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

OTTAWA CITIZEN

Public service bargaining: a bruising battle lies ahead

Kathryn May, Ottawa Citizen, July 21, 2014

In 1967, Lester Pearson gave public servants collective bargaining rights that allowed unions to choose whether to settle contract disputes by arbitration or, if necessary, by strike.

Treasury Board President Tony Clement, the current government's point man on federal labour issues, changed that, with sweeping reforms to the Public Service Labour Relations Act contained in a 2013 budget bill. Armed with new rules for bargaining that some feel favour the government, he's coming to the table with a controversial plan to alter public servants' sick-leave benefits.

The 17 federal unions have signed a pledge not to accept what they see as clawbacks to sick-leave benefits.

"The government has certainly made it more difficult (to negotiate) but not impossible," says Ron Cochrane, co-chair of the National Joint Council, a joint union and management forum on employment issues.

Here's a look at the labour landscape.

Who is involved

The three-year contracts for the 27 bargaining units in the core public service began expiring shortly after Christmas. Unions for lawyers, dockyard workers, ships officers and translators are among those that met Treasury Board negotiators in a subdued round of preliminary discussions. Negotiating teams for five of the giant Public Service Alliance of Canada's bargaining units, representing 100,000 employees from clerical and education workers to tradespeople and border guards, met with Treasury Board for the first time earlier this month. Talks are expected to quickly heat up.

Each union has its own issues and will bargain independently with the government, but they collectively signed a historic "solidarity pledge" on sick leave, agreeing not to surrender benefits they have enjoyed for 50 years and end up with less than they have now.

Why sick leave is the big issue

Public servants now get 15 days of fully paid sick leave a year. They can carry over any unused days from year to year. If they fall ill, they draw on their banked sick days to get paid. For prolonged illness, they have to wait 13 weeks (i.e. 65 days of banked sick leave, if they have that much) before they can go on long-term disability.

On average, public servants use about 11 days of paid sick leave a year (they would, on average, bank four). Prison guards typically take the most, executives the least.

Clement wants to get rid of a $5.2-billion liability of banked sick leave, reduce absenteeism and promote wellness at work by replacing the sick-leave regime, created decades ago, with a short-term disability plan.

Why the government wants it changed

Clement infuriated unions when he originally presented sick-leave reform partly as a way to combat absenteeism in the public service, which he estimated at a much-disputed 18 days annually. The Parliamentary Budget Officer deconstructed that 18-day estimate and confirmed seven of those sick days were unpaid, such as for those on long-term disability.

Treasury Board now pitches short-term disability as fairer for employees who don't have equal access to benefits. It recently posted a communiqué to all employees outlining the weaknesses of the current sick-leave system, explaining how a short-term disability plan might fix them and get employees back to work faster.

Currently, those who don't have enough sick leave banked to bridge the 13-week waiting period for long-term disability aren't paid, and must rely on employment insurance. The government estimates half of all employees don't have enough banked sick leave to cover the waiting period. Older workers typically have more banked sick leave than do younger ones, who are most vulnerable to lost income if they fall ill.

As well, the government argues the requirement that all banked sick leave be exhausted before going on disability delays getting the support, treatment and case management

necessary to help employees return to work. Studies show that the longer employees are off work, the less likely they are to return.

The unions' objections

What irks the unions is that Clement seems to have already decided how he wants to fix the system. He has settled on a broad design for a new short-term disability plan, consulted with the insurance industry, and plans to seek tenders for new short- and long-term disability plans by the fall. For Treasury Board, only details – not the broad outline – are to be sorted out at the bargaining table.

Several unions have lodged complaints of unfair labour practices against the government, accusing it of bargaining in bad faith by settling on the scheme without consulting them, then sending communiqués to employees about the new plan.

More recently, the unions rejected Clement's invitation to take part in "ground floor" consultations being held separately from contract talks to discuss the new plan.

Union leaders argue such a massive change in managing sick leave should be done at the bargaining table. They concede there are weaknesses with the existing sick-leave regime but say the gaps can be fixed rather than starting over.

They feel many problems are the result of departments' poor management and they want to see the business plan that justifies bringing in a private insurance company to administer the short-term disability.

How the power balance is shifting

Clement has every reason to be confident that his plan will proceed because his government has changed the ground rules for bargaining.

Sweeping amendments to the Public Service Labour Relations Act (PSLRA), buried in one of the federal budget bills, took unions by surprise.

Labour relations in the public service are unique. Bargaining is a two-track process that once allowed unions to decide whether they wanted to settle their disputes by arbitration – a process in which arbitrators can impose a settlement – or conciliation, in which a settlement can be recommended rather than imposed, and is backed by the right to strike. The Pearson government codified that choice, rather than forcing militancy and strike on public servants.

Federal public service unions already have more limited bargaining scope than private sector unions: They are restricted to bargaining over pay, hours of work, leave, discipline and other working conditions. They can't negotiate job classification, duties or evaluations. Also, the government is both the employer and the lawmaker, ultimately holding the balance of power.

The new rules mean the government, rather than unions, will now decide whether disputes are solved by arbitration or conciliation/strike. Unions predict they will be

forced into conciliation with the right to strike rather than have the choice of arbitration to resolve impasses. The only bargaining units that can insist on arbitration are those in which more than 80 per cent of the employees have been designated essential workers. Unions may ask for arbitration, but Treasury Board has to agree.

The government has also blunted the impact of strikes by giving itself the "exclusive" right to decide which workers are essential and thus can't strike. The government can decide which "service, facility or activity" will be designated "essential" for the safety and security of all – or some – Canadians, at any time during the process.

Clement has fiercely defended the move, arguing the an elected government has the right to decide which services are essential and that Canadians would be "shocked" to learn that unions had any say. He says the new process is more streamlined and "rebalances" the playing field because the "pendulum had swung too far" in favour of unions at the expense of the public interest.

He has also argued that the overhaul is critical to his mission to rein in the pay, benefits and costs of the public servants, which he believes are so out of whack with the private sector that the public service has lost its "legitimacy and credibility."

How the right to strike is affected

These changes will severely limit the right to strike for strong, militant unions such as those representing prison guards and border guards, while forcing smaller and weaker unions that rarely, if ever, considered strikes to now face that prospect. These smaller unions typically picked arbitration over strikes because they are too small to mount an effective walkout or because they represent employees who, historically, aren't comfortable with strikes.

