AJC-AJJ
ASSOCIATION OF JUSTICE COUNSEL
ASSOCIATION DES JURISTES DE JUSTICE

Press Clippings for the period of May 20 to May 26, 2014
Revue de presse pour la période du 20 au 26 mai 2014

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

OTTAWA CITIZEN

Public Service: The looming fight over sick leave

KATHRYN MAY, Ottawa Citizen, May 25, 2014

The Conservative government's plan to replace the existing sick-leave regime is likely to provoke a showdown with unions over the number of sick days public servants will get and what to do with the $5.2 billion in leave they have already banked.

A Treasury Board Secretariat document recently circulated to employees lays out the government's model for a new "Workplace Wellness and Productivity Strategy." The government has clearly decided on a plan, leaving just the details to sort out at the bargaining table.

Q. What is the existing plan?

A. Public servants get 15 days of fully paid sick leave a year. They can carry over any unused days from year to year, which they do, at a cost of $325 million a year. If they fall ill, they have to wait 13 weeks (65 days) before they can go on disability.

Q. What's wrong with the plan?

A. Many problems are embedded in its design, which hasn't changed in 40 years. The unions, however, argue that the existing system is workable and can be fixed, and doesn't need a wholesale overhaul.

Managers don't monitor and track the use of sick leave as they should, a weakness that, when combined with a generous sick-leave benefit, has invited abuse. Whatever is

unused can't be cashed out when employees leave, which critics say tempts some to take more time off as they approach retirement.

The plan was designed when the nature of injury and illness taking employees off the job was very different. Cancer patients rarely returned to work and mental illnesses, such as depression and anxiety, weren't even talked about.

Q. What else?

A. Employees also don't have equal access to benefits. Those who don't have enough sick leave banked to bridge the 13-week waiting period don't get paid and have to rely on employment insurance. The government estimates that half of all employees don't have enough banked sick leave to cover the waiting period. Older workers typically have more sick leave banked than do younger employees, who are most vulnerable to lost income if they fall ill.

As well, the requirement that all banked sick leave be exhausted before going on disability delays getting the support, treatment and case management necessary to help get employers back to work. Studies show the longer employees are off work, the less likely they are to return.

Q. What's the consequence?

A. Absenteeism has been rising and public servants take an average of 11.5 days of paid sick leave a year.

Q. What's the government's proposed "Wellness" strategy?

A. Accumulated sick leave would be replaced by a short-term disability plan with more focus on prevention, case management and rehabilitation so the sick and injured get earlier care and are back to work faster. The new plan would be a combination of sick leave, short-term, and long-term disability.

- ***Sick Leave:*** Employees will get a number of sick leave days every year that they can use at their discretion.
- ***Short-term Disability Plan:*** Employees off work for five days will start getting support, including case management, to help recovery. Short-term disability typically covers employees for 26 weeks, offering graduated incomes that begin at 100 per cent of salary and drop off the longer employees are off work.
- ***Long-term Disability Plan:*** This plan kicks in after the term for short-term disability is up for employees who are still ill. Employees typically collect 70 per cent of their salaries until they return to work or up to age 65 if they can no longer work.

Wayne Wouters: Public service reform means fixing sick leave too

KATHRYN MAY, Ottawa Citizen, May 22, 2014

Canada's top bureaucrat says his reforms to the public service, coupled with a new approach to sick leave, will go a long way to fix what some critics call a toxic workplace that reflects record levels of stress and depression.

Privy Council Clerk Wayne Wouters told the Citizen his Destination 2020 reforms, meant to bring the public service into the digital age, go hand-in-hand with Treasury Board President Tony Clement's promise to replace an outdated sick-leave regime created more than 40 years ago for a very different workforce.

Wouters said he supports Clement's plan to replace the existing accumulated sick-leave regime with a new short-term disability plan aimed at getting ill and injured workers better and back to work faster.

"Our system is not conducive to a modern workforce," said Wouters. "People go on sick leave and they go on long-term disability and it's out of sight, out of mind. We never think how to bring these people back, incorporate them and what kind of wellness program they need."

Wouters said the problems with the existing sick-leave system hit home for him as a deputy minister because of an incident in which his driver fell off a roof and broke his back. The man never walked again, and Wouters said he was stunned by how little help the injured and disabled get to recover and return to work.

That's also when he realized how little data the government had on managing sick leave and disability.

In addition to addressing such problems, many of Wouters's Destination 2020 reforms will also tackle the thorny organizational and management problems that public servants say get in their way and undermine performance and productivity.

A recent health study of executives in the public service concluded that the workplace was making employees sick.

APEX, which represents executives, has argued that organizational and management problems contribute to mounting stress and depression in the workplace. Mental health

claims among rank and file employees also increased in recent years, peaking in 2012 when they accounted for nearly half of all approved claims – led by stress, anxiety and depression.

"The way to fix it is to try and fix the workplace and their work environment and that is what Destination 2020 does, from my point of view, along with support when they are off, which is part of the disability management system we are working on," said Wouters.

"Part and parcel of a modern workforce (is) having good disability management and helping those who are on stress leave deal with their stress, work with them and get them back to work because at the end of the day if we manage a workplace where people are productive – which is part of Destination 2020 – that is the most positive thing we can do to help people who feel stressed in the workplace."

APEX has called for a slew of changes to improve management, but also appealed to Wouters to consider adopting the Mental Health Commission's national standard for Psychological Health and Safety in the Workplace as part of the Blueprint 2020 reforms.

Scrapping sick leave is the hot-button issue that's expected to dominate collective bargaining, which will kick into gear as the majority of public service contracts expire next month. Some argue that Clement's hardline approach to bargaining could create a backlash of skepticism among workers about Wouters's broad commitment to modernize the public service.

But Wouters said any antagonism should be avoided by management clearly explaining the problems with the existing regime.

"I think it is important to get our message out as to why our current system is not as effective as it needs to be," he said. "That is management's responsibility and I think we can do a better job at that across the public service."

Treasury Board has taken the lead in explaining problems with the existing system and has released a detailed document for employees that lays out proposed changes. This strategy of talking directly to employees is a new approach that the giant Public Service Alliance of Canada has attacked for subverting collective bargaining before it even begins.

OTTAWA CITIZEN

Public servants risk becoming policy dinosaurs, David Emerson warns

KATHRYN MAY, Ottawa Citizen, May 22, 2014

Public servants are losing their monopoly on policy advice to government and will soon be considered irrelevant unless they change how they gather, analyze and shape their recommendations, says the man who led a heavyweight committee on the public service for Stephen Harper.

Former cabinet minister David Emerson, the outgoing chair of the prime minister's advisory committee on the public service, said technology and big data are turning the world of policy-making on its ear.

"Government is a little information economy with lots of barriers to the free flow and use of information, so a big challenge for the public service will be how to adapt when the world is now able to access all kinds of quantitative and qualitative information is a split second on hand-held devices," Emerson told the Citizen.

"And if they can't do that quickly, government becomes less and less relevant because, by the time decisions are made, it will be too late."

Emerson said the public service can no longer rely on traditional sources of "structured" and "cleansed" data produced by the likes of a downsized Statistics Canada to advise ministers in a world flooded with massive amounts of unfiltered information and less reliable data.

Emerson said his committee never took a position on the elimination of the agency's mandatory long-form census but instead argued globalization and huge volumes of data now available have changed the "breadth and scope" of advice governments need in order to deal with complicated issues.

He said this "tectonic shift" will force public servants to change the way they work and think about their advice to cabinet, which was "traditionally seen as utterings of the priesthood."

Public servants have to get out of the "Ottawa bubble," re-think how to analyze and manipulate data and speed up internal approval processes to get advice to ministers faster.

"If all you are doing is relying on StatsCan and other institutional sources of data … then you are missing out on massive amounts of new data now available," Emerson said. "The other sources of information will crowd you out and compete for the ear of politicians who are trying to anticipate what is actually happening out in the world to satisfy voters who have access to the same massive amounts of information. It is a whole new ball game."

In fact, Emerson argues that adapting to the new reality could resolve one of the key "irritants" between public servants and politicians. Ministers want information and advice faster and if the public service drags its feet because of outdated methods, tools and attitudes, the government will look elsewhere.

And, he noted, there is no end of places to look, ranging from think-tanks, academics and lobbyists, to advocacy groups and even political staffers who have easy access to information on hand-held devices.

APEX, the association representing federal executives, acknowledged in a report on Privy Council Clerk Wayne Wouters' Blueprint 2020 exercise that ministers aren't always happy with the "kind and quality of advice they need on a timely basis."

But APEX argued the advice must still be "sound, strategic and non-partisan" which means training public servants to be more collaborative, have a deeper understanding of Canada and sharper analytical skills.

Wouters recently released the first round of his Blueprint 2020 changes to modernize the public service, calling for new IT tools, fewer rules and less red tape in addition to honing new skills to collect and analyze information.

David Zussman, the Jarislowsky Chair in Public Sector Management at the University of Ottawa, said big data, coupled with the number-crunching capacity of computers, will revolutionize policy-making and redefine the "policy analyst" job in government. They will no longer be experts in their policy fields but rather "aggregators" of information.

The secret short list that caused a rift between Chief Justice and PMO

SEAN FINE, The Globe and Mail, May 23, 2014

Early last summer, Supreme Court Chief Justice Beverley McLachlin sat down with five federal politicians at the stately court building on Wellington Street, just down the road from Parliament.

The Supreme Court selection panel – three Conservative MPs, a New Democrat MP and a Liberal MP – had come bearing a list of six candidates to replace Justice Morris Fish of Quebec, who was nearing 75 and about to retire.

That list, crafted by the Prime Minister's Office and the Justice Department, was so troubling to Chief Justice McLachlin that she phoned Justice Minister Peter MacKay and took initial steps toward contacting the Prime Minister. These attempts to raise potential eligibility issues would later trigger an unprecedented public dispute between the Prime Minister and the Chief Justice, a coda to the ultimately failed appointment of Justice Marc Nadon.

Until now, the list of six candidates has been a closely held secret. But The Globe and Mail has obtained both that list, and the short list ultimately chosen by the selection panel. The names on those lists not only shed light on Justice Nadon's appointment but the larger political machinations behind it – and its fallout. A judge rejected. A court short-handed. A Prime Minister's public accusation of impropriety by a Chief Justice.

The lists also show how the government, though aware of the risks, worked the selection process to find a more conservative judge than it believed was available in Quebec. The province's top judges and lawyers were largely ignored for a job reserved by law for Quebec candidates because of the province's unique civil code. Four of the six judges put forward were from the Federal Court in Ottawa, even though it wasn't clear judges from that court were eligible. Adding salt to Quebec's wound, one of those judges had been publicly rebuked by an appeal court for copying from government briefs.

Choosing a Supreme Court judge is a constitutional prerogative of the Prime Minister. In the Federal Court, Mr. Harper found a source of candidates closer to his political heart – and he courted the danger of a long and messy challenge to his selection. Even now, as the court's vacancy drags into its 10th month, he leaves a star candidate to languish on his short list – a list of only one eligible judge.

To peer behind the curtain of the appointment process, The Globe spoke to more than a dozen leading members of the Canadian and Quebec legal communities and government officials over the past several weeks. All of them talked on condition of anonymity. Neither Chief Justice McLachlin nor anyone associated with the Supreme Court provided information to The Globe for this story.

Although Mr. MacKay has described the process as the most open and inclusive ever for the Supreme Court, The Globe's reporting reveals that the all-party selection panel presented a veneer of neutrality, and behind that veneer the government was free to pursue its political goals.

'Let's broaden the scope'

Staffers in the PMO were optimistic when the process began. Less than a year earlier, with another Quebec spot on the top court to fill, Mr. Harper had chosen Justice Richard Wagner of the Quebec Court of Appeal. He was conservative-minded and had an excellent reputation in the legal world. The appointment was widely applauded.

"Everyone was quite confident that the success of the Richard Wagner appointment would be repeated," a source familiar with the process said.

But the prospects in Quebec for another conservative judge were few, the source said, and the Prime Minister wanted to find someone who would be in sync with his tough take on crime and his view of the restrained role of judges.

