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Brison promises unions he'll quickly repeal sick-leave measures

Kathryn May, Ottawa Citizen, January 25 2016

Treasury Board President Scott Brison has promised federal unions that steps to repeal Tory legislation that gave the government power to unilaterally impose a new sick-leave regime will begin when Parliament resumes this week.

Treasury Board officials notified the unions in a letter that sections of Bill C-59, which allow the government to force a sick-leave deal, will be repealed as one of the “first orders of business.”

The move lifts a major threat hanging over bogged-down contract talks on sick-leave reforms and come as the largest union, the Public Service Alliance of Canada, gets ready for its first bargaining session with the Liberals on Feb. 1.

“We are pleased that the new Liberal government has promised to repeal the labour law changes in Bill C-59 and given assurances that they will not unilaterally take away our negotiated sick leave provisions,” said PSAC president Robyn Benson.

But Brison isn't going as far with another Conservative omnibus bill, C-4, which completely changed the rules for collective bargaining in the public service. The unions also want those changes repealed for the rest of this round of bargaining.

“We want the government to do the same with C-4 so our union and Treasury Board can go back to a system of fair collective bargaining on a level-playing field and achieve a collective agreement that strengthens public services for all Canadians,” said Benson. “We continue to oppose the labour law changes imposed through the Conservative government's Bill C-4.”

Treasury Board's letter, however, said the government “intends to engage in consultations with public sector partners to revisit legislative provisions introduced through Bill C-4.” That process “will be put in place at the earliest opportunity.”

Debi Daviau, president of the Professional Institute of the Public Service of Canada, said the repeal of C-59 bodes well for improved labour relations and will help the upcoming bargaining sessions get off on the right foot. PIPSC returns to the table at the end of February.



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But Daviau questions whether this round of bargaining can be fairly completed under the rules of C-4, which some say greatly diminished unions' bargaining clout and breaches workers' rights. She said the "jury is still out" on whether unions could bargain under those rules.

"We believe we can progress, but I don't know if we can conclude this round fairly with C-4 in play," she said.

But she argued the C-4 provisions — which changed everything from the right to strike and arbitration to new rules for essential services — should be undone as soon as possible to finish this round of bargaining; then consultations can proceed on how to fix or modernize the system.

"We would like to see them take our advice to repeal those anti-labour bits of C-4, go back to the old process, and then go into the consultation process to review the legislation," said Daviau.

"We are in the middle of a round of bargaining that can't be concluded without this being addressed. We don't have time for a long, drawn-out consultation process."

The Conservatives drastically changed the ground rules for bargaining in the public service, first with the sweeping reforms of omnibus budget bill C-4 in 2013, followed by more in C-59 last year.

C-59 gave the Conservatives the power to override contracts and impose a sick leave deal that eliminated public servants' sick leave banks, saving \$1.5 billion over five years.

The unions have filed constitutional challenges against both bills, which could take years to wind through the courts. With C-59, the unions, fearing the Conservatives would invoke the powers during the federal election, sought an injunction to stop it until the constitutional challenge was heard.

When elected, the Liberals assured unions they wouldn't use C-59's powers to force a deal. The unions took the government at its word and agreed to defer the injunction hearing until March 1. With Brison's promise to repeal it, however, the unions agreed to drop the case altogether.

They have also agreed to put the constitutional challenge of C-59 on hold until the legislation is repealed.

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The problem is Brison's consultations could have an impact on the unions' constitutional challenge of C-4. The first court date is set for June, which could be in the middle of consultations.

Bargaining could also still be underway. It has been inching along for more than year with little progress. The government was supposed to file the evidence defending its case against the unions' C-4 challenge last week but hasn't done so.

The Liberals have positioned themselves as friends of the public service, promising more respect than the Conservatives and to build a better relationship. But the government faces major economic challenges that will make it a tough negotiator when it comes to wage increases or the sick leave issue.

The Liberals also promised during the election to return to the table with a "new mandate," but when that mandate will be unveiled is uncertain.

It's unlikely a deal will be reached any time soon, which means the sick-leave savings booked — particularly the \$900 million booked for this year — won't materialize and will be added to the growing deficits the government plans to run over the next few years.

The C-4 rules will have a major impact on negotiations if the government and unions hit an impasse.

Under it, the Tories changed the Public Service Labour Relations Act of 1967 that give public servants the right to unionize and bargain collectively. The reforms effectively put the government in the driver's seat when determining which unions get to strike and which ones go to arbitration to resolve contract disputes. The changes gave the government the exclusive right to decide which workers are essential and can't strike.

They also reduced the independence of arbitrators who must now consider the government's economic and budgetary priorities as the "predominant factor" when proposing settlements to any impasses.

Legislative primer: here's what you need to know

The Hill Times' primer on what to expect on all major policy files in this session in the 42nd Parliament.

RACHEL AIELLO, The Hill Times, January 25 2016

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MPs return to Ottawa after a six-week break since they met briefly in December and they finally get down to work, three months after last fall's surprising majority election win for Prime Minister Justin Trudeau's Liberals.

