of other rights.

"I cannot accept that it would be in the public interest to accredit an institution . . . which does not accept and embrace equality amongst individuals who choose to practise or live a sexual orientation that might not be quote-unquote, biblical," Goldblatt said.

Even some of those who supported accreditation said they did so against their own personal beliefs.

"I've been forced to conclude that I must vote for accreditation," said Barbara Murchie. "We're bound to do so by law."

"Maybe the covenant is good or bad or ugly, but the covenant is clothed by freedom of religion," agreed Harvey Strosberg,

Although disappointed, a tired-looking Kuhn said he doesn't foresee the refusal forestalling the university's plans. The school is still expected to open in 2016 following conditional approval from the Federation of Law Societies of Canada, the go-ahead from the B.C. government and B.C. Law Society accreditation where he expects most graduates will work.

The Nova Scotia Barristers' Society will vote on accreditation Friday and benchers at the Law Society of New Brunswick are expected to vote in June.

No matter, Conway said, Canadian law societies will be left grappling with the ramifications of the decision.

It "obviously has some consequences" because it differs from B.C., he said. "Those consequences are going to be subject to further discussion and reflection."

Law Society of B.C. to hold new vote on Trinity Western's law school: lawyer

BY BRIAN MORTON, VANCOUVER SUN, APRIL 24, 2014

More than twice the required number of signatures have been gathered to force the Law Society of B.C. to hold another vote in an attempt to withdraw approval of Trinity Western University's law school, a Victoria lawyer said Thursday.

"The response has been overwhelmingly positive," said Michael Mulligan, who said 1,303 written requests were collected in less than a week. It was well above the 650 votes needed to call a special general meeting to reconsider the approval, he said.

"I had an email yesterday from the president of the law society confirming that we had met the requirements to compel the special general meeting," said Mulligan. "We've met the requirements, they've confirmed it, so the vote will take place."

This move comes as Ontario's law society voted Thursday to deny graduates of the Christian university's planned law school — which bans homosexual activity among students and faculty — the right to practise in Ontario.

Many members of the Law Society of Upper Canada's board of directors condemned the policy as "abhorrent,'' though several said they would still vote in favour of allowing graduates to practise in Ontario. Ultimately there were 28 votes against accreditation to 21 in favour.

Earlier this month, the benchers (as directors are called) of B.C.'s law society voted 20-6 to allow the new law school.

Mulligan said the law society approved the application despite the university's covenant that discriminates on the basis of sexual orientation. TWU requires that students and staff sign a Community Covenant including a provision prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman."

The new vote must be held within 60 days, Mulligan said, noting that if the members vote in favour of directing the benchers to deny accreditation to the law school, the benchers will then have 12 months to implement the resolution. "If they were so bold as to fail to implement a resolution like that from the membership, there's then a process for a binding referendum to force them to do that."

A petition has also been filed in B.C. Supreme Court by openly gay Vancouver park board commissioner Trevor Loke after Minister of Advanced Education Amrik Virk approved the new school.

Mulligan praised the Ontario decision. “I’m hopeful we’ll be able to get the B.C. law society on the right side of history here and get us on track in the same way the Law Society of Upper Canada resolved the issue today.”

Trinity Western president Bob Kuhn appealed to the Law Society of Upper Canada to avoid penalizing his students for their beliefs as it would signal to millions of Canadians with religious views that they are “not welcome in the public marketplace,’’ he said.

But Lawyer John Campion in his submission dismissed Kuhn’s pitch that the issue is one of freedom of religion.

Anyone is free to go to the school, he said, but its policies are discriminatory and contrary to public policy in Ontario, where gay marriage is embraced and common-law relationships are recognized.

“I don’t think we should take even a millimetre step backwards,’’ Campion said. “We can’t do it. All that work and all that trouble and all that pain and we’re going to take one little step backwards? I say no.’’

Lawyer Christopher Bredt, who voted for the school’s accreditation, said the Trinity Western covenant conflicts with his personal views, but the decision must be based on the law.

“There is no suggestion that the graduates of TWU are any more likely to discriminate than graduates of any other Canadian law school.’’

Kuhn touted his graduates’ achievements and said they are particularly engaged members of the community.

“It’s not a university of bigotry or a university of intolerance,’’ he said. “It’s a university the students leave saying, ‘I love this place.’”

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Controversial TWU covenant may be tested at highest court

Charter challenge brought as law societies cast their votes on Christian law school

By Cristin Schmitz, The Lawyers Weekly, April 25, 2014 issue

The dispute over Trinity Western University's planned law school has spread from law societies to the courts, with a new Charter challenge filed in B.C. that could open the door to the Supreme Court of Canada eventually deciding whether or not to accredit future TWU law graduates.

At press time, benchers from Ontario and Nova Scotia were poised to decide on April 24 and April 25 respectively whether to follow their B.C. counterparts' 20-6 vote April 11 approving the admission of TWU law grads to their bar.