Claude Poirier is president of the Canadian Association of Professional Employees (CAPE) and his members haven't opted for strike since the 1970s. They aren't comfortable with adversarial bargaining and prefer to solve problems collaboratively.

"What purpose does this serve? We used arbitration to avoid confrontation and disrupting the workplace. So we have a third party make a decision that's normally balanced and favours neither the employer nor union. And now we don't have that and the only option is strike. Do they really want us to go on strike?"

How essential workers are defined

Until now, the government and each union negotiated essential services agreements. The government decided the level of service to ensure public safety and security, but negotiated with unions the positions needed to deliver that service. If the two couldn't agree, the matter was turned over to the government-appointed Public Service Labour Relations Board.

The new rules take away the board's independent oversight and give the government the unfettered right to decide. Under the old rules, designated employees could stop doing any tasks that weren't considered essential during a strike. Border guards, for example,

are typically designated essential, but tasks such as collecting excise taxes or GST are arguably not essential for safety and security so they could stop collecting these. Now, designated employees will have to perform all the duties of their jobs.

Steven Barrett, a labour lawyer at Sack Goldblatt Mitchell, said the number of people who can strike is critical to the give-and-take of meaningful bargaining and shouldn't be left up to one side to decide.

Limiting arbitrators' powers

The government also limited the factors arbitrators and conciliation boards can consider when making their decisions. Arbitrators must now give primacy to two factors: the government's "fiscal circumstances relative to its budgetary policies" and the ability to recruit and retain employees. Revamping sick leave was announced as a priority in the last federal budget, which will invariably tie arbitrators' hands.

This is a particular sore point for unions because the labour board rapped Clement's knuckles for "bargaining in bad faith" during the foreign service strike in 2013, when he agreed to arbitration only if arbitrators based their decisions on those two factors. The labour board concluded those two preconditions stacked the deck in the government's favour. A few months later, Clement made the preconditions law.

How this changes unions' approach

The public service unions don't want to be caught off-guard as they were in the last round of bargaining, when the government divided them, then took away severance pay for voluntary departures.

In that case, the government targeted PSAC, the largest union, struck a deal, then made the same take-it-or-leave-it offer to all other unions. Many objected and took it to arbitration but arbitrators sided with the government because the largest union had already acquiesced.

Union leaders swear that "divide and conquer" won't happen this time. Many had speculated that most unions would probably forgo their strike option and select arbitration this time, as a way to keep sick leave intact. The thinking was that arbitrators wouldn't take away sick leave without a precedent, unless the government offered something substantial in exchange. Tactically, that has now changed.

Barrett told MPs during hearings into the changes that the government rewrote the rules "in as lopsided a manner as could be conceived," upsetting the balance that's critical to collective bargaining, stability, labour peace, harmony in the workplace and even "basic fairness."

Small unions, one labour official said, could be "easy pickings" for the government to reach a deal that could set the precedent. They don't want to strike and don't have the numbers to successfully mount a walkout. If they did, the government could designate more workers essential and render a strike useless. Any remaining strikers could wither on the picket line for months.

So the challenge for the unions is to work together. Can all those small bargaining units join forces and mount effective job action? And who wins in the court of public opinion: government or unions?

That means the real battle is a political one. Both sides make little secret of their antipathy to the other. These talks will parallel the run-up to the next federal election when both government and unions will play to their bases. But unions have the most to lose.

Will their members back them – especially with Conservatives on the hustings exploiting the image of the public service as overpaid and pampered? The bargaining begins.

What they're saying

- "Our government is committed to introducing short- and long-term disability plans that will help public servants get healthy and get back to work. We will work with the bargaining agents to find ways to reduce the incidence and duration of disability in the Public Service and to improve workplace wellness." — **Treasury Board President Tony Clement.**

- "This autocratic approach to collective bargaining, with an unprecedented set of rules, will favour the outcome of any negotiation in the government's favour. In this round, the government doesn't require skilled negotiators. All they need is someone who can read from a script." – **Ron Cochrane, co-chair of the National Joint Council.**

- "They are pushing us in a direction that we don't want and then they will have control of who can go on strike because they have now given themselves the exclusive power to designate." **– Claude Poirier, president of the Canadian Association of Professional Employees.**

- "Parliament decided (in 1967) on a choice of procedures model, which balances respect for the right to strike with the recognition that many public servants are averse to what they consider to be the adversarial, more militant strike/lockout method, so that arbitration was a sensible and constructive choice to give them for resolving disputes." **– Steven Barrett, labour lawyer at Sack Goldblatt Mitchell.**

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Opinion: Assessing the real costs of sick leave for federal public servants

BRIAN LEE CROWLEY, Montreal Gazette, July 27, 2014

Brian Lee Crowley *is managing director of the Macdonald-Laurier Institute (macdonaldlaurier.ca), a non-partisan public-policy think tank in Ottawa.*

If you go to the dentist for a filling and she doesn't show up because she's not feeling well, you don't expect to be billed for the service as you leave.

But if you were asked to pay anyway, because you had planned to pay for the filling and therefore paying doesn't leave you any worse off than before, then you will get the logic of the recent report of Jean-Denis Frechette, the Parliamentary Budget Officer (PBO), about sick leave in the federal public service.

Oh wait. You don't get the logic?

Good.

Because there is precious little of it.

The PBO has stepped into a controversy between the Conservative government and its civil servants, over sick leave. Treasury Board President Tony Clement says that the system is archaic, costly and undisciplined. The public-service unions are resisting reform; that's their job.

Federal public servants are permitted 15 days of paid sick leave a year; and what they don't use, they can carry forward year after year. The PBO found take, on average, 11.5 days off annually due to illness.

Speaking of jobs to be done, the PBO is supposed to bring a non-partisan and analytical view to budgetary and fiscal matters. At its best, the PBO should provide MPs with a fact-based starting point for parliamentary debate. As Daniel Patrick Moynihan once so sagely remarked, you are entitled to your own opinions but you are not entitled to your own facts.

But the usefulness of the PBO's work arises as much from the quality of the questions it asks as from the quality of the answers it gives.

And that brings us back to the debate over sick leave in the public service.

The PBO is arguing that there is little “incremental cost” to civil service sick leave. By that he means few absent civil servants are replaced by temporary workers, hence the government (and taxpayers) are no worse off than they were before. They were going to pay that worker that day’s wages regardless.

