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ASSOCIATION OF JUSTICE COUNSEL
ASSOCIATION DES JURISTES DE JUSTICE

Press Clippings for the period of July 6 to 13, 2015
Revue de presse pour la période du 6 au 13 juillet, 2015

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

AJC IN THE NEWS / L'AJJ FAIT LES MANCHETTES

Lawyers' union to fight for prosecutor turned political hopeful

Kathryn May, Ottawa Citizen, July 6, 2015

The union for Canada's federal lawyers is prepared to defend prosecutor Emilie Taman if she loses her job for defying the Public Service Commission so she could seek the NDP nomination in the riding of Ottawa-Vanier.

Len MacKay, president of the Association of Justice Counsel, said he expects Taman will be suspended or fired but "we will defend her no matter what happens" and fight for her to get her job back.

"We are willing to defend her in any way we can if she is fired to ensure she is reinstated," said MacKay.

Taman, a prosecutor with the Public Prosecution Service of Canada (PPSC) and daughter of former Supreme Court Justice Louise Arbour, announced plans on the weekend to run for the NDP nomination despite objections from the watchdog overseeing neutrality in the public service.

She didn't formally resign from the public service and took what she called an "unauthorized leave," which can be grounds for dismissal.

Taman was previously warned by her bosses to be at work on Monday even though she prepared them for her departure, turning over her files to colleagues and clearing out her office last week.

Taman said she has heard nothing from the PPSC or the commission on whether she is being disciplined. If she does, she can file a grievance with the union to challenge it.

David Zussman, a former PSC commissioner, said the commission can move for her dismissal, but that would take months and the election is only 14 weeks away.

The PSC refused last December to give Taman leave so she run in the October federal election. Taman went to the Federal Court to set aside the PSC decisions as "unreasonable" because it fails to balance her obligations to be a loyal and impartial public servant with her constitutional right to seek public office.

The case won't be heard until Sept 1, which means Taman won't have a ruling before the nomination meeting. She recently asked the PSC to reconsider its decision and grant her leave until the Federal Court determines her case, but it refused.

The PSC has the exclusive authority to decide who can seek nominations and run in elections. Public servants who get approval can take leave without pay during the election period. If elected, they must leave the public service.

MacKay said the union took on Taman's case from the start because the PSC's ruling could set the "precedent" to deny leave for all federal prosecutors who may want to run in an election. Taman's case is the first of a prosecutor being denied the right to run since the PPSC's creation.

A big concern is that the prosecution service's management recommended the PSC reject Taman's leave because her ties to a political party would undermine the office's independence and her perceived impartiality if she lost and returned to work.

He said the next milestone in defending bureaucrats' political rights is to allow them to return to the public service if they win and lose that seat after a four-year term. There are no rules stopping defeated MPs from getting a job in the public service or cabinet ministers getting judicial or other appointments requiring impartiality.

"There is not a huge distinction in impartiality between running for a party and being successful or being unsuccessful. If you are unsuccessful you are still held out as being tied to a party so I don't think it should matter whether you are successful or not. There are enough checks and balances in the system that to allow a return to the job."

MacKay said he understands concerns about impartiality and feels the principle should apply to public servants in more senior jobs who are making policy, providing litigation advice or working with ministers and political staff and need their confidence.

But he argues front-line prosecutors handling routine cases should not be stopped from seeking a nomination or a candidacy. He said Taman prosecutes cases on the directions from her bosses and she doesn't have complete discretion on the handling of cases.

The Supreme Court of Canada's pivotal Osborne decision in 1991 changed the landscape for public servants, who were once forbidden to take part in political activities. That ruling recognized principle of political neutrality but it had to be balanced with the right of public servants to participate in political activities.

As a result, public servants can take part in political activities as long as it doesn't impair or compromise their ability to do their jobs impartially — or leave a perception of compromise.

For the upcoming federal election, the PSC has considered 39 requests for leave from public servants who want to run.

But Zussman said there is an inherent conflict that makes that line between neutrality and political activity difficult to draw. He said he has long said public servants shouldn't be politically active.

He said the rules are inconsistent when former politicians can join the public service or the prime minister can appoint party faithful and cabinet ministers to the judiciary or other patronage appointments that require neutrality.

Until the Conservatives came to power, former political staff were able to get a priority on jobs in the public service.

Zussman said the PSC puts public servants through an investigation if they want to run for office but there is little scrutiny of other political activities. They can write speeches, canvass, fundraise and campaign for candidates, write letters to the editor endorsing a candidate or attend peaceful demonstrations on political issues.

Zussman said he finds it hard to reconcile that public servants can be loyal public servants "by day and spend evenings advocating to get rid of the government you serve."

L'ex-juge Louise Arbour appuie sa fille, candidate pour le NPD

Hugo de Granpré, La Presse, le 7 juillet 2015

(Ottawa) Une avocate fédérale qui a décidé d'être candidate aux prochaines élections malgré le refus de la Commission de la fonction publique a obtenu un appui de taille: celui de sa mère, l'ancienne juge à la Cour suprême du Canada Louise Arbour.

Emilie Taman, procureure au Service des poursuites pénales du Canada, conteste devant la Cour fédérale le refus de la Commission de lui accorder l'autorisation d'être candidate. Le procès est prévu pour le 1er septembre.

Une candidate décidée

Mais la femme de 38 ans, et mère de trois enfants, a décidé de ne pas attendre avant de s'engager en politique et a remis son téléphone et sa carte de sécurité à son employeur vendredi et aussitôt commencé à faire campagne pour l'investiture du NPD dans la circonscription d'Ottawa-Vanier.

Elle espère déloger le député Mauril Bélanger, qui représente ce château fort libéral à la Chambre des communes depuis plus de 20 ans. Mais elle devra auparavant convaincre les militants néo-démocrates de lui accorder leur confiance: d'autres personnes ont déjà soumis leur candidature.

Pour sa mère, Louise Arbour, le choix ne fait aucun doute: «Je suis convaincue que tous ceux qui la connaissent, et ceux qui la connaîtront prochainement, seront d'accord avec moi qu'elle est la mieux située pour représenter les gens d'Ottawa-Vanier dans un gouvernement néo-démocrate», a-t-elle écrit sur la page Facebook de sa fille.

Mme Taman explique que ce sont les attaques du gouvernement Harper contre les tribunaux et la Cour suprême qui l'ont notamment décidée à se lancer en politique active. Elle a elle-même travaillé à la Cour pendant trois ans. «Je me suis dit: je peux faire quelque chose, je peux m'engager», dit-elle.

Autre point de vue

La Commission de la fonction publique a vu les choses autrement. En raison de leur devoir d'impartialité, les fonctionnaires fédéraux doivent obtenir le feu vert de cet organisme s'ils veulent être candidats dans des élections au Canada. Cette demande ne précise pas le parti pour lequel l'employé souhaite se présenter. Mais la Commission s'est rendue aux arguments de l'employeur voulant que les procureurs occupent une position trop importante et, surtout, trop visible pour compromettre leur apparence d'impartialité.

L'Association des juristes de Justice, le syndicat qui représente Me Taman et près de 3000 de ses collègues, a contesté cette décision devant la Cour fédérale, au motif qu'elle contrevient à ses droits constitutionnels.

L'avocate ignorait hier quelles seraient les conséquences de sa décision, même si elle est consciente qu'elle pourrait lui coûter son emploi.

Claude Provencher, autre avocat du gouvernement fédéral et ancien directeur général du Barreau du Québec, est dans une position semblable: la Commission lui a refusé le droit de se présenter pour les libéraux de Justin Trudeau dans une circonscription de Laval. Il conteste aussi cette décision devant la Cour fédérale, mais a choisi de rester en poste.

Lawyer seeking NDP nomination in Ottawa-Vanier isn’t taking anything for granted

By Michael Woods, Metro News Ottawa, July 7, 2015

Emilie Taman understands if people think her decision to almost certainly give up her job as a government lawyer to seek the NDP nomination in Ottawa-Vanier is “a bit crazy.”

But the prosecutor with the Public Prosecution Service of Canada said the decision to run for office in a longtime Liberal riding was “a simple calculus.”

“I’m not naïve, and I don’t take anything for granted,” she said. “I understand what I’m up against. I think if there was ever a time for the NDP to be successful in Ottawa-Vanier, this is the time.”

By seeking the nomination, Taman is defying a decision by the Public Service Commission, the watchdog of Canada’s non-partisan public service, forbidding her from seeking office.

The commission's decision was in December. Taman filed an application for judicial review, but her hearing in Federal Court is scheduled for Sept. 1. The election is scheduled for Oct. 19 under the government's fixed election date law.

"It kind of boiled down to: do I want to do this or not? Because I think waiting and running was not really a viable scenario," Taman said.

Taman, the daughter of former Supreme Court justice Louise Arbour, has not officially quit her job; rather, she has taken an unauthorized leave of absence. "I've taken a unilateral leave, and there will likely be consequences to that," she said.

She has left a secure job as a federal Crown layer for the uncertainty of an election campaign. Ottawa-Vanier has been Liberal since 1995, and incumbent MP Mauril Belanger is running for re-election.

"If I don't win the election, if I don't win the nomination, I'm going to have to find new employment, and I'm prepared to do that," she said.

Since announcing her decision on social media Saturday, she has received support from hundreds of people and hear from and a number of strangers offering to volunteer and donate to her campaign.

"It's a huge boost, just in terms of my spirits," she said. "But you have to translate those expressions of enthusiasm into votes at the nomination meeting and votes in an election."

Taman, who started her career as a Supreme Court of Canada clerk, said her professional background situates her well to deal with important issues, particularly related to the Conservative government's legislative agenda.

"I think that this current government has really underestimated people's ability to understand the issues and to take the time to communicate with people about the merits of good policy, and have favoured instead populist, easy to pitch, sound bite-driven law," she said. "I think I am the kind of person who can take the time to explain things to people, and I think I'm going to be able to be a voice for change that's not necessarily easy to pitch, but that's important."

An NDP nomination meeting for Ottawa-Vanier has yet to be scheduled.

Senior bureaucrats fights PSC for right to run in election

Kathryn May, Ottawa Citizen, July 8, 2015

A senior manager at Justice Canada is challenging the constitutionality of the employment legislation used to deny him leave to seek the nomination as a Liberal candidate in the new Vimy riding in Quebec.

Claude Provencher, general counsel and a regional director in Quebec, is asking the Federal Court to set aside an April decision of the Public Service Commission that refused him leave to run for the Liberals in the October election

The nomination meeting for Vimy, a new riding in Laval, Que., has yet to be held but Provencher is unlikely to a get a court ruling before the October election.

The Public Service Commission oversees the neutrality of Canada's public service. It has the exclusive authority to decide who can run. Public servants who want to seek a nomination or run for office must get the commission's approval. If approved, they are on leave without pay. If elected, they must leave the public service.

Provencher is making similar arguments to those of federal prosecutor Emilie Taman, who is also seeking a judicial review of a PSC decision that barred her from seeking the NDP nomination in the riding of Ottawa-Vanier.

Taman, however, decided to defy the PSC decision and this week began her campaign to seek the NDP nomination. She has not formally resigned. She is braced to lose her job, but so far no formal action has been taken to fire or discipline her for failing to go to work. Her hearing has been scheduled for Sept. 1.

The PSC won't comment on cases before the courts.

Provencher refused to comment on his case, but there is no indication that he intends to follow Taman's footsteps and defy the PSC order and run for the nomination.

Like Taman, Provencher argues the PSC decision is "unreasonable" because it fails to balance his obligations as a loyal and impartial public servant with his constitutional rights to seek public office.

But Provencher goes further and argues that provisions in the Public Service Employment Act are unconstitutional.

The Supreme Court of Canada's landmark Osborne decision in 1991 changed the landscape for public servants, who were once barred from getting involved in political activities. That ruling recognized the importance of political neutrality while balancing the right of ordinary public servants to participate in political activities.

As a result, public servants are allowed under the Public Service Employment Act to take part in political activities as long as it doesn't impair or compromise their ability to do their jobs impartially — or create the perception of such a compromise.

Provencher argues this section violates his rights under the Charter of Rights and Freedoms to run for office as well as his right to freedom of association and freedom of expression.

In court documents, he said it was unconstitutional to put the onus on public servants to prove that running for office wouldn't affect their impartiality. He argued the right to seek office is protected by the Charter and the onus should be on the government to prove.

This doesn't mean that the right to run for office should trump the impartiality or loyalty of public servants, but rather the burden of proof should shift from the shoulders of the public service to that of the government to prove.

In an affidavit, he said Canadians can accept that former politicians, partisans and cabinet ministers can become judges and maintain their neutrality, citing Pierre Blais, Vic Toews, Clyde Wells, Edmond Blanchard and Michel Robert as examples.

But Provencher's case stands out because he is much more senior than most public servants who seek permission to run.

Public servants must weigh a range of factors when deciding whether to get involved in a campaign. The nature of their work, role, level and importance and visibility within the department's hierarchy must be considered. Deputy ministers and other senior bureaucrats, for example, can vote but must otherwise steer clear of all political activity.

Provencher graduated from University of Montreal law school in 1988 and soon after joined the public service. He did his MBA and was picked as a high-flyer when selected for several leadership training programs to fast-track him for the senior ranks.

In 2008, he became the commissioner — a deputy minister-ranked position — of the Federal Judicial Affairs Canada, where he oversaw the independence of the judiciary and ensured judicial appointments were done at "arm's length" from the Justice department.

In 2010, he became the chief administrator of the Quebec bar. At the time, the organization said he was picked because of his federal experience in governance, ethics and managing jobs that interact with the high levels of government and the judiciary.

In April 2014, he returned to Justice as a general counsel and regional director — a lower executive position than his previous deputy head job — where he manages 74 employees and is responsible for a $7 million budget.

The PSC's ruling is based on that job, which is the one he would be returning to if he lost the nomination or the election.

In his affidavit, Provencher claims he largely manages files and staff and has no dealing with media or the public, doesn't provide legal advice or strategy and doesn't deal with ministers, political staff or deputy ministers.

Provencher's direct boss felt he could return to the job without affecting his impartiality but Justice's senior management concluded he couldn't. Senior management also felt that they couldn't find another job for him or shuffle around his tasks if a problem did arise.

The PSC concluded he had a “high-level of autonomy and decision making” and relied on senior management’s concerns.

“The commission is of the view that (Provencher’s) ability to perform his duties in a politically impartial manner will be impaired in light of the nature of his duties and the increased publicity visibility and recognition that would be associated with seeking nomination as and being a candidate in the federal election.”

Senior public servants shouldn't run for political office: Savoie

'To run for federal politics, to be identified with partisan interests of a political party then expect to serve in a non-partisan professional manner is very difficult. It’s a very difficult circle to square at the senior level,' says Université de Moncton professor Donald Savoie.

By BEA VONGDOUANGCHANH , The Hill Times, July 6, 2015

It’s difficult for senior public servants to run for political office and then return to serve in a non-partisan manner, says Université de Moncton political science professor Donald Savoie.

“I think the bargain that we had between politicians and public servants was that public servants provided advice without fear or favour and politicians would receive that advice on a confidential basis and would protect the merit principle. Public servants were anonymous and would not become political actors or public actors or would not be asked to defend or support a policy position or government decision. That was the bargain,” Prof. Savoie told The Hill Times.

“Now, that’s coming unglued all over the place. I don’t think senior public servants should be part of the ungluing and they should show some reserve on their own. To run for federal politics, to be identified with partisan interests of a political party then expect to serve in a non-partisan professional manner is very difficult. It’s a very difficult circle to square at the senior level.”

Prof. Savoie, who’s written numerous books about public service and politics and has an upcoming book on the topic coming out in September called What Is Government Good At?, told The Hill Times that senior public servants at the EX-1 level and above should not run for political office even though they may be allowed to legally.