Here's *The Hill Times'* primer on what to expect on some of the major policy files in this session.

Legislative changes to come: The Liberals say they will review several laws passed by former prime minister **Stephen Harper's** Conservative government, including the controversial **Bill C-51**, the **Anti-terrorism Act, 2015**; **Bill C-42**, the **Common Sense Firearms Licensing Act**; and changes made to the **Canada Elections Act** made under **Bill C-23**, the **Fair Elections Act**.

There will also be a review of all bills that were passed into law in the last Parliament without proper consultation with indigenous peoples or that contravene Sec. 35 of the Constitution, respecting aboriginal and treaty rights.

The Liberal government also plans to amend the Canadian Human Rights Act to add gender identity as prohibited grounds for discrimination and to repeal anti-union private members' bills **C-377** (requiring unions to publicly disclose financial information) and **C-525** (changing the rules for forming and dissolving a union local).

All these amendments, reviews, and possible repealing of these bills will have to be done keeping in mind the Liberal promise to change the House of Commons Standing Orders to bring an end to the so-called "abuse" of omnibus bills.

As well, based on campaign promises and the Speech from the Throne, the Liberal government will also have to tackle numerous items in these policy files.

Economy: The government will release its first budget, expected in March or possibly April. According to a Reuters report last week, citing a senior Liberal official, the government might push back its budget to April due to economic uncertainty.

Meanwhile, the Liberals promised to replace the Universal Child Care Benefit with a Canada Child Benefit based on family income. It will cancel income splitting and strengthen the Employment Insurance system, and is still promising to balance the books by 2019 despite the shaky economy.

According to the update of economic and fiscal projections released by the government on Nov. 20, 2015, the forecast—without including any planned policy changes under the Liberals—projects a deficit of \$3-billion for this fiscal year, \$3.9-billion in 2016-17, \$2.4-billion in 2017-18, \$1.4-billion in 2018-19, and a \$1.7-billion surplus by 2019-20.

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As well, this projection estimated the federal debt for this fiscal year to be \$616.5-billion, increasing to \$620.4-billion in 2016-17, \$622.8-billion in 2017-18, \$624.2-billion in 2018-19 and then back down to \$622.5-billion by 2019-20.

Finance Minister **Bill Morneau** (Toronto Centre, Ont.) will be assisted by his chief of staff **Richard Maksymetz**, policy director **Robert Asselin**, and policy advisers **Elliot Hughes**, **Hersi Hujaleh**, and **Ian Foucher**.

On implementing the Canada Child Benefit, Families, Children and Social Development Minister **Jean-Yves Duclos** (Quebec, Que.) will take the lead, as the minister responsible for the Employment and Social Development Canada Department.

Indigenous affairs: The government wants to announce an inquiry into murdered and missing indigenous women by the spring. It also wants to adopt both the United Nations Declaration on the Rights of Indigenous Peoples and the 94 Truth and Reconciliation Commission recommendations. The Liberals promised to lift the two per cent cap on funding for First Nations programs and establish a \$25-million Métis Economic Development Strategy, among other measures. It also promised to consult indigenous peoples on all facets of decision-making. Indigenous and Northern Affairs Minister **Carolyn Bennett** (Toronto-St. Paul's, Ont.) will be the point-person on this file. She's been charged with resetting the relationship to nation-to-nation interaction. Expect to see indigenous leadership like Assembly of First Nations National Chief **Perry Bellegarde** have an increased profile in Ottawa.

Parliamentary and democratic reform: The government wants to establish a special committee to study election reform and replace the first-past-the-post electoral system in time for the next federal election.

It will appoint 22 new Senators under its new "non-partisan" selection process and it recently announced the advisory panel that will be nominating candidates for the first five vacancies promised to be filled by the end of February. The Senate panel is headed by **Huguette Labelle** and includes **Dawn Lavell Harvard**, both Trudeau Foundation scholars, along with **Indira Samarasekera**, **Daniel Justras**, **Murray Segal**, **Sylvie Bernier**, **Yves Lamontagne**, **Susan Lewis**, and **Heather Bishop**.

It's also promising to end the use of government ads for partisan purposes and to appoint a new advertising commissioner.

It wants to update the Access to Information Act to apply to the Prime Minister's Office and to all Cabinet ministers' offices and remove all fees outside the initial \$5 filing fee.



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It will introduce a special weekly Prime Minister's Question Period and it's promising that House committees will have adequate resources to do better work and to reduce the power of parliamentary secretaries on committees.

Democratic Institutions Minister **Maryam Monsef** (Peterborough-Kawartha, Ont.), who is responsible for Elections Canada, will be a key player on electoral reforms.