But the employment relationship is not a one-way obligation but an exchange of value. To go back to my example, the dentist is only entitled to bill me when she performs a service. If I don’t get the service and I have to pay the bill regardless, I am left worse off because I have paid but my tooth remains unfilled. Ditto for the carpenter who doesn’t show up to build my deck, the plumber who doesn’t show up to fix my pipes and so forth.

If a public servant (or any employee) doesn’t show up for work, gets sick pay, and there is no money in the budget for replacement workers, several things can happen. One is the work won’t get done. Another is that other workers or supervisors will shoulder an extra load. A third possibility is that no one will notice and nothing will remain undone — a clear signal that the employee is not providing a service that anyone needs.

In all three cases, someone (clients, colleagues or taxpayers) is bearing a cost, but none of those costs are “incremental increases” to the government’s budget.

That doesn’t make them disappear. It just means you’re not counting the real costs correctly. And all of this is true whether the employee is genuinely sick or not — I am not contesting the value of sick leave, just underlining that every benefit has a cost. Of course a healthy employee who nonetheless takes sick leave is abusing that entitlement, but that is a separate issue.

The PBO will protest that he specifically said productivity was not the subject of his report. But surely he has an obligation to clarify the debate by asking, and answering, the questions that really matter.

What are those questions? A few might be: What are the underlying causes of high workplace illness in the public sector compared with the private sector? How might we get more value out of the public service? And can we deal better with poor performance by public servants?

Those would be reports worth reading.

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Ontario Justices of the Peace should have a law degree: Editorial

Education matters. Ontario Justices of the Peace should have law a degree when deciding on bail or on matters affecting someone's personal liberty.

Toronto Star Editorial, July 28, 2014

They can decide if you walk free or are stuck in jail, or if police are allowed to raid your home, but most have never worked as a lawyer or earned a law degree. Better training is in order.

Decisions entrusted to Ontario's Justices of the Peace range from the serious, affecting people's liberty, to the picayune, such as settling a parking dispute. They're typically the first, and often the only, contact the average person has with the justice system. That means they handle a tremendous caseload, but they don't always handle it well.

In separate cases in recent weeks Ontario judges have pondered allegations of bad rulings leveled against two justices of the peace. As reported by the Star's Todd Coyne, a higher court found one JP had been biased against the defence and had acted on the basis of expediency. And a judicial review council is preparing to reprimand a second justice of the peace for, among other things, recklessly tossing out 68 cases when a prosecutor arrived a few seconds late.

This has sparked renewed discussion over the credentials, or lack of them, required to serve as an Ontario JP. And one proposed reform stands out — requiring any justice of the peace ruling on someone's liberty to have at least gone to law school.

A private member's bill put forward in 2012 by Liberal MPP David Orazietti could have delivered that welcome change, but it died when the legislature was prorogued. Its approach is well worth reviving.

This centres on creating a two-tier system, with "presiding" justices of the peace handling major legal issues, especially matters affecting personal liberty. Such justices would be required to have a law degree plus five years of experience working as a lawyer. Lesser legal matters, by far the largest in number, would be dealt with by "administrative" justices of the peace who need not have a law degree.

A disadvantage of this system is that it would be more cumbersome. Scheduling would be more complicated and involve more administrative work. Indeed, years ago justices of

the peace were more specialized but were combined into a single job category, enhancing bureaucratic efficiency.

Better protection of people's liberties, through increased professionalism, should outweigh the urge to streamline.

Right now, justices of the peace don't operate entirely in the dark. They do receive several weeks of training plus months of mentoring with a senior JP. That's good enough to decide the merits of a bylaw infraction matter, or a traffic fine, but it doesn't compare to insights accrued through years of law school and professional experience.

When it comes to decisions affecting their fundamental rights, people deserve to have their case judged by someone with this specialized insight.

In 1998 Alberta was the first province to require JPs hearing major cases to hold a law degree, and at least three other provinces have since gone this route. Ontario should do the same.

How to fix the prostitution law

Bruce Ryder, Contribution to the Globe and Mail, July 24, 2014

Bruce Ryder *is an associate professor, Osgoode Hall Law School, York University.*

It doesn't take long for the Conservative government's bill on sex work to go off the rails: In the first sentence of the preamble it declares that "exploitation is inherent in prostitution." In the context of the exchange of sexual services for consideration between consenting adults, this ex cathedra pronouncement is demonstrably false. It ignores mountains of social science evidence and the testimony of many sex workers. The bill perpetuates stereotypes that marginalize and stigmatize sex workers.

Bill C-36 and the government's discourse about it draws to a remarkable degree on what the scholar Gayle Rubin identified as deep wells of "sex negativity" in our culture. Sex is neither redeemed nor corrupted by the presence or absence of economic exchange, any more than it is by the social approval or disapproval the relationship receives. Rather, the social value of any sexual activity is determined by the quality of respect and the quantity of pleasures that participants bring to each other.

The stereotype that sex work lacks social value is most commonly expressed by the question, "Would you want your daughter to be a sex worker?" Well, no, not in a society that disrespects her work and degrades the value of sexual pleasure. But if we direct our

energies to dismantling the prejudices that undergird the question, the answer might be different.

The proposition that commercial exchange inevitably renders sex exploitative is a moralistic or ideological premise that will not stand scrutiny in the courts in the inevitable Charter challenge.

In rulings limiting the scope of obscenity law (Butler 1992) and legalizing adult swingers' clubs (Labaye 2005), the Supreme Court of Canada affirmed that criminal offences must be based on concrete harms, not on conventional understandings of right and wrong. The court said that "legal moralism," where a majority decides what values should inform individual lives and then coercively imposes those values on minorities, cannot serve as a basis for imposing limits on Charter rights. The criminal law, the court has said, should be shaped by "objectively ascertainable harm instead of subjective disapproval."

Sexual exploitation is an objectively ascertainable harm. Preventing it is an important objective that is part of the definition of many sexual offences. Given the profound imbalances of power that can exist in the sex trade, the criminal law has an important role to play in condemning and punishing exploitative practices and relationships. But before criminalizing adult sexual relationships, exploitation is a harm that needs to be proven, not merely asserted.