“It should go beyond the legal aspect,” he said. “Sure, you can make the legal case, you can make a Charter case, you can also go to the Public Service Employment Act, and I understand that, but I think public servants themselves, EX-1 and above, without turning to the legal aspects of the constitution should, because of the position of trust that they occupy, show reserve and not run for partisan office.”

The issue came to light recently when Emilie Taman, a federal lawyer with the Public Prosecution Service of Canada, was denied leave from her public service job to run for nomination to be the NDP candidate in the riding of Ottawa-Vanier, Ont. The Public Service Commission, which has authority to approve whether public servants can run for political office, ruled that Ms. Taman, daughter of former Supreme Court Justice Louise Arbour, was ineligible to take an unpaid leave of absence to run and then return to the public service if she loses. She decided to run anyway.

“When I expressed an interest in engaging in federal politics as a candidate, I was not authorized to take an unpaid leave for that purpose,” she wrote on her Facebook page. “So, here I am! This election is simply too important for me to stand on the sidelines. I have put everything on the line which demonstrates my commitment to becoming your next MP.”

Ms. Taman is challenging the PSC’s decision at Federal Court and will have a hearing on Sept. 1.

Ms. Taman, who handles cases related to immigration and refugees, the Fisheries Act and Income Tax Act and advises senior bureaucrats, has been a federal lawyer since 2008. Her union, the Association of Justice Counsel, is supporting her.

According to the PSC ruling, director of public prosecutions Brian Saunders, said that seeking a party nomination would “undermine the independence” of the PPSC. The PSC said that Ms. Taman’s ability to return to her job after the election might be “impaired or perceived to be impaired.”

Ms. Taman told The Hill Times in an email that her rank at the PPSC is an LP-2, the non-manager law practitioner category which has five levels before the management “legal cadre” category.

Prof. Savoie noted that lower level public servants should be allowed to run politically, just not at EX-1 levels or above. “I’m not talking about rank and file public service, I’m not talking about front line workers who may want to run for mayor of their community. At the less senior level, I have less concern, but certainly at the EX-1 and above, I think it should be public servants themselves that would show some reserve and not wish to run for public office,” he told The Hill Times.

“It violates the bargain, the unwritten bargain that exists between politicians and public servants under our Westminster model. It undermines that bargain. That bargain in my view has been undermined so many times in recent years, we shouldn’t continue to poke

holes in it. Running for office at the EX-1 and above pokes holes in it and it doesn't serve the interests of a non-partisan professional public service."

In response to Prof. Savoie's comments, Ms. Taman told The Hill Times: "I haven't given too much thought to the case of more senior management-level counsel other than to say that I view my position as being significantly different than theirs, particularly when it comes to the scope of their discretion and the extent to which they exercise it independently."

Chris Aylward, national executive vice-president for the Public Service Alliance of Canada, said that while he couldn't comment specifically on Ms. Taman's case, the union, which represents the most federal public servants, has supported their members in similar situations. "We have also made multiple representations to the PSC about the appropriate interpretation and application of the Political Activities Sections of the PSEA," he told The Hill Times in an email statement. "The political neutrality of the federal public service must be balanced against the constitutionally protected right of federal public service employees to political expression. Silencing employees does not ensure neutrality."

Federal election 2015: Most public servants seeking nominations allowed to run

Public Service Commission has granted leaves of absence to 34 bureaucrats to run in the next election

By James Fitz-Morris, CBC News, July 11, 2015

Two federal bureaucrats who want to see their names on lawn signs like these in the next election have been denied permission for unpaid leave by the agency that oversees the public service.

Two federal bureaucrats who want to see their names on lawn signs like these in the next election have been denied permission for unpaid leave by the agency that oversees the public service. (CBC)

Although facing criticism — and even a court challenge — for barring some civil servants from running for office, Public Service Commission numbers show the vast majority of such applications are approved.

In a statement provided to CBC, the independent agency responsible for the civil service says it has granted permission to 34 public servants to take leaves of absence in order to run in October's election.

Two have so far been refused, while the cases of two others are pending.

Before 1991, there was a blanket ban on public servants partaking in political activities — up to and including running for office.

A Supreme Court ruling determined that rule violated a number of charter rights and ordered the government to balance the need for a non-partisan public service and the individual rights of those who hold the jobs.

Since then, bureaucrats have needed to apply for permission to run for any elected office in Canada — including at the municipal and provincial levels.

Unpaid leave

If they are able to convince the commission that running as a candidate for a given party would not compromise their non-partisan positions, they are allowed to take an unpaid leave of absence during the campaign.

If they are successful and become an MP, they would then have to formally resign. If not, they can return to their jobs.

But they don't always get the chance.

Emilie Taman, a lawyer with the Public Prosecution Service of Canada, says she was denied her request for unpaid leave to run for the NDP nomination in the Liberal-held riding of Ottawa-Vanier. She appealed the decision and lost, but this past week announced on Facebook and Twitter she is running anyway.

Taman, the daughter of former Supreme Court justice Louise Arbour, told the Ottawa Citizen she hasn't resigned but expects she will be fired.

'Politically impartial'

Claude Provencher was also denied a leave of absence to run in this election and is taking the government to court.

Provencher is general counsel and regional director with Justice Canada in Quebec and wants to run for the Liberals in a Quebec riding.

The commission concluded Provencher's ability to carry out that role in a "politically impartial manner," could be, or could be perceived to be, "impaired in light of the nature of his duties and the increased publicity, visibility and recognition that would be associated with seeking nomination as and being a candidate in a federal election."

The PSC won't comment publicly on individual cases and decisions, but Provencher included the written decision from his case in support of his application to the Federal Court.

Beyond arguing the rules and the decision violate his charter rights to freedom of association, he also believes the system is backwards.

Currently, the onus is on the civil servant to demonstrate they can continue in their role in a non-partisan way, as opposed to the employer having to prove the applicants role would be compromised. Provencher argues that system should be reversed.

Federal executives get small raise while bonuses now tied entirely to individual performance

Kathryn May, Ottawa Citizen, July 12, 2015

The Conservative government is giving executives in Canada's public service a one-per-cent raise over two years and tying their bonuses to personal job performance, including pushing forward on the "corporate" priorities of mental health and recruitment.

After months of uncertainty, executives learned from the Association of Professional Executives of Canada (APEX) last week that they are receiving a 0.5 per cent raise for 2014-2015 and another 0.5 per cent increase for 2015-16 retroactive to April 1 of each year.

The increase also goes to mediation and conciliation officers who work for Labour Canada.

This year's 0.5 per cent raise is barely one-fifth the 2.3 per cent pay increase that MPs received in April not to mention the the 2.7 per cent hike that went to senators.

By legislation, MPs' yearly salary increases are tied to the average wage settlements negotiated in private-sector companies that have more than 500 employees. That means they are automatically entitled to the average 2.3 per-cent increase private sector employers gave their employees in 2014.

Compensation is a sensitive issue in Ottawa these days, given Treasury Board President Tony Clement's longstanding vow to bring the pay and benefits of public servants in line with other public and private sector employers to balance the budget.

The private-sector increases to which MPs are linked, however, have outstripped the average wages negotiated by unions with similarly large employers in the public sector every year since 2010.

Some argue the executives' raise signals that unionized public servants may not be offered much more.

The 17 federal unions are still at the bargaining table in contentious negotiations over giving up existing sick leave benefits. So far, the government has tabled the same offer it gave executives –0.5 per cent increase for last year and 0.5 per cent for this year.

But Ron Cochrane, co-chair of the joint labour-management National Joint Council, argues executive raises will have little impact on the wages being negotiated for unionized employees. He said the increase shows the government's "disdain" for its employees when wage increases trail inflation.

"This government collapses expectations by withholding increases for two years so they (executives) are happy with whatever they get," he said.

"Their salaries are not keeping up with inflation yet MPs give themselves increases based on the private sector unionized workforce at 2.3 per cent a year."

There are 6,500 executives in the public service working in five levels, from Ex 1 to Ex 5. Base salaries before the increase start at $105,700 and go up to $200,300 at the Ex-5 level.

Executives typically hear about their raises long before now and many had braced themselves for a modest raise at best.

The Conservatives gave executives the same increases as unionized employees until 2013-14 when it gave them less – one per cent compared to between two- and 2.5-per-cent hikes that went to unionized employees, MPs and senators.

Executives have also been lagging behind the increases federal pensioners receive on their pensions.

Federal pensions are tied to inflation and pensioners have received bigger bumps in their pension payments than executives since 2012-13. The pension increase last year was 0.9 per cent and this year's is 1.7 per cent – more than the one per cent pay hike executives are getting.

At the same time, the government is shifting how it rewards executives for meeting the commitments they agree to in performance agreements with their bosses.

For 2015-16, deputy ministers will set performance objectives for executives based on the specific needs of their departments, as well as corporate goals for recruitment and

mental health. These are two of the three top priorities of Canada's top bureaucrat Janice Charette, who also ranked policy development on her list.

With this shift, executives' performance pay now will be based totally on their personal commitments. Until now, executives' performance or "at risk" pay was split with 67 per cent tied to their individual commitments and 33 per cent for corporate goals.

The split began in 2011 when the Conservatives took an unprecedented step of tying 40 per cent of executives' "at-risk" pay to the government's corporate priority of reducing jobs and $5.2 billion in operational spending by 2015. The other 60 per cent was tied to executives' individual performances. Tying executive bonuses to job cuts never went over well with rank and file employees.

Once the cuts were implemented, the government reduced the portion tied to corporate goals from 40 to 33 per-cent and boosted the share of performance pay for individual performance to 67 per cent for 2013-2014.

For recruitment, the big push is recruiting and developing talent with skills for the future. Departments have to keep their human resources plans updated so they know the kind of talent they need.

For mental health, the objectives are threefold. First, to reduce the "stigma" of mental illness; second, to root out the policies and practices that could contribute to it, such as harassment or discrimination; and finally, figure out how to accommodate those facing mental health issues.

Stephanie Rea, a spokesperson for Clement, said the government decided to combine the at-risk pay for corporate and individual objectives on the advice of the Advisory Committee on Senior Level Retention and Compensation headed by entrepreneur Vijay Kanwar. That committee has historically recommended the raises executives should get.

APEX met with the committee, urging it to make the change. APEX has put executive recruitment on its priority list warning the public service needs the "right conditions" to attract and keep executive talent, including respect for the work public servants do and "commensurate compensation."

"APEX …. applauds the inclusion of workplace health, mental health, and expectations in executive performance measures that foster a workplace that does not tolerate harassment or discrimination," said a memo from APEX President Donna Achimov.

Performance Pay

Executives are entitled to performance pay, which comes in two parts.

At risk pay: A portion of base salary that executives can earn based on how they perform against the corporate and individual commitments they agreed to meet. It must be re-earned every year.

Bonus: portion of pay – on top of at-risk pay – for those who surpass all expectations.

Amount: Executives from Ex 1 to Ex 3 are eligible for total performance pay up 15 per cent of salaries; Those at Ex 4 and Ex 5 can earn up to 26 per cent.

Senior bureaucrats question whether they do 'real' executive work

Kathryn May, Ottawa Citizen, July 7, 2015

Canada's federal executives say they have little authority to manage, resent politicians' criticism of public servants, and face problems with employees never encountered before.

A survey conducted by the Association of Professional Executives of the Public Service of Canada paints the picture of an executive cadre that feels it has the skills to handle the responsibilities of senior jobs. But nearly 80 per cent of the executives also feel that they face challenges "beyond their control" or that "reduce their performance."

A key theme running through the responses from the survey's 1,077 respondents is the changing nature of executive work in the past few years.

About 75 per cent said the executive job has changed. Many feel it no longer carries the leadership, strategic role and authority of a "true executive." Some say the job is more clerical, like the work they did as officers before being promoted into the upper ranks.

"Executives' perception that their role as 'true executives' has declined significantly is a serious concern because – if the perception is accurate – it means that the public service leadership is not able to provide as much support to the government and service to Canadians as it is capable of providing," said the report.

"It also means that executives are unlikely to be as engaged and satisfied with their work, and that neither the government nor Canadians are likely get value for money from executives' work."

It's a worrisome picture for a public service that is at a crossroads and shifting into a major modernization project that the public service's 6,400 executives are expected to lead. Treasury Board recently published a list of the new leadership competencies expected of executives to get there.

The report suggests that some of the problems are the result of a deteriorating relationship with politicians. Executives feel they aren't trusted, their advice isn't sought, or it is second-guessed.

This tension and mistrust between the public service and ministers was one of APEX's chief concerns in its 2014 report on Blueprint 2020 and it urged steps to fix that relationship.

The report said politicians' criticism of public servants – whether real or perceived – erodes the engagement and loyalty of executives. It noted that executives offered so many comments about the negative impact of politicians' criticism of public servants that the "issue merits serious consideration."

"As a public service executive you used to feel like you were making a difference, You felt trusted and your ideas were considered to be valid and helpful," wrote one executive in his comments.

"Now there is an air of distrust and disrespect. You don't feel valued and you are part of the machine. Get the work done, do it with the least amount of staff, and everything has to be verified and validated at several levels before it is ever believed."

Lisanne Lacroix, APEX's chief executive officer, said the report was commissioned in May 2014 to gauge executives' perceptions on the "evolving" nature of their work. Executives answered 15 questions and offered nearly 5,200 comments about the job.

That report, coupled with APEX's health survey of executives and its submission on the Blueprint 2020 plan to modernize the public service, became the basis for APEX's closed presentation to the new advisory committee on senior level retention and compensation that Treasury Board President Tony Clement appointed with Toronto entrepreneur Vijay Kanwar as the new chair.

"Top executive talent is needed more than ever to position the public service for the future and we outlined the conditions that must be in place to attract and retain top executive talent," said Lacroix.

Many executives feel they don't have the authority and latitude to manage, especially in areas of finance and human resources. They complain about being unable to order a 79-cent pen without layers of approval, to use their judgment on a travel request, or even to approve coffee for a meeting.

Approvals and issues that would once have been managed by low level executive have been kicked several levels up the hierarchy to the assistant deputy ministers and deputy ministers, which drags down the timeliness of decisions and efficiency of operations.

"Delegation has been raised to the highest possible level, removing almost all accountability from managers to manage," wrote one executive.

"I am stirring the soup that someone else has made from a pack of pre-packaged noodles. I am not able to contribute to the ingredients, cooking time or quality," lamented another.

"Let managers manage" has been a mantra for reform among executives for four decades, but the report argues that the volume of comments from executives who feel they don't have authority to manage should be investigated.

"Have delegations actually been withdrawn? Have executives been failing to exercise their authority? Are there too many levels of approval? Is there excessive micromanagement of executives by their superiors? If so, why?" asked the report.

The report said executives are also hampered by a growing gap between the services they have to produce and the resources they have to do that, which has been made all the more difficult by inefficient system-wide procedures, such as for finance, HR and procurement.

They feel they face big expectations to do more with less – and faster than ever.

Everything is last-minute and a priority, but they have so many hoops to jump through with keeping lists, tracking, monitoring and reporting to their bosses and the central agencies for "little discernible benefit but increased workload."

They work with constant deadlines and pressures to deliver with fewer staff, smaller budgets, outdated tools and piles of internal red tape that slow everything down.

The report said federal executives feel human resources will be the big management challenge of the future with 58 per cent saying they already face "people management problems" that they never encountered in the past.

Problems staffing and managing people is a perennial complaint of executives and 51 per cent said that this, and performance management, are their biggest headaches. Overall, executives say they spend 30 per cent of their time managing people and their problems and expect more time will be needed to deal with rising mental health issues and physical ailments of employees that affect performance.

They complain that senior executives, assistant deputy ministers and deputy ministers often micromanage basic HR issues, which slows down operations.

The report noted that executives find younger employees want "work-life balance" and don't want the long hours that baby boomers accepted – a shift for which the public service isn't prepared. More employees consider flexible work arrangements a right rather than a possibility based on operational requirements.