"Let's look elsewhere, let's broaden the scope," was the prevailing attitude, the source said.

The Prime Minister knew the legal risks. “The PCO would have said, ‘Oh, we have a problem,’” the source said. The Privy Council Office is the nerve centre of the Canadian bureaucracy, and advises the Prime Minister on Supreme Court appointments.

Another source said two candidates from the Federal Court had been on the list in 2012, but neither made the short list. A year later, there were four, making it a certainty that at least one would be on the short list of three. No Federal Court judge had ever been chosen for one of the Supreme Court’s three Quebec seats. The Supreme Court Act governing those appointments does not expressly say they are eligible.

“If I see a list like that,” a veteran Quebec litigator said when told of the six names by The Globe, “I conclude the Prime Minister absolutely wants to have someone from the Federal Court.”

That was the list the Chief Justice saw. When she phoned the Justice Minister, it would not have been to lobby against the appointment of Marc Nadon, as some Conservative MPs have accused her of doing. There were four names of questionable eligibility on that list, not just one.

The five members of the selection panel received the list in early summer. Then they did their homework. Each of the candidates supplied them with five rulings. There were also legal analyses given to the panel by the Office of the Commissioner for Federal Judicial Affairs.

Two judges on the list were heavyweight candidates from the Quebec Court of Appeal. Justice Marie-France Bich had been a law professor for 20 years before spending 10 years on Quebec’s top court. She is known for writing powerful judgments with an academic bent. (She was on the previous short list but for personal reasons declared herself temporarily unavailable.) She is difficult to pigeonhole as a liberal or conservative. She is the consensus pick of the Quebec legal community.

The second was Justice Pierre Dalphond, a Mr. Everything in Quebec law, considered commercial-minded but with a black mark against him – he’d spent five years in executive positions in the federal Liberal Party more than 20 years earlier.

Three candidates were from the Federal Court of Appeal.

Justice Nadon had been semi-retired for two years and specialized in maritime law – hardly a pressing need on the Supreme Court, according to court watchers who said a criminal law expert would be more helpful. But he was known to be outspoken in his conservative views. He was the only Canadian judge who found Canada blameless in the Omar Khadr affair involving an al-Qaeda member imprisoned since his teens by the United States. Twelve other judges on three Canadian courts had excoriated the Canadian government.

A second candidate was Justice Johanne Trudel. If she had made any controversial rulings in her seven years on the Federal Court of Appeal, they had escaped notice.

A third was Justice Robert Mainville, who as a lawyer had represented native groups such as the James Bay Cree for 25 years, and had written books on aboriginal law.

A fourth, Michel Shore, was from the Federal Court's trial division. In late 2011, rejecting a man's claim to a religious right to smoke cannabis, he copied 144 of 152 paragraphs in his judgment from the federal government's written argument – without attribution. In a separate case, he copied 62 of 66 paragraphs "almost verbatim" from a federal brief. The Federal Court of Appeal warned Justice Shore that the copying must stop.

Why was Justice Shore on the list for the Supreme Court? Two possible reasons: His track record of deference to government sent a message to the Quebec legal community about the kinds of judges this government favours. Also, according to legal observers, his name was easy to cut.

'Jesus – come on'

Nearly everything about the selection panel is secret, except the names of its members, all of whom sign an oath of confidentiality.

"It is so confidential that they make you return every bit of information you have about the people, about the schedule," said New Democrat MP Françoise Boivin, a member of the panel who spoke in broad terms about the process. "Everything is given through a thumb drive with password protection that has to be returned."

They are not all lawyers. The Conservatives are Jacques Gourde, a farmer from Quebec; Shelly Glover, a former Winnipeg police officer who became Heritage Minister during the process; and Robert Goguen, a New Brunswick lawyer. (The three Gs, they have been dubbed by Ms. Boivin, the only Quebec lawyer on the panel.) The fifth member, Liberal Dominic LeBlanc is, like Mr. Goguen, a New Brunswick lawyer. He is also a senior member of his party; the previous time, former Liberal leader Stéphane Dion represented the party.

The selection panel rode a train together to Montreal, where they met with 10 luminaries of Quebec's legal community at the Loews Vogue Hotel. The rock band Kiss was staying there, too. (Gene Simmons, with his mop of black hair, was hard to miss in the lobby.)

One by one, the wise old heads of the Quebec legal world trooped into the Vogue. Daniel Jutras, the McGill University law dean. Michel Robert, the province's former chief justice. Gérald R. Tremblay, a former president of the Federation of Law Societies of Canada.

The province's top judges spoke their piece, too. Chief Justice Nicole Duval Hesler of the Quebec Court of Appeal and Chief Justice François Rolland of the Quebec Superior Court were not pleased, sources said. They are proud of their courts, and were not happy the Federal Court produced more candidates than theirs had. They told the panel they were concerned about the eligibility issue.

Then the panel members deliberated. In 2012, the selection panel had been unanimous. Not this time. In the end, the unranked short list of three they gave the Prime Minister was Justice Nadon, Justice Trudel and Justice Bich.

The Globe showed the list to senior Quebec lawyers who were not involved in the process. They expressed astonishment at learning that four of the initial six were from the Federal Court.

“Jesus – come on,” one said.

“Oh Lord,” another said, then began to laugh. But later this senior lawyer described the exclusion of most of the cream of the province’s legal community as “a blow in our faces, a disavowal of the Quebec bench.”

An empty seat

Even within the PMO, the selection process is kept close to the vest. It is managed by the deputy chief of staff, and discussed only with the chief of staff and the Prime Minister. The Justice Department provides advice and consultation during the appointment process, but the choice rests with the Prime Minister.

Justice Nadon’s conservative attributes were made clear to Mr. Harper. “The memo to the Prime Minister would have said: On the list he is the closest to our policies,” a source said.

On Sept. 30, when Mr. Harper announced Justice Nadon as his pick, he released a legal opinion – from retired Supreme Court justice Ian Binnie – asserting that Federal Court judges were eligible. Soon after, a Toronto lawyer, Rocco Galati, filed a court challenge; Justice Nadon stepped aside temporarily; and the Quebec National Assembly unanimously denounced the appointment. Finally, the Harper government asked the Supreme Court to rule on the eligibility.

In March, the court ruled 6-1 that Federal Court judges cannot sit in any of its three Quebec seats.

For nine months, Canada’s most influential court has been short one judge – a judge from the only province with a constitutionally protected right to have three on the court. Meanwhile, Mr. Harper accused Chief Justice McLachlin of trying to engage him in an inappropriate conversation about a case. The confidentiality of the process allowed Mr. Harper to assert that a hidden act of wrongdoing had occurred, even as that same confidentiality prevented the Chief Justice from fully explaining her actions.

Today, Mr. Harper is stuck. He can’t name Justice Trudel. And he apparently doesn’t want Justice Bich.

The Prime Minister has the constitutional prerogative to choose the person he wants for the court. But the question is whether the process offers a pretense of neutrality – a curtain to hide the politics from view. Neither Ms. Boivin nor Mr. LeBlanc can fully

debate the value of the process, because of their oaths of confidentiality. But Ms. Boivin did say this: “I am tortured on what to do the next time.”

And at the end of it all, Justice Nadon finds himself back on the Federal Court of Appeal, trying to put the ordeal behind him.

“He’s one of the nicest men in the world, the nicest, kindest, most honest person you can ever hope to meet,” said a senior Quebec lawyer. “Nobody in Quebec would have put his name at the level of the Supreme Court. He’s been sacrificed. It’s profoundly terrible – a perfectly honest, happy man and this happens to him.”

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Cour suprême : Quatre juges fédéraux sur la liste de Harper

Hélène Buzzetti, Le Devoir, le 24 mai 2014

Ottawa — Mutisme absolu. C’est par le silence que le gouvernement conservateur et la communauté légale ont réagi vendredi aux révélations du Globe and Mail selon lesquelles Ottawa avait proposé non pas un, mais quatre noms de juges fédéraux pour combler la vacance québécoise à la Cour suprême du Canada. Marc Nadon n’était donc pas seul.

Le quotidien torontois a mis la main sur la liste secrète de six candidats que le gouvernement conservateur avait concoctée pour pourvoir le poste de juge québécois à la Cour suprême. Des six, quatre provenaient de la Cour fédérale ou de la Cour d’appel fédérale, bien qu’un doute subsistait déjà sur l’admissibilité de telles candidatures (une décision de la Cour suprême confirmera plus tard que ces candidatures étaient bel et bien irrecevables). Comme un comité multipartite de députés devait ramener cette liste à trois noms, il était garanti qu’au moins un proviendrait d’un tribunal fédéral.

Selon le Globe and Mail, outre M. Nadon, Ottawa avait proposé les noms des juges fédéraux Johanne Trudel, Robert Mainville et Michel Shore. Les deux autres candidats provenaient de la Cour d’appel du Québec (et donc admissibles à une nomination) : Marie-France Bich et Pierre Dalphond. Le comité de députés a écarté trois noms pour ne conserver que ceux de Marc Nadon, Johanne Trudel et Marie-France Bich. On sait maintenant que ni M. Nadon ni Mme Trudel ne se qualifient.

Le Globe and Mail cite quantité de sources anonymes qui soutiennent que le gouvernement de Stephen Harper avait l’impression que la magistrature québécoise n’était pas assez conservatrice. Puiser dans les rangs des tribunaux fédéraux lui assurait,

pensait-il, un juge plus au diapason du régime. Certains avocats interrogés par le quotidien voient dans la sélection de quatre juges fédéraux sur six un désaveu de la magistrature québécoise. Cette révélation signifie en outre que lorsque la juge en chef de la Cour suprême, Beverley McLachlin, a averti, en cours de processus de sélection, le gouvernement des « enjeux » reliés à la nomination québécoise, elle ne visait pas spécifiquement le juge Nadon.

Le bureau du ministre de la Justice Peter MacKay a refusé de commenter ce qu'il qualifie de « rumeurs ». « Nous allons respecter la confidentialité du processus [de sélection]. » Le bureau de M. Harper n'a pas répondu à notre requête. Même silence au bureau de la ministre québécoise de la Justice, Stéphanie Vallée, au Barreau du Québec et à la Cour suprême.

Le professeur de droit à l'Université de Montréal Paul Daly ne comprend pas les motivations du gouvernement. Il note que le juge fédéral Robert Mainville n'a pas la réputation d'être très conservateur. « Pour Mme Trudel, on ne sait pas trop. » Quant à Michel Shore, il est connu pour son ouverture aux règlements alternatifs tels que la médiation ou la justice réparatrice. Pour ce qui est de M. Nadon, on sait qu'il était le seul des 13 juges s'étant un jour ou l'autre penchés sur le cas de l'enfant-soldat Omar Khadr à ne pas avoir rabroué le gouvernement canadien.

La candidature proposée de Michel Shore fait par ailleurs sourciller, car, note le Globe and Mail, ce juge s'était fait rappeler à l'ordre pour avoir rédigé deux jugements dont la quasi-intégralité était constituée de passages tirés des argumentaires du gouvernement fédéral. Une sorte de plagiat judiciaire, en somme. Le professeur Daly met toutefois un bémol à ce sujet. « Depuis, la Cour suprême s'est penchée sur ce sujet et a laissé beaucoup de latitude aux juges quant au plagiat des factums. »

Rappelons qu'il y a deux mois, la Cour suprême a invalidé la nomination de Marc Nadon au plus haut tribunal du pays au motif qu'un juge fédéral ne se qualifie pas aux trois sièges réservés au Québec. Depuis, le premier ministre Stephen Harper s'est attaqué à la juge en chef McLachlin, estimant qu'elle avait agi de manière inappropriée en avertissant le gouvernement des problèmes potentiels que posait sa liste de candidats.

Le deuxième siège du Québec se libère

Le gouvernement n'a toujours pas indiqué comment il entend pourvoir le poste vacant depuis maintenant près d'un an. Si Ottawa avait voulu s'en remettre aux candidats restants de sa courte liste, il aurait été obligé de nommer Mme Bich. Certains pensent qu'Ottawa veut plutôt recommencer le processus de sélection et qu'il attendait que l'autre poste québécois de juge se libère officiellement pour faire une pierre deux coups. C'est d'ailleurs maintenant chose faite.