Bill C-36 has some laudable provisions that respond to the need to focus on exploitative relationships and protect sex workers from risks of harm. First, the bill amends the bawdy-house provision of the Criminal Code to make it legal for sex workers to work indoors. Second, the bill draws a careful line by targeting people who exploit sex workers, such as pimps and procurers, and exempting those who provide services that can enhance sex workers' safety, such as security guards. In these two ways, the bill is aligned with the Supreme Court's ruling in the Bedford case, which found the existing "bawdy house" and "living on the avails" offences to be unconstitutional because they exposed sex workers to heightened risk.

Sadly, the focus on targeting exploitative relationships is completely absent from the proposed offences that prohibit the purchase of sexual services and the advertising of sexual services. Because of the false and moralistic presumption that all commercial sex is exploitative, Bill C-36 makes it an offence to purchase sexual services in any context, and likewise makes it an offence for anybody to advertise sexual services in any context (such as in a magazine or on a website).

Because these two provisions of the bill will heighten the risks faced by sex workers while legally selling their services, their overbreadth renders them unconstitutional. They are easily fixed by confining them to circumstances of exploitation.

Buyers and advertisers of sexual services should face prosecution only if they have failed to ascertain the absence of conditions of exploitation. This should include a duty to take all reasonable steps to ensure that sex workers are 18 or over, are not trafficked or otherwise subject to violence or coercion, and have given meaningful consent to sexual

contact that is not compromised by, for example, mental health disabilities, alcohol or drugs.

If Bill C-36 were amended in this way, it would achieve its objective of preventing sexual exploitation more effectively. Police, prosecutorial and judicial resources would not be wasted targeting non-exploitative sexual transactions between consenting adults. Rather than stigmatizing sex workers, their clients and advertisers, they would all be enlisted in eliminating real harms, rather than avoiding prosecution for imaginary ones.

Harper, MacKay should apologize to Chief Justice McLachlin, commission says

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

The International Commission of Jurists has called on Prime Minister Stephen Harper and Justice Minister Peter MacKay to apologize for impugning the integrity of Supreme Court Chief Justice Beverley McLachlin and withdraw their comments, after an investigation sparked by a complaint from a group of Canadian lawyers and law professors.

The ICJ, an advocacy group based in Geneva, also called on the Canadian government to change the way it appoints Supreme Court judges, to bring its practice into line with contemporary world standards.

The ICJ said Mr. Harper and Mr. MacKay had no factual basis for accusing Chief Justice McLachlin in April of trying to have an inappropriate conversation with the Prime Minister about a case before the Supreme Court.

That case involved the eligibility of Mr. Harper's choice of Justice Marc Nadon for a spot on the Supreme Court. In March, the Supreme Court ruled Justice Nadon ineligible.

“The ICJ considers that the criticism was not well-founded and amounted to an encroachment upon the independence of the judiciary and integrity of the Chief Justice,” the commission said in a letter from its headquarters in Geneva to Gerald Heckman, a University of Manitoba law professor who spearheaded the complaint.

It accepted Chief Justice McLachlin’s explanation, as expressed in a public reply from her office to the allegations of impropriety first made in April by the Prime Minister’s Office, that she had spoken to Mr. MacKay and her office had spoken to the Prime Minister's chief of staff, Ray Novak, only to alert them to a potential legal issue.

Even if Mr. Harper and Mr. MacKay had been of the opinion that her actions were wrong, they should have dealt with the matter through a process in which the initial stages would have been confidential, the ICJ said.

The group said that Canada's appointment process is too secretive and opaque. It suggested Canada's practices are out of step with the United Nations Basic Principles on the Independence of the Judiciary. The Canadian government "should review the law and practice for the appointment of judges in light of contemporary international standards and practice," the ICJ said, citing UN principles promoting "an open process with prescribed criteria based on merit and integrity, and without discrimination."

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Chief justice cleared in spat with Stephen Harper government

The International Commission of Jurists slammed the Prime Minister for remarks that were critical of Supreme Court Chief Justice Beverley McLachlin.

Tonda MacCharles, Toronto Star, July 25, 2014

OTTAWA — An international legal body has cleared Chief Justice Beverley McLachlin in her efforts to communicate with Prime Minister Stephen Harper's government over a judicial appointment to her court last year, and slammed the prime minister for remarks it says hurt her moral authority, integrity and public confidence in the judiciary.

The Geneva-based International Commission of Jurists, in a letter to a group of Canadian lawyers and legal academics who asked it to investigate, said it concluded that McLachlin's move to flag a potential legal problem was "not inappropriate."

On the contrary, Harper's and his officials' remarks were the problem, it said.

The International Commission of Jurists is a respected international body of up to 60 lawyers including senior judges, attorneys and academics who promote respect for international human rights through the law. The group's review outlines the facts of the unprecedented spat that unfolded after Harper's officials revealed a call by McLachlin to Justice Minister Peter MacKay, suggesting her behaviour was "inappropriate and inadvisable" and amounted to lobbying against Harper's eventual choice of Federal Court of Appeal Judge Marc Nadon.

The ICJ dismissed that argument.

It set out the responsibilities of the Canadian government under international law to uphold an independent judiciary, and said Harper's, MacKay's and other senior government officials had made criticisms of McLachlin that were "not well-founded and amounted to an encroachment upon the independence of the judiciary and integrity of the Chief Justice." Their public criticism "could only have a negative impact on public confidence in the judicial system and in the moral authority and integrity of the judiciary, and thereby on the independence of the judiciary in Canada."

The ICJ added its voice to an overwhelming chorus in Canada that said the best thing Harper could do is withdraw his remarks and apologize.

"The Prime Minister and Minister of Justice could best remedy their encroachment upon the independence and integrity of the judiciary by publicly withdrawing or apologizing for their public criticism of the Chief Justice."

The letter was the result of an examination undertaken in response to a May 9 letter written by Manitoba law professor Gerald Heckman, Saskatchewan professors Ken Norman and Brent Cotter, Lucie Lamarche of the Université du Québec à Montréal and the University of Ottawa, Toronto professor Audrey Macklin and Lorne Sossin dean of Osgoode Hall Law School.

"We welcome the Commission's thoughtful and constructive report on this matter and agree with its findings and conclusions," Heckman said in a written statement.

"We are hopeful that the Prime Minister of Canada and Minister of Justice will respond positively to this report. We once again invite them to publicly withdraw or apologize for their public criticism of the Chief Justice of Canada at the earliest possible opportunity."