The public service is banking heavily on youth for its innovation and drive so managers are warning the government has to have the culture, processes and management that appeals to them.

With cuts, executives say there is little time, money or support for training. Executives put a top priority on training in leadership, performance and innovation – which are in sync with the Blueprint 2020 plan – but the report noted they don't seem as concerned about the skills and knowledge some feel executives lack and need for the digital age: e-government skills, social media, private-public partnerships and data analysis.

"Unprecedented changes in organization, collective agreement benefits, processes, budget pressures, have all contributed to the perfect storm," said one executive. "Apathy, indifference, many close to retirement, fear, make it extremely difficult to lead people into the future

Perspectives of Public Service Executives on Their Revolving Work, May 2014 survey

85: Percentage of executives who say they have the skills and knowledge for the job

92: Percentage who are confident they have the skills to handle the financial responsibilities of the job

80: Percentage who say they face challenges, difficulties and issues beyond their control or that reduce their performance

75: Percentage who say the work of executives has changed over the last few years

92: Percentage who report or expect to encounter new "people management" problems

51: Percentage who said people management and performance issues are their biggest challenges

30: Percentage of their time executives say they give to people management and staffing

86: Percentage who say they get the tasks and responsibilities of their jobs done

43: Percentage who are very or mostly satisfied with their work as an executive (but at the expense of long hours and work-life imbalance)

27: Percentage who are sometimes satisfied

Nine: Percentage who are very or mostly dissatisfied

Tories appoint 43 judges in June, filling long-standing vacancies

Sean Fine, The Globe and Mail, July 7, 2015

The Conservative government appointed 43 judges in June, filling appeal court vacancies left to languish as long as a year and a half and ending a shortage that contributed to backlogs in family, civil and criminal courts.

The weeks leading up to the official start of the election campaign may be the government's last chance to reshape the federally appointed judiciary, since judges are rarely chosen during a campaign.

The flood of appointments reduces the number of vacancies to 14. During the almost 10 years the Conservative government has been in power, judicial vacancies have often been at record levels, usually hovering around 50, according to figures from the Office of the Commissioner for Federal Judicial Affairs Canada.

On Manitoba's highest court, the Court of Appeal, one job was left open since Jan. 1 of last year and another unfilled since the following May; both those posts were filled in June. A Quebec Court of Appeal position had been open since Nov. 1. And Ontario had more than 20 vacancies at one point.

The Conservatives also left the Supreme Court short one judge for an unprecedented 10 months and did not fill the job of Ontario chief justice for six months.

As a result, some courts have struggled to meet the demand for access to justice. In Quebec, civil trials expected to take longer than 25 days must be booked four years in advance, Superior Court Chief Justice François Rolland said in his annual public address last September.

After complaining that one of the vacancies on his court went back a year and another four positions had been open for six months, he jokingly asked if anyone could get Justice Minister Peter MacKay on the phone, because he had tried and failed. He has since retired.

“The vacancies that sit there represent a judge that could be and should be available to the public,” said Michele Hollins, president of the Canadian Bar Association, adding that the CBA had repeatedly urged the government to fill the jobs. In her home province of Alberta, the shortage of judges has led to serious delays in family, civil and criminal cases, she said.

The Justice Minister’s office did not respond directly when asked why it had decided now to fill jobs left open for so long. Clarissa Lamb, a spokesperson for Mr. MacKay, said in an e-mail: “Judges are appointed based on merit and legal excellence and on recommendations made by the 17 judicial advisory committees across Canada. We work with our provincial counterparts to ensure they have the resources they need to administer the justice system more efficiently and effectively for Canadians.”

Leaving the judiciary with chronically high numbers of unfilled jobs is just one aspect of this government’s troubled relationship with the courts.

While some legal observers have wondered whether Ottawa was simply trying to save money – Superior Court judges earn $288,100 a year, plus benefits – those close to judicial appointments say the government took great pains to ensure that few liberal-minded candidates made it through, slowing the process.

The government has seen judges strike down its crime laws or make refugee rulings it disliked, and cabinet ministers have responded at times with vociferous public criticism.

Judicial appointments are a big part of Prime Minister Stephen Harper’s legacy, according to Wayne MacKay of the Schulich School of Law at Halifax’s Dalhousie University. The federal government appoints judges to provincial superior and appeal courts, the Federal Court and the Tax Court, as well as the Supreme Court.

“He’s had more impact [than at the Supreme Court] installing judges with a small-c conservative, more restrained judicial temperament he’s looking for – one that’s more supportive of the government and less inclined to take an activist view of the Charter of Rights,” Prof. MacKay said in an interview.

Eric M. Adams: Time for unions to forgive the Constitution

Ottawa Citizen, July 9, 2015

Eric M. Adams *teaches constitutional and employment law at the University of Alberta, Faculty of Law.*

Two years ago, Conservative Senator Hugh Segal caused a media stir by speaking out against a private member's bill from his own party. Bill C-377, he declared, "has an anti-labour bias running rampant; and it diminishes the imperative of free speech, freedom of assembly and free collective bargaining." Unions cheered, the Prime Minister's Office did not, and Segal resigned from the Senate soon afterwards.

Last week, on its last day before breaking for the summer, the Senate quietly passed Bill C-377. There was little drama, and no grand speeches about the constitution, and not much attention from the media. The quiet will not last.

The proposed law, amending the federal Income Tax Act, requires all "labour organizations" to annually disclose to the federal government detailed information related to their financial holdings, expenditures, salaries, gifts, bonuses, loans, and contracts. All transactions of more than $5,000 must include the "name of the payer and payee". The law also requires that unions specifically report what they spend on particular conduct such as political activities, lobbying, and legal activities. More than an accounting of dollars, unions must also report how much time they spend on various specified activities. All information collected is to be made public. Non-compliance results in fines of $1,000 per day.

In short, the law demands that unions provide the government and public with fine-grained detail of their financial affairs, plans and priorities, political ideas and preferences, and organization and structure.

In the inevitable constitutional challenge that will follow if the law is implemented as scheduled following the next election, unions will argue that the law violates the Canadian Charter of Rights and Freedoms protections of freedom of expression and association. I suspect, however, that an older idea of constitutional law – one that unions have traditionally opposed – may determine the fate of the legislation.

For most of the twentieth century, the labour movement blamed the judicial interpretation of the division of powers between the provinces and federal government for destroying the dream of a national labour law. In 1925, the Judicial Committee of the Privy Council, then Canada's highest appellate court, declared unconstitutional the federal government's labour legislation for invading provincial jurisdiction over "property and civil rights in

the province". The regulation of union activities, collective bargaining, strikes, and lockouts, the Privy Council held, directly engaged the local interests, responsibilities, and aptitudes of provinces. Labour law and unions should be governed by the government closest to the people, Viscount Haldane reasoned, since labour disputes often grew out of local conditions and grievances and directly engaged the private law of contract.

Senator Eugene Forsey labelled Lord Haldane the "wicked stepfather of Canadian Confederation," and Frank Scott blamed the case for creating "a legal morass in labour matters from which the country has never recovered," but nonetheless the Privy Council established the basic constitutional framework that survives to this day: provincial authority over unions and labour relations as a rule, with only a minor exception for the federal regulation of those industries that fall directly under federal jurisdiction such as railways and banks. Indeed, a number of provinces have already exercised their constitutional authority over labour relations to require various forms of financial disclosure from unions.

In Parliament, Bill C-377's architect, Russ Hiebert, argued that his private member's bill fell within federal jurisdiction over taxation, since unions receive the public benefits of tax-deductible union dues. Although Conservatives in the House of Commons stressed that the "bill does not regulate labour organizations and does not tell them how to spend their money," others conceded that the law is intended to enable the public "to gauge the effectiveness, financial integrity and health of any union they wish."

Ultimately, courts will be persuaded not by what politicians say, but what the law does. In singling out unions for particular treatment, in the breadth of the disclosure obligations imposed, and, most significantly, in the impact and potential chill on how unions spend their time and resources, it is difficult to see Bill C-377 as a law "in relation to" the federal powers of taxation, or sufficiently related to the federal tax scheme to survive as an "ancillary" use of federal authority.

If the federal government possesses the constitutional authority to compel unions to disclose such details simply because Parliament has made the policy choice to make union dues tax deductible, then the federal government must also possesses a similar constitutional authority over a host of provincially-regulated professional associations where membership dues are tax deductible. A federal law requiring the Alberta Association of Architects, Law Society of Upper Canada, or Collège des Médecins du Québec to disclose all of the details of their finances, salaries, and spending would likely not survive constitutional challenge either.

Bill C-377's "true character" is about unions, what they do, and how they operate. Although unions long wished it were otherwise, the regulation of labour relations and union operations generally falls within provincial jurisdiction.

Unions across the country will look back on 2015 as the year the Supreme Court of Canada breathed life into the freedom to associate under s. 2(d) of the Charter. But last

week, a vote in the Senate also set the stage for another constitutional development of note. After 90 years, it may be time for unions to forgive the constitutional division of powers.

More than half of newly-appointed judges are women

Sean Fine, The Globe and Mail, July 7, 2015

Women make up more than half of Ottawa's court appointments in June, in sharp contrast with the government's record on gender balance on the courts.

Twenty-two of the 43 new appointments are women. Just 30 per cent of the judges appointed by the Conservative government from 2006 until Feb. 18 of this year were women, according Marc Giroux, deputy commissioner of the Commissioner for Federal Judicial Affairs office. The proportion of candidates who applied was also 30-per-cent female, as was the proportion of candidates given a "recommended" rating by the 17 judicial advisory committees across Canada that screen those who wish to become judges, Mr. Giroux said.

And on the most senior courts – provincial appeal courts and the Federal Court of Appeal – the government appointed six women and five men in June.

"It's fantastic they're listening," said Linda Robertson, a Vancouver lawyer and co-chair of the Canadian Bar Association's Women Lawyers Forum. "The government is responding to all that's been written in the press. The bar associations and the law societies have been calling for this."

So eager was the government to proclaim its new commitment to women on the bench that it added a line to its news releases last week when it announced three new judges – all of them men: "Through these appointments, the Government of Canada has demonstrated an awareness of the need to bring greater gender balance to the bench, to help ensure that the judiciary is more representative of Canadian society."

The government also named Winnipeg lawyer Regan Thatcher, a sole practitioner in Winnipeg, to the Family Court Division of the Manitoba Court of Queen's Bench. Mr. Thatcher is a son of Colin Thatcher, a former Saskatchewan cabinet minister who was convicted of killing his ex-wife, JoAnn (Regan's mother), in 1983.

Regan's mother and father had a drawn-out battle over custody and support in the years leading up to the shooting. Regan later testified to urge a jury to recommend an early parole hearing for his father. The Conservative government has since scrapped the so-called faint-hope law that allowed convicted murderers to ask for permission to apply for parole after 15 years.

The Hill: Taxpayers foot the bill as feds' legal losses pile up

By Richard Cleroux, Law Times, July 6, 2015

For a prime minister who has been spending plenty of money on constitutional litigation, Stephen Harper doesn't seem to have a lot to show for it.

Not long ago, a Liberal MP, Scott Simms, asked six of Harper's cabinet ministers to reveal how much of the taxpayers' money they had spent fighting 16 specific constitutional cases.

Obviously, being a Liberal, Simms picked 16 cases he knew would show Harper and his cabinet had been wasting taxpayers' money, in this instance about $7 million of it. Simms didn't choose the cases at random. He chose those Harper had lost.

Harper's legislation isn't all that bad, especially for a Conservative government. It's seems he just doesn't know how to write legislation that doesn't violate the Charter of Rights and Freedoms or the Constitution.

NDP justice critic Françoise Boivin says the Conservative government needs to explain why there's a pattern of ramming through flawed bills that don't stand up in court.

So why does Harper keep throwing flawed legislation at the courts? Maybe he thinks that sooner or later they'll come over to his side.

It's more likely Harper doesn't know how to take legal advice from the scores of legal experts he has available to him or he refuses to listen to them as he thinks he knows the law better than they do. It seems he'd rather fight his case in court time and again and then attack the judges when he loses.

One of the best-known losses was the Supreme Court's rejection of Justice Marc Nadon's appointment to its own bench. Chief Justice Beverley McLachlin had even called up the justice minister ahead of time to talk about it.

Was it to warn Harper? Talk about doing Harper a favour. Harper, however, went ahead with the Nadon appointment anyway and lost the case. Since then, it has been one lost case after another.

Harper acts as if the Supreme Court judges are against him, forgetting that he appointed most of them. In reality, they understandably feel they're there to uphold the law rather than just agree with whatever Harper wants.

Since 2006, Harper's government has brought in mandatory minimum sentences for 60 different crimes including gun and drug possession, sex offences, and drunk driving. Because of his mandatory minimums, Harper has more people in jail than ever even though crime rates have dropped to a 50-year low.

Harper shoots back that it's his mandatory minimums that have reduced the crime rate. Judges resent that and some of them have found ways around the mandatory minimums.

Harper was on the losing side a few months ago when the Supreme Court ruled by a 6-3 margin that mandatory minimum sentences for gun possession were cruel, unusual, and unconstitutional.

In another instance, the judges struck down Harper's retroactive changes to parole eligibility because it imposed a new punishment on offenders already tried and sentenced by the court.

Last July, a court ruled Harper's cuts to health care for refugee applicants from places Harper considers to be safe countries amounted to cruel and unusual punishment. That case cost taxpayers $1 million. The court gave Harper four months to change the refugee health rules. Instead of accepting the judgment, Harper is going to appeal. How many more millions will the government spend on that?

Earlier this month, the Supreme Court said medical-marijuana users have a right to consume the drug in ways other than by smoking it. That was good news for people with lung problems as it could mean they could instead consume it in cookies, cakes, candies, and chewing gum.

Health Minister Rona Ambrose expressed outrage at the decision. She said the court was trying, like Liberal Leader Justin Trudeau, to encourage young people to use marijuana.

Rather than judges, government medical experts should decide what kind of medical marijuana people can consume, she said. Talk about politicizing a court decision.

In another drug case, the Supreme Court decided the federal government had no right to close down a Vancouver clinic where drug addicts could inject illegal drugs under proper medical supervision.

Lawyers have also found themselves in the middle of the controversies between the government and the courts.

In February, the court overturned a federal law that obliged lawyers to reveal to the government certain financial transactions involving their clients. The Supreme Court found the law unconstitutional because it forced lawyers to be unwitting agents of the government.

And so it goes with the Harper government passing laws and the courts overturning them. Taxpayers, of course, continue to foot the bill as the losses pile up.

Depart of Justice on trial today for not vetting bills for constitutionality

By Christopher Pearson, ThinkPol website, June 30, 2015

Edgar Schmidt, a former special advisor and general counsel to the Department of Justice, will appear in Federal Court in Ottawa this morning to present his claim against the government demanding that the Minister and Deputy Minister of Justice adequately vet new bills for their consistency with the Canadian Charter of Rights and Freedoms.

Schmidt is claiming that the current vetting process is insufficient and "suggests that the normal vetting process has been overturned, and replaced by another."

On December 14th, 2012 , Schmidt was suspended without pay after filing his claim related to section 4.1 of the Department of Justice Act, section 3 of the Canadian Bill of Rights, and section 3 of the Statutory Instruments Act.

These employment related issues have been resolved and as of May 2013, he has since retired from federal public service.

Schmidt asserts that, citing charter provisions, the Minister of Justice is obligated to serve notice if any new bill violated or was inconsistent with the Canadian Charter of Rights and Freedoms. However in practice Mr. Schmidt states that the he and his colleagues were told not to inform the minister even if there was a 95% chance of a bill violating the charter.

The claim that the DOJ ignores this potential risk of violation, which is deemed at the very high to certain risk range by the DOJ, has been agreed upon in 2014 when both parties filed a statement of agreed facts. This gives validity to Schmidt's claim.