Health: The government will begin work alongside the provinces and territories to develop a new Health Accord. It will increase the Public Health Agency's funding by \$15-million annually in the next two years to fund a national vaccination strategy and to raise awareness about concussions; it wants to introduce new restrictions on unhealthy foods; and it will end the Canadian Blood Services donation ban on men who have sex with men. The Liberals have also promised to deliver \$3-billion spending on improving home care over the next four years. Health Minister **Jane Philpott** (Markham-Stouffville, Ont.) hired **Caroline Pitfield** from the Public Health Agency of Canada to serve as her ministerial director of policy.

Environment: The government is expected to release a climate change strategy in April on Earth Day. It will also review and introduce a new environmental assessment process in addition to review changes made by the last government to the Fisheries Act and the Navigable Waters Protection Act. The Liberals say they will increase the study and funding for Canada's waterways. Environment and Climate Change Minister **Catherine McKenna** (Ottawa Centre, Ont.) has already been playing a leading role in Canada and internationally as the climate change conversation progresses. With a promised focus on clean technology, Natural Resources Minister **Jim Carr** (Winnipeg South Centre, Man.) will also have to balance environmental responsibility and indigenous land claims with energy projects such as pipelines. Mr. Carr hired **Ryan Adams** to help advise on policy in his office. Fisheries, Oceans and the Canadian Coast Guard Minister **Hunter Tootoo** (Nunavut) and **Nick Pashkoski**, his policy adviser, will play a role when it comes to restoring the funding to federal ocean science, monitoring programs, and bringing the percentage of protected marine coastal areas up to five per cent by 2017.

International trade: The government will decide whether it will ratify the massive Trans-Pacific Partnership deal agreed to by the last government, as well as work out the details of the Comprehensive Economic and Trade Agreement between Canada and the European Union. The TPP is the trade agreement between Canada and 11 other Asia-Pacific countries including Australia, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam. The countries involved have a combined GDP of \$20.5-trillion and would reduce tariffs on agriculture products, the automobile industry and the forestry sector.

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International Trade Minister **Chrystia Freeland** (University-Rosedale, Ont.) said recently that when the House returns, she will ask the House International Trade committee to make a “comprehensive cross-country study” of the deal. “Our parliamentary debate about this, we really believe, should include careful committee study,” she said.

Ms. Freeland has said the government is re-evaluating the last government’s \$4.3-billion, 15-year compensation package for the agriculture industry under the TPP. Ms. Freeland will be assisted by her chief of staff **Brian Clow** and others, including policy adviser **Sarah Hussaini**. Agriculture and Agri-Food Minister **Lawrence MacAulay** (Cardigan, P.E.I.) will also play a role on this file, given that much of the TPP and CETA deals will affect the Canadian agriculture industry. Mr. MacAulay’s chief of staff is **Mary Jean McFall**.

Last week, the CETA deal came under fire as the European Union reportedly has asked Canada to revisit a controversial investment protection clause in the text of the agreement in preparation for negotiations for an EU trade deal with the United States. Under the investment protection clause, businesses would be protected if governments decide not to fulfill the trade deals they sign. Ms. Freeland said that she is discussing the issue with her counterparts and is confident the deal will be ratified.

The government also says it will pursue other opportunities with emerging markets, including reviving Canada’s relationship with China, and it wants to improve relations with the United States and Mexico, including eliminating trade barriers. This also includes working on pipeline issues with the U.S. and developing a North American clean energy agreement. Ms. Freeland will also oversee implementing trade deals with Israel, Chile, and Ukraine in addition to developing a Canadian Trade and Export Strategy to help Canadian business get their products abroad.

Defence: The government says it will elaborate on its plans to pull out of air strikes in Syria and Iraq while boosting military training and it says it will conduct a transparent review of Canada’s Armed Forces and defence needs. National Defence Minister **Harjit Sajjan** (Vancouver South, B.C.) will be assisted by his chief of staff **Brian Bohunicky**, and others including policy adviser **James Cudmore**.

The new Liberal government will be criticized on the defence and national security fronts after Canada was shut out of an anti-ISIS coalition meeting with defence officials from the United States, France, the United Kingdom, Germany, Italy, Australia and the Netherlands.

As well, the government says it will restart the procurement process to replace Canada’s CF-18 fighter jets and it will prioritize funding for the Navy, something Public Services and Procurement Minister **Judy Foote** (Bonavista-Burin-Trinity, Nfld.) will have to stickhandle along

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with her chief of staff **Gianluca Cairo** and her other staffers. Ms. Foote will also be responsible for determining the way forward for home mail delivery and Canada Post.

Refugees: The government says it will follow through on resettling 25,000 Syrian refugees by the end of February and possibly up to 35,000 after that. Immigration, Refugees and Citizenship Minister **John McCallum** (Markham-Thornhill, Ont.) is the government's central spokesperson on this massive refugee resettlement, but he is also assisted by Defence Minister **Harjit Sajjan** and Health Minister **Jane Philpott**. International Development and La Francophonie Minister **Marie-Claude Bibeau** (Compton-Stanstead, Que.) will also assist Mr. McCallum on some aspects of the refugee file. It is expected the cost of resettling the initial 25,000 refugees is \$900-million during the first year and \$1.2-billion over the next six years.