The ICJ said there was "no evidence" the chief justice "had any intention in contacting the Minister of Justice and the Prime Minister's Office other than to alert them to the possibility that a legal issue could arise with the nomination" of a Federal Court judge to the Supreme Court of Canada.

And no evidence that she "either intended to or expressed a view on the merits of that legal issue or the merits of any individual."

"The ICJ understands that at the time the Chief Justice made the calls on 31 July 2013, the issue of eligibility potentially affected several candidates on a long short list under consideration." Even if it had only been an issue with one candidate under consideration, it wouldn't change the ICJ's view of it, the body said.

Furthermore, the ICJ clears McLachlin of any hint of wrongdoing in issuing her own public denial to the allegations first published in the National Post, calling her statement "brief, measured and factual . . . consistent with international standards and within the scope and role of her office in defending the public confidence in the judiciary in light of the allegations she had been informed were then being made public."

It said McLachlin's remarks "contained no implied or express criticism of the actions of the PMO or Minister of Justice."

Rather, McLachlin's response "emphasized the need for respect between the different branches of government."

It said a "problem arose" when Harper's own office — through his spokesman Jason MacDonald — said neither the prime minister nor MacKay "would ever consider calling a judge where that matter is or could be before the court of competent jurisdiction," remarks that MacKay and Harper repeated in following days.

"This was unfairly conflating the issue of the executive seeking to influence a court on the merits of a matter in litigation," the ICJ said. It was a statement made during the normal consultation period, when no shortlist or candidate had been picked, and even if Harper and MacKay held a different view of it, there was no need months after the fact for the government to raise it "in public and in a manner that impugned the propriety of the Chief Justice's actions."

If anything, the only appropriate thing would have been to raise the concerns at the time through a formal complaint process.

"If the concerns were not of a character to warrant formal complaint, it is difficult to see why there was a need to air them in the court of public opinion several months after the fact."

Nova Scotia judge impressed with live-tweeting from inside courts

GEORDON OMAND, THE CANADIAN PRESS, July 27, 2014

HALIFAX - A top judge in Nova Scotia says he is surprised at the positive impact live-tweeting inside the courtroom has had after the province's judiciary recently relaxed the rules on the use of Twitter in the courts.

Chief Justice Joseph Kennedy of the Nova Scotia Supreme Court allowed reporters to live-tweet proceedings during the trial of Lyle Howe, a Halifax lawyer convicted of sexual assault.

"I couldn't get over how well it had worked," Kennedy said in an interview, describing it as the closest thing to gavel-to-gavel coverage he has seen.

"I didn't think it was going to be as accurate as it turned out to be. I have to say that I was very impressed.

"I'd come back (to my office) occasionally and go on the computer after I'd been to the courtroom — I'd tell my colleagues that I used to have to come back here to find out what happened," he said, kidding.

New guidelines governing the use of electronic devices in the courtroom came into effect in Nova Scotia on May 15, allowing communication such as tweeting and texting for any purpose, including publication, in most courts, unless otherwise banned by the presiding judge.

The policy places restrictions on tweeting from youth, mental health and family courts, and do not affect statutory publication bans, including revealing the identity of youths or sexual assault victims.

During the Howe case, senior Crown attorney Darcy MacPherson used printouts of a reporter's tweets as a set of reference notes.

"I was on a break on the weekend and I went online … and it dawned on me at that moment: I have a great asset here. It's something that I'll be able to make use of," he said.

MacPherson, who had never looked at Twitter prior to the case, said the tweets served as another set of objective eyes, allowing him to catch things he and his co-counsel may have missed.

Though his notes remained his primary source of information, MacPherson said he was struck by the usefulness of this second, objective account.

Though he has yet to sign up on to the social media site, he said he can see lawyers increasingly taking advantage of reporters' tweets in the future.

Kennedy said allowing Twitter into the courtroom is part of the legal system's quest to improve access to justice.

"That's not just a matter of making it easier for people to come before the courts from the point of view of expense and time and that kind of thing, but also better communication of what we do," he said.

"I think that an informed public would agree most of the time with what we're trying to do," he added. "Tweeting, that's all part of that."

Kennedy said he would like to go further. He said he intends to introduce video broadcasting of criminal court proceedings, though he added he would likely begin with a sentencing hearing to avoid the risk of negatively impacting witnesses.

"Does anybody think that 25 years from now there won't be television in those courtrooms?"

The Super Awesome Act of 2014

How to properly convey the greatness of your own legislation

Aaron Wherry, MacLean's magazine, July 23, 2014

Public Safety Minister Steven Blaney has announced his intention to table a new bill this fall, the Common Sense Firearms Licensing Act. Never mind what the legislation will entail. Unless the opposition parties have something against common sense, they will surely be compelled to agree to pass it unanimously at all stages as soon as the House convenes in September.

If passed by both the House and Senate, the Common Sense Firearms Licensing Act will join the Fair Elections Act, the Canada-Honduras Economic Growth and Prosperity Act, the Strengthening Canadian Citizenship Act, Economic Action Plan 2013 Act No. 2, the Fair Rail for Grain Farmers Act, the Fair and Efficient Criminal Trials Act, the Supporting Vulnerable Seniors and Strengthening Canada's Economy Act, the Safe Streets and Communities Act, the Keeping Canada's Economy and Jobs Growing Act, the Strengthening Military Justice in the Defence of Canada Act, Marketing Freedom for Grain Farmers Act, the Fair Representation Act, the Canada–Jordan Economic Growth and Prosperity Act, the Canada–Panama Economic Growth and Prosperity Act, the Protecting Canada's Immigration System Act, the Protecting Air Service Act, the Protecting Canada's Seniors Act, the Increasing Offenders' Accountability for Victims Act, the Jobs, Growth and Long-term Prosperity Act, the Enhancing Royal Canadian Mounted Police Accountability Act, the Faster Removal of Foreign Criminals Act, the Helping Families in Need Act, the Jobs and Growth Act, 2012, the Northern Jobs and Growth Act, the Safer Witnesses Act, the Fair Rail Freight Service Act and the Economic Action Plan 2013 Act, No. 1, among the 41st Parliament's contributions to the field of adding verbs, adjectives and notions to bill names to more precisely convey the fantastic quality of the legislation in question.

Each of those names is officially the "short title" of a government bill that has received royal assent in the current Parliament.