Schmidt commented when interviewed by Lawyers Weekly that the statement of agreed facts "confirms that there really is not a factual disagreement" and that "the facts are that the standard for review/examination is very low. The only question is whether this complies with law."

Schmidt argues that the government operates under a 'faint hope' standard which they veil as a 'credible argument' standard and that the government has a duty to introduce charter-compliant legislation – or at least inform the public when legislation does not pass the test.

The government claimed they do not have to do so unless legislation is "manifestly unconstitutional, such that no credible argument exists in support of it."

As stated earlier, Schmidt haspaid a high price for bringing this case to court after being suspended from work without pay and barred from his office.However the policy to ignore this very high risk of violation was more than he could stomach, which caused him to challenge this policy.

He "accepted early retirement in 2013", and has since stated that he has received support from a variety of sources.

Schmidt says that he is asking for “a declaration of the law, so that is the only substantive remedy that can emerge from the lawsuit.”

He adds that “I think it would be useful if the court would also comment on certain other issues in order to provide guidance to ministers and public employees—issues such as the relationship between executive officers of the state and the state itself”.

Schmidt’s case is being closely watched by lawyers and politicians alike as it sets an important legal precedent and may explain why Stephen Harper’s Conservatives have a habit of passing legislation that Supreme Court of Canada subsequently strikes down.

The nation’s highest court struck down the mandatory minimums for gun crimes calling it “cruel and unusual punishment” this year and ruled the prostitution bill unconstitutional in 2013.

Constitutional lawyers back Legault court application on C-59

By Geoff Kirbyson, The Lawyers Weekly, July 10, 2015 issue

Constitutional experts are backing federal Information Commissioner Suzanne Legault after she filed an application with the Superior Court of Ontario recently as budget Bill C-59 was receiving royal assent.

Legault alleges the RCMP destroyed firearms registry records in 2012 with the full knowledge that the records were the subject of an access to information request, activity which normally would have resulted in criminal charges against the police. But the government retroactively changed the law with the budget bill to exempt long-gun registry records from such requests, effectively wiping the RCMP’s slate clean.

Legault said the government violated the constitution and that the documents should have been preserved. The case has been referred to a three-judge panel of Ontario’s Divisional Court, where hearings aren’t expected for several months.

“It’s a black hole into which government information is dropped with impunity,” said Margot Young, a constitutional law and social justice issues professor at the Allard School of Law at the University of British Columbia.

“When you have a request for a particular piece of information through the proper freedom of information channel and the government’s response is to destroy that information, thereby negating the legitimate request, the government negates the possibility of effective, free discussion.”

What is particularly distasteful, Young said, is that Legault’s chronology of events revealed that at the same time as she was assured the registry records would be available, orders were going out from the Prime Minister’s Office to destroy them.

She said the idea of accessing government information rests on the principle of democratic discourse, which is behind the protection of the freedom of expression in the Charter in the first place, and demands a free flow of information relevant to the larger political debate.

Retroactive laws have been implemented by governments in the past, but Toronto-based criminal lawyer Elliott Willschick called this instance “rather disturbing.”

Willschick added: “(Legault) has every right to sue the government in order to prevent this type of disregard for the rule of law. The records should have been preserved in the first place.

“The introduction of a retroactive law to protect those who destroyed the records is not a precedent any government should follow. Access to information preserves the transparency of the government's actions. (Canadians) should be concerned with a government that is going to great lengths to keep information from being disseminated to the public.”

This type of action is consistent of the Harper government, he said.

“I don’t know what would have been in there that they needed to destroy,” he said. “It’s typical of this government, though. They seem to be ignoring the rule of law and anybody’s else’s concerns and acting in their own best interests.

“When the request was made, it’s difficult to figure out why they continued to destroy the documents unless they went beyond their mandate. It’s extremely unusual.”

Willschick said the government and the RCMP knew full well the documents shouldn’t be destroyed and would have realized that down the road there would be allegations of wrongdoing.

“They wanted to be protected against that,” he said.

Ironically, Willschick thinks the government may have shot itself in the foot.

“If they had just made the records available, it wouldn’t have attracted this much attention. To protect people in this instance is a way to insulate the government from any responsibility,” he said.

Young said the government’s “shenanigans” are not only impeding political discourse, but raise an issue of constitutional law.

“The principal of rule of law is a fundamental information principal. The whole Canadian constitution’s retroactive laws are problematic in the area of criminal law,” she said.

It’s the retroactive erasure of criminal liability that has Young up in arms.

“It’s an issue that’s important for the courts to consider in their role as the protectors of the certainty, predictability and legitimacy of law. Thank goodness we have an information commissioner to identify and move forward on this concern,” she said.

De l'aide disponible pour les employés

Paul Gaboury, Le Droit, le 6 juillet 2015

Tout en affirmant qu'il n'y a pas de problème généralisé avec le traitement de la paye des employés fédéraux, Travaux publics et Services gouvernementaux Canada (TPSGC) a mis des mesures en place pour aider les employés qui éprouveraient certains problèmes.

Les employés fédéraux qui ne reçoivent pas leur premier paiement au cours des 21 jours suivant leur première journée de travail peuvent ainsi s'adresser directement au ministère pour lequel ils travaillent afin d'obtenir un chèque de paye.

Au cours des dernières semaines, des employés fédéraux ont indiqué avoir eu de la difficulté au cours des derniers mois à être payés à temps à la suite du transfert du traitement de la paye au Centre de service de Miramichi, au Nouveau-Brunswick. De plus, certains disent éprouver des problèmes à entrer en communication avec des agents de rémunération de Miramichi pour régler le problème.

De cas de non-versement des paiements

«Le non-versement des paiements aux fonctionnaires ne peut être toléré. Les fonctionnaires peuvent communiquer directement avec les conseillers du Centre des services de paye, en composant le 1-855-686-4729, s'ils ne reçoivent pas leur paye en temps opportun. Si un employé ne reçoit pas son premier paiement au cours des 21 jours suivant sa première journée de travail, il peut obtenir un chèque directement de son ministère, et nous l'encourageons à en faire la demande», a indiqué dans un courriel Pierre Alain Bujold, porte-parole de TPSGC.

Un employé a raconté cette semaine ne pas avoir été payé depuis dix semaines et avoir été incapable de parler à un agent à Miramichi. Récemment, l'Alliance de la fonction publique du Canada déplorait le manque de ressources pour assurer les services.

«Le rendement des employés de Miramichi, au Nouveau-Brunswick, est bon. La transition au centre des services de paye n'a pas eu d'incidence négative sur le traitement de la paye des employés», souligne-t-on à TPSGC.

Environ 70200 comptes de paye sont présentement traités à Miramichi. Le transfert de la majorité des 113800 autres comptes sera effectué lorsque le nouveau système de traitement sera mis en place en octobre et décembre 2015. «Ce nouveau système automatisera considérablement les processus et le calcul de la paye, ce qui permettra d'effectuer les paiements plus rapidement», précise le ministère.

Les grands cigarettiers s'opposent au premier versement imposé par la cour

La Presse, La Presse Canadienne, le 9 juillet 2015

Les plus importants fabricants de cigarettes du pays étaient réunis en cour à Montréal, jeudi, afin d'expliquer pourquoi ils croient qu'ils ne devraient pas verser plus d'un milliard de dollars aux victimes du tabac d'ici la fin du mois.

Un juge a déterminé, il y a un peu plus d'un mois, qu'Imperial Tobacco, Rothmans - Benson & Hedges et JTI Macdonald devaient verser plus de 15,6 milliards de dollars aux fumeurs qui sont soit tombés malades, soit devenus dépendants de la cigarette.

Le jugement indiquait que les entreprises devaient faire un premier versement de 1,1 milliard dans les 60 jours suivant la décision, que la cause soit portée en appel ou non.

Cette date limite est le 26 juillet.

Les avocats des trois cigarettiers ont déclaré jeudi que les entreprises n'avaient tout simplement pas les fonds nécessaires et qu'un tel paiement pourrait nuire considérablement à leur capacité d'en appeler de la décision, et même les acculer à la faillite.

Selon eux, le juge a erré en accordant une telle somme provisoire.

Les avocats des plaignants croient pour leur part que les cigarettiers bluffent et sont en mesure de trouver les fonds nécessaires auprès de leur société mère à l'extérieur du Canada.

Un avocat a noté que les fabricants de tabac n'ont pas mis d'argent de côté pour ce dossier, bien qu'ils aient eu 17 ans pour le faire.

La cause a d'abord été lancée en 1998 avec deux poursuites qui ont ensuite été consolidées. Les premiers témoins n'ont cependant été entendus qu'en 2012.

Trois juges de la Cour d'appel du Québec rendront leur décision ultérieurement.

Analysis: Harper hyper-hostile to unions

Charles Smith, contribution to Winnipeg Free Press, July 8, 2015

Charles Smith *is an assistant professor of political studies, St. Thomas More College, University of Saskatchewan. He works on areas related to labour relations, constitutional law and Canadian politics*

Winnipeg Transit members of Amalgamated Transit Union demonstrate in front of city hall in May. The Harper government now requires unions to declare funds spent on political activity. Photo Store

It is no secret the Harper government is hostile to organizations unsympathetic to the government. This has been especially true for Canada's unions. No federal government in

modern history has been so quick to weaken the ability of workers to strike or to effectively bargain.

Last week, with the Senate's passage of Bill C-377, the Conservatives have taken that hostility one step further and utilized the federal government's tax powers to undermine one of its chief civil-society opponents.

Under the bill, which amends the Income Tax Act, labour unions will be required to disclose all transactions and all disbursements over $5,000 and all salaries over $100,000. The legislation imposes steep obligations on unions: to outline annual assets and liabilities, statements of income, loans and annual income. Unions must also declare funds spent on political activity, lobbying, administration, education and training, legal fees, and a host of other areas. Revenue Canada is then obligated to post those expenses on a public website.

This, in effect, is using the tax system to destabilize a political opponent, and it raises important questions about the neutrality of administrative agencies such as Revenue Canada.

There are also serious constitutional problems with this legislation. First, C-377 wades into one of the most prominent provincial powers in the Constitution. In 1925, Canada's highest court ruled labour relations fell under the property and civil rights powers of the provinces. Since then, the provinces have taken primary responsibility for the regulation of labour-related matters. With C-377, the federal government appears to be using its tax powers to regulate in an area outside of its jurisdiction.

Second, by forcing unions to declare financial information on a public website, the federal government has handed employers a substantial advantage during collective bargaining. Employers will now be able to gauge the strike-readiness of a union at crucial moments of negotiations, thus undermining strike votes or other such measures designed to pressure employers to settle an agreement. By extending this power to employers, however, the government may be violating Sec. 2(d) of the Charter of Rights and Freedoms, which protects the freedom of association rights of Canadians. In 2015, the Supreme Court of Canada ruled in Mounted Police Association of Ontario (MPAO) v. Canada. The Supreme Court ruled government cannot "substantially interfere" with a meaningful process of collective bargaining that seeks to "disrupt the balance between employees and employer that Sec. 2 (d) seeks to achieve." There is a plausible argument C-377 violates these principles.

Finally, during the parliamentary hearings on the bill, many of the government's supporters stated C-377 provided individual union members with a genuine financial picture over how union dues were spent.

Backbench MP Russ Hiebert, the bill's sponsor, said it is meant to assist unions to become more "transparent and accountable." In Hiebert's estimation, posting expenses will empower workers and the public "to gauge the effectiveness, financial integrity and health of Canada's unions." Certainly these are lofty goals; few people would oppose efforts to make organizations -- be it the Prime Minister's Office, the Senate, the public service, or even the private sector -- more accountable and transparent.

But it was clear that for many anti-union supporters, it is legitimate for unions to spend dues for collective-bargaining purposes but illegitimate and frivolous if spent on political activity. Yet, is it possible to easily separate these two measures?

In 1991, the Supreme Court addressed this very question in a case about the constitutionality of Ontario's mandatory dues structure (the so-called Rand formula). Under the Rand formula, workers must financially support a union, but are not required to join that organization. While three of the seven justices were critical of what they termed the "compelled association" of the Rand formula, the court still held there was no plausible way to separate the usage of union dues because both bargaining and political activity contribute to the "the spirit of solidarity" that builds "democracy in the workplace."

In other words, for collective bargaining to work, unions must be free to struggle both in the community and at the bargaining table.

It seems clear this amendment to the Income Tax Act is designed to make these activities significantly more difficult.

Opinion: A sobering look at Canada's human rights record

Alex Neve, Contribution to The Globe and Mail, July 10, 2015

***Alex Neve** is the secretary-general of Amnesty International Canada.*

"This is not the Canada I once knew." Those were the words of a British member of the UN Human Rights Committee who was taking part this week in the committee's first review of Canada's human rights record in 10 years.

Sir Nigel Rodley, a law professor and chair of the Human Rights Centre at the University of Essex, was referring to the deteriorating space for human rights advocacy, protest and dissent in Canada. He noted it was almost unbelievable that the UN committee felt compelled to raise these sorts of concerns with Canada. Sir Nigel highlighted research by the Voices coalition, which pointed to astonishing levels of fear and intimidation felt by Canadian activists and civil society groups, and referred to the disquiet expressed by the UN's leading expert on the freedoms of assembly and association. He dismissed the Canadian government's initial response to questions about the crackdown as "thin."

It was a powerful moment that came near the end of six hours of back-and-forth, over two days, between committee members (drawn from countries around the world) and a sizable Canadian delegation from various federal departments and the province of Quebec. And it captured wider concerns about the range of troubling issues explored in the review.

Canada's human rights record has been on display, and the range of shortcomings and violations that have been probed has been sobering. Some are long-standing, such as concerns about sex discrimination under the federal Indian Act. Others are more recent,

such as many references to Bill C-51, the new Anti-Terrorism Act. Some of the issues, certainly violence against indigenous women, have an impact on hundreds of thousands of people.

The point of the review is not that Canada is among the worst human-rights violators in the world. Of course not. It is a regular review that comes around for all countries that have signed the International Covenant on Civil and Political Rights. The point, rather, is that all signatories are obliged to protect all rights – and that there is an expectation that a signatory with all the resources and strong institutions that Canada has will set a high example for other countries to follow.

That is not the picture that emerged during the review, however. Instead, it was of entrenched problems in Canada, such as the failure to have an effective process for recognizing and protecting aboriginal land rights. And of new and troubling developments that take Canada in the wrong direction, such as the battle over federal cuts to health care for refugees.

All of this against a backdrop of increasing Canadian disregard for many aspects of the international human rights system. Canada was still dismissive of the important UN Declaration on the Rights of Indigenous Peoples – which the government asserted is not binding, not law, only aspirational. Committee members were not impressed, for example, when Canada implied that it has no human rights responsibilities under the covenant when Canadian mining companies operate abroad.

Nor did Canada apologize for frequently refusing to comply with requests from UN human rights bodies to hold off on deportations while a full review of troubling cases was under way. And there was no commitment that governments across Canada would come together (for the first time since 1988) to talk about human rights and come up with a transparent, accountable system to ensure full implementation of our international obligations.

There was no shift in Canada's apparent determination to not move forward with solutions to complex and urgent problems. No willingness to establish a public inquiry and action plan for murdered and missing aboriginal women, for example. No budging from insistence that voluntary approaches are the best way to ensure that mining companies do not abuse human rights.

By the end of the review it was difficult to think of a serious social issue, with clear implications for human rights, that had not come up. Homelessness and the right to life. Intelligence sharing and torture. Pay equity and women's equality rights. Solitary confinement and high incarceration rates of aboriginal people. Detention of immigrants with mental-health problems.

The committee report is due by month's end, and then comes the true test for Canada. Will there be a good-faith commitment to take up the UN's advice to tackle entrenched problems and head off new ones? Will the Canadian government show determination to protect human rights at home and be a leader abroad? Will there be action?