Based on vigorous preliminary discussions the Ontario and Nova Scotia benchers held in public, unanimity seemed far from certain, notwithstanding that the law societies of Saskatchewan and Alberta (adopting a previous decision of the Federation of Law Societies) have also green-lighted TWU's proposed law school.

Lawyer Bob Kuhn of Langley, B.C., the evangelical Christian university's president, said he believes Ontario, Nova Scotia and New Brunswick (which votes June 27) will accredit the law school. At their April 10 convocation, many Ontario benchers expressed concerns about the morality, constitutionality, and discriminatory impact of the private university's religious-based insistence that TWU students and staff sign a "community covenant agreement" requiring homosexuals and unmarried heterosexuals to remain celibate, since sex is reserved to marriage between one man and one woman.

"I am confident, and have been from the beginning, that the brightest and best minds of this country expressing their opinions on the relatively narrow issues that have to be determined in order for Trinity Western to gain approval will come to the same conclusion as British Columbia came to," Kuhn told The Lawyers Weekly.

University of Calgary legal ethics professor Alice Woolley said that differences in provincial human rights laws, as well as in the jurisdictions of the various regulators, means that Ontario and Nova Scotia benchers "can legitimately reach different conclusions" than their B.C. colleagues, which would result in a regulatory patchwork across the country.

"Having said that, I think the Charter issues apply across jurisdictions," she said.

A Charter challenge launched April 14 in B.C. Supreme Court against last year's decision by the B.C. Minister of Advanced Education to permit TWU to grant law degrees has the potential to resolve the legal debate. Indeed, Alberta's law society has said it would "welcome a judicial determination that would have national application."

Loke v. Minister of Advanced Education of B.C., a pro bono initiative of Vancouver lawyers Karey Brooks and Elin Sigurdson and Toronto lawyers Clayton Ruby, Gerald Chan and Angela Chaisson, contends that the province violated the Charter by approving TWU's law school, despite its "discriminatory" admissions policy that excludes students

on the basis of their sexual orientation. The plaintiff, a gay man who wants to go to law school, seeks to have that decision quashed, or at least reconsidered in light of Charter rights and values.

Halifax lawyer Amy Sakalauskas, past chair of the Canadian Bar Association's sexual orientation and gender identity conference, said the case could settle an unprecedented debate about freedom of religion and freedom from discrimination that has generated thousands of passionate and thoughtful submissions to provincial law societies from lawyers and the public.

"We welcome a judicial determination on this issue," she said. "If the court challenge in B.C. is successful, the law school approval by the government will not stand."

But TWU argues — with support that includes independent legal opinions separately commissioned by the Federation of Law Societies and the B.C. Law Society — that the Supreme Court of Canada spoke definitively on the matter in Trinity Western University v. B.C. College of Teachers [2001] S.C.J. No. 32. In that case, which TWU contends remains binding, a majority held that TWU's community covenant should not prevent the university from being accredited to train teachers.

"Those opposed to TWU are upset that Supreme Court law is not in their favour, and now having lost, want a rematch — but this time they want to change the rules," says TWU's counsel in Ontario, Eugene Meehan of Ottawa's Supreme Advocacy.

Kuhn said he rejects the lawsuit's premise that TWU's admission policy denies access to would-be law students who are LGTBQ, since such students do attend TWU.

Whether the TWU decision is binding or distinguishable was debated by benchers in both B.C. and Ontario.

"We have very good, very impartial legal opinions which indicate that the Supreme Court of Canada's TWU case still applies and is good law and it is not our discretion to say that we would prefer it to be different," said Vancouver lawyer Miriam Kresivo, general counsel of Chevron. Expressing a view echoed by others, she said "I do not think that we can bar TWU from a law school because of the covenant, although the covenant may be abhorrent to me. I think we have to follow the law…and the law is clear, I believe, and I think we should be able to meet the expectation, even if the decision is very unpopular and very difficult."

Sharon Matthews of Vancouver's Camp Fiorante agreed that benchers must apply the law, but argued that the TWU decision is not determinative, as the ruling turned on whether the beliefs held by TWU's teachers would cause actual harm by perpetuating discriminatory attitudes in the class room. The majority said there was no evidence of such harm.

"TWU 2001 decided…that in balancing these rights we must look at whether belief becomes conduct," Matthews said. "As long as you stay on the 'belief' side of the line your freedom of religion must be respected. But if it becomes conduct, and the conduct is harmful, then the balance switches to protecting against discrimination."

Matthews contended the law school's discriminatory admissions policy, and its sanctions for breaching the covenant, which include expulsion from the university, amount to "coercive conduct" and not just belief.

"While I don't dispute what TWU 2001 says about belief and conduct, I do dispute that if it was properly applied to this covenant, the result would be the same," she said. "I agree we have to apply the law, but we have to do it in a fulsome way. We have to do it as leaders. And we have to do it with courage."