If we expand our survey to include bills that haven't received royal assent, we could include the Respect for Communities Act or or the Protecting Canadians from Online Crime Act or the Protection of Communities and Exploited Persons Act. Neatly named private members' bills include the Poverty Elimination Act (sponsored by NDP MP Jean Crowder), the Cell Phone Freedom Act (Green MP Bruce Hyer), the Protecting Canadians Abroad Act (Liberal MP Irwin Cotler), the Strengthening Fiscal Transparency Act (NDP MP Peggy Nash), the Providing Support to Grandparents Act (NDP MP

Claude Gravelle) and the Protecting Taxpayers and Revoking Pensions of Convicted Politicians Act (Conservative MP John Williamson). (Though at least private members' bills are comparatively straightforward in substance.)

Each of these bills also has an official "long title" that sets out what legislation the bill will amend, replace or create, as well as a letter-number signifier (C-38 or some such). But the short title allows for a bill's sponsor to clarify the righteousness to be accomplished.

This phenomenon of messaging via title has been a bit of a thing in the United States—American legislators particularly enjoy coming up with acronyms—and a couple years ago the Walrus' Alina Konevski explored this emerging brand of nomenclature here and the linguistic and political considerations of it (The Post's Scott Stinson had previously mocked the practice). It doesn't seem to have always been like this and it still occurs that bills are given straightforwardly bland names (the act to establish the Canadian Museum of History, for instance, was simply called the "Canadian Museum of History Act," not the Strengthening Pride In Our History Act).

But budget implementation acts, as opposed to simply being called budget implementation acts, are now given short titles that promise growth, prosperity or action plans (the Conservatives, of course, have stopped referring to an annual "budget" and instead present an annual "economic action plan" each spring). Similarly, acts to implement free trade agreements aren't described as such, but as acts of jobs and growth. The "Respect for Communities Act" concerns safe injection facilities for opiate addicts. The "Protection of Communities and Exploited Persons Act" is the government's prostitution legislation.

The Common Sense Firearms Licensing Act might break new ground though—the bill's particular use of descriptive terms seems to open up new territory for future attempts to convey the wisdom and utility of a bill. If we can have the Common Sense Firearms Licensing Act, we could have the Blessed and Generous Employment Act or the Super Awesome Immigration Act or the Wise Budget Act of Pure Intent.

Why, for that matter, stop at referring to budgets as "Economic Action Plans"? Does that really fully convey the depth and breadth of the greatness contained therein? If I were prime minister, I'd go with An Annual Tiding Of Comfort And Joy And Reasonably Principled Fortitude For The Future.

The implementation bill would be An Indisputably Perfect Act Descended From The Heavens Upon A Magic Unicorn For The Strengthening And Protection Of Everything That Is Good And Just, Particularly Grandmothers and Adorable Animals.

Granted, those are a bit wordy. Probably my handlers would have me settle on something simpler like affixing the phrase "Brilliant Leadership" to every bill. So the Brilliant Leadership on Immigration Act or the Brilliant Leadership on Health Care Act or the Brilliant Leadership on Pork Subsidies Reform Act and so on.

Or possibly that would be ridiculous, a silly, infantilizing practice that polluted our debate, corrupted our legislative process and cheapened us all—a cartoonish approach to

public policy that we should not tolerate. We could then establish some system for the straightforward naming of bills.

The Brits, for instance, seem to somehow satisfy themselves with straightforward names. Then again, just imagine how much better off Britain would be with more bills of Common Sense.

B.C. man who went to Syria becomes the first charged with terrorism under new Canadian law

Stewart Bell and Tristin Hopper, National Post, July 23, 2014

A British Columbia man accused of traveling to Syria to join an armed Islamist group was allegedly on a no-fly list but evaded counter-terrorism authorities by assuming a false identity, according to those familiar with the case.

Hasibullah Yusufzai, 25, was already known to Canadian authorities because of a previous trip he had made to Afghanistan, but he allegedly still managed to make his way to Syria by using a passport that did not belong to him.

The RCMP said Mr. Yusufzai had been charged under a new law that came into effect last year that made it a criminal offence to leave or attempt to leave Canada to engage in terrorism. He faces up to 14 years if convicted.

83.201 *Everyone who leaves or attempts to leave Canada, or goes or attempts to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.*

He is the first person charged in Canada over alleged involvement in the Syrian conflict, which has attracted dozens of radicalized Canadian extremists amid concerns they could bring their violence and militant ideology to Canada.

“This investigation underscores the reality that there are individuals leaving Canada to take part in terrorist activity,” James Malizia, the RCMP Assistant Commissioner, said in

a statement. “These charges reaffirm the RCMP’s resolve to aggressively pursue terrorist acts to the fullest extent of the law.”

At the family home in Burnaby, B.C., relatives declined to speak to reporters.

The charges laid in Richmond, B.C., last Thursday accuse Mr. Yusufzai of leaving Canada on Jan. 21, 2014, for the purpose of committing murder “for the benefit of, at the direction of or in association with a terrorist group.”

Neither the charge sheet nor police indicated which terrorist group he was accused of joining, but many Western foreign fighters end up with Jabhat Al-Nusrah, the Al Qaeda affiliate in Syria that is locked in a power struggle with the Islamic State (IS).

Recently, Al-Nusrah fighters have been crossing over to IS, which last month declared itself the rulers of a swath of Syria and Iraq it has captured and ethically cleansed through a campaign of beheadings and forced conversions.

The Canadian Security Intelligence Service declined to comment on Mr. Yusufzai, but earlier this year the agency said about 30 Canadians had left to fight with extremist groups in Syria. They are mostly from Ontario, B.C. and Alberta.

At least five have been killed in the past year, according to death notices posted online by fellow extremists. They include former Calgarians Damian Clairmont and Salman Ashrafi, whom IS said carried out a November, 2013, suicide bombing in Iraq that killed almost 20 people.

Earlier this month, IS released a video featuring André Poulin, a troubled Timmins, Ont., youth who died in Syria last August. The 11-minute video appealed to Canadians to join the fight to impose a militant Islamist state in the region.

Canadian imams recently issued a statement warning Muslim youths against traveling abroad to fight in foreign conflicts. The RCMP, meanwhile, has been tracking “high-risk travellers” and attempting to disrupt their plans using such methods as denying them passports and placing them on the no-fly list.

But some have managed to slip away, occasionally by using fraudulent documents. Mr. Yusufzai, who first came to the attention of authorities about two years ago when he turned up in Afghanistan, allegedly traveled to Syria using a passport that did not belong to him.