Or can we look forward to another such performance a decade from now? And another lament of "not the Canada I once knew." Surely not.

Feds soften Integrity Framework, but some criticisms remain

By Jeff Buckstein, The Lawyers Weekly, July 10, 2015

The federal government has softened, but not eliminated, some of the perceived rough edges around its controversial Integrity Framework for procurement, though some observers feel the changes still don't go far enough and at least one alteration has raised alarm bells.

Under the new rules, bidders who have been convicted of a wide variety of offences, including corruption, collusion, money laundering, income and excise tax evasion, bribery of a foreign public official, extortion, secret commissions, criminal breach of contract, fraudulent manipulation of stock exchange transactions, and prohibited insider trading, among others, remain disbarred from securing Public Works and Government Services Canada contracts for at least 10 years.

But there is flexibility where none existed before, with the government having discretion to reduce the penalty to five years if the supplier has co-operated with legal authorities or taken remedial steps to address the causes of the underlying misconduct.

"That's an improvement. It's not a complete cure because five years is still a very long time," said Sally Gomery, a partner with Norton Rose Fulbright in Ottawa and head of the firm's business ethics and anti-corruption team in Canada.

"My concern about the regime overall is that even with the reduction from 10 years to five years, you're still creating a situation where there is no possibility for negotiation against a basic debarment based on evidence that the supplier has done everything that it needs to do in order to clean house," she added.

The federal government said in the press release announcing its latest changes that "the new integrity regime better aligns with international best practices and includes new provisions to ensure fairness and due process. It will also allow companies to undertake remedial action to address misconduct in order to conduct business with the government of Canada."

Milos Barutciski, a Toronto-based partner with Bennett Jones and leader of the firm's international trade and investment practice, is also pleased to see the automatic 10-year debarment reduced, though not so much that an automatic five-year debarment period remains.

"To put a minimum, a floor on the length of the reduction makes no sense, especially when it's five years. Five years could easily put someone out of business. The idea of having automatic debarment without any ability to take all relevant factors into account seems draconian in the extreme. It will hurt the target — of course. The problem is it will hurt the government just as much," he said.

“In many markets, there are only a handful of suppliers. The inevitable impact in a concentrated market of eliminating a supplier, making the market more concentrated, is the price goes up.”

Furthermore, while minimum sentences might make sense in the context of criminal law, which is about punishment and deterrence, they make no sense in procurement because that process involves protecting the integrity of the public purse and the taxpayer, he said.

Under another major change to the revised Integrity Framework, suppliers will no longer be automatically subject to debarment because of the actions of affiliates. In order to be deemed ineligible, it will have to be demonstrated that the supplier had a degree of control over the convicted affiliate.

“Under the old regime if an affiliate was convicted of an offence, then a supplier in Canada would be automatically ineligible to contract. Now if the affiliate is convicted abroad, the supplier can retain an independent third party to determine whether the supplier in Canada participated or was involved in the affiliate’s actions. So that’s a positive change,” said Gomery.

Under the old rules, no matter how distant the affiliate or how junior the employee who committed the offence, an affiliate company could have been convicted in a foreign country, and thus be automatically debarred for 10 years with no possibility of restatement. The punishment could occur even if the rogue employee had acted contrary to the instructions of the parent company, which diligently followed state of the art compliance programs, monitored its worldwide affiliates closely, and had an otherwise stellar record, Barutciski explained.

The federal government will also under the revised Integrity Framework to suspend a supplier for up to 18 months if they have been charged with or admitted guilt to a listed offence.

That such a suspension can be administered merely as a result of charges is “deeply troubling,” said Gomery.

“The reason this is dismaying is because, of course, we have a rule in Canada and in most civilized countries that you’re innocent until proven guilty. The potential here would be that a supplier would be cut off from federal contracts for 18 months, or a much longer period because there’s the potential for an extension if judicial proceedings are still underway.

“In my view, the legality of that is highly questionable,” she added.

Lacklustre Canadian market leads Gowlings to hook up with U.K. firm

Yamri Taddese, Legal Feeds blog, Canadian Lawyer, July 8, 2015

Gowling Lafleur Henderson LLP is merging with U.K.-based Wragge Lawrence Graham & Co. to create a new international firm with more than 1,400 lawyers.

Its new name, Gowling WLG, will maintain its Canadian heritage, which many firms have lost in recent mergers with international firms.

The new firm — full name: Gowling WLG International Ltd. — which officially launches in January 2016, will have offices in 18 cities across Canada, the U.K., Asia, the Middle East, and Europe. Gowlings is currently one of the five largest law firms in Canada with over 750 lawyers.

“It’s a really wonderful day for Gowlings and a wonderful day for Canada to see a Canadian firm expanding globally in the way we are,” says Scott Jolliffe, CEO of Gowlings.

While other firms from the U.S. and U.K. approached Gowlings, Jolliffe says WLG was a good fit as it shares many of the firm’s strengths in expertise, particularly in the areas of intellectual property and innovation.

The firms are also like-minded and share similar corporate environments, says Jolliffe.

“They’re very much like us. They’re good people, they are sort a people-oriented firm as we are,” he adds. “They are one of the best employers in the U.K. as we are in Canada.”

While the appeal of an international market contributed to the merger, Jolliffe says a lacklustre Canadian legal marketplace was a bigger motivator.

“The Canadian market has been pretty stagnant or contracting on the legal side,” Jolliffe tells Legal Feeds. “The same is true for business generally in Canada. Our clients are more and more looking into international markets and especially developing markets for their growth.”

“Gowling WLG is a true coming together of like-minded firms,” said David Fennell, CEO of WLG. “In addition to complementary practice and sector strengths, a strong commitment to client service, and a shared vision for international growth, both WLG and Gowlings have fostered internal cultures that champion a people-first approach, innovation and collaboration. Together, we look forward to building one of the top sector-focused law firms in the world.”

The news follows another major law firm merger in March, when international giant DLA Piper found a portal into the Canadian market through an amalgamation with Vancouver-based Davis LLP.

Unlike DLA Piper Canada LLP and Dentons Canada LLP (which was formed when Fraser Milner Casgrain LLP merged with SNR Denton and Salans in 2012), Gowling WLG will not follow the Swiss verein model.

Gowling WLG will be structured as a company limited by guarantee, a scheme that creates an umbrella organization of which WLG and Gowlings will be members, according to Jolliffe. While it’s not a financially integrated partnership, the two firms’ client service and approach to the market will be full integrated, he says.

“We found that the U.K. limited by guarantee [model] was a more flexible structure and one that is a little more transparent,” he adds. “It’s also governed by U.K. common law, which we’re much more familiar with than Swiss civil code.”

The new firm will be governed by an international board, comprising each of the founding firms’ CEOs, Jolliffe and Fennell, and two additional representatives from each founding firm.

Gowlings WLG will provide services in areas including life sciences, manufacturing, power generation and distribution, projects and infrastructure, real estate, energy, and technology and communications.

Clients are excited about having immediate access to international expertise, Jolliffe says. “Secondly, a lot of our clients have been proud of the fact that this is a Canadian institution expanding internationally under a Canadian name.”

With this merger, Jolliffe says it was important for Gowlings to maintain its Canadian identity.

“We’ve seen other very good firms, U.S. and U.K. firms come to Canada and pick up a Canadian law firm to become part of their existing international platform. What that has meant is it’s a good thing for those [Canadian] firms but they’ve sort of given up their name and identity to join an international firm,” he continues.

“Our feeling was that we should create our own — a platform that was particularly suited to the Canadian market and the needs of Canadian business.”

Among recent mergers was also Norton Rose’s move in 2013 to join up with American firm Fulbright & Jaworski LLP, creating Norton Rose Fulbright — just a few years after storied Quebec-born Ogilvy Renault became part of U.K.-based Norton Rose.

Lawyers see ample opportunity as marijuana goes mainstream

Julius Melnitzer, Legal Post, Financial Post, July 8, 2015

The legalized pot industry is quickly moving into the mainstream of Canada’s business and legal communities.

Driving growth is the new Marijuana for Medical Purposes Regulation (MMPR), which last year replaced the former home growing regime with a system that allows for the commercial production and distribution of marijuana by private companies licensed by Health Canada.

As of June 2015 the federal government had issued licenses to 25 producers. Meanwhile, almost 100 medical marijuana “dispensaries” have opened in Vancouver.

Many observers had predicted legalized marijuana would become a $1-billion industry. That number could be conservative. A June decision by the Supreme Court of Canada

struck down a law that had said medical marijuana could only be consumed in dried, smokable forms. This opens the door for medical marijuana consumption in teas, cookies and oils.

“Legalized marijuana is an industry that has been keeping our lawyers busy of late,” says Barbara Miller of Fasken Martineau DuMoulin LLP in Toronto. She has been advising licence applicants, investors and lenders involved in the industry.

“Investors and financial institutions alike are all looking at this industry trying to figure out whether there will be more IPOs or the extent to which big pharma will try to take over the industry,” Miller says.

Medical growers Tweed Marijuana Inc. and Bedrocan Cannabis Corp. have agreed to merge in a $58-million all-stock deal that is expected to close in August. Tweed became the first publicly traded marijuana company in Canada earlier this year when it closed a reverse takeover with LW Capital Pool Inc.

Regulators are closely scrutinizing the industry. In February 2015, Canada’s umbrella group of provincial regulators, Canadian Securities Administrators, cautioned investors that 25 cannabis companies had provided “unbalanced and promotional disclosure” that raise “serious” investor protection concerns.

Clearly, opportunities for lawyers abound. Many of the lawyers involved with the industry have practices that embrace health sciences. But, like other businesses, pot is spreading its tentacles through a variety of legal practice groups. Quite apart from needing help with licence applications and advice on operating procedures, marijuana growers also need the assistance of tax, financing, securities and government relations lawyers.

“Medical marijuana is a hot area that will be going through quite some waves before it calms down,” says Cheryl Reicin, a life sciences lawyer in Torys LLP’s Toronto and New York offices.

Even municipal lawyers have got in on the act. In one case, Fasken represented a client who had grown marijuana under the old regime and obtained a license for commercial production under MMPR. The municipality where the client was located passed a by-law prohibiting commercial production in the area. Fasken lawyers, however, were able to work around the by-law by establishing that the client’s business was at least in part a “legal non-conforming” use that pre-dated the bylaw and was therefore not subject to its restrictions.

The bylaw challenge is just one of the many issues that can arise in corporate pot law.

“Lenders, for example, aren’t quite sure about the nature of the security they’re getting,” Miller says. “After all, they can’t just dispose of pot in insolvency proceedings in the same way that they might dispose of other, more traditional assets or inventory.”

Insurance companies, sensing opportunities to deal with the risks both on the product and the liability side, are also perusing the industry.

“The legal work on the non-applicant side hasn’t fully blossomed yet,” Miller says. “But it will when lenders and others get to understand the business a little better — which is what they’re trying to do now.”

And inevitably, there’s litigation. The courts are already busy with a challenge to the MMPR’s ban on home growing. A decision, which is expected in the fall and which could overturn the ban, could have a significant impact on the commercial side of the business.

Business opportunities could also arise if pot is decriminalized after the federal election in the Fall.

“If recreational marijuana becomes legal, the revenues from the industry will double almost immediately,” Miller says. “Counsel are going to be very busy with this industry.”

LEGER: Harper wants transparency — but not for his government

Dan Leger, Halifax Chronicle-Herald columnist, July 6, 2015

It seems fitting, somehow, that the last act of the tragic 41st Parliament should play out on that theatre’s dilapidated second stage, the Senate. And how typical that the last law passed should be a Conservative measure to undermine their political opponents.

More than a week after the House of Commons had shut for the summer and with an election looming when the leaves turn, senators were still there, play-acting their roles as sober second thinkers.

It turned out that the final dialogue in the final act of Parliament 41’s theatre of the absurd concerned organized labour. The Senate passed a Conservative private member’s bill forcing public disclosure of union financing, spending and the salaries of senior officers.

Labour organizations will file the information with the Canada Revenue Agency, which will publish it online.

Now, there is indisputable merit in advancing the cause of transparency among the actors in our political dramas. Unions, part of the chorus to stage left, shouldn’t be exempt from critical scrutiny of their role in partisan affairs.

As Bill C-377’s proponents argued, unions get beneficial tax treatment. That’s a public subsidy, so there should be fair disclosure.

I’d guess that most union members don’t know how much their national leaders make in salary, expenses and benefits, nor where their dues money goes. Many don’t bother looking.

But it's clear that C-377, passed using what even the Senate's Conservative Speaker called "draconian methods," aims to undermine confidence in union leaders, expose their politics and make them look more like plutocrats than proletarians.

It's not the least bit coincidental that many union leaders are aligned with the New Democratic Party, now the strongest apparent threat to the ruling Conservatives if the current polling trends are to be believed.

Like most of their "democratic reform" measures, such as in campaign financing and voting rules changes, C-377 aims to maximize Conservative advantages over other parties and political actors.

Through it, the government can damage the surging NDP by undermining one of its collective allies. And they can do it in the name of transparency, a word the Conservatives can still utter, somehow, without bursting out laughing.

And that's the point, really. The Conservative government holds a fervent belief in openness, transparency and accountability for every public organization except itself.

In 2013, it passed a law forcing aboriginal organizations to disclose financial statements and salaries of chiefs and top leaders.

"All Canadians, including First Nations, want and deserve transparency and accountability from their governments," said Saskatchewan Conservative MP Kelly Block at the time.

And we do want that from our governors. But the Harper government has also cracked down on environmental groups and charities, with no public clamour for greater accountability from them and no matching accountability for itself.

Last March, Information Commissioner Suzanne Legault said public access to information was being choked off. Its misuse of access laws wasn't "moving the government forward in a culture of openness, it has seemed to have moved us forward in a culture of secrecy."

Legault suggested that instead of improving transparency, the government had used the laws to "act as a shield against disclosure." Some unfilled information requests date back to 2009.

But there's more, much more.

Parliamentary committees are drowned in talking points, journalistic access has been severely restricted, public servants have been muzzled and accountability watchdogs, such as Legault, the Parliamentary Budget Office, the Auditor General and Elections Canada, are attacked as biased opponents of a besieged Tory government.

But we're sure going to get accountability from unions, First Nations and public interest groups critical of the Harper government.

The election campaign won't likely turn on the merits of transparent government. But if transparency does becomes an issue, it certainly will work against Team Harper.

Openness and accountability were core promises of the Conservatives when they came to power in 2006. Nine years later, it's clear they meant it for everyone but themselves.

Stephen Gordon: Both the Liberals and the NDP would be likely to continue Tory austerity

Stephen Gordon, The National Post, July 6, 2015

Spending restraint has been the hallmark of Conservative fiscal policy in the post-recession years, and the federal public service — whose unionized members are represented by the Public Service Alliance of Canada (PSAC) — has been obliged to bear almost the full brunt of it.

Unsurprisingly, PSAC has decided to work against the re-election of the Conservatives: the reasoning is presumably that once the Conservatives go, so does the austerity. The opposition parties have not made any great effort to disabuse anyone of this belief, but there's little reason to think that a government led by the NDP, the Liberals (or some combination) will deviate significantly from the spending agenda that the Conservatives have put in place.

The most useful way to measure public spending is as a share of GDP, for both the level of services provided and the government's ability to pay for them. Since GDP is a measure of economic activity, it's useful as a proxy for the available tax base. And since changes in GDP reflect inflation, population increase and real economic growth, GDP also captures the costs of providing a given level of public services. (There is not universal agreement on this last point: Andrew Coyne, for one, prefers real per capita spending.) For a given level of services, public spending should increase in proportion with GDP.

The deficit incurred under the Conservatives was mainly due to the recession: a weakened economy generates reduced revenues, and the stimulus package increased spending. Most of the deficit would have gone away on its own as revenues recovered and the stimulus package was unwound.