Justice: Parliament set up the Special Joint Committee on Physician-Assisted Dying to consult Canadians and to come up with new legislation. The government now has until June 2016 to implement a new law, after the Supreme Court of Canada gave it a four-month extension two weeks ago.

The government also wants to pursue the legalization and regulation of marijuana, which Liberal MP and former Toronto police chief **Bill Blair** (Scarborough Southwest, Ont.) will lead.

The Liberals have not committed to a timeline to get the bill passed, but have promised to "create a federal-provincial-territorial task force, and with input from experts in public health, substance abuse, and law enforcement."

The government will introduce legislation on domestic and sexual assault, as well as legislation on handguns and assault weapons. Both Justice Minister and Attorney General of Canada **Jody Wilson-Raybould** (Vancouver Granville, B.C.) and Public Safety and Emergency Preparedness Minister **Ralph Goodale** (Regina-Wascana, Sask.) will play key roles. Ms. Wilson-Raybould hired **Jessica Prince** as a senior policy adviser and **David Hurl** is now director of policy and parliamentary affairs for Mr. Goodale. Related to this, Status of Women Minister **Patricia Hajdu** (Thunder Bay-Superior North, Ont.) will be rolling out the promised implementation of a federal gender violence strategy and action plan.

Veterans: The government says Veterans Affairs Canada will create a new \$8-million Veterans Education Benefit; it will reopen the nine Veterans Affairs service offices across the country, closed under the last government. It says it will implement all the auditor general's recommendations on enhancing mental health service delivery to veterans and will spend \$20-million creating two new veterans' care facilities. The Liberals also promised to allocate another \$100-million a year on education, counselling and training for veterans' families. Veterans

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Affairs Minister **Kent Hehr** (Calgary Centre, Alta.) will also work closely with Mr. Sajjan as the associate minister of National Defence .

Infrastructure: The government promised to make “significant new investments” in public transit, green infrastructure, and social infrastructure to help boost the economy, including establishing a Canadian Infrastructure Bank to provide low-cost financing for new infrastructure projects. It promises to transfer any uncommitted federal infrastructure funds to municipalities. Infrastructure and Communities Minister **Amarjeet Sohi** (Edmonton Mill Woods, Alta.) will be the one leading the implementation of the colossal Liberal promise of doubling federal infrastructure spending to \$125-billion over 10 years. According to *The Globe and Mail*, the government is considering speeding up the amount it plans to spend on infrastructure over the next few years in an attempt to boost the economy. Mr. Sohi is also responsible for the Windsor-Detroit Bridge Authority and the Toronto Waterfront Revitalization Initiative. **John Brodhead** is Mr. Sohi’s chief of staff and **Gurpreet Vinning** was hired as a policy adviser in Mr. Sohi’s office.

Canadian Heritage: Canadian Heritage Minister **Mélanie Joly**’s (Ahuntsic-Cartierville, Que.) new role will involve stickhandling the broadcast industry, including reinvesting in the CBC/Radio-Canada, as well as taking on the multiculturalism file and the National Capital Commission in preparation for Canada’s 150th anniversary celebrations in 2017. **Carla Qualtrough** (Delta, B.C.), minister of Sport and Persons with Disabilities, will also provide support.

In addition, the Department of Canadian Heritage will have a lot going on with the NCC, including overseeing the redevelopment of the LeBreton Flats project; finalizing the Victims of Communism Monument; moving forward on the Library and Archives proposal to work with the Ottawa Public Library on a whole new library downtown; and making a decision about what to do with the former United States embassy building on Wellington Street.

Innovation, Science and Economic Development: Innovation Minister **Navdeep Bains**’ (Mississauga-Malton, Ont.) office will play a key role in the government’s innovation agenda. He is also responsible for all six regional development agencies and implementing the reintroduced mandatory long-form census.

The government promised to invest \$200-million each year in a new Innovation Agenda aimed at expanding support for incubators and accelerators and “the emerging national network for business innovation and cluster support.” It also wants to invest \$100-million into the Industrial Research Assistance Program for small and medium sized businesses.

Mr. Bains will be assisted in his role by **Kirsty Duncan** (Etobicoke North, Ont.), minister of Science, and **Bardish Chagger** (Waterloo, Ont.), minister of Small Business and Tourism. Ms.



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Duncan will likely lead the creation of a Chief Science Officer, and Ms. Chagger will implement the promised reduction of the small-business tax rate from 11 per cent to nine per cent.

Rentrée parlementaire : tests et patience pour Justin Trudeau

Emmanuelle Latraverse, Radio-Canada, le 24 janvier 2016

Rappelez-vous, en campagne électorale, tout semblait si simple... Justin Trudeau promettait un gouvernement libéral qui offrirait rapidement des résultats concrets dans la vie des Canadiens. En cette veille de rentrée parlementaire, on pourrait davantage parler d'un gouvernement de la patience. La baguette magique du changement instantané ne suffit plus.