Le juge Louis LeBel a officiellement annoncé vendredi qu'il se retirera le jour de son 75e anniversaire, le 30 novembre prochain. « Le juge LeBel a servi la Cour avec grande distinction. Juriste éminemment doué et doté d'une immense sagesse, il est un pilier de la Cour. Tous ses collègues lui vouent un attachement et un respect profonds, et il nous manquera considérablement », a indiqué par communiqué de presse la juge en chef. À ce sujet, le bureau de M. Harper a publié un communiqué de presse stipulant que « les plans

en vue de son remplacement à la Cour suprême du Canada seront annoncés en temps et lieu ». Techniquement, rien n'empêche le gouvernement de lui désigner un successeur avant son départ, mais dans le passé, Ottawa a attendu pour ce faire.

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Op-Ed: Fall-out from the Nadon decision

Carissima Mathen and Paul Daly, contribution to the Ottawa Citizen, May 21, 2014

The challenge to Prime Minister Stephen Harper's nomination of Marc Nadon to the Supreme Court of Canada began as a question about a rarely-discussed statute, became a momentous question of legal principle and is now a constitutional conflagration of the first order.

Section 5 of the Supreme Court Act sets out the basic criteria for appointment: only lawyers of at least 10 years' standing are eligible. Section 6 reserves three seats for jurists from Quebec, learned in the civil law tradition.

In determining that only current members of the Quebec bar, Superior Court or Court of Appeal qualify, the Supreme Court turned its gaze to "the historic bargain that gave birth to the Court in 1875." A need to preserve Quebec's distinct civil law tradition – and the confidence of Quebecers in the court – underpinned the policy choice to restrict the pool of eligible candidates. Nadon, a distinguished member of the Federal Court of Appeal, was thus ineligible.

Shortly after the federal government referred the matter to the court, Parliament passed declaratory legislation which aimed to retrospectively validate Nadon's appointment. Yet the Constitution protects the "composition of the Supreme Court" from unilateral alteration by the federal authorities.

Facing this issue, the court plunged into deep waters. Leading commentators had suggested that the Supreme Court has no constitutional status – that it could be altered, or even abolished, by Parliament acting alone.

Perhaps unsurprisingly, the court balked at this suggestion, concluding that its "essential features" cannot be changed without substantial provincial consent. Moreover, any modifications to its "eligibility requirements" require the unanimous agreement of Parliament and the provinces. The Quebec seats must be filled by current Quebec judges or lawyers, until Quebec and the other provinces agree otherwise. There is some irony in

the fact that Quebec's interests were robustly protected by an institution and document whose legitimacy many Quebecers decry or deny.

The court's momentous decision is not without consequences. The prime minister has said judges from Quebec are now in a second class, and that talented jurists will be dissuaded from joining the federal court. This is not only completely speculative, it casts such jurists in an unappealing light. If the prime minister's concerns about recruitment prove to be justified, perhaps he will push for much-needed reform of the federal courts – for example, permitting judges to remain in their home provinces.

More serious are the potential constraints on reforms which, some argue, will help the court better reflect the changing face of Canadian society. Institutionalizing bilingualism, gender equality and guaranteed representation for ethnic minorities may now require constitutional negotiations.

Most serious of all is the decision's political fall-out, almost entirely created by the federal executive. First by anonymous leaks to the press and subsequently in statements to the House of Commons, the prime minister and the minister of justice have suggested that the Chief Justice of Canada acted improperly in flagging a potential issue with section 6. These attacks on the integrity of the chief justice have provoked waves of condemnation from the Canadian legal community. If anything positive can be drawn from this sordid affair, it lies in the possibility that the judicial appointment process will be thoroughly overhauled to avoid a repeat of l'affaire Nadon.

In collaboration with the Public Law Group at the University of Ottawa, we have assembled some of Canada's leading lawyers and commentators to unpack the decision and its aftermath in a free, interactive, day-long symposium on May 28. All are welcome to jointhis vitally important constitutional discussion.

Carissima Mathen is associate professor of law at the University of Ottawa. Paul Daly is assistant professor of law at the University of Montreal.

Trop clément... mais pas honteux

YVES BOISVERT, La Presse, le 23 mai 2014

Qu'est-ce qui est plus grave: vendre du pot ou tuer un enfant?

Moussa Sidimé, qui a tué sa fille en la giflant, a été condamné lundi à 60 jours de prison.

En 2012, une femme du Bas-Saint-Laurent a été condamnée à 15 mois de prison pour possession dans le but de trafiquer 380 grammes de cannabis.

Faut-il en conclure, en raccourci, que la vie d'un enfant vaut moins qu'un sac de pot? Évidemment pas.

Tous les commentateurs ont pourtant l'air de nous dire ça, en se scandalisant à l'unisson de la sentence «bonbon» ou «honteuse» infligée par le juge Richard Marleau lundi.

Je trouve également que cette peine est trop clémente. Mais elle n'est pas «honteuse». Le ministère public lui-même requérait une peine de deux ans. Les circonstances très particulières de cette triste affaire n'appelaient pas une peine sévère.

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Réglons tout de suite une chose. Nulle part le juge Marleau ne tient compte du «contexte culturel» pour atténuer la gravité du geste. Sidimé, en effet, est un Canadien d'origine guinéenne.

Le juge cite un ami de la famille qui «reconnaît qu'une gifle ou une tape sur les fesses n'est pas considérée comme un geste violent dans leur communauté». Il cite également une criminologue qui dit, dans le jargon des intervenants sociaux, que «la différence de référents socioculturels» a pu «s'avérer déterminante dans l'actualisation des gestes violents».

Nulle part il ne reprend ces propos à son compte, et encore moins n'en fait-il un facteur atténuant.

***

Deuxièmement, les peines au Canada ne sont pas infligées uniquement en fonction du crime, mais en fonction du criminel. Non pas que le geste et ses conséquences n'aient pas d'importance, mais le degré de «responsabilité morale» de l'accusé est capital.

Il ne suffit donc pas de comparer les horreurs entre elles pour savoir quelle sentence rendre. La mesure de la tragédie ne nous dicte pas une conclusion. Sinon, un complot terroriste avorté, qui ne fait aucune victime, entraînerait une peine moins lourde qu'un vol à main armée avec un couteau en plastique.

Il faut donc se demander non seulement ce qui est arrivé, mais qui est le criminel.

***

Que s'est-il passé? Moussa Sidimé est un architecte retraité de 74 ans. Il vivait à Longueuil avec sa femme et leurs trois enfants (il a des enfants d'autres unions).

Le 6 octobre 2010, il a une querelle avec sa plus jeune fille, Nouténé Sidimé, 13 ans. Il trouve qu'elle avait mal fait le ménage de la cuisine. Il croit qu'elle l'insulte. Il la gifle deux fois (avec la paume et le revers de sa main). Il quitte la cuisine. Il entend un bruit étrange et revient dans la cuisine. Elle est inconsciente. Il appelle le 911 et dit immédiatement qu'il l'a giflée. Il ne tente pas de camoufler son crime. Il avoue tout à la police.

L'enfant est morte deux jours plus tard.

L'homme a passé 19 jours en détention préventive. Il s'est avoué coupable. Il restait à lui infliger une peine pour cet «homicide involontaire».

***

C'est «une simple gifle», a plaidé l'avocate de la défense, qui réclamait une absolution.

Non, a répliqué le juge Marleau: c'est un geste illégal [des voies de fait] qui a entraîné la mort. Il est d'autant plus grave qu'il s'agit d'un acte de maltraitance d'enfant et d'un abus d'autorité.

Les enfants et la femme de Sidimé ont témoigné. Ils ont dit n'avoir jamais été giflés ou maltraités par l'accusé - qui n'a jamais été accusé de quoi que ce soit par le passé. Nouténé n'avait aucune marque au corps et rien n'indique qu'il y ait eu d'autres incidents violents auparavant - elle avait au contraire une très bonne relation avec son père.

Le jugement n'est pas très explicite sur le degré de violence requis pour entraîner la rupture de l'artère vertébrale - qui a causé la mort -, mais la victime ne portait aucune marque au visage.

Bref, pour criminel qu'il ait été, le geste ne paraissait pas susceptible d'entraîner la mort.

Oui, direz-vous, mais l'enfant est bel et bien morte!

C'est vrai. Mais la notion d'homicide involontaire recouvre une telle gamme de gestes qu'il faut les distinguer pour ne pas mettre sur le même pied un geste irréfléchi, mais dangereux et un geste crapuleux.

On est ici, tragiquement, dans la première catégorie. Alors, où situer la peine entre le zéro et l'infini?

L'homicide involontaire est passible de l'emprisonnement à perpétuité, mais il n'y a pas de minimum pour cette exacte raison: il recouvre un champ trop vaste de cas de figure. Le meurtre, qui suppose la volonté de tuer, entraîne la perpétuité automatiquement.

***

Aurait-il fallu, pour «rendre justice» à la petite Nouténé, envoyer son père au pénitencier pour le reste de ses jours? Le mettre sur le même pied qu'un assassin?

Non. Mais 60 jours discontinus, en plus des 19 purgés, ce n'est pas assez pour une raison fondamentale: ça ne dit pas assez la réprobation sociale de la violence faite aux enfants.

«Trop clément», cependant, ne signifie pas «honteux».

À moins de vouloir un système de justice à l'américaine, avec ses peines automatiques, toutes bien intentionnées, toutes faites pour «rendre justice aux victimes», mais qui créent plus d'injustices et d'inhumanité encore.

CBC news

5 bills to watch before Parliament breaks for summer

Online crime, digital privacy, election reform among bills needing attention

By Susana Mas, CBC News, May 22, 2014

When members of Parliament return to Ottawa next Monday, they will have four weeks left to get work done before the House of Commons is scheduled to break for summer recess.

While the federal government could extend the sitting or decide to adjourn early, June 20 is the date MPs have circled in their calendars.

As MPs enter the home stretch of this spring sitting, here are five bills worth keeping an eye on:

1. Bill C-13, the protecting Canadians from online crime act

Bill C-13 would make it a criminal offence for anyone to post or transmit "intimate images" of another individual without that person's consent. The bill also includes a number of other measures that would give police greater powers.

Ontario's privacy watchdog Ann Cavoukian said she is concerned with "overreaching surveillance powers" contained in the cyberbullying legislation. She is calling on the federal government to split Bill C-13 by removing the surveillance-related sections from the bill and moving ahead with those that directly address cyberbullying.

Bob Dechert, the parliamentary secretary to the minister of justice, has said the surveillance-related provisions in this bill are needed to update the Criminal Code.

2. Bill S-4, the digital privacy act

Conservative Senator Leo Housakos said Bill S-4 would "establish stronger rules to ensure that the privacy rights of individuals are protected, while at the same time

allowing businesses to use personal information to support their normal, day-to-day business activities."

The bill would amend the Personal Information Protection and Electronic Documents Act, commonly known as PIPEDA, which sets out the rules for how businesses collect, use and share personal information.

In her preliminary remarks on the bill, interim privacy commissioner Chantal Bernier said "there are some very positive developments for the privacy rights of Canadians in relation to private sector companies." She promised to provide more detailed comment after studying the bill at further length.

On the other hand, Ottawa law professor Michael Geist has warned that Bill C-13 along with S-4 would allow organizations to disclose subscriber or customer personal information without a court order. Bill S-4 would go even further by expanding the potential of warrantless disclosure to anyone, not just law enforcement, Geist said.

3. Bill C-23, fair elections act

The Minister of State for Democratic Reform Pierre Poilievre amended the bill following a massive outcry from experts worried the bill would be undemocratic. The opposition parties, Chief Electoral Officer Marc Mayrand and even former auditor general Sheila Fraser were among those who registered their opposition to measures in the original bill.

Harry Neufeld, the author of the report often cited by government officials to support the original bill, said he was happy to see Poilievre compromise on the bill, but still has some concerns with it.

The amendments were passed at committee and the amended bill was adopted at third reading before MPs returned to their ridings prior to the Victoria Day break.