Most, but not all. According to both the Parliamentary Budget Office and the Department of Finance, the structural budget — that is, adjusted for the business cycle — was roughly in balance when the Conservatives took power. (The actual budget was in surplus, thanks to a pre-crisis economy that was operating well above capacity.) Reducing the GST by two percentage points created a structural deficit that the government has closed by gradually reducing federal spending expressed as a share of GDP.

More precisely, direct program expenditures have been reduced. Spending on transfer programs — which accounts for half of all program spending and basically involves sending out cheques — have continued to grow with GDP. Payments to individuals (Employment Insurance, Old Age Security, Universal Child Care Benefit, etc.) have remained at about four per cent of GDP, in line with their share before 2006. Transfers to provinces have also held steady at about 3.2 per cent, also in line with their share before the election of the Conservatives, and higher than they were under Jean Chrétien's last mandate. (Anyone familiar with these data is puzzled by claims that Stephen Harper's government has cut transfers to provinces; the opposite is true.)

Even as transfer payments continued to grow with GDP, nominal direct program expenditures — mainly spending on public-service wages — have either declined or been held constant. As a result, direct program spending expressed as a share of GDP has fallen. Since the costs of providing public services more or less rises with GDP, constant nominal spending means real cuts. And these cuts have been borne almost entirely by public servants, by some combination of reduced employment and reduced benefits. Conservatives would doubtlessly — and not without some justification — respond by noting that expressed as a share of GDP, direct program spending has simply been returned to the levels they inherited from Paul Martin's Liberal government.

This brings us up to date: the membership of the Public Service Alliance of Canada has borne the lion's share of the Conservatives' recent spending restraint. According to the 2015 federal budget, the budget balance will move into surplus in the current fiscal year, and small surpluses are projected over the four subsequent years. So does the elimination of the deficit also eliminate the need for further austerity?

No, it doesn't. Those projected surpluses are a bit of a patch job, held together by baling wire and duct tape: they depend on some conveniently timed asset sales (e.g., the divestment of the federal government's GM holdings) a delayed reduction in EI contribution rates — and continued spending restraint. Continued restraint on direct program spending, meaning a continued reduction of its share of GDP, is baked into those projected surpluses. Even if all of the spending and tax-reduction measures announced in the 2015 budget were cancelled — and no opposition party has yet gone so far as to promise that — that still would not be enough revenue to prevent a return to deficit.

If the next government were to let direct program spending increase with GDP after the current fiscal year, it would have to find an extra $6.6 billion in 2016-17, $9.4 billion in 2017-18 and $11.3 billion in 2018-19. Actually reversing the Conservatives' previous cuts would cost even more.

So far, there's little reason to think that the opposition parties are prepared to offer much more than lip-service to the anti-austerity cause. As it is, the Liberals' fiscal proposals are underfunded; one presumes that the difference is to be made up by those surpluses that depend on continued spending restraint. And the NDP's hints about raising the corporate income tax are unlikely to be enough to offset future austerity, much less finance any new spending that they have in mind.

Going on what we know now, all three major parties are explicitly or implicitly campaigning on a platform of continued restraint in direct program spending. Regardless of who wins the next election, the Public Service Alliance of Canada may have to get used to being disappointed.

Interview with Irwin Cotler

Irwin Cotler reflects on leaving the House of Commons after 12 years in politics, Canada's fight against terrorism and the need to uphold our Charter rights.

By Yves Faguy, National Legal Insights & Practice Trends, Canadian Bar Association, Summer 2015

National: You're not running again in the upcoming federal election. How do you feel about this chapter of your life coming to a close?

Irwin Cotler: At this point I'm one of the oldest members in the House of Commons, if not the eldest, and I sort of felt the time had come, to use that cliché, for the torch to be passed to a younger generation. I will continue to be active on all the issues that I have been engaged in, including defence of political prisoners; I just will be doing it from outside the parliamentary arena rather than within.

N: As Minister of Justice you had to address concerns with anti-terrorism legislation introduced by the Liberals under Bill C-36. Now with Bill C-51, the CBA has raised a number of concerns similar to those raised during your tenure. How does the debate today compare to what happened in 2004?

IC: The government introduced Bill C-36, the anti-terrorism legislation, on October 15th, 2001, in the wake of 9/11. I got up October 16th and said I had 10 civil libertarian concerns about the government's legislation. Anne McLellan, who was the Minister of Justice at the time but who had been a law professor before, said, "Look Irwin, let's sit down and see if we can work out some sort of shared understanding." In any case, after sustained talks, we agreed to address seven of those concerns, whereupon she said to me, "I know we didn't address all 10, we addressed seven. I think that's pretty good." She said, "Support the legislation. When you're Minister of Justice, someday maybe you can take care of the other three."

Well, that's exactly what happened. When I was the Minister of Justice, we had sustained hearings. I also met with the president of the Canadian Bar Association, on a regular basis. We had hearings that went over the better part of a year in both the House and the Senate. And the legislation was changed […] from what was originally proposed as a result of those hearings. In fact, as I [recently reminded] a member of the parliamentary committee at the time, who is the [current] Minister of Justice Peter MacKay, "When you were a member of the parliamentary committee, you recommended to me, when I was the Minister of Justice, there should be an oversight mechanism." And I said, "You're right, there should an oversight mechanism." And we tabled legislation for that oversight

mechanism in the fall of 2005. We were then defeated and it was never put in place. It's even more needed now with the expanded powers with regard to C-51.

N: Do the circumstances today warrant extraordinary measures as they did following 9/11?

IC: 9/11 was a kind of transformative event, which changed the whole appreciation of the global terrorist threat. There was a clear change in the global terrorist environment. Today we're seeing some of that as well. The globalization of terrorism represented by ISIS and all the companion and sometimes competing groups has generated a new terrorist threat, the destabilization in the Middle East and the kinds of situations where the terrorist threat has now entered into North Africa, East Africa. And there are the dramatic changes in transportation and communications, technology and the like. With 9/11 we passed a strategic watershed. I think we're witnessing another kind of strategic watershed now for some of the reasons I mentioned, which do require enhanced powers and information-sharing by government agencies. But all this must be commensurate with enhanced oversight and enhanced ac-countability. You can't have one without the other.

N: The other important piece of legislation your government presided over was lawful access. Do you have any lingering concerns on that front, particularly in the wake of the Snowden revelations?

IC: Oh, yes. I have concerns. I had concerns then. I have concerns now. I stated before the committee hearings at the time that I regarded the right to privacy — as Justice Brandeis put it, the most comprehensive of rights and the right most valued by civilized men, civilized men and women today. The Privacy Commissioner Daniel Therrien also raised privacy concerns. And what is of concern is that Mr. Therrien was not even invited to be a witness before the Public Safety Committee.

N: How do you react to renewed charges from commentators against the Supreme Court of judicial activism?

IC: Well, I think that we sometimes ignore that we're no longer just in a parliamentary democracy, with the courts having an interpretive function with regard to the vicissitudes of legal federalism. We've had, as Chief Justice Antonio Lamer said on the occasion of the 10th anniversary of the Charter — some may have said his rhetoric was somewhat enthusiastic at times — a legal revolution in this country comparable to the revolution of [Louis] Pasteur in science. We've moved from the sovereignty of Parliament to the sovereignty of the Constitution, and invested in the courts the authority to declare legislation that violates the Charter of Rights and Freedoms unconstitutional. That was not there before. That is something that I believe, regrettably, the present government [has never] accepted.

N: Do you think the Canadian public has accepted that?

IC: I think the Canadian public has. All of the surveys have shown that if there's one iconic instrument in this country it's the Charter of Rights and Freedoms. And I remember when I was minister and I would go around and I'd ask the public in this

country, whether it be women or minorities, “are you better off now under the Charter than you were before,” the answer would invariably be yes. In that sense the Charter has had a transformative impact not only on our laws, but on our lives.

Entrevue avec Irwin Cotler

Irwin Cotler revient sur ses 12 années en politique fédérale au moment de quitter la Chambre des communes, de même que sur la lutte au terrorisme et le besoin de protéger les droits garantis par la Charte.

By Yves Faguy, Actualités et tendances en droit, Association du Barreau canadien, Été 2015

National : Vous ne serez pas candidat aux prochaines élections. Comment vous sentez-vous devant ce chapitre qui prend fin?

Irwin Cotler : Je suis l’un des plus vieux députés de la Chambre, sinon le plus vieux, et je sens que le temps est venu, pour employer un cliché, de passer le flambeau à une génération plus jeune. Je continuerai à être actif dans tous les enjeux dans lesquels je me suis engagé, incluant la défense de prisonniers politiques; je ne le ferai que de l’extérieur du forum parlementaire, plutôt que de l’intérieur.

N : En tant que ministre de la Justice, vous avez dû répondre à des préoccupations à l’égard de la loi antiterroriste présentée par les libéraux, le projet de loi C-36. Dans le cadre du débat entourant l’actuel projet de loi C-51, l’ABC a soulevé un certain nombre de préoccupations semblables à celles soulevées durant votre mandat. Comment le débat d’aujourd’hui se compare-t-il à celui de 2004?

IC : Le gouvernement a présenté le projet de loi C-36, la loi antiterroriste, le 15 octobre 2001, dans la foulée du 11 septembre. Je me suis levé le 16 octobre et j’ai dit que j’avais 10 questions relatives aux li-bertés civiles à l’égard de la législation du gouvernement. Anne McLellan, qui était ministre de la Justice à l’époque et qui avait été professeure de droit auparavant, a dit : « Asseyons-nous et voyons si nous pouvons en arriver à une sorte de vision commune ». Après des discussions intensives, nous avons convenu de répondre à sept de ces 10 préoccupations, et elle m’a dit : « Je sais que nous n’avons pas ré-pon-du à chacune des 10, [mais] je crois que c’est très bon ». Elle a dit : « Appuie le projet de loi. Peut-être que si tu es ministre de la Justice un jour, tu pourras t’occuper des trois autres. »

C’est exactement ce qui est arrivé. Quand j’étais ministre de la Justice, nous avons eu des audiences intensives. J’ai aussi rencontré le président de l’Association du barreau canadien sur une base régulière. Et la loi a changé […] par rapport à ce qui avait été proposé à l’origine. En fait, comme je l’ai [rappelé récemment] à un membre du comité parlementaire de l’époque, qui est l’actuel ministre de la Justice, Peter MacKay, « quand vous étiez membre du comité parlementaire, vous m’avez recommandé, alors que j’étais ministre de la Justice, qu’il devrait y avoir un mécanisme de surveillance. » Et j’ai répondu : « Vous avez raison, il devrait y avoir un mécanisme de surveil-lance ». Nous

avons déposé un projet de loi pour établir un tel méca-nisme de surveillance à l'automne 2005. Nous avons alors été défaits et il n'a jamais été mis en œuvre. C'est encore plus nécessaire aujourd'hui avec l'augmentation des pouvoirs en vertu de C-51.

N : Est-ce que les circonstances d'aujourd'hui requièrent des mesures extraordinaires, comme c'était le cas dans la foulée du 11 septembre?

IC : Le 11 septembre était un évènement transformateur, qui a changé l'ensemble des perceptions à l'égard de la menace terro-riste internationale. Il y a eu un changement clair dans l'environnement terroriste mondial. Nous voyons aussi un peu de cela aujourd'hui. La mondialisation du terrorisme que représentent l'EI et tous les groupes amis et parfois concurrents a engendré une nouvelle menace terroriste, la déstabilisation du Moyen-Orient et le genre de situations où la menace terroriste a maintenant fait son entrée en Afrique du Nord, en Afrique de l'Est. Et il y a les changements dramatiques dans les moyens de transports et de communications, la technologie et tout le reste. Avec le 11 septembre, nous avons atteint un seuil stratégique. Je crois que nous atteignons un autre seuil stratégique aujourd'hui […], ce qui requiert des pouvoirs accrus et un partage d'informations entre agences du gouvernement. Mais tout cela doit être proportionnel à une surveillance accrue et une responsabilité accrue. Vous ne pouvez avoir l'un sans l'autre.

N : L'autre projet de loi important présenté par votre gouvernement est celui sur l'accès légal. Avez-vous des préoccupations sur cette question, en particulier dans la foulée des révélations d'Edward Snowden?

IC : Oh oui, j'ai des préoccupations. J'avais des préoccupations à l'époque. J'ai des préoccupations maintenant. J'ai déclaré lors des audiences en comité que je voyais le droit à la vie privée, tel que l'a décrit le juge Brandeis, comme le droit le plus étendu et le droit le plus valorisé par les hommes et les femmes civilisés d'aujourd'hui. Le Commissaire à la protection de la vie privée, Daniel Therrien, a aussi soulevé des préoccupations relatives à la vie privée. Et il est préoccupant que M. Therrien n'ait même pas été invité à témoigner devant le comité de la sécurité publique.

N : Comment réagissez-vous devant les nouvelles charges d'activisme judiciaire formulées par certains commentateurs à l'égard de la Cour suprême?

IC : Je crois que parfois nous ignorons que nous ne vivons plus seulement dans une démocratie parlementaire, avec les cours qui ont une fonction interprétative à l'égard des vicissitudes du fédéralisme. Nous avons eu, comme l'a dit le juge en chef Antonio Lamer lors du 10e anniversaire de la Charte […] une révolution juridique dans ce pays, comparable à la révolution de [Louis] Pasteur en sciences. Nous som-mes passés de la souveraineté du Parle-ment à la souveraineté de la Consti-tution, et donné aux cours l'autorité de déclarer inconstitutionnelles des lois qui violent la Charte des droits et libertés. Ce n'était pas le cas auparavant. C'est une chose que, je le regrette, l'actuel gouvernement [n'a jamais] accepté.

N : Croyez-vous que le public canadien l'a accepté?

IC : Je crois que le public canadien l'a accepté. Tous les sondages ont indiqué que s'il y a un instrument emblématique dans ce pays, c'est la Charte des droits et libertés. Je me souviens, lorsque j'étais ministre et que je me promenais, je demandais aux gens, que ce soit des femmes ou des minorités, « êtes-vous en meilleure posture avec la Charte que vous ne l'étiez auparavant », et la réponse était invariablement « oui ». En ce sens, la Charte a eu un effet de transformation non seulement sur nos lois, mais dans nos vies.

The state of surveillance

Equipped with measures introduced since 9/11 and advancements in technology, the government has resources like never before to track terrorists — and average citizens. Has Canada become a surveillance state?

By Hugo de Granpré, National Legal Insights & Practice Trends, Canadian Bar Association, Summer 2015

Barbie has been accused of many things since she was born in 1959. Saudi Arabia banned her for reasons of morality. Hugo Chavez would have preferred that she look less "American." Her stereotyped allure also garnered her many other critics — not only in Venezuela. But until now, no one has ever associated her with the Stasi, the defunct East German security and intelligence organization. Yet the German magazine Stern recently did just that, nicknaming Mattel's latest addition "Barbie-Stasi."

Unveiled in February on a New York stage, Hello Barbie can talk and converse with children, much like Siri on iPhones. Conversations are recorded and sent in real time to Mattel and its partner ToyTalk, which can then analyze them and create more appropriate responses. With time, the doll will be able to inquire about the health of Clifford, the family dog.

Mattel may hope to improve its image with this toy that will be available in stores in the fall. Privacy advocates, on the other hand, see it differently. The Campaign for a Commercial-Free Childhood launched an offensive against what it describes as a chilling invasion of privacy.

Several hundreds of kilometres north, this doll is the example that comes to mind for Michael Zekulin, a political sciences instructor at the University of Calgary, when talking about Bill C-51 and the global context of the fight against terrorism that has gradually intensified over the last 15 years or so.

"[Hello Barbie] seems so innocent, like such a good idea, and then you start to think about the implications — that the doll sends the information somewhere without us really knowing what will happen to it. Again, there are no sinister intentions, [but] what seems on the surface to be a good idea may not necessarily be one. Or it can present real problems after the fact," says the terrorism and radicalization specialist.