“Where there’s a will there’s a way,” said Ray Boisvert, the former CSIS director general of counter-terrorism. He said there had been “lots of cases” where suspects had used the passport of a sibling they resembled. “That’s the easiest, simplest way.”

While police have not yet laid any terrorism charges for attempting to travel to Syria, Mr. Boisvert, who now runs the consulting firm I-SEC Integrated Strategies, said the goal has long been to stop would-be terrorists before they leave Canada.

“They’re Canadians so it’s our problem,” he said. “We can’t be seen as a net exporter of terror because that will completely pervert the whole Canadian identity system. It’ll affect business, commerce. But more importantly it’s unconscionable to think that we’ll let somebody travel offshore so they can go out and murder dozens or even just one other person, in a foreign environment.”

A Hasib Yusufzai, also born in 1989, attended Byrne Creek Secondary in Burnaby, and participated in the school’s wrestling program. In a series of 2013 Facebook posts, a man with the account name Hasib Yusufzai — and who identified himself as living in Canada — wrote about his plans to move to a Muslim country, denouncing the “so-called Muslims” of Canada.

“No one can fully practise their religion in Canada,” he wrote. “Can one talk about jihad in a khutbah [sermon]? They can but soon they will be reported to the authorities by the so called Muslims.” In another post, he wrote that it was better to live in an Islamic country run by a tyrant than to live among infidels.

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Twitter harassment trial: Tweets not harassment, just a different political view, defence argues

“I know lots of normal men who have raped,” says Gregory Alan Elliott’s accuser in her fifth day of being cross-examined.

ALYSHAH HASHAM, Toronto Star, July 23, 2014

Stephanie Guthrie and Gregory Alan Elliott have decidedly different social and political views. That much is clear from the hundreds of tweets that have been presented at Elliot’s trial on charges that he criminally harassed Guthrie and two other women on Twitter — possibly the first case in Canada to deal solely with harassment-by-tweet.

On Wednesday, day 5 of Guthrie’s cross-examination, Elliott’s lawyer, Chris Murphy, suggested that Elliott’s tweets were valid social and political commentary, rather than harassment directed at Guthrie.

Guthrie is a prolific social media user, community organizer and founder of a group dedicating to engaging women and female perspectives in Toronto politics.

She alleges that Elliott became fixated on her in the summer of 2012, obsessively following her tweets, commenting on them, using hashtags she created for various events and creating hashtags about her such as #fascistfeminists. She has testified that it was the frequency and volume of the tweets that caused her to fear Elliott, though she has also made clear that he never threatened her or sexually harassed her in any tweet.

On Wednesday, Guthrie testified that she found Elliott's political views "spurious," "invalid" and "a crock."

Murphy pointed to a tweet from @greg_a_elliott, though it is not conceded by the defence that Elliott was the one actually tweeting from the account in question:

"Not trusting ALL #men because of 'rapists are men' only isolates #women further. Bad strategy. Rapists are mentally damaged. #TBTB #TOpoli," @greg_a_elliott tweeted on Sept. 5, 2012.

"Would you agree that's a pretty good point?" asked Murphy.

"I know lots of normal men who have raped," Guthrie retorted, later adding that while she didn't consider the tweet offensive, it was "dangerously misguided."

Elliott and Guthrie also disagreed on her choice to out the identity of a Sault Ste. Marie gamer who created a online game in which the goal was to beat up the face of a prominent feminist, Guthrie testified.

Justice Brent Knazan ruled that he was allowing the questions about Guthrie's opinions on Elliott's views because Elliott's intention in sending the tweets is one of the issues to be decided in the trial.

During the extensive and often heated cross-examination, exacerbated Wednesday by a stifling hot courtroom, Murphy suggested that Guthrie and the two other complainants in the case were part of a larger conspiracy to "gang up on" Elliott.

Guthrie has denied this.

Murphy has also suggested that Guthrie was not genuinely fearful of Elliott and was actually bullying him and taunting him through the use of a hashtag #GAEhole.

"There is no perfect victim . . . We don't always just hide away, sometimes we fight back a little bit," said Guthrie near the end of the day. "Sorry if I wasn't a perfect victim."

Guthrie has testified that by the fall of 2012, she simply wanted Elliott to stop contacting her. "He's entitled to defend himself to the world, but not to me," said Guthrie.

No matter what you say about him? Murphy asked her. "Dozens of people will back me up on what I said about him," Guthrie said.

The trial continues.

Alberta pushing more matters to small claims and faster trials

By Jennifer Brown, Legal Feeds Blog, Canadian Lawyer, July 22, 2014

Alberta is moving to change the way some matters are dealt with in the court system in an attempt to improve access to justice.

The province's justice minister says the change will ensure "more timely and cost-effective resolution of civil claims using a more simplified and user-friendly process."

In a statement issued Monday Minister of Justice and Solicitor General Jonathan Denis, said: "Increasing access to justice for Albertans is a priority. This is why the civil claims limit in the Provincial Court is being increased, and why more options for dispute resolution are being introduced."

Lawyers who have experienced backlogs in the Court of Queen's Bench and who have already been pushing clients to small claims court say it should be effective.

"I think that's a really good thing because I think it will result in cheaper, quicker access to the courts for a number of individuals," says Sharon Stefanyk, head of the insurance practice group at Field LLP's Edmonton office.

"A lot of people do have claims that are between $25,000 and $50,000 and with those claims it's difficult even as lawyers to advise these people because if a $50,000 claim had to go through the Court of Queen's Bench, by the time you do all the preliminary steps to get the matter to trial you're probably going to eat up a lot in legal fees."

Stefanyk agrees the Court of Queen's Bench "is quite overloaded." For example, she was dealing with an appeal on a small claims matter going to the court a month ago and the closest available appeal date was April next year.

The Court of Queen's Bench does have a judicial dispute resolution process where lawyers prepare briefs and appear before a judge to help mediate a settlement, but it is increasingly more difficult to get a JDR.

"It's tough to get those — the dates they are giving out are fewer and fewer," she says.

By increasing the limit to $50,000 for small claims, individuals can go into small claims court, have access to a judge, and get a dispute resolved faster using less resources for less. It is now thought to be the highest small claims limit in Canada. For example, Ontario and British Columbia had limits of $25,000.