« Nous livrerons ce que les Canadiens ont demandé, nous ouvrirons de nouveaux horizons à notre pays et nous montrerons au monde entier que la diversité, la créativité et la compassion sont essentielles à un avenir pacifique et prospère », lisait-on dans le discours du Trône, 4 décembre 2015.

Elle semble bien loin, l'époque où le simple fait de faire miroiter aux Canadiens un gouvernement ouvert, ambitieux, audacieux, laissait présager une transformation rapide du rôle du gouvernement fédéral et de ses services.

Certes, le nouveau gouvernement libéral a posé quelques gestes rapides. On n'a qu'à penser aux baisses d'impôts pour les familles de la classe moyenne, au retour du formulaire long du recensement et au lancement de la vaste opération d'accueil de 25 000 réfugiés syriens. Mais aussi importants soient-ils, ils servaient davantage à donner le ton qu'à amorcer les transformations profondes promises en campagne électorale.

Le défi économique

Comment réagir face à la détérioration de l'économie canadienne? Patience, plaide son ministre des Finances, un plan sera dévoilé à temps pour le budget, quelque part entre mars et avril, dit-on.

Justin Trudeau a laissé miroiter une transformation du moteur de l'économie canadienne au-delà des ressources naturelles en vertu d'un vaste virage vers l'innovation. Pour y arriver, il faudra corriger les lacunes importantes dans le financement de la recherche et de



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l'innovation au pays, développer surtout un programme d'infrastructures qui ira au-delà de la réfection des routes et des arénas du pays. Il faudra résister à la tentation des projets rapides clé en main et politiquement payants en faveur de projets plus complexes à plus long terme. Ce sera d'autant plus difficile dans le climat actuel de pression importante pour injecter rapidement de l'argent dans l'économie.

Et ça ne s'arrête pas là. Comme il était simple en campagne électorale de naviguer dans le litigieux dossier du Partenariat transpacifique! Oui, les libéraux étaient en faveur, du moins en principe; il ne s'agissait que d'en étudier les détails. Maintenant au pouvoir, on fait valoir que le gouvernement a deux ans pour consulter et évaluer le vaste accord de libre-échange, comme si, soudainement, face au débat qui entoure l'entente chez nos voisins du sud, le gouvernement préfère voir de quel côté le vent va tourner avant de se commettre.

Et que dire de l'aide financière pour Bombardier, dossier litigieux politiquement s'il en est un? Patience, patience, répète le ministre de l'Innovation, des Sciences et du Développement économique.

Négocier le changement avec les provinces

Pacte sur la santé, approche efficace pour lutter contre les changements climatiques... Ici aussi, les ambitions et les promesses des libéraux se heurtent à la complexité des défis et au besoin de bâtir un consensus avec des provinces qui ont des besoins et des visions divergentes.

Il semblait si simple de promettre que le Canada serait un acteur constructif des négociations sur les changements climatiques. Or, pour ceux qui en doutent encore, la rencontre fédérale-provinciale des ministres de l'Environnement, cette semaine, illustrera rapidement à quel point le Canada est encore loin du but. Le gouvernement Trudeau mise sur une approche qui tient compte des efforts et progrès réalisés par les provinces. Le problème, c'est que, selon plusieurs experts et de l'aveu même du premier ministre Philippe Couillard en entrevue aux Coulisses du pouvoir, les plans de réduction des gaz à effets de serre mis de l'avant ne permettent même pas d'atteindre la cible, pourtant si décriée, qu'avait présenté le gouvernement Harper. Accoucher d'un plan qui permettra de combler l'écart entre la réalité et les ambitions politiques prendra non seulement du temps et beaucoup de doigté, mais coûtera cher aussi. La bisbille des derniers jours sur l'avenir du vaste projet d'oléoduc Énergie-Est n'aide en rien à créer un climat de confiance et de coopération.

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Et que dire de la mise sur pied d'une enquête sur les femmes autochtones assassinées et disparues? Dès qu'il a pris les rênes du pouvoir, la mise sur pied immédiate d'une telle enquête était sur toutes les lèvres. Pourtant, près de trois mois plus tard, il est devenu évident que celle-ci ne se mettra pas en branle avant - au plus tôt - le début de l'été. La raison est simple : soucieuses de gagner l'appui des communautés touchées, soucieuses de miser sur cette enquête pour changer la nature des relations entre Ottawa et les peuples autochtones, les ministres responsables ont préféré prendre le temps de consulter les familles et les victimes. Si c'est certainement pour une bonne cause, ici aussi, la patience est de mise.

Guerre contre le groupe armé État islamique

On a beaucoup fait état de la réaction timide et maladroite de Justin Trudeau aux attentats d'Ouagadougou la semaine dernière. Ce qu'on a vu, c'est avant tout le malaise d'un gouvernement qui peine à réconcilier son engagement envers la guerre contre le terrorisme avec le retrait des CF18 de la mission de bombardement contre l'EI en Irak et en Syrie.