4. Bill C-24, strengthening Canadian citizenship act

The government has proposed sweeping changes to Canada's Citizenship Act, from changing the eligibility requirements for would-be citizens, to granting citizenship to so-called "lost Canadians," to expanding the grounds for revoking citizenship.

The Canadian Bar Association has welcomed some of the new measures proposed in the bill, but said it also has "serious concerns" with several aspects of the bill.

The bar association said some of the more controversial measures are “likely unconstitutional" and raise "serious human rights concerns."

Immigration Minister Chris Alexander has said this bill is "entirely in line with the requirements under the Constitution."

5. Bill C-31, the economic action plan 2014 act, No. 1

The federal government will likely want to see its omnibus budget bill passed into law before MPs leave Ottawa for a two-month summer recess, but independent experts and opposition parties alike are still calling for several sections of the bill to be stripped out altogether.

Bernier, the interim privacy commissioner, said that her office is "encouraged by provisions that require FINTRAC to destroy personal information not related to the suspicion of criminal or terrorist activity," but it also has concerns about changes to the Income Tax Act.

Bernier said she was concerned with the government's proposal to allow Canada Revenue Agency officials to voluntarily hand over taxpayer information to police if they have reason to believe such information is evidence of a crime — without a warrant or court approval.

The Bar Association also has reservations about a provision in the budget bill that that would see 11 independent tribunals merged into one and is calling on the government to remove it.

Several experts have also raised concerns with the bill's provisions related to the sharing of tax information with the U.S. under the U.S. Foreign Account Tax Compliance Act, or FATCA.

CBC news

Stockwell Day calls for changes to cybercrime bill

Former public safety minister urges caution in policing cyberbullying and other online crime

Laura Payton, CBC News, May 22, 2014

Former public safety minister Stockwell Day says he hopes the Conservative government takes "another look" at its bill to fight cybercrime and curtails some of the powers it would give to police.

Speaking as a panellist on CBC News Network's Power & Politics, Day said he's sympathetic to concerns raised about Bill C-13 by Ontario Privacy Commissioner Ann Cavoukian, who said the government is "overreaching."

Cavoukian said the government should split the bill to deal with the cyberbullying provisions separately, echoing concerns of Carol Todd, whose daughter Amanda killed herself after being bullied online.

Day was a cabinet minister in the Conservative government from 2006 until he retired from Parliament in 2011.

"In my former portfolio at public security and public safety, this was an issue, the whole area of privacy and what can police do," he said, noting that reaction to a heartbreaking situation can be understandably profound.

"There can be an overreaction in terms of how you correct it. So [Cavoukian is] raising a bit of an alarm here. Let's be very careful in how we could protect someone in a situation like this, but let's also be careful in going too far and limiting even things like free speech, [or using] invasive techniques that could be employed by policing."

"I'm hoping they take another look at this and kind of curtail some of those powers," Day added.

'Crystal clear'

It's alarming, Day said, that people increasingly treat a lack of privacy "with a bit of a shrug."

Laws, he said, have to be "crystal clear on the aspect of police, what data they could have. I stood firmly against giving more access without some kind of warrant procedure."

Canada must also balance freedom of expression with the need to protect vulnerable young people, he said.

"I'm hoping that all MPs … take a serious look at how we can maintain certain rights to speech and freedom of expression even when it's unpleasant."

Capsules vidéo sur Harper: le gouvernement reste muet sur les coûts

JOËL-DENIS BELLAVANCE, La Presse, le 22 mai 2014

Le gouvernement conservateur refuse de divulguer les coûts liés à la production de vidéos hebdomadaires d'une durée d'environ trois minutes relatant la semaine de travail du premier ministre Stephen Harper.

Depuis le début de l'année, tous les jeudis, le bureau du premier ministre met en ligne une courte vidéo intitulée 24/sept. On y voit le premier ministre et parfois sa femme, Laureen Harper, sous leur meilleur jour. Une musique militaire joue en ouverture de la vidéo, qui contient à l'occasion des extraits de déclarations de M. Harper.

Mais les dossiers embarrassants comme le scandale des dépenses au Sénat, les manifestations de certains groupes durant les discours du premier ministre ou encore la récente sortie de M. Harper contre la juge en chef Beverley McLachlin sont passés sous silence.

Jusqu'à quatre personnes sont appelées à travailler à ces vidéos, selon des informations fournies par le Bureau du Conseil privé. Impossible, toutefois, de savoir combien coûte cette initiative.

Les films ne connaissent toutefois pas un succès viral. Si un peu plus de 11 000 personnes ont regardé le premier, en janvier, ils n'étaient plus que 153 irréductibles deux mois plus tard à regarder la version en anglais et.... 41 en français. Depuis, les cotes d'écoute varient de 200 à 1000 par semaine.

Les proches collaborateurs du premier ministre estiment qu'il s'agit d'un moyen louable de communiquer directement avec les Canadiens sans le filtre des médias.

«Propagande»

Les partis de l'opposition et certains médias, notamment le Huffington Post, affirment au contraire que cette initiative s'inspire davantage des stratégies de propagande du régime nord-coréen de Kim Jong-Un que d'une volonté du gouvernement Harper d'être transparent. Le NPD soutient en outre que ces vidéos n'ont rien d'informatif et que les coûts de leur production devraient être payés par le Parti conservateur et non avec l'argent des contribuables.

«Les contribuables ne devraient pas payer pour cela, surtout quand on voit qu'à peine 200 personnes regardent ces vidéos, qui sont de mauvaise qualité. Nous sommes en période de restriction budgétaire et on coupe dans les services aux citoyens. Il est difficile de justifier une telle dépense», a affirmé la députée néo-démocrate de Terrebonne-Blainville, Charmaine Borg.

Au bureau du premier ministre, un collaborateur de M. Harper, Carl Vallée, a affirmé que cela n'entraîne aucune dépense supplémentaire.

«Il n'y a aucun coût additionnel, nous utilisons les ressources disponibles. C'est assez ironique de voir le NPD se soucier de l'argent des contribuables alors qu'il l'a dépensé impunément pour payer ses bureaux politiques satellites à travers le pays. Quand vont-ils rembourser les contribuables?», a-t-il demandé.

Budget de fonctionnement

Le NPD souligne toutefois que le budget de fonctionnement du bureau du premier ministre n'a cessé d'augmenter depuis 2011 (de 7,6 millions en 2011-2012 à 8,2 millions

en 2012-2013), alors que les crédits alloués au bureau de Thomas Muclair passeront de 4 millions en 2011-2012 à 3,67 millions en 2014-2015, une baisse de 10%. Les budgets du bureau de M. Harper pour 2013-2014 et 2014-2015 n'ont pas encore été publiés.

«Le problème n'est pas que le budget de l'opposition soit réduit - nous pouvons faire notre part. Mais lorsque, au même moment, le budget du bureau du premier ministre va dans le sens inverse et que l'écart se creuse, cela devient une décision politique: les conservateurs veulent museler l'opposition néo-démocrate, jugée trop dérangeante, et ils augmentent leurs propres budgets de propagande», soutient-on dans les rangs néo-démocrates.

Supreme Court rules against lawyer who wouldn’t retire at 65

JEFF GRAY, The Globe and Mail, May 22, 2014

The Supreme Court of Canada has ruled against a Vancouver lawyer who refused to retire at 65 and charged that his law firm’s mandatory retirement policy was discriminatory.

The case of John Michael (Mitch) McCormick, closely watched in the legal community, hinged on the question of whether a partner at a law firm could be considered an employee, and therefore subject to provincial human rights legislation prohibiting age discrimination.

Many law firms have mandatory retirement clauses in their partnership agreements, aimed at moving out senior lawyers who are slowing down and allowing younger blood to take over. For most employees in other professions however, mandatory retirement has been abolished for several years.

Mr. McCormick, who kept working at Fasken Martineau DuMoulin LLP after he turned 65 in 2010, took his case to B.C.'s Human Rights Tribunal in 2009. The Tribunal ruled that it had jurisdiction over the case, but the decision was later overturned by the B.C. Court of Appeal.

Lawyers for Mr. McCormick, now 69 and no longer with the firm, argued that despite technically being a partner, and thus a part-owner, of the law firm, his position was otherwise essentially one of an employee.

But Fasken Martineau, and lawyers for the country’s major accounting firms – which also have similar partnership structures and intervened in the case – argued that since equity

partners share in the profits, losses and financial risk of the firm, they cannot be considered employees.

In a unanimous ruling on Thursday, the Supreme Court sided with Mr. McCormick's law firm, upholding the B.C. Court of Appeal decision and dismissing the lawyer's appeal.

The Supreme Court ruled that Mr. McCormick's status as a partner gave him the benefits of ownership, as well as his ability to vote for, or stand for, the firm's board, meaning he could not be considered a mere employee.

"This is not to say that a partner in a firm can never be an employee under the Code, but in the absence of any genuine control of [Mr. McCormick] in the significant decisions affecting the workplace, there was no employment relationship between him and the partnership under the provisions of the Code," the judgment reads.

Fasken Martineau said it was pleased with the ruling.

"We are satisfied with the decision, which reinforces our understanding of the law in British Columbia surrounding the terms of partnership agreements," William Westeringh, the firm's managing partner in Vancouver, said in an emailed statement. This is an isolated issue that is unprecedented at Fasken Martineau."

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Supreme Court of Canada upholds mandatory retirement for partnerships

Drew Hasselback, National Post, May 22, 2014

A Supreme Court of Canada decision on Thursday reinforces the right of big law firms and other partnerships to force leaders out at the age of 65, long considered a practice that makes room for new blood at the top.

Vancouver lawyer Mitch McCormick was a partner in the Vancouver office of Fasken Martineau DuMoulin LLP for 30 years, during which the firm's partnership agreement enforced mandatory retirement at 65. In 2009, when he was 64, he decided to challenge the mandatory retirement provision before the B.C. Human Rights Tribunal.

In Thursday's ruling, the Supreme Court said the Tribunal doesn't have jurisdiction to hear Mr. McCormick's complaint because, as an equity partner of the law firm, he was in effect his own boss. Mr. McCormick therefore is unable to complain to the Tribunal about his employer's unfair behaviour, because he wasn't an employee.

The decision has huge implications for the way law firms and other partnerships run themselves. And it wasn't even close. In a unanimous 7-0 decision written by Madam Justice Rosalie Abella, the Supreme Court found that Mr. McCormick was the master of his own fate.

"In no material way was Mr. McCormick structurally or substantively ever in a subordinate relationship with the other equity partners," Justice Abella writes. "As an equity partner, he was part of the group that controlled the partnership, not a person vulnerable to its control."

Mr. McCormick became an equity partner in 1979, and he was part of the equity partnership when Fasken voted to introduce mandatory retirement during the 1980s. He financially benefited from the mandatory retirement policy for over 30 years. If the policy was unfair, he was equally responsible for correcting that as much as any other equity partner, she said.

"We are satisfied with the decision, which reinforces our understanding of the law in British Columbia surrounding the terms of partnership agreements. This is an isolated issue that is unprecedented at Fasken Martineau," said William Westeringh, the firm's managing partner in Vancouver, in a statement on Thursday.

The mandatory retirement case was so important that a group of Canada's largest accounting firms and consultants, who organize themselves as partnerships, Ernst & Young LLP, KPMG LLP, Deloitte LLP, PricewaterhouseCoopers LLP, BDO Canada LLP and Grant Thornton LLP, intervene in the matter. They argued that partnerships need to be able to put time limits on ownership to protect their ability to regenerate their partnerships.

Time limits on ownership interests play an important role in promoting upward associate mobility

"Time limits on ownership interests play an important role in promoting upward associate mobility and succession in an ongoing partnership," the accounting firms argued.

At the same time, Canadian human rights tribunals seized upon the appeal to protect their turf. They argued that human rights legislation is supposed to be given broad interpretation, and cautioned the court not to limit their reach by coming up with a narrow definition of employee.

Those views help explain how the court came up with the result that it did. While the case was a clear win for the law firm and the big partnerships, Justice Abella unveiled a new way for Canadian lawyers to answer the question of whether someone is an employee or an employer.