Since September 11, 2001, Canada, like other countries, has implemented major security measures to counter national and international terrorist threats, Bill C-51 being the most recent piece of the puzzle on this side of the border [at press time, the bill had passed third reading and gone to the Senate.]

But when those planes hit the twin towers of the Word Trade Center, email was just starting to become a part of daily life, and Skype, social media, even smartphones, didn't exist yet.

Today Canada finds itself at what Zekulin describes as a turning point in the fight against terrorism, a time when the "tension" has perhaps never been greater between the growing terrorist threat and the technology that's become an integral part of day-to-day life and whose invasive character is bound only by laws, which are themselves evolving.

In this context, and with Bill C-51 about to come into effect, there is reason to ask: Has Canada become a surveillance state? And what price must the average citizen pay in the fight against terrorism?

From September 11th to October 22nd

The Canadian government didn't waste any time after the Oct. 22, 2014, attack on Parliament. When the House of Commons met the morning of the 23rd, Prime Minister Stephen Harper promised to expedite the work to give more "surveillance, detention and arrest" powers to security services.

The Anti-terrorism Act, 2015 was tabled in Parliament three months later. Bill C-51 followed a series of other measures presented since the September 11th attacks in Manhattan. The omnibus Bill C-36, brought in by the then-Liberal government in fall, 2001, attracted its share of criticism for changes such as preventive detention, secret court hearings and new definitions related to terrorism.

Other measures were adopted in the years that followed, including the creation of a no-fly list and the obligation of airline companies to provide certain information to the government (Bill C-7), the obligation of telecommunications companies to provide subscriber information to police without a warrant (Bill C-13), and the assertion of the Canadian Security Intelligence Service's investigation and intervention powers abroad (Bill C-44).

As for Bill C-51, it proposes to give CSIS new powers to intervene in Canada and abroad to reduce and counter threats to Canada's national security. These actions may even infringe upon rights guaranteed under the Canadian Charter of Rights and Freedoms if the Federal Court and the Minister of Public Safety and Emergency Preparedness allow it, on the basis that the infringement is justified, prima facie, by its limitations clause. In parliamentary committee, CSIS director Michel Coulombe cited the interception of financial transactions and the interruption of telephone communications as examples.

A vast information-sharing network will also be created across the federal administration, through which agencies and departments will be authorized to disclose any information

deemed relevant to 17 organizations, including the RCMP, CSIS and the Communications Security Establishment (CSE). Lastly, certain minimum requirements will be reduced to facilitate the issuance of peace bonds, among other things, and preventive detention, which may be for a longer duration.

“Radical” bill

Critics of C-51 were quick to take action. University of Ottawa professor Craig Forcese, an expert in national security law, described it as “the most radical bill I’ve seen in my field in Canada.”

Others, including certain groups and experts that supported the bill, called for major changes, such as the inclusion of more effective oversight and examination mechanisms to monitor the activities of intelligence agencies like CSIS and the CSE. (At the time of writing, the government had not conceded on this point despite some amendments proposed after the House of Commons’ Standing Committee on Public Safety and National Security reviewed the bill.)

The Canadian Bar Association sided with those who have called for significant changes. A submission presented to the House committee, based on comments from several national CBA sections, noted the excessive scope of some of the proposed measures, particularly those related to the Criminal Code. Appearing for the CBA, Eric Gottardi and Peter Edelmann stressed that the regime for the oversight and examination of national security agencies is insufficient. They criticized the holding of secret court proceedings to authorize CSIS to “flout the constitutional foundations of our legal system.” And they demanded the creation of sufficient controls to oversee the sharing of information within the government administration.

David Elder, an attorney at Stikeman Elliott in Ottawa specializing in privacy and communications law and an executive member of the CBA’s National Privacy and Access Law Section, says that “the main purpose of the CBA’s submission was to ensure that a fair balance is obtained between granting additional state powers and protecting Canadians’ rights to privacy and fundamental freedoms.

“The CBA believes that in several places in the bill, the provisions go too far, are too vague or invite potential abuse.”

But these critics, while numerous, are not unanimous, and some have defended the government’s initiative. Ray Boisvert, a former high-ranking member of the intelligence service, notes that “the global climate has not been this threatening since the troubles that preceded the First World War. The time therefore seems to me particularly right to fundamentally revise Canadian law in matters pertaining to security.”

Christian Leuprecht, a political sciences professor at the Royal Military College of Canada and Queen’s University, reports a certain level of hypocrisy on the part of those who throw stones at the intelligence service without fully understanding its needs or how it operates. “I find that certain critics are not very fair or reasonable when it comes to the professionalism of our national security agencies and the people who work in those agencies,” he says, having nevertheless also recommended certain changes.

“We must also keep in mind that they are not a group of cowboys who do just anything.”

The golden age of surveillance

But considering the context in which these changes were presented, it’s not surprising that they made waves. Since June 2013, documents provided to the media by Edward Snowden, former subcontractor for the US National Security Agency (NSA), have shown an unprecedented portrait of the magnitude of large-scale electronic surveillance being done by the US intelligence service and its partners in the Five Eyes alliance, which includes intelligence services from Canada, the United Kingdom, Australia and New Zealand.

These leaks have indicated among other things that the NSA obtained the telephone records of 120 million Verizon subscribers and that Internet users’ communications through the services of big names such as Google, Microsoft and Yahoo could be monitored under the PRISM program.

Former NSA director Keith Alexander described the practice as “collecting the entire haystack;” a wide net is cast in the sea of intercepted information, hoping to find in it the proverbial needle using algorithms and various techniques.

Bruce Schneier, a US expert in technology and security known as the ”security guru,” qualified the current period as the “golden age of surveillance” in his latest book Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World.

He said in an interview, “everyone uses computers and generates data, and everyone wants this data because it makes them more powerful: Google wants it, Facebook wants it, and your government wants it.”

The United Kingdom has itself been grappling for several years with the debate about the magnitude of state surveillance of its citizens, with the House of Lords reporting in 2009 that “surveillance is an inescapable part of life in the UK. Every time we make a telephone call, send an email, browse the internet, or even walk down our local high street, our actions may be monitored and recorded. . . . successive UK governments have gradually constructed one of the most extensive and technologically advanced surveillance systems in the world.”

And Canada is no different. Federal intelligence agencies also were the subject of revelations made in recent years, when many documents updated by Edward Snowden confirmed their involvement in projects such as the program to monitor the cellphones and computers of passengers in a Canadian airport for two weeks using the wi-fi network.

In principle, Canadian rules prohibit the CSE from directly targeting Canadians with their information collection activities. But many reckon that in practice, this rule can easily be circumvented by simply collecting massive quantities of metadata without selecting or distinguishing their origin. And in December, the Supreme Court of Canada ruled in Spencer that the police had to obtain a warrant to request that internet service providers share personal information. Privacy advocates considered the judgment to be a breath of

fresh air. But almost simultaneously, Ottawa adopted Bill C-13, which grants immunity to these same telecommunications companies to share subscribers' personal information without a warrant. "Those who continue to believe that Canada is behaving like a good scout and being cautious and fair, and not playing the same game as our more aggressive neighbours to the south, I think they're failing to consider a significant aspect," said Andrew Clement, a University of Toronto professor and co-ordinator of the Information Policy Research Program. Clement is particularly interested in the interception of electronic data by the NSA in recent years.

Surveillance state?

So has Canada become a surveillance state? It all depends first on how we define the expression. "It's a state where citizens are subject to invasive surveillance," says Schneier. Ben Hayes, an associate fellow at the Transnational Institute specializing in security issues, said that "it's a society in which surveillance has become so invasive that it threatens the very fibre of democracy."

"I find it a little simplistic, this idea that Canada is becoming a surveillance state," says Christian Leuprecht. "It implies that surveillance is inevitably calling into question our rights and freedoms. And I believe that we have considerable evidence in the context of a contemporary democratic state that a strong security capacity complements our rights and freedoms."

Arthur Cockfield, a law professor at Queen's University and member of the Surveillance Studies Centre, takes the opposite view. "Absolutely," he says, "we are increasingly a surveillance state, and there has been a gradual decrease in our right to privacy and our right to not be bothered by agents of the state."

"Yes, there is greater surveillance, but is Canada becoming a surveillance state? I certainly don't think, for example, that Canada is becoming a totalitarian state," says Daniel Therrien, Privacy Commissioner of Canada.

Therrien has also sounded the alarm regarding Bill C-51, and more specifically the new powers granted to the federal government with respect to the sharing of citizens' information. According to him, the "relevance" criteria used to permit the exchange of an enormous amount of information throughout the federal administration is too permissive, and the oversight of this activity, including the oversight he promises to carry out himself, will not be sufficient.

"We are very quickly entering the world of megadata, which relies on the algorithmic analysis of enormous amounts of personal information to decipher trends, predict behaviour and establish links before a particular investigation is launched or a person is suspected of something," cautioned Therrien in his submission to the Senate committee that studied the bill.

Security at what price?

During Question Period in February, Opposition Leader Thomas Mulcair asked the prime minister to guarantee that the new powers under Bill C-51 will not be used against the

government's political opponents. To which Stephen Harper responded "Mr. Speaker, we knew that, with the NDP, it would be only a matter of a couple of weeks before we got into this kind of conspiracy theory. That is what we have come to expect from the black helicopter fleet over there."

But despite the Prime Minister's razzing, the concerns of certain groups, experts and the Opposition seem to have resonated with a large part of the population. Not long after the bill was tabled, more than 80 per cent of the population said they supported it, according to an Angus Reid poll. A few weeks later, this support had dropped by almost half, to 45 per cent, according to a survey by another firm, Forum Research.

The criticisms most often made are about the secrecy of operations. While an essential condition for intelligence service activities, this secrecy is also likely to fuel distrust regarding the risks of abuse that may occur in matters pertaining to both privacy and other Charter-guaranteed rights and freedoms — freedom of conscience and of religion, freedom of expression, freedom of opinion and freedom of association.

The argument that citizens should all simply trust in the professionalism of police officers and intelligence and security agents isn't convincing to everyone.

"Police can act in good faith, but they will use the powers given to them," notes Therrien. "There will be pressure on them to identify criminals, identify terrorists, and they will make full use of the tools given to them. So it's not enough to trust that agents of the state will act in good faith. There needs to be a rigorous legal framework in place, and I fear that with all the bills that have been tabled, and Bill C-51 in particular, this framework will not be substantial enough to fully ensure that rights are upheld."

This is all the more important, he notes, since the notion of consent applies differently depending on the personal information context in which we find ourselves — commercial or governmental. "One of the principles of the Privacy Act that applies in the private sector is that companies cannot use consumers' information without their consent," Therrien explains. "But in the case of government activities, the notion of consent is almost non-existent."

Need for answers

This question of trust in institutions therefore brings us back to the question of adequacy of the rules in effect. For Forcese, this question transcends the strict limits of Bill C-51. He argues that a larger discussion is necessary about all the laws pertaining to national security.

He said: "Law has not kept up with advancements in technology, which results in outdated legal concepts being repurposed to structure new governmental actions, but imperfectly in my opinion.

"My concern relates to the fact that we are sleepwalking into the future with inadequate laws and technology that is very quickly becoming a new system that none of us has really considered and from which the government is able to obtain vast amounts of information.

“The question therefore becomes knowing what happens to all the information.”

In matters of national security and personal information, this is a $300-million question — the cost of the increase approved in the last federal budget for police and intelligence to combat terrorism.

And for parents, this could be the $75 question, namely the price of the new Hello Barbie for their child.

As for the Privacy Commissioner, Therrien hopes to obtain some answers, but he hopes above all for greater transparency in the government’s relationship with its citizens. “New technology — the internet in particular — has yielded new personal development tools that are extremely important for individuals,” he said. “And increasing government surveillance could jeopardize this very important benefit of modern means of communication.”

Hugo de Grandpré *is a journalist with the parliamentary bureau of the daily newspaper La Presse in Ottawa and a member of the Barreau du Québec.*

L’État de surveillance

Entre les mesures introduites depuis le 11 septembre et l’évolution des technologies, le gouvernement dispose de moyens croissants pour suivre la trace de terroristes — et de simples citoyens. Le Canada est-il devenu un État surveillance?

Hugo de Granpré, Actualités et tendances en droit, Association du Barreau canadien, Été 2015

La poupée Barbie s’est fait traiter de toutes sortes de choses depuis sa naissance en 1959. L’Arabie saoudite l’a bannie pour des raisons de moralité. Hugo Chavez aurait préféré qu’elle affiche des traits moins américains. Son allure stéréotypée lui a attiré nombre d’autres critiques — et pas seulement au Venezuela. Mais personne jusqu’ici ne l’avait associée à la Stasi, la défunte police de l’Allemagne de l’Est. C’est pourtant ce qu’a fait récemment le magazine allemand Stern, surnommant la dernière née de Mattel « Barbie-Stasi ».

Présentée au monde sur une scène de New York en février, Hello Barbie peut parler et entretenir des conversations avec les enfants, un peu comme le fait Siri sur les téléphones iPhone. Les conversations sont enregistrées et envoyées en temps réel à Mattel et son partenaire ToyTalk, qui peuvent ainsi les analyser et forger des réponses plus

appropriées. Avec le temps, la poupée pourrait ainsi s'enquérir de la santé de Polux, le chien de la famille.

Si Mattel espère redorer son blason avec ce jouet qui se vendra en magasins dès l'automne, des défenseurs de la vie privée le voient autrement. Le groupe Campaign for a Commercial-Free Childhood a lancé une offensive contre ce qu'elle décrit comme une invasion à la vie privée qui donne la chair de poule.

À plusieurs centaines de kilomètres au nord, c'est à cet exemple que pense Michael Zekulin, un professeur de sciences politiques de l'Université de Calgary, quand on lui parle du projet de loi canadien C-51 et du contexte global de lutte au terrorisme qui a été déployé graduellement depuis près de 15 ans.

« Ça semble tellement innocent, tellement une bonne idée, et puis lorsque vous commencez à penser aux implications, que la poupée envoie ces informations-là quelque part sans qu'on sache trop ce qui va en arriver… Encore une fois, c'est fait sans dessein sinistre, [mais] ce qui semble être une bonne idée en surface ne l'est peut-être pas nécessairement, ou peut présenter de réels défis par la suite », dit ce spécialiste des questions de terrorisme et de radicalisation.

Depuis le 11 septembre 2001, le Canada comme d'autres pays se sont dotés d'un important dispositif de sécurité pour affronter les menaces terroristes nationales et internationales, C-51 étant la plus récente pièce du casse-tête de ce côté-ci de la frontière. [Au moment d'aller sous presse, le projet de loi avait été adopté à la Chambre des communes et avait été envoyé au Sénat.]

Mais lorsque les avions ont percuté les tours jumelles du World Trade Center, les courriels commençaient à peine à s'intégrer à la vie de tous les jours, Skype et les médias sociaux n'existaient pas, les téléphones intelligents non plus.

On se retrouve donc aujourd'hui avec ce que Michael Zekulin décrit comme un moment charnière en matière de lutte au terrorisme : un moment où la « tension » n'a peut-être jamais été aussi grande entre la menace terroriste grandissante et l'explosion de ces technologies, que tous utilisent et qui font partie intégrante de notre quotidien et dont le caractère invasif n'est encadré que par des lois qui sont elles-mêmes en mutation.

Dans un tel contexte, et tandis que C-51 s'apprête à entrer en vigueur, il y lieu de se poser la question : le Canada est-il devenu un État surveillance? Et si la lutte au terrorisme est bel et bien légitime, quel est le prix à payer pour les simples citoyens?