Encore là, il semblait si simple en campagne électorale de promettre le retrait immédiat des avions de chasse de la coalition. Or, depuis le début de l'année, ceux-ci ont davantage intensifié leurs sorties. Quelle sera donc la nature de cette nouvelle mission canadienne? En quoi sera-t-elle plus efficace que la précédente, davantage au diapason de l'expertise des Forces armées canadiennes? Patience, nous dit le ministre des Affaires étrangères, le gouvernement consulte ses alliés.

« Nous avons gagné cette élection parce que nous avons écouté », dit Justin Trudeau...

Finalement, à l'enthousiasme de séduire les Canadiens pour prendre le pouvoir a succédé la prudence d'un gouvernement confronté à l'ampleur du défi. Ceci est d'autant plus vrai que les libéraux ont fait le pari d'un nouveau style de gouvernance : une gouvernance inclusive, nourrie par les consultations, l'engagement des partenaires et des autres niveaux de gouvernement. Cette approche fut à la base de son succès électoral, elle demeure au cœur de son style de gouvernance. La consultation exige la patience.

Comme le disait si bien le conseiller britannique Michael Barber dont je vous parlais la semaine dernière : « se faire élire est plus facile que de gouverner à la hauteur de ses ambitions. »

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Trudeau plans repeal of Tory union, citizenship laws as Parliament returns

Parliamentary oversight for Canada's national security agencies also high on Liberals' agenda

Chris Hall, CBC, January 25 2016

He's been to Turkey, the Philippines, London, Malta and Paris. And now, fresh from his efforts to rebrand Canada with billionaires and business leaders at the World Economic Forum in Davos, Justin Trudeau takes his front row seat in the Commons today for the first full sitting of Parliament since his election in October.

Different audience. Different task.

No matter how adept the prime minister might be at convincing international audiences that his new government represents the face of Canada — of resourcefulness over resources — the challenge at home is to deliver what's already promised.

The Liberals already brought in their middle-class tax cut during the week-long sitting in December. But the list of what else was pledged in the campaign is long, and the importance of setting the right tone this week is critical.

Government House Leader Dominic LeBlanc says the primary focus for the Liberals remains the economy, in particular moving ahead with infrastructure spending and the tax cut.

"Everybody recognizes an increased urgency to implement what we think are the key elements of our election campaign ... elements that will create economic growth and jobs."

Those elements include moving quickly to release money approved by the previous government for infrastructure programs, as well as preparing the Liberals' first budget.

"Those are measures, obviously, that cabinet will be working on."

So the economy will be the priority. But government sources suggest it won't be the sole preoccupation in the first two weeks as the new government looks to put a positive stamp on these early days in power.

Among the measures expected to be dealt with through new legislation:



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- Repealing the Conservative's Bill C-24, which allows the government to strip Canadian citizenship from dual citizens who are convicted of terrorism-related offences.
- Repealing two other Conservative laws that the Liberals argue weaken the rights of trade unions. They are Bill C-377, which requires unions to disclose how they spend members' dues, as well as Bill C-525, which makes it harder for unions to organize in federally-regulated workplaces.
- Introducing parliamentary oversight for Canada's national security agencies, though the commitment to repeal parts of the previous government's anti-terrorism law, Bill C-51, is expected to come later.

Conservatives adapt to opposition

There is an underlying political motivation to moving early on these measures: To remind voters that the Conservatives were willing to override charter rights in the pursuit of security and to burnish the Liberals credentials as a party that cares about new Canadians and working families.

The added bonus is that the New Democrats will almost certainly support each of the measures.

For the Conservatives, still getting accustomed to the role of Official Opposition, their focus will likely be on shoring up the core issues of their supporters.

Conservative House Leader Andrew Scheer says his party will push the government to act on what he calls "low-hanging fruit," which includes finalizing trade deals negotiated by the previous government, and starting the work of getting pipelines built.

The Conservatives are also likely to remind Trudeau of the \$10-billion deficit ceiling he committed to in the campaign.

"All indications are that they are going to blow right by those targets," says Scheer.

And then there's the military mission against ISIS.

The Liberals have said they will withdraw the six CF-18 fighter jets in favour of a more robust role in training Kurdish fighters. That much is clear.

But when the change will happen, how many Canadian soldiers will be sent into Iraq and where have not yet been decided.



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Mulcair's job

For New Democrats, the focus is back on traditional social democratic issues.

Party Leader Tom Mulcair said last week that his party will focus on injustice and inequality, and what NDP House Leader Peter Julian calls the urgent need to improve the social safety net as jobs disappear, and prices for basics such as food begin to rise.

"We're seeing an increasing number of Canadians losing their jobs. We're seeing an erosion of the health-care system all within the context of a record debt load that Canadian families are carrying."

Looming, always in the background, is an economy that could be in far-worse shape than anyone imagined in last year's campaign.

Oil is half the price it was in October. The loonie traded at 77 cents when Canadians went to the polls Oct. 19, and is now hovering around 69 cents with some forecasters saying it could slip even further against the greenback.