Rather than look at whether a given fact situation satisfies a list of legal criteria, Justice Abella decided to take a broader view of the entire relationship between the lawyer and the firm. The result of her approach is what she calls a "control/dependency" test. As she put it: "The test is who is responsible for determining working conditions and financial

benefits and to what extent does a worker have an influential say in those determinations?"

In her approach, lawyers who are officially called partners might still be employees if they have little control or influence over the firm's management. Or so goes the theory. That was hardly the case with Mr. McCormick at Fasken, according to Justice Abella.

"Far from being subject to the control of Fasken, Mr. McCormick was among the partners who controlled it from 1979, when he became an equity partner, until he left in 2012," she writes. Fasken introduced the mandatory retirement policy during the 1980s, right when he was one of the partners entitled to vote on the policy, she observes. "Responsibility for remedying any alleged inequity thus lay in the hands of Mr. McCormick as much as any other equity partner. Instead, he financially benefited for over 30 years from the retirement of the other partners."

CBC news

Unpaid interns mostly female: upcoming study claims

300,000 Canadians working for free, some estimates suggest

The Canadian Press, May 21, 2014

Preliminary findings from an upcoming study on internships in Canada show that the majority of interns are young women who make less than the provincial minimum wage — if they're paid at all.

The study, to be released soon by two researchers at the University of Victoria and the Canadian Intern Association, is aimed at determining the scope of unpaid internships in Canada amid a growing uproar about the practice both here and abroad.

Saskatchewan and Ontario recently cracked down on unpaid internships, while Alberta is facing calls to do the same.

Several American states are taking tougher measures against unpaid internships while parliamentarians in Great Britain recently passed a motion to ban the practice by a whopping 181 votes to 19.

The British motion was put forward by a Conservative MP who argued that unpaid internships disproportionately favour the children of the wealthy and well-connected.

Lack of data poses problems

In Canada, there's no such move among Conservatives to ban unpaid internships despite some estimates suggesting as many as 300,000 young Canadians work without pay — 200,000 more than in the UK, which has a population almost twice the size of Canada's.

The lack of federal labour market data, however, has made it impossible to determine a precise number, said Claire Seaborn, head of the Canadian Intern Association.

Employers in Canada are not required to report unpaid interns to provincial or federal authorities, she added, making meaningful data elusive. A private member's bill by an NDP legislator in Ontario would force employers to account for their unpaid interns.

Andrew Cash, a federal NDP MP who tabled a private member's bill on unpaid internships last fall, said he's working on another bill that will focus on beefing up federal regulations to protect those who are working for free.

Federally regulated telecommunications companies like Rogers and Bell are among the biggest users of unpaid interns in Canada.

"I hear it all the time from my constituents — anyone who has an adult child between 20 and 30 probably has some experience with unpaid internships, and they're mad about it," said Cash.

"It flies against everything we stand for in terms of labour relations in Canada. If you work, you get paid. And so we need to zero in on federal regulations so that everyone knows what the rules are."

Of the interns that responded to the survey by Isabelle Couture and James Attfield, public administration grad students at the University of Victoria, 83 per cent reported earning less than the provincial minimum wage or nothing at all.

The majority of the internships are in Ontario and are most common in the private sector, where 49 per cent of respondents said they worked, preliminary results of the study found. Public and non-profit sectors made up the difference at 26 and 25 per cent respectively.

Forty-one per cent of respondents reported working for entertainment, media and journalism companies. Some 15 per cent said they were hired at marketing, public relations and advertising firms.

Most of the interns who participated were female, given many of the industries routinely using them are female-dominated, said Seaborn. Women are equally ill-served by a recent funding announcement by the Conservative government for paid internships, she added.

The Tories recently announced $40 million for 3,000 paid internships in the "high-demand" fields of science, technology, engineering, mathematics and the skilled trades.

But there was nothing for industries traditionally dominated by women, like nutrition sciences, social work and teaching, Seaborn said.

"I can't say that was the intended effect, but it could have such a drastic effect on gender, on women my age," said Seaborn, 25.

"It just means a 22- or 23-year-old female is a lot less likely to be paid in their first few jobs than a young male. That's really problematic."

A spokeswoman for Employment Minister Jason Kenney said it is "entirely false" to suggest the "high-demand" fields are geared toward men only.

"In fact, our recent Apprenticeship Grant commercial highlights a real life woman, Valerie, who got support from the Government of Canada and is in one of these fields," Alexandra Fortier said in an email.

"These internships will provide post-secondary graduates, both male and female, with the experiences and opportunities to help them succeed in the job market."

Judge scolds feuding rich neighbours for ‘kindergarten’ antics in Toronto’s tony Forest Hill

MICHAEL BABAD, The Globe and Mail, May 21, 2014

The poop has hit the fan in one of Toronto’s most exclusive areas.

An Ontario Superior Court judge has chided two warring rich couples, who he says need a “stern kindergarten teacher” because they’re acting like children in a legal dispute that has rippled through the upscale neighbourhood and taken up valuable court time.

In short, Mr. Rogers would be oh, so upset by the fight between defendants Audrey and Gary Taerk and plaintiffs Paris and John Morland-Jones. (You just knew it would be a double name, right?)

This is a complex case, and Justice E.M. Morgan tells it well as he scolds the neighbours for their childish behaviour.

“The parties to this action live across the road from each other in Toronto’s tony Forest Hill neighbourhood,” he writes in a decision released this week from a case heard last month.

“The video footage played at the hearing shows that both families live in stately houses on a well-manicured, picturesque street. They have numerous high end automobiles parked outside their homes.”

Mr. Morland-Jones is an oil company executive, and Mr. Taerk a psychiatrist. And, as the court notes, “they do not seem to like each other, and neither do their respective spouses.”

The Morland-Joneses went to court seeking “various forms of injunctive relief on an interlocutory basis,” seemingly years in the making and related to “the plaintiffs’ allegation that the defendants have been misbehaving and disturbing their peaceful life in this leafy corner of paradise.”

To sum it up:

The Morland-Joneses’ home is “ringed” with 11 security cameras, two of them “aimed directly” at the Taerks’ front door and driveway. “Nothing that the defendants do escapes the plaintiffs’ video camera lens.”

The April hearing started with lawyers for the Morland-Joneses playing security footage from years ago “in which Ms. Taerk is seen performing a ‘poop and scoop’ after a dog did its business on her front lawn.” Ms. Taerk is seen taking the offending plastic bag across the street, where the Morland-Joneses had their garbage out to be collected.

“Although the impugned deed actually takes place off camera, Ms. Taerk can be seen moments later returning to her side of the street empty-handed. Apparently, much to the consternation of the plaintiffs, she deposited the goods in the plaintiffs’ garbage can. In doing so, she failed to walk to the back of her house to place it in her own receptacle like a truly good neighbour would do.”

(I know what you’re thinking here. And, yes, seriously. Actually, read on.)

This was referred to by the Morland-Jones lawyers as the “dog feces incident,” and was a “high point” of the court claim.

And then – the nerve! – there was the “dog urination issue.” Lawyers sent the Taerks a cease-and-desist letter “documenting Mr. Taerk walking his dog and occasionally allowing it to lift its leg in a canine way next to the bushes lining the plaintiffs’ law.”

As the judge put it, it’s all downhill from there: The Taerks sometime park “one of their cars” in front of the Morland-Joneses’ home. And vice-versa. The Taerks – Ms., in particular – sometimes take cellphone pictures of the Morland-Jones house. They also accuse Ms. Taerk of photographing their housekeeper walking their dog for its “daily constitutional” at “what they describe as its favourite grassy spot in a parkette only feet from the defendants’ front lawn.”

Oh, and sometimes, Ms. Taerk would just stand and stare at the home of the Morland-Joneses, once "for a full 25 seconds."

And once, the Morland-Joneses believe, the Taerks "appeared to be photographing" their then 16-year-old son sitting in a parked car, with his girlfriend, across from the Taerk residence. "He speculated, but could not entirely recall, precisely what he and the young woman were doing in the car at that moment."

(Well, that leaves little to the imagination.)

And my absolute favourite: "The antics have only gotten worse since then. Ms. Morland-Jones has shouted at the Taerks from her front yard, and Ms. Taerk has given Ms. Morland-Jones 'the finger' from her front driveway.

After that, in the ruling, is where the judge says the neighbours don't need a judge, but a kindergarten teacher. And for that matter, a court can't order the Taerks to "be nice" to the Morland-Joneses.

He then scolds them as "educated professionals" acting like kids, and taking up a day of court at the expense of the taxpayer.

"There is no claim for pooping and scooping into the neighbour's garbage can, and there is no claim for letting Rover water the neighbour's hedge. Likewise, there is no claim for looking at the neighbour's pretty house, parking a car legally but with malintent, engaging in faux photography on a public street, raising objections at a municipal hearing, walking on the sidewalk with dictaphone in hand, or just plain thinking badly of a person who lives nearby."

The motion, by the way, was dismissed, and each side has to pay its own costs.

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Judge's ruling smacks down wealthy Forest Hill families for 'acting like children' in feud

Joseph Brean, National Post, May 20, 2014

In a legal ruling that is by turns sarcastic, exasperated, and downright hilarious, an Ontario judge has smacked down a lawsuit between two wealthy families in Toronto's most exclusive neighbourhood, or as Justice Ed Morgan calls it, "tony Forest Hill… this leafy corner of paradise."

“In my view, the parties do not need a judge; what they need is a rather stern kindergarten teacher,” he wrote. “They are acting like children.”

Pitting an oil executive and his wife against a psychiatrist and his, the case arose over a bag of dog excrement, allegedly deposited by Audrey Taerk in a garbage can belonging to her neighbours across the street, Paris and John Morland-Jones.

“And it goes downhill from there,” Mr. Justice Morgan wrote. In essence, the Morland-Joneses claimed the Taerks “have been misbehaving and disturbing their peaceful life,” a claim they document with security footage from cameras trained on the Taerks’ house, which the judge described as “more a sword than a shield.”

“Nothing that the [Taerks] do escapes the [Morland-Joneses’] video camera lens,” the ruling reads. “The [Morland-Joneses] can see when Ms. Taerk leaves to go shopping, they can study what the [Taerks] are wearing every morning when they pick up their newspaper on the front step, they have a videotaped record of when Mr. [Gary] Taerk goes to work or walks his dog, etc.”

The judge, former University of Toronto law professor Ed Morgan, also a former president of the Canadian Jewish Congress, was brutal in his dismissal of the Morland-Joneses’ case, not even awarding legal costs to the victorious Taerks, finding they “seem to relish playing” on the sensitivities of their neighbours, even taunting them by taking pictures of their own.

All these “hijinks” might make for a successful television show, the judge observed, “although probably limited to the cable channels high up in the 300’s.”

“As I explained to Plaintiffs’ counsel at the hearing, a court cannot order the Defendants to be nice to the Plaintiffs,” he wrote

In mocking tone, peppered with biting asides, the judge describes how the “dog feces incident” led to a lawyer’s letter, an “erudite piece of legal correspondence” to which the Taerks did not reply.

Each side apparently parks their cars, legally if annoyingly, in front of the other’s home. Ms. Taerk was accused of taking cell phone pictures of the Morland-Jones home, and even of their housekeeper walking the dog, which earned little sympathy from the judge, given the Morland-Joneses’ own blatant surveillance of the Taerks.

The tension has become so bad that, according to an affidavit by Mr. Taerk, Ms. Morland-Jones shouts profanity at him whenever he walks by, so he has taken to always carrying a voice recorder, held at the ready in his right hand.

“The controversy has even extended to other lucky residents,” the judge wrote. “The [Morland-Joneses] summoned… no less than four of their neighbours to testify on the pending motion, no doubt endearing themselves to all of them. One witness, a lawyer, was asked to confirm that he had warned the [Morland-Joneses] about the [Taerks] when they first moved into the neighbourhood; he responded that [he] can recall saying no such

thing. Another witness, a professor, was asked to confirm that she sold her house for below market value just to get away from the Defendants; she said she did not."