A Provincial Court pilot project will direct civil claims disputes into appropriate resolution tracks. The pilot project begins this fall in Edmonton and Calgary.

"The mission of the Provincial Court of Alberta is to deliver quality justice on an accessible, affordable and timely basis. The Civil Division of our Court is committed to providing the fair and just resolution of civil disputes through affordable, understandable and simplified processes. The increase in the financial jurisdiction of our Court to $50,000 and the Court's decision to implement resolution tracks will, together with existing dispute resolution mechanisms, enable more people to access our Court to resolve their civil disputes in a timely and cost-effective manner," says Provincial Court Chief Judge Terrence Matchett.

Stefanyk says if there is a huge influx in small claims matters there will need to be an increase in resources to manage that and perhaps more judges.

"Jonathan Denis does sound like he's prepared to do that," she says.

But the increase in claims going via small claims may not be huge because in her own experience, Stefanyk says she has already been advising clients who have a $30,000 claim to go to small claims court rather than the Court of Queen's Bench and give up on the $5,000 over the $25,000 limit currently in place.

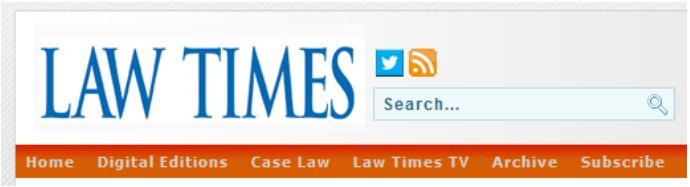
"There may already be quite a few of those people already in that court system who have given up their claim above $25,000," she says.

According to the Edmonton Journal, more changes are coming to how disputes get resolved. It reports] in the fall Denis plans to table legislation to divert landlord and tenant disputes from the court system to a quasi-judicial tribunal for dispute resolution. He is also apparently looking at legislation that will create summary trials. Litigants will be able to opt for quick 30-minute trials.

"Thirty minutes might be optimistic but I don't think it's a bad idea," says Stefanyk. "I think some effort and time would have to be spent thinking about the steps involved in getting to that summary trial. As long as all the documents are produced and at least one pre-trial meeting with the judge I think it would work quite well."

It's likely the changes will result in more work and potentially more difficult for the judges involved.

"If you have two self-represented litigants, I think the judge will have a heightened responsibility and obligation to make sure the proper evidence is before them, making sure the right evidence comes out and the documents are produced so they can make a decision," says Stefanyk.



Posthumous call for students killed at war

Ceremony will honour those who died before becoming lawyers

Yamri Taddese, Law Times, July 21, 2014

We only had one killed and one wounded in our company, not including two men who went nuts from being close to exploding minenwerfers, which are more dangerous to one's nerves than to one's body."

Those are words from the diary of George L.B. MacKenzie, a law student who died in the First World War.

Many decades after MacKenzie penned those words, a Toronto lawyer sat through a Remembrance Day ceremony at Osgoode Hall and heard MacKenzie's name listed with 60 Ontario law students never called to the bar because they had perished in the war.

"For some of the names they read off, instead of giving the year of call, what the person reading the names said was, 'Never called,'" says Patrick Shea, a partner at Gowling Lafleur Henderson LLP in Toronto.

"They didn't say student-at-law. They just said, 'Never called.'"

Something about hearing the students' names followed by the words "never called" didn't sit well with Shea.

He wrote a letter to former Law Society of Upper Canada treasurer Tom Conway proposing that as 2014 marks the 100th anniversary of the start of the war, the regulator should posthumously call the students who never became lawyers to the bar of Ontario.

Conway liked the idea. "The treasurer gets lots of suggestions to do lots of projects and most of them for some reason or another are not realistic," says Conway.

"But this one just immediately had an appeal to me and it had an appeal for virtually everyone I talked to about it."

He adds: “The two wars, particularly the First World War, had a very deep and lasting impact on the many generations of the legal profession. It still has effects. So I thought: What a great way to commemorate the young men who gave up their legal studies — they thought they were going for a few weeks or a few months — and never came back.”

The law society will honour the students on the eve of Remembrance Day this year at a special ceremony that will draw some of their family members. They’ll travel from as far away as California to attend the event.

Sitting outside Osgoode Hall on a warm summer morning, Shea flips though a book of biographies he drafted for each of the students who died in the war. The bankruptcy and insolvency lawyer spent a year digging up their stories, trying to locate any family members who could receive certificates on their behalf.

He says finding out about the students well beyond their year of birth and death was important to him.

“Once you go down the path of looking at their stories, you have to keep going,” says Shea.

“There’s something compelling about telling the story of someone who is not able to tell his own story. For some of these people, there is no one else to tell their story because their families have long since died out.”

Shea took to the Internet and various archives to find the descendants of the students and reached out to family members he found. He travelled as far as Alberta to scour archives containing information about the students and their backgrounds and spent his vacation days at another archive in Ottawa. He decided early on that reconstructing the students’ stories would be a priority for him this year. “It’s been a journey but nowhere near the sacrifice these individuals have made. So it’s worthwhile,” he says.

Shea found out about the students’ families, hometowns, where they went to school, when they enlisted, how they died, and even bits about their personal lives. In one case, he found a letter Capt. Gerald Blake, the great grandchild of the founder of the law firm now known as Blake Cassels & Graydon LLP, wrote to his fiancée Katherine on June 19, 1915.

“I felt wretched leaving you looking so wretched and so we’re pretty wretched all around,” wrote Blake.

“But someday if I hadn’t gone we all would have been ashamed. I would have been a grouch for the rest of my days — and now perhaps I will be only half the time!”

There’s also Lieut. Roy Biggar, whose father practised law in Hamilton, Ont., as a partner at the Biggar & Lee law firm.

Some, like Capt. Stanley Brocklebank, received the Military Cross, and their medals and why they received them will be part of the collection of biographies printed in a book for the November posthumous call ceremony.

The students came from various places in Ontario and had diverse family and economic backgrounds, says Shea.

“There is no single thing that you can say each of these individuals had in common except for the fact that they were all students here at Osgoode.”

The November event will be the first time the law society will honour a group of law students posthumously.

“When it comes to the ultimate sacrifice that our members gave, it’s important that we remember them and that we recognize that their contributions were significant for our country and for our history,” says Conway.

“It’s not to celebrate war,” he adds.

“It’s rather to remember what the cost of war truly is.”