Tens of thousands of jobs have been lost in the energy sector alone, an industry heavily concentrated in Alberta and Saskatchewan, the two provinces that resisted the Liberal surge in October.

Trudeau has spent much of his time since the election on the road, pitching Canada as a good place to invest, and as a new and willing partner in the battle against climate change.

With the Commons set to resume Monday, a different audience. Different task.

It's time to begin delivery.

Trudeau nomme le nouveau chef de la fonction publique

Le Devoir, le 21 janvier 2016

Le gouvernement Trudeau a annoncé mercredi la nomination du fonctionnaire d'expérience Michael Wernick à titre de greffier du Conseil privé et secrétaire du Cabinet.

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Il entrera en fonction ce vendredi, en remplacement de Janice Charette, qui avait été nommée en octobre 2014. M. Wernick cumulera trois fonctions : il sera le chef de la fonction publique, il s'assurera que les fonctionnaires comprennent et se conforment aux orientations du Conseil des ministres et il conseillera le premier ministre sur les questions qui peuvent avoir une incidence sur le gouvernement.

M. Wernick pourrait cependant occuper ses nouvelles fonctions pour une durée limitée. Dans son communiqué, le gouvernement indique que « *le premier ministre a demandé l'avis de M. Wernick en ce qui a trait au processus visant à pourvoir ce poste de façon permanente* ».

This is not the way to treat a clerk of the Privy Council, Mr. Trudeau

L. Ian MacDonald, iPolitics.ca, January 23 2016

There was consternation in the public service and confusion in Ottawa's political class mid-week when Justin Trudeau ditched Janice Charette as clerk of the Privy Council and secretary to the cabinet, replacing her with her deputy clerk, Michael Wernick.

The PS was shocked at the timing of the clerk shuffle — Wednesday afternoon, two days before a deputy ministers' retreat that Charette would have chaired, with the announcement itself being made in a news release by the prime minister from the Davos conference in Switzerland.

So Trudeau was out of town *and* out of the country. Bad form. Mind you, it's happened once before — in 2009, when the Prime Minister's Office announced the departure of Kevin Lynch as clerk while Stephen Harper was visiting Canadian troops in Afghanistan. In both instances, the PMO's approach was insensitive and inelegant.

The confusion among politicians arose from the second paragraph of Trudeau's announcement — which said that "the prime minister has asked Mr. Wernick for advice on a process to fill the position on a permanent basis."

That could have used an edit. It also should have been moved to the first paragraph, instead of following a sentence about Charette remaining as a senior adviser in PCO "pending a new assignment."

Consulting and lobbying firms were immediately inundated with calls and texts from clients asking whether filling "the position on a permanent basis" referred to Charette's *new*



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assignment, or — more likely — “a process” for filling the clerk’s role on a permanent basis. In other words, part of Wernick’s mandate is to help find his own replacement.

So (people were asking themselves) was Wernick clerk, interim clerk or a placeholder for someone else? Those questions would have been very much on the minds of his colleagues as they gathered Friday at the DMs’ retreat. The clerk is not only secretary to the cabinet, but also head of the public service.

Wernick has been in the public service since he joined Finance 35 years ago, and notably survived eight years as DM at Aboriginal Affairs from 2006-14, a tumultuous period even by the standards of a department which historically has been a graveyard for many careers. Wernick’s time covered Stephen Harper’s apology to First Nations, the appointment of the Truth and Reconciliation Commission, the Idle No More movement and the sabotaging of the First Nations Control of Education Act by dissident chiefs. As clerk, he’s uniquely qualified to lead the implementation of the TRC’s sweeping recommendations, Trudeau having accepted all 94 of them.

But as a placeholder. The question is — who’s next?

Aide à mourir: Wilson-Raybould compte légiférer d'ici juin

Hugo de Grandpré, La Presse, le 21 janvier 2016

La ministre de la Justice, Jody Wilson-Raybould, dit avoir bon espoir d'adopter un cadre fédéral sur l'aide médicale à mourir en respectant les délais impartis par la Cour suprême, malgré l'échéance serrée et des doutes soulevés par les conservateurs, qui sont majoritaires au Sénat.

En entrevue avec *La Presse*, la ministre Wilson-Raybould a fait peu de cas des commentaires de l'opposition conservatrice, qui a qualifié d'irréaliste cette semaine l'intention du gouvernement Trudeau d'encadrer une question aussi complexe en aussi peu de temps.

En février 2015, la Cour suprême du Canada avait donné un sursis d'un an à Ottawa pour adopter son propre régime avant que deux dispositions clés du Code criminel interdisant l'aide médicale à mourir ne soient invalidées. Ce délai a été prolongé de quatre mois la semaine dernière.

Ottawa a donc jusqu'au 6 juin pour légiférer en la matière.