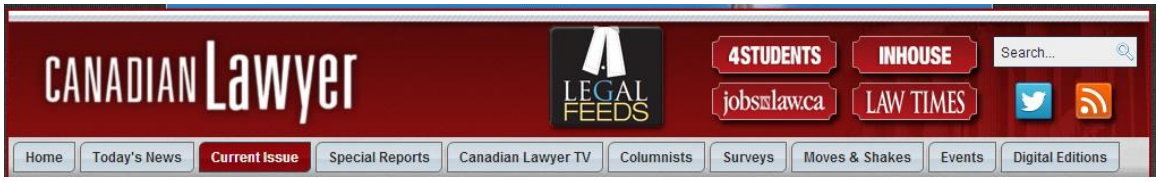
The "piece de resistance," as Mr. Justice Morgan observed, was the Morland-Joneses' claim that Ms. Taerk sometimes stands in her driveway and looks at their house for several seconds, a claim backed by video.

"There is no denying that Ms. Taerk is guilty as charged. The camera doesn't lie," the judge wrote.

He decided that this accusation, like the others, does not belong in court.

"There is no claim for pooping and scooping into the neighbour's garbage can, and there is no claim for letting Rover water the neighbour's hedge," he wrote.

There is no serious issue to be tried, he found, and each side must bear their own substantial legal costs.



Weird case of the week: 'A gem of a lawsuit'

Gail J. Cohen, Legal Feeds blog, Law Times, May 21, 2014

Morland-Jones v. Taerk, Ontario Superior Court

Popping out from a stately home in Toronto's Forest Hill, 11 security cameras capture everything the Morland-Jones' neighbours, especially the Taerks, do.

Two cameras are directed right at the Taerks' home, allowing the Morland-Joneses to gather evidence of Audrey Taerk depositing dog poop in their garbage bin, taking photos of their house with her cellphone camera, "casting her gaze from her own property across the street and resting her eyes on the plaintiffs' abode for a full 25 seconds," and other such supposedly abhorrent illegalities.

"For their part, the defendants have not been entirely innocent," according to Superior Court Justice Edward Morgan, who calls the case a "gem of a lawsuit."

In addition to Ms. Taerk's habit of taking photos of the Morland-Jones home to annoy Paris Morland-Jones, Gary Taerk carries a voice recorder when he walks past the house, presumably to record the profanities with which Ms. Morland-Jones greets him.

The Morland-Joneses pursued a civil lawsuit after shouts and "the finger" were exchanged between the parties, the police called on numerous occasions, and an attempt at peace bond restricting the Taerk's movements failed.

"In my view, the parties do not need a judge; what they need is a rather stern kindergarten teacher," Morgan said.

"I say this with the greatest of respect, as both the plaintiffs and the defendants are educated professionals who are successful in their work lives and are otherwise productive members of the community. Despite their many advantages in life, however, they are acting like children. And now that the matter has taken up an entire day in what is already a crowded motions court, they are doing so at the taxpayer's expense."

Case dismissed, no costs ordered.

Cour suprême: le juge québécois Louis LeBel va prendre sa retraite

La Presse Canadienne, le 23 mai 2014

Un nouveau poste sera à pourvoir à la Cour suprême du Canada le 30 novembre prochain. Le juge québécois Louis LeBel a officiellement annoncé vendredi qu'il prendrait sa retraite en novembre, alors qu'il atteindra l'âge de 75 ans, donnant au premier ministre Harper la tâche de nommer deux nouveaux juges québécois.

L'annonce est survenue presque au même moment où le journal The Globe and Mail publiait un rapport surprenant détaillant les faits derrière la tentative ratée du premier ministre Stephen Harper de nommer Marc Nadon comme juge à la Cour suprême, nomination jugée invalide puisque l'ancien juge de la Cour fédérale ne remplissait pas les conditions nécessaires pour occuper l'une des trois places réservées aux magistrats du Québec.

Louis LeBel a été nommé juge en janvier 2000, après 15 années passées à la Cour d'appel du Québec. Il aura été juge durant 30 ans.

«Ce fut un privilège de contribuer à l'administration de la justice au Canada et à l'évolution de nos lois. J'ai eu la chance d'exercer mes fonctions avec des collègues pour qui j'ai énormément d'estime et de respect», a-t-il déclaré par voie de communiqué.

La juge en chef de la Cour suprême, Beverly McLachlin, a déclaré que le juge LeBel avait accompli un excellent travail au sein de l'institution.

«Juriste éminemment doué et doté d'une immense sagesse, il est un pilier de la Cour. Tous ses collègues lui vouent un attachement et un respect profonds, et il nous manquera considérablement», a-t-elle exprimé.

De son côté, le bureau du premier ministre a envoyé un message qui sonnait étrangement familier, remerciant M. LeBel pour son dévouement.

«Nous conserverons longtemps le souvenir de son dévouement exemplaire à la cause du droit et de ses distingués services.»

«Les plans en vue de son remplacement à la Cour suprême du Canada seront annoncés en temps et lieu», concluait la déclaration de M. Harper. Cette phrase machinale semble cependant avoir plus de poids qu'à l'habitude.

C'est que ces plans de nomination seront sans doute parmi les plus surveillés de l'histoire de la Cour suprême, qui est normalement composée de neuf membres, mais qui est à court d'un juge depuis le tout début de sa dernière session, il y a quelque neuf mois.

Cette vacance, de surcroît, est dans l'un des trois sièges réservés aux juges québécois par la Constitution. Le départ de Me LeBel signifie que le premier ministre Harper devra nommer deux nouveaux juges québécois d'ici six mois.

Depuis l'annonce de l'inadmissibilité de Me Nadon, les jeux de coulisses dans sa nomination font graduellement surface, rendant public un différend sans précédent entre la juge McLachlin et le bureau du premier ministre.

Plus tôt ce mois-ci, les conservateurs ont mis en doute les décisions de Mme McLachlin, laissant entendre qu'elle avait tenté d'entrer en contact avec M. Harper - à tort - pour discuter des potentiels problèmes juridiques que pourrait soulever la nomination de Marc Nadon.

Cependant, apprenait-on vendredi dans le Globe and Mail, c'est non seulement le cas de M. Nadon qui a incité la juge en chef à joindre le gouvernement, mais aussi une courte liste de candidats, qui comprenait quatre juges de la Cour fédérale, bien qu'il était loin d'être assuré que ces candidats seraient admissibles au poste.

Le rapport laisse sous-entendre que le gouvernement a rempli sa liste de candidats de la Cour fédérale, dans l'espoir de nommer un juge plus conservateur que ceux qu'il croyait disponibles au Québec.

LeDroit

Le code de déontologie des lobbyistes sera révisé

Paul Gaboury, Le Droit, le 22 mai 2014

Dans quelles circonstances les lobbyistes peuvent-ils offrir des cadeaux et participer à des activités politiques au niveau fédéral?

La commissaire au lobbying du Canada, Karen E. Shepherd, a confirmé hier que le code actuel sera révisé dès cet été. Cela permettra de clarifier et simplifier certains éléments soulevés par les différents intervenants qui ont participé à une consultation sur le code de déontologie, l'automne dernier.

Une fois ses propositions connues, une deuxième consultation sera lancée l'automne prochain sur la version révisée du code. Elle entend soumettre les modifications proposées à l'étude d'un comité parlementaire.

«La consultation a confirmé que le Code de déontologie des lobbyistes constitue une base solide, mais qu'il pourrait être amélioré dans certains domaines», a indiqué la commissaire Shepherd. «Au moment de réfléchir aux façons de renforcer le Code, je tiendrai compte des points de vue entendus et de ma propre expérience.»

En vertu du code actuel, la règle sur l'influence répréhensible et les conflits d'intérêts indique que «les lobbyistes doivent éviter de placer les titulaires d'une charge publique en situation de conflit d'intérêts en proposant ou en prenant toute action qui constituerait une influence répréhensible sur ces titulaires.»

Au cours de la consultation, certains intervenants ont dit souhaiter plus de clarté au sujet des cadeaux, des activités politiques et de l'accès préférentiel.

Dans son rapport sur la consultation rendu public hier, la commissaire souligne que la directive qu'elle a publiée en 2010 précise que «l'offre d'un cadeau, d'un montant d'argent, d'un service ou d'un bien, si son remboursement n'est pas obligatoire», peut entraîner une obligation concurrente pour le titulaire d'une charge publique.

«Plusieurs participants croient que nonobstant cette directive, il y a une lacune dans le Code concernant les cadeaux offerts par les lobbyistes. Alors que différentes lois et différents codes de déontologie traitent de l'acceptation de cadeaux offerts à des titulaires d'une charge publique, aucune orientation n'est offerte aux lobbyistes dans le Code de déontologie des lobbyistes», note la commissaire Shepherd.

Par exemple, l'Association du Barreau canadien (ABC) a recommandé qu'un lobbyiste ne puisse pas offrir un cadeau, l'accueil ou d'autres avantages, sauf une marque de valeur nominale à un titulaire d'une charge publique.

«On a demandé une clarification à savoir si les services bénévoles, l'argent ou le temps fourni pour aider un député à se faire élire pourraient être perçus comme un cadeau susceptible de favoriser les intérêts privés d'un individu», souligne-t-on.

Plusieurs participants ont indiqué que la clarté du Code pourrait être améliorée en définissant, de façon précise, ce qui constitue des «activités politiques», note la commissaire.

Par ailleurs, au cours de cette consultation, l'ABC a recommandé l'ajout de règles pour s'assurer que les lobbyistes ne demandent, ni n'acceptent, un accès préférentiel en organisant des rencontres avec des titulaires d'une charge publique qui sont des amis ou des parents, ou avec qui ils effectuent des transactions financières.

Supreme Court to rule soon on telecom data privacy

Paul McLeod, Ottawa Bureau Chief Halifax Chronicle-Herald, and Alex Boutilier, Toronto Star, May 26, 2014

Canada's top court will soon rule on whether warrantless sharing of telecom customer data with police is legal.

It has become commonplace for police to obtain identifying information about Canadians from Internet service providers. But some lawyers argue this is a perversion of a law that was supposed to beef up privacy.

Now the Supreme Court of Canada is set to rule on whether the practice is constitutional.

"This is the equivalent of the state standing over your shoulder and essentially watching what you're doing," said Ronald Piche of the Saskatchewan law firm Piche & Company.

"Now, they don't know who you are at the time, but they're just one letter away."

Piche took on the case of Matthew David Spencer, a Saskatchewan man who was charged with possessing child pornography at age 19. Police laid charges after Spencer's Internet service provider, Shaw, turned over his identity voluntarily. Spencer was convicted but appealed his case up to the Supreme Court.

Before 2001, police had to prove reasonable grounds that a crime was committed and obtain a warrant before accessing private information. But that year Parliament passed the Personal Information Protection and Electronic Documents Act. It was billed as safeguarding Canadians' digital privacy.

The act opened the door for telecoms to voluntarily hand over customer data police if it is "requested for the purpose of enforcing any law in Canada, a province or a foreign jurisdiction."

This opened the door for warrantless access to personal data, said Richard Fedorowicz of the Toronto law firm Robinson, Chartier, Taraniuk, Owoh & Fedorowicz.

"I can tell you there's nothing stopping police from pursuing search warrants. The troubling thing is it almost became just a matter of convenience. It's just easier to send this form email," said Fedorowicz, who has litigated similar cases.

Here is how it works.

According to four lawyers interviewed, police witness behaviour online they suspect to be illegal. They do not know who is behind it, but they trace the Internet protocol address to a Canadian telecom. They then go to the company and get the name, address and phone number tied to that IP address. There is no warrant involved and the disclosure is not revealed to the individual.

Most telecoms have reworded their customer contracts in recent years to allow for this disclosure, said Fedorowicz.

Lower courts have consistently ruled that "tombstone data" such as names, addresses and phone numbers do not carry an expectation of privacy, even if they are tied to someone's online activity.

But if the Supreme Court sides with Spencer, all of that will change. Spencer's legal team argues the way police have been using the act is an unconstitutional breach of privacy.

"The purpose of PIPEDA is not to enhance police powers but rather to protect privacy rights," says the legal argument written by Aaron Fox and Darren Kraushaar, lawyers with McDougall Gauley LLP.