Du 11 septembre au 22 octobre

Le gouvernement canadien n'a pas perdu de temps après l'attaque du 22 octobre au Parlement. Lorsque la Chambre des communes s'est réunie le matin du 23, Stephen Harper a terminé son discours en promettant d'accélérer les travaux pour donner plus de pouvoirs aux services de sécurité en matière de « surveillance, détention et d'arrestations ».

La « Loi antiterroriste de 2015 », a été déposée au Parlement trois mois plus tard. Ce projet de loi C-51 donnait suite à une série d'autres mesures présentées depuis les attaques du 11 septembre à Manhattan. C'est le cas du projet de loi omnibus C-36, adopté en vitesse à l'automne 2001 par un gouvernement libéral et qui s'est lui-même attiré sa part de controverses avec des changements tels que la détention préventive, les audiences judiciaires secrètes et les nouvelles définitions relatives au terrorisme.

D'autres mesures ont été adoptées dans les années qui ont suivi, incluant la création d'une liste d'interdiction de vols et l'obligation des compagnies aériennes de fournir certaines informations au gouvernement (C-7); l'obligation faite à des compa-g-nies de télécommunications de fournir des renseignements sur ses abonnés sans mandat des policiers (C-13); ou la confirmation des pouvoirs d'enquête et d'intervention internationale du Service canadien du renseignement de sécurité (C-44).

Quant au projet de loi C-51, on propose de nouveaux pouvoirs accordés au SCRS pour intervenir au Canada et à l'étranger afin de réduire ou contrer des menaces qui pèseraient contre la sécurité nationale du Canada. Ces actions pourraient même contrevenir aux droits garantis par la Charte des droits et libertés si la Cour fédérale et le ministre de la Sécurité publique l'autorise, estimant que la contravention est a priori justifiée par la clause restrictive. En comité parlementaire, le directeur du SCRS, Michel Coulombe, a cité comme exemples le fait de perturber des transactions financières ou de désactiver des communications téléphoniques.

Un vaste système de partage de renseignements serait aussi instauré à travers l'appareil fédéral, par lequel les agences et ministères seraient autorisés à faire parvenir toute information jugée pertinente à 17 organismes, dont la GRC, le SCRS et le Centre de la sécurité des télécommunications (CST). Enfin, certains seuils seraient abaissés pour faciliter l'imposition d'engagements de ne pas troubler l'ordre public, entre autres, et la détention préventive, qui pourrait elle-même être de plus longue durée.

Loi « radicale »

Les critiques de C-51 ne se sont pas fait attendre. Le professeur de l'Université d'Ottawa Craig Forcese, un expert en droit de sécurité nationale l'a décrite com-me « la loi la plus radicale que j'ai vue dans mon domaine au Canada ».

D'autres, incluant certains groupes ou experts qui ont appuyé le projet de loi, ont réclamé des changements importants, dont le fait d'inclure des mécanismes de surveillance et d'examen plus efficaces pour superviser les activités d'agences de renseignements comme le SCRS et le CST. (Au moment d'écrire ces lignes, le gouvernement n'avait pas cédé sur ce point, malgré quelques amendements proposés au terme de l'étude du projet par le comité permanent de la sécurité publique et nationale de la Chambre des communes.)

L'Association du Barreau canadien fait partie de ceux qui ont réclamé certains ajustements. Lors de témoignages devant le comité des Communes, des représentants de plusieurs sections nationales ont noté la portée excessive de certaines des mesures proposées, en particulier au Code criminel. Comparaissant pour l'ABC, Eric Gottardi et Peter Edelmann ont souligné l'insuffisance du régime d'examen et de surveillance des

organismes de sécurité nationale. Ils ont dénoncé la tenue de procédures judiciaires secrètes pour autoriser le SCRS à « faire fi des fondements constitutionnels de notre système juridique ». Et ils ont réclamé la création de contrôles suffisants pour surveiller le partage d'informations au sein de l'appareil fédéral.

« Principalement, le thème de la soumission de l'ABC était de s'assurer qu'un juste équilibre soit atteint entre le fait d'accorder des pouvoirs étatiques supplémentaires et de protéger les droits des Canadiens à la vie privée et leurs libertés fondamentales », a expliqué en entrevue David Elder, un avocat de Stikeman Elliott à Ottawa qui se spécialise en droit de la vie privée et des communications et qui est un membre de l'exécutif de la section nationale du droit de la vie privée et de l'accès à l'information de l'ABC.

« L'ABC estime qu'à plusieurs endroits dans le projet de loi, les dispositions vont trop loin, elles sont trop vagues et elles sont ouvertes à des abus potentiels. »

Mais ces critiques, bien que nombreuses, ne font pas toutes l'unanimité et certains ont défendu l'initiative du gouvernement. Ray Boisvert, un ancien haut gradé du service de renseignement, a noté que « le climat mondial n'a jamais été aussi menaçant depuis les années troubles qui ont précédé la Première Guerre mondiale. Le moment me paraît donc particulièrement bien choisi pour réviser en profondeur les lois canadiennes en matière de sécurité ».

Christian Leuprecht, professeur de sciences politiques au Collège militaire royal du Canada et à l'Université Queen's, a dénoncé une certaine « hypocrisie » de la part de ceux qui jettent la pierre aux services de renseignement sans bien connaître leurs besoins et leur fonctionnement. « Je trouve que certaines critiques ne sont pas très justes et équitables quant au professionnalisme de nos agences de sécurité nationale et les gens qui travaillent au sein de ces agences-là », a déclaré, qui a néanmoins recommandé certains ajustements.

« Il faut aussi considérer qu'il ne s'agit pas d'un groupe de cowboys qui font n'importe quoi. »

L'âge d'or de la surveillance

Mais compte tenu du contexte dans lequel ils ont été présentés, il n'est pas étonnant que ces changements aient fait des vagues. Depuis juin 2013, des documents fournis aux médias par Edward Snowden, un ancien soustraitant de la National Security Agency américaine (NSA), pré-sentent un portrait inédit de l'ampleur de la surveillance élec--tro-nique menée à grande échelle par les services de renseignements américains et leurs partenaires des « Five Eyes », l'alliance des services de renseignement qui comprend ceux du Canada, du Royaume-Uni, de l'Australie et de la Nouvelle-Zélande.

Ces fuites ont indiqué entre autres que la NSA a obtenu les registres téléphoniques de 120 millions d'abonnés de la compagnie Verizon et que les communications d'internautes par l'entremise des services de géants tels que Google, Microsoft ou Yahoo pouvaient être suivies dans le cadre du programme PRISM.

L’ancien directeur de la NSA, Keith Alexander, a décrit la pratique comme « la collecte de toute la botte de foin » : on ratisse large dans la quantité innombrable de données interceptées, en espérant y déceler la proverbiale aiguille à l’aide d’algorithmes et techniques diverses.

Désigné comme un « gourou de la sécurité », Bruce Schneier, un expert américain en matière de technologie et de sécurité, qua-lifie d’ailleurs l’époque actuelle d’« âge d’or de la surveillance » dans son dernier livre, Data and Goliath : The Hidden Battles to Collect Your Data and Control Your World.

« Tout le monde utilise des ordinateurs et produit des données, et tout le monde veut ces données parce que ça les rend plus puissants : Google les veut, Facebook les veut et votre gouvernement les veut », a-t-il dit en entrevue.

Le Royaume-Uni est lui-même aux prises depuis plusieurs années avec un débat sur l’ampleur de la surveillance étatique de ses citoyens, la Chambre des lords ayant décrété dans un rapport en 2009 que « la surveillance est devenue une part inévitable de la vie au Royaume-Uni. Chaque fois que l’on fait un appel téléphonique, envoie un courriel, navigue sur internet, ou même que l’on marche dans la rue, nos actions sont surveillées et enregistrées. […] Les gouvernements britanniques successifs ont graduellement construit l’un des systèmes de surveillance les plus étendus et technologiquement avancés au monde ».

Et le Canada n’est pas en reste. Les agences fédérales de renseignement n’ont pas été épargnées par les révélations des dernières années, où plusieurs des documents mis à jour par Edward Snowden illustrent leur participation à des projets comme le programme de surveillance de téléphones cellulaires et ordinateurs de passagers qui s’est déroulé pendant deux semaines dans un aéroport canadien par l’entremise du réseau d’internet sans fil.

En principe, les règles canadiennes interdisent au CST de cibler directement les Canadiens dans leur collecte de renseignements. Mais plusieurs estiment qu’en pratique, cette règle peut facilement être contournée ne serait-ce qu’en collectant des quantités massives de métadonnées, sans cibler ni distinguer leur provenance. Et en décembre, la Cour suprême du Canada a statué dans l’arrêt Spencer que les forces policières devaient obtenir un mandat pour réclamer le partage de renseignements personnels à des fournisseurs de services internet. Le jugement a été accueilli comme une bouffée d’air frais par les dé-fenseurs du droit à la vie privée. Mais presque en même temps, Ottawa a adopté le projet de loi C-13, qui accorde une im-munité à ces mêmes compagnies de télécommunications pour… le partage de renseignements personnels de leurs utilisateurs, sans mandat.

« Ceux qui continuent de croire que le Canada se comporte en bon scout et qu’il est prudent et judicieux, et qu’il ne joue pas le même jeu que notre partenaire plus agressif au sud de la frontière, alors je pense qu’ils manquent un aspect important », lance Andrew Clement, un professeur de l’Université de Toronto qui dirige le Programme de recherches sur les politiques d’informations. M. Clement s’est intéressé tout particulièrement à l’interception de données électroniques par la NSA au cours des dernières années.

État surveillance?

Ainsi, le Canada est-il devenu un État surveillance? Tout dépend d'abord de la manière dont on définit l'expression. « C'est un État où les citoyens font l'objet d'une surveillance au caractère envahissant », estime Bruce Schneier. Ben Hayes, un chercheur associé au Transnational Institute et qui se spécialise dans les questions de sécurité, estime que « c'est une société dans laquelle la surveillance est à ce point envahissante qu'elle menace le tissu même de la démocratie ».

« Je trouve un peu simpliste cette perspective que le Canada est en train de devenir un État surveillance, estime Christian Leuprecht. Ça implique que la surveillance met forcé-ment en cause les droits et les libertés. Et je crois qu'on a amplement la preuve dans le contexte d'un État démocratique moderne qu'une forte capacité de sécurité complémente nos droits et libertés. »

Arthur Cockfield, professeur de droit à l'Université Queen's et membre du Centre d'étude sur la surveillance, est de l'avis contraire. « Absolument, dit-il, nous sommes de plus en plus une société de surveillance, et il y a eu une diminution graduelle de notre droit à la vie privée et notre droit de ne pas être dérangé par des agents de l'État. »

« Oui, il y a une plus grande surveillance, mais est-ce que le Canada est en train de devenir un État de surveillance? Je ne pense aucunement par exemple que le Canada est en train de devenir un État totalitaire », estime pour sa part Daniel Therrien, le Commissaire à la protection de la vie privée du Canada.

Le commissaire Therrien a d'ailleurs tiré la sonnette d'alarme à l'égard de C-51, et plus particulièrement des nouveaux pouvoirs accordés au gouvernement fédéral en matière de partage de renseignements de citoyens. Selon lui, le critère de « pertinence » établi pour permettre l'échange d'une énorme quantité d'informations à travers l'appareil fédéral est trop permissif et la supervision de cette activité, incluant celle qu'il promet de lui-même mener, ne sera pas suffisante.

« Nous entrons très rapidement dans le monde des mégadonnées, qui repose sur l'analyse algorithmique d'énormes quantités de renseignements personnels pour dégager des tendances, prévoir des comportements et établir des liens avant qu'une enquête particulière soit lancée ou qu'une personne soit soupçonnée de quoi que ce soit », a mis en garde M. Therrien dans son mémoire au comité sénatorial qui a étudié le projet de loi.

La sécurité à quel prix?

À la période de questions en février, le chef de l'Opposition, Thomas Mulcair, a demandé au premier ministre de ga-rantir que les nouveaux pouvoirs de C-51 ne seraient pas uti-lisés contre les opposants politiques du gouvernement.

« Mon--sieur le Président, nous nous doutions bien que le NPD ne tarderait pas à avancer de telles théories du complot. C'est ce à quoi nous ont habitués les guetteurs d'hélicoptères noirs là-bas », a répondu Stephen Harper.

Mais malgré les railleries du premier ministre, les préoccupations de certains groupes, experts ou de l'opposition semblent avoir gagné une part importante de la population. Peu après le dépôt du projet de loi, plus de 80 % disaient l'appuyer, selon un sondage Angus Reid. Quelques semaines plus tard, cet appui avait chuté de près de la moitié au terme d'une enquête menée par une autre firme, Forum Research, qui l'a évalué à 45 %.

Les critiques les plus souvent formulées visent le secret des opérations. Une condition essentielle aux activités des services de renseignement, ce secret est aussi susceptible d'entretenir la méfiance quant aux risques d'abus qui pourraient survenir, tant en matière de vie privée que pour d'autres droits et libertés garantis par les chartes — liberté de conscience ou de religion, liberté d'expression, liberté d'opinion, ou liberté d'association.

Ainsi, l'argument selon lequel les citoyens devraient tout simplement s'en remettre au professionnalisme des agents du renseignement, de la sécurité ou de la police ne convainc pas tout le monde.

« Les forces policières peuvent agir de bonne foi, mais ils vont utiliser les pouvoirs qu'on leur donne, note le commissaire Daniel Therrien. Il va y avoir de la pression sur elles pour identifier les criminels, identifier les terroristes, et elles vont utiliser pleinement les outils qu'on leur donne. Alors ce n'est pas suf-fisant de se fier à la bonne foi des agents de l'État. Il faut un cadre juridique rigoureux et je crains qu'avec l'ensemble des lois qui ont été présentées, et en particulier avec C-51, ce cadre-là ne sera pas suffisamment important pour s'assurer pleinement que les droits sont respectés. »

C'est d'autant plus vrai, note le commissaire, que la notion de consentement s'applique différemment selon le contexte dans lequel on se trouve en matière de renseignements personnels — commercial ou gouvernemental : « Un des principes de la loi sur la vie privée qui s'applique au secteur privé, c'est justement que les compagnies ne peuvent utiliser des renseignements des consommateurs sans leur consentement, explique M. Therrien. Dans le cas des activités de l'État, la notion de consentement est à peu près inexistante. »

Besoins de réponses

Cette question de la confiance envers les institutions renvoie donc à celle de la suffisance des règles en vigueur. Pour Craig Forcese, cette question transcende le strict cadre du projet de loi C-51. Il plaide pour la tenue d'un débat plus large sur l'ensemble des lois relatives à la sécurité nationale.

« Le droit n'a pas maintenu le rythme de l'évolution des technologies, avec pour résultat que des vieux concepts de droit son redéployés pour encadrer de nouvelles actions étatiques, mais selon moi de manière imparfaite », dit le professeur.

« Mon inquiétude tient au fait que nous avançons comme des somnambules avec des lois inadéquates et des technologies qui explosent vers un nouveau système qu'aucun d'entre nous n'a réellement considéré et par lequel le gouvernement est capable d'obtenir de vastes quantités de données… »

« La question alors devient de savoir ce qu'il advient de toutes ces données. »

En matière de sécurité nationale et de renseignements personnels, c'est la question à 300 millions de dollars, soit le coût de l'augmentation budgétaire consentie dans le dernier budget fédéral aux services policiers et de renseignement pour lutter contre le terrorism.

Et pour des parents, ce pourrait être la question à 75 $, soit le prix de la nouvelle Hello Barbie de leur enfant.

Quant au commissaire Therrien, il espère bien sûr obtenir des réponses, mais surtout une plus grande transparence dans les relations qu'entretient l'État avec ses citoyens. « Les nouvelles technologies, l'internet en particulier, sont des outils de dé-veloppement personnel extrêmement importants pour les individus, dit-il. Et la surveillance croissante de l'État pourrait mettre en cause cet avantage très important des moyens de communication moderne. »

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