They argue that police should be able to trace an IP address, but only with the sign-off of a judge. The lawyers say the police are using the "power to collect intimate and revealing personal information without any judicial oversight."

The court is considering the Spencer case now and and could render its decision at any time.

Law enforcement agencies requested data from nine Internet, telecommunications and web companies about 1.2 million times in 2011. It is not known how many times the companies complied with police requests.

Police argue they need their powers strengthened to catch up with modern criminals.

Speaking at a House of Commons committee studying Bill C-13, the Conservatives' so-called cyberbullying bill, members of the RCMP, Ontario Provincial Police and Halifax Regional Police said they need access to data quickly in order to address crimes in the digital world.

"Under the current legislation police can only access the very basics of subscriber information," said Supt. Carson Pardy, the OPP's director of eastern region operations.

"The outcome (of C-13) will be that police can quickly and consistently gain access to information that makes a difference to our effectiveness in investigating and preventing criminal activity and victimization."

Both the Conservatives and police agencies have stressed that C-13 does not explicitly expand warrantless access to Canadians' personal data for authorities. But the bill does remove a disincentive for telecoms to co-operate. The legislation includes a clause that shields from prosecution anyone who voluntarily hands over information to authorities.

The Canadian Civil Liberties Association is also challenging warrantless access through the Personal Information Protection and Electronic Documents Act in Ontario Superior Court. A court date has not been set.

How to cram for a law exam

GDL legal exams are tough, but with solid revision notes and a little help from your friends, you should get by

Flora MacQueen, The Guardian.com, May 21, 2014

Those of you taking a graduate diploma in law (GDL) this year are now firmly into revision season. Condensing a legal degree into one year is no mean feat – time is very tight and as the exams approach you may not feel like you understand anything. But keep going; many subjects won't come together until the final few weeks. Here's a few tips to help you on your way.

Be like Bruce Lee

When struggling with exhaustion and time constraints, it is tempting to take a gamble and focus on learning just a few areas really well, hoping that these topics will come up in the exam.

However, law students are warned against this as it is unnecessarily stressful. It leaves you backed into a corner, without a choice of questions to answer. In the exam you might find yourself forcing square blocks into round holes if you try to apply what you have learned to .

Examiners also now often set questions that mix topics and so you may struggle to answer a full question.

If you don't mind that kind of stress then go for it, but there are limitations to what you can achieve. Perhaps better to think of the GDL exams like preparing for a fight - flexibility will be your best asset. Bruce Lee says it best: "Be like water my friend… adjust to the object and you shall find a way around or through it."

Let them eat case

Broadly brush over your revision notes and make sure you have gone through decent structures for answering one question per module, whether essay or problem question. The structures should include the relevant principles of law, with case law and statute that best relate to it. Finally, note any remedies and defences available.

Try to avoid getting bogged down in the case law; there are more cases than it is possible to learn and you can waste time dwelling on this too much if you haven't yet grasped the principle. Think of case law as the cherry on the cake.

To learn key cases, try writing the case name on one side of a memo card and the facts on the other. Flicking through these cards and testing whether you know the name of the case just from reading the facts, or vice versa, will enable you to memorise them.

You will not have time during the exam to start finding your way around a piece of statute. It is really important to use the statutory extracts you will have access to in the exam as part of the revision process and learn the necessary signposts that will help prompt you. Do not be tempted to copy large passages into your answers as you will not get extra marks for this.

Teach a child

"If you can't explain it to a six-year-old," said Einstein, "you don't understand it yourself." You might struggle to find a six year old with the patience to learn about advanced law, but don't overlook the value of regularly testing your understanding of the law by writing out practice essay answers and applying what you know to a set of facts.

Pay attention to the question as every word is there for a reason and the facts may include some red herrings that examiners expect you to avoid. Going through past exam papers is

the best way to do this and if you can do anything in the final weeks, this is what you should be focusing on. A good student will know the law but will also know how to apply it to the facts.

Finals thoughts

There are a few things you can do during the exam to ensure you get better marks. Sounds simple but keep your answers as neat as possible so that the examiner does not struggle reading the points you make. One teacher (who also marks exam papers) suggests leaving every left hand page in the answer booklet blank so that you have space to add paragraphs at the end of the exam, if you need to. It's easier to draw a line across to the blank page to add sentences into your answer than squeeze them between the lines you have already written.

It is also wise to write a plan before starting to answer the question, but more importantly not to cross it out. Crossed out words cannot be included as part of your answer and will not be marked. Therefore, if you run out of time, you may score a few extra points for those parts not included in your answer but features on your plan.

And most importantly, keep in close contact with your course friends as this will keep you sane when you are feeling like you really don't understand the law. They are your best support during these final few weeks of anxiety.

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Supreme Court will not cloak all settlement talks in secrecy

Parties in private mediation can contract out of settlement privilege exception, top court holds

By Cristin Schmitz, May 23, 2014 issue

The Supreme Court has refused to throw an “impermeable cloak of secrecy” over the “without-prejudice” settlement discussions that occur during mediations.

In a judgment that stresses the importance of promoting settlements via mediation, the top court ruled 7-0 on May 8 that parties engaged in private mediation can agree to an “absolute confidentiality” clause that overrides the common law rule that confidential

discussions may be revealed in court for the limited purpose of proving the existence, scope and terms of a settlement.

Importantly, however, the court stressed that such contractual clauses will only be interpreted as granting absolute confidentiality if the parties expressly and clearly stipulate that they intended such sweeping secrecy.

Justice Richard Wagner therefore ruled that even though the appellant defendants, Union Carbide Canada and Dow Chemical Canada (now known as Dow) and the respondent plaintiff, Bombardier Inc., signed a standard-form clause stipulating "nothing which transpires in the mediation will be alleged, referred to or sought to be put into evidence in any proceeding," Bombardier was not precluded from disclosing their confidential talks in Quebec Superior Court in order to assist the plaintiff in proving the scope of the parties' settlement — about which the parties vehemently disagree.

"Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality," Justice Wagner wrote in Union Carbide Canada Inc. v. Bombardier Inc. [2014] S.C.J. No. 35. "However the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace [the common law settlement] privilege and the exceptions to it. Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear."

After examining the mediation contract and the circumstances surrounding its creation, Justice Wagner concluded that Dow and Bombardier did not intend the confidentiality clause in question to exceed the usual protection of the common law settlement privilege and, more specifically, to dispense with the exception to that privilege that applies where a party seeks to prove the existence or scope of a settlement.

"Absent an express provision to the contrary, I find it unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Such a result would be illogical," Justice Wagner held.

The Supreme Court's judgment is positive for the business of mediation across Canada, said William McDowell of Toronto's Lenczner Slaght, who represented intervener Arbitration Place of Toronto.

"It's a very important decision about the enforceability of settlements reached in mediation," McDowell said. "The court has made it quite clear that it sees the prime importance of ensuring that settlements reached in good faith are respected. It has made it clear that it doesn't want to permit parties to easily go sideways on the deals that they've reached in mediation, and it's…important because if deals reached at mediation turned out to have enforceability problems, that's bad for the mediation business…for Canadian business, and Canadian litigation as well."

McDowell said it is positive that the court declined to spread "a broad impermeable [common law] cloak of confidentiality over anything said at mediation [and] any agreement reached at mediation."

Dow's counsel Richard Hinse of Montreal's Lavery did not take issue with the court's comments on public policy, but "that being said, the court should have applied the contract also. I will leave it at that."

Bombardier's counsel Martin Sheehan of Montreal's Fasken Martineau said the judgment "draws a reasonable compromise" between freedom of contract and the public policy that aims to encourage settlement.

He suggested the judgment will encourage parties to pay more attention to the mediation contracts they sign and to consider what should happen vis-a-vis confidentiality if a settlement occurs. If they want to ensure that their without-prejudice discussions and disclosures during private mediation do not end up in court they could, for example, specifically state in their mediation contract that "it will not be allowed for parties to attempt to prove [in court] a verbal agreement. There will only be an agreement here once both parties agree in writing that there is an agreement," he said.

Bombardier is suing Dow in Quebec Superior Court in Montreal for about $32 million in respect of allegedly defective gas tanks the defendant supplied for Bombardier's Sea-Doo personal watercraft in 1997, 1998 and 2003. The gas tanks exploded, injuring customers. The lawsuit was launched in 2000 and the parties agreed to private mediation by Montreal lawyer Max Mendelsohn in 2011. They signed a standard-form mediation agreement he provided them the day before the mediation.

During mediation Dow offered to settle for $7 million and agreed to Bombardier's counsel's request to keep the offer open for 30 days while he sought instructions from Bombardier.

Twenty days later Bombardier told Dow it was accepting the offer. But the parties then disagreed over the scope of the settlement, with the defendant demanding a release for all present and future litigation anywhere in the world and the plaintiff insisting the $7 million was just for settling the Montreal litigation.

Bombardier filed a motion in court for homologation of the transaction but the Quebec Superior Court granted Dow's motion to strike out some of the allegations on the ground that they violated the confidentiality agreement by referring to events that had taken place during mediation. The Quebec Court of Appeal reversed.

The Supreme Court's judgment gives Bombardier the green light to rely on events in the mediation to aid its efforts in Superior Court to prove the scope of the settlement.

Settlement privilege generally protects the confidentiality of parties' communications that lead to settlement, including during mediation. However under the common law, which also applies in this regard in Quebec, such communications cease to be privileged if disclosing them is necessary to prove the existence or scope of the settlement.

Justice Wagner noted that in this case neither of the parties drafted the mediation contract or confidentiality clause, and both signed it just hours before a mediation that the parties intended to settle their dispute. “They had no reason to assume that they were signing away their ability to prove a settlement if necessary,” nor was there evidence that the parties thought they were deviating from the settlement privilege that usually applies to mediation when they signed the agreement, he said.

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The elephant in the room

Will Canadian law societies follow Britain’s lead and allow outside investment in law firms? They’re thinking about it — and it’s making lawyers nervous.

BY AGNESE SMITH, National Legal Insights & Practice Trends, April - May 2014

There’s an elephant sitting in law society offices around the globe. And it speaks with an English accent.

It’s saying that based on the British experience in liberalization, neither the rule of law nor legal ethics are undermined when outside supervision and investors are allowed into the legal services industry, which still enjoys a near monopoly in many jurisdictions on public interest grounds.

“There is no evidence that standards have been let down” as a result of the Legal Services Act of 2007, says Chris Kenny, chief executive of the Legal Services Board, the independent regulator for England and Wales created by the Act. It has, however, resulted in a wholesale change of attitude, even in legal areas that are not covered by the LSA, he said.

“I don’t think any jurisdiction can justify a monopoly in legal services,” Kenny added.

Most legal societies disagree, despite the fact that the system in Britain did not implode after outsiders were admitted to the club several years ago in the name of improving access to justice and encouraging innovation.

As access to legal counsel moves increasingly beyond the reach of the average person and technological advances render old paradigms for legal regulation problematic, this may change. But for the moment, the United States and many other countries have come out against liberalization.

The situation in Canada is somewhat different.

While Canadian provinces still prohibit non-lawyers from owning law firms, law societies here accept that change is necessary and many are seriously studying the experience in Australia and Britain, which have permitted outside investment in the form of Alternative Business Structures (ABS) for several years.

The question is: Will the Canadian system, which is regulated in the public interest by 14 provincial and territorial law societies, allow for greater competition, and to what degree? Are the self-regulated law societies capable of leading such monumental change without being forced to do so?

Observers agree that Canada is moving in the right direction, but there is some concern that if law societies do not act, the government will do it for them, and in the process, remove the regulators' ability to oversee members. This was the case in Britain and Australia.

"Access to justice in Canada is a real problem, and if practitioners themselves cannot find a way to alleviate the pressure, there is a good chance that governments will be forced to act," said Jordan Furlong, an Ottawa-based partner at Edge International, who has written extensively on this topic. "The quid pro quo of self-regulation is: you have to clearly show that you are regulating in the public interest. The day the public and governments lose faith that we're doing that is the day we start to lose self-regulation."

Not all legal professionals will be overjoyed at the increase in competition that new ownership structures would create, he adds.

"There will be a lot of resistance from rank and file lawyers," added Furlong. "They see regulatory liberalization as a threat — that we would be opening the floodgates to new competitors" at a time when lawyers are already struggling financially.

"The existing tight regulatory restrictions on business structures are not justifiable given the lack of evidence that regulatory liberalization will cause harm."

Britain's experience suggests that Canadian lawyers, especially those who aren't at the top of the legal food chain, have reason to be nervous.

The ABS sector represents only a sliver of the UK's £25-billion ($CAD46-billion) market and only a small percentage of legal services are actually regulated, or "reserved." Nevertheless, the very idea of liberalization has already sparked concern among the 11,000 or so firms in England and Wales.

Lawyers were initially ambivalent about the threat of competition, "but now there seems to be a belief that there are many more threats out there," said Giles Murphy, head of business services at accountancy and investment management group Smith & Williamson in London.

And they see a limited upside to liberalization. Murphy believes that's because many have yet to alter their business practice sufficiently to attract outside investors or partners in different types of business.

A recent survey by Smith & Williamson found that 9 out of 10 respondents expect greater levels of competition as a result of the LSA. (The survey was completed by 102 respondents from the top 250 UK-based law firms.) Only one in 10 firms with 49 partners or less expect to become a multidisciplinary practice. Only one in four expect to recruit non-lawyers as partners.

Meanwhile, the Law Society of Upper Canada's Alternative Business Structures working group has recommended the regulatory body consider allowing non-lawyers to own at least a portion of legal firms. Although it's no panacea for the current problems facing some practitioners and the public, it could help boost innovation and increase access to justice, the group said.

"The existing tight regulatory restrictions on business structures are not justifiable given the lack of evidence that regulatory liberalization will cause harm," the report said. "This is coupled with substantial evidence that business structure liberalization combined with entity regulation is likely to provide greater flexibility and more options for both licensees and the public."

The group, which provided four different models for further study in its report, suggested that a broader definition of permitted investment would lead to faster and more meaningful reform than either restricted or incremental adjustments in ownership. "Liberalization is the logical conclusion absent evidence of real risk," Malcolm Mercer, co-chair of the working group, said in a telephone interview.

Change, however, won't happen overnight. The law society still needs to decide whether liberalization is even in the public interest before it considers which model to follow, says Mercer.

"There are numerous consultations yet to come, and a lot can still happen," Furlong adds. "But the fact that Convocation [the law society's governing body] unanimously approved this report speaks volumes about its willingness to look to the public interest first and to lawyers' more parochial interests second."

In other provinces, the Nova Scotia Barristers Society and the Law Society of British Columbia are mulling or have already passed some reforms, including expanding the role of paralegals and ABS. In Quebec, non-lawyers are already allowed to own a minority stake in legal firms.

Liberalization is also on the radar of the CBA's Legal Futures Initiative, which will release its final report later this year. Alternative business structures proved to be a major point of contention during consultations which wrapped up earlier this year. Most respondents came down either for or against the idea, with little middle ground, according to an interim report.

Proponents were excited about the opportunities for innovation that outside investment in law firms would open up; critics seemed mainly concerned about how lawyers could ethically and professionally carry out their duties while also acting in the interests of corporate shareholders.

Observers outside of Canada are encouraged by the recent developments here.

"A number of jurisdictions in Canada are doing exactly what they should be doing," Laurel Terry, a Pennslyvania State University law professor, said in an email. "They have researched the approaches used in other jurisdictions, they have tried to figure out whether there is data that suggests a particular approach has been successful, and they have been educating their thought leaders and decision-makers about these complex (and sometimes controversial) issues with an eye towards taking appropriate action."

So far, there appears to be limited government interest in altering the current system of self-regulation for law firms in Canada. However, some practitioners fear the tide could turn.

Prudent banking regulation and a commodity bull market have allowed the Canadian economy to fare much better than most over the past five years. This has arguably helped curtail resentment toward the privileged, which includes much of the legal community. That could change with sinking commodity prices and weaker growth in general, despite the fact that many lawyers are already hurting in a challenging legal marketplace.

Considering Britain's recent experience, some observers there question how hard Canadian legal societies can push for changes that could hurt practitioners, even though organizations such as LSUC are mandated to regulate in the public interest — not promote lawyers' well-being.

"I don't think it's absolutely impossible, but if you try to make a degree of change like ABS happen, the research work suggests that the economic imperative will lessen the ambition for that change," added Legal Services Board (LSB) Chief Kenny, referring to the possibility of law societies themselves endorsing meaningful change.

The spat in Britain between frontline regulators and the LSB about the future of legal regulation there illustrates the reluctance of some legal societies to relinquish power.

The current regulatory system in the UK, forged out of the necessity to compromise with legal practitioners, features the LSB at the top of the pyramid while frontline regulators handle the day-to-day management of the industry. It's an expensive and complicated system that has its share of detractors.

Many observers believe the best possible solution to the current messy half-way measure would be the creation of a unified, independent regulator that could spur greater competition and innovation. But public and government apathy coupled with resistance from practitioners mean that, for now, the unhappy status quo will remain.

"I think [a single, independent regulator] is logical, not inevitable," says Richard Moorhead, director of ethics and law at University College London. "History in the lobbying power of the Bar Council and Law Society stand in the way," he said by email.

Of course in Canada, the notion of a single, independent regulator is a non-starter; with 14 provincial and territorial law societies, decisions on how to promote innovation in the legal sector rest with many different jurisdictions.

But rest assured, they're all paying close attention to the elephant with the English accent.

"The Tesco law"

In 2001, Britain's Labour Government ordered an independent inquiry after the Office of Fair Trading criticized competition and restriction in the legal services industry. In 2004, Sir David Clementi issued his report: "Review of the Regulatory Framework for Legal Services in England and Wales."

The government supported many of Clementi's conclusions and brought in The Legal Services Act of 2007 (LSA), which put consumer interest at the heart of reforms aimed at increasing competition and innovation.

Dubbed the "Tesco law," the Act opened the door for businesses like supermarkets and insurance companies to expand into legal services. Previously, only lawyers could own legal firms, as is the case in many jurisdictions. More than 250 Alternative Business Model (ABS) firms have been approved since 2011.

The LSA also created the Legal Services Board, which oversees the frontline regulators for approximately 150,000 solicitors and barristers in England and Wales

Liberalization of legal services in Canada

The Law Society of Upper Canada's working group recently suggested four models of Alternative Business Structures (ABS) for further consideration:

Entities that provide legal services only, and in which non-licensee owners are permitted an ownership share of up to 49 per cent;

Entities that provide legal services only, and in which there are no restrictions on non-licensee ownership;

Entities which may provide both legal services and non-legal services (except those identified by the law society as posing a regulatory risk), and in which non-licensee owners are permitted an ownership share of up to 49 per cent;

Entities which may provide legal services as well as non-legal services (except those identified by the law society as posing a regulatory risk), and in which there are no restrictions on non-licensee ownership.

Citizenship Act will create two classes of Canadians

MICHAEL ADAMS, AUDREY MACKLIN AND RATNA OMIDVAR, contribution to The Globe and Mail, May 21, 2014

Michael Adams is president of the Environics Institute; Audrey Macklin is a professor in the Faculty of Law at the University of Toronto; Ratna Omidvar is president of the Maytree Foundation.

The federal government argues that its proposed new Citizenship Act will "protect the value of citizenship." We are concerned that it may have the opposite effect: making Canadian citizenship harder to get and easier to lose, and creating second-class citizens along the way.

The government is introducing stricter residency requirements, increasing the required period of permanent residency to four years from three. At first glance, this may not seem like a major change. But this is in addition to processing delays that stretch from one to three years.

Consider this scenario: A foreign student completes her master's degree here in three years. She wants to stay in Canada – and is just the kind of highly skilled immigrant Canada needs – but she's not eligible to apply for permanent residence yet. First, she must find suitable employment and work for a year. Having done so, she applies for permanent resident status, which takes another year to process. She has now been in Canada for five years, but none of it counts toward the four-year permanent residency requirement. Under the old rules, she would have received partial credit for years lived in Canada as a temporary resident. No more.

She is now a permanent resident, just at the starting line of the four years she must spend in Canada to apply for citizenship. Her Canadian employer asks her to work in one of its overseas offices (perhaps to take advantage of her language skills and cultural knowledge). But under the new rules any time spent outside Canada will further delay her eligibility for citizenship and could even jeopardize her permanent residence. She refuses the career opportunity.

Four years later, she has fulfilled her permant residence requirement and applies for citizenship. Based on existing delays (the result of staff shortages, not law), she will have to wait about two years before her application is processed. She's been here for eleven years, six of them as a permanent resident. Only now can she call herself "Canadian" and vote for the representatives that collect her taxes and make decisions that affect her life.

Too bad for her? Maybe. But too bad for Canada as well: citizenship tends to promote engagement and contribution. Research indicates that the sooner people get citizenship, the sooner and more fully they invest themselves in their new society.

In addition to making citizenship more difficult to obtain, Bill C-24 will make it easier to lose. The Act grants the federal minister of immigration authority to revoke the citizenship of those found guilty of major crimes, including terrorism.

Of course, no one wants terrorists roaming around Canada or travelling on Canadian passports. The question is, is the revocation of citizenship the right tool for preventing terrorism or punishing criminals?

Some Canadians commit serious crimes. The foreign-born are no more likely than the Canadian-born to do so (some evidence suggests they are less likely to) but small numbers in each group do break the law. Nor are dual citizens more likely than mono-citizens to commit crimes. Today, citizens (including foreign-born and dual citizens) are equal before the law and are treated the same way as other Canadians if they are accused of a crime. They undergo due process and, if convicted, are punished according to the provisions of the Criminal Code of Canada. If their crimes are committed abroad, the procedures are different but their treatment by the Canadian government is identical.

Adding citizenship revocation as an extra prospective punishment for dual citizens (many of whom, but not all, are foreign-born) is tantamount to creating a second class of citizenship. This is a change that cuts to the core of what it means to be Canadian – and in order to solve what problem?

Canadian citizenship is a solution, not a problem. Canada has traditionally had exceptionally high naturalization rates; nearly nine in 10 immigrants (89 per cent) have become Canadian citizens. This pattern has been praised as a strength of our immigration program: a sign that immigrants are invested in Canada and Canada is invested in the successful integration of its immigrants.

When immigrants become citizens they can vote, stand for office (and win: in 2011, 44 of our sitting MPs were born outside the country), and generally become fully contributing, fully participating members of Canadian society. To turn citizenship from a tool of integration into a reward for good behaviour – to be revoked at the discretion of one minister on grounds of bad behavior and without due process – is to undermine the meaning and value of citizenship for all Canadians.

Some argue that the Bill C-24 addresses public concerns about dual citizenship, divided loyalties, and some Canadians' lack of tangible attachment to Canada. We are not dismissive of these concerns. In a globalized world, where 215 million people live outside their countries of origin and where new technologies make borders feel thinner, the question of what it means to be a citizen is one worth asking.

It may be a valid goal to encourage all Canadian citizens to live in Canada. But is it fair to use citizenship law, as this bill does, to make some categories of Canadians promise not to reside elsewhere? After all, if Canadian-born monocitizens want to spend winters in Florida or a decade working in New York, nobody proposes to stop them.

In 2011, we conducted a study that investigated Canadians' attitudes about citizenship. We undertook this work – a project supported by the Environics Institute, the Maytree Foundation, CBC News, RBC, and the Institute for Canadian Citizenship – precisely

because we believed a thoughtful conversation about citizenship was overdue in this country. What we found was that citizenship is seen as an important step toward full integration into the Canadian economy and society.

We have each had different paths to Canadian citizenship. Two of us became Canadian by the sheer good fortune of being born in Canada to citizen parents (one of whom arrived as a refugee). One of us was born in India and earned Canadian citizenship as an immigrant. One of the things we all love about this country is that, as citizens, we are equal in every respect. Canada does not reserve special rights for people who were born on its soil, or who hold only Canadian citizenship. A Canadian is a Canadian. If the government is interested in protecting the value of Canadian citizenship, it should start with protecting that.