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« Nous allons certainement chercher à respecter la date butoir de la Cour suprême en travaillant de manière ouverte et large avec tous les parlementaires et en cherchant à façonner une réponse fédérale », a déclaré Jody Wilson-Raybould.

Or, ce délai est d'autant plus serré que le Parlement aura un horaire pour le moins irrégulier au cours des prochains mois : la Chambre des communes et le Sénat ne siègent qu'une semaine en janvier, trois semaines en février, moins de deux semaines en mars et deux semaines en avril.

Le comité parlementaire formé pour étudier la question ne s'est réuni qu'une seule fois, lundi. Il doit présenter son rapport le mois prochain, le 26 février.

En marge de cette première réunion du comité, l'un de ses membres, le député conservateur du Québec Gérard Deltell, a remis en question la faisabilité de l'exercice. « On est des gens qui respectent les institutions. La Cour suprême nous dit de le faire en dedans de quatre mois. On va le faire. Mais je vous rappelle qu'au Québec, ç'a été un débat de six ans », a-t-il lancé, selon La Presse Canadienne.

Sénat au ralenti

À cela s'ajoute la question du Sénat. Le gouvernement a pris du retard dans la mise sur pied de son processus de sélection des sénateurs afin de pourvoir la vingtaine de postes laissés vacants par Stephen Harper. Dans l'attente, et compte tenu de la décision de Justin Trudeau d'évincer les sénateurs libéraux de son caucus, il pourrait manquer des appuis nécessaires pour faire progresser assez rapidement le dossier à la Chambre haute, une étape inévitable pour l'adoption d'un projet de loi.

Les conservateurs n'ont montré aucun empressement à adopter un régime fédéral d'aide médicale à mourir dans la foulée de la décision de la Cour suprême dans l'affaire Carter en février 2015. Le leader de l'opposition au Sénat, Claude Carignan, n'a pas semblé plus pressé, dans une réponse fournie par son bureau cette semaine.

« Il est impossible de dire si les membres de notre caucus vont appuyer ou non le projet de loi, n'en connaissant pas le contenu. Chose certaine, les sénateurs conservateurs vont, le moment venu, se pencher avec sérieux et diligence sur cette question. Tous sont conscients que les délais sont serrés, mais les sénateurs entendent bien faire leur travail de réflexion et débattre des enjeux », a écrit une porte-parole du sénateur Carignan.

Réponse cohérente avec les provinces



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Autre obstacle : la coordination avec les provinces. Le droit criminel est de compétence fédérale, mais la santé relève des provinces, de sorte qu'Ottawa devra coordonner sa réponse avec ses partenaires de la fédération. Jusqu'ici, seul le Québec s'est doté d'un régime en ce sens.

La ministre Wilson-Raybould est à Québec aujourd'hui pour rencontrer ses homologues canadiens et discuter de certains enjeux, dont l'aide médicale à mourir. Cette question est aussi à l'ordre du jour de la réunion des ministres de la Santé à Vancouver, cette semaine.

À cet égard également, la politicienne fédérale s'est montrée optimiste quant à la capacité de son gouvernement de présenter à temps une réponse cohérente partout au pays. « C'est un court délai, mais je crois que si nous travaillons de manière collaborative, nous pouvons respecter la date butoir qui a été établie par la Cour suprême », a martelé la ministre.

Special joint committee: Justice lawyers argue that Parliament has leeway on assisted dying

Wayne Kondro, iPolitics.ca, Jan 18 2015

There's enough ambiguity in the Supreme Court of Canada's ruling on physician-assisted suicide that Parliament can pretty much do whatever it wants with the file, Justice Department lawyers argued Monday.

"There are different ways of reading and interpreting the Supreme Court ruling" and it is "open to Parliament to provide a greater or narrower scope" to physician-assisted suicide in Canada, whether that be more permissive or highly restrictive, Joanne Klineberg, senior counsel for the Justice Department's criminal law policy section told the Special Joint Committee on Physician-Assisted Dying.

Moreover, whatever the committee of MPs and Senators recommends to the government in its final report, both it and the government should expect to soon be challenged in the courts, added Jeanette Ettel, senior counsel for the department's human rights section.

The Justice Department lawyers were asked by the committee, after it formally constituted itself Monday and appointed Senator Kelvin Ogilvie and MP Robert Oliphant as co-chairs, to sketch the parameters of the issues it faces in the run-up to its February 26th deadline for



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making recommendations to the government regarding a suitable framework for physician-assisted suicide in Canada.

Most experts believe that the Supreme Court's *Carter et.al. v Attorney General of Canada* decision laid out a minimum floor for physician-assisted suicide in Canada when it said that eligibility should be broad enough to encompass every "competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."

The experts believe that takes eligibility beyond terminal diseases to include a broad range of conditions, including psychological and neurogenerative disorders, but the Justice lawyers argued that's not necessarily the case because there are "different ways of reading and interpreting" the ruling.

Similarly, the court did not draw a distinction between physician-assisted suicide and medical-aid-in-dying, opening the door for doctors to actually administer a lethal drug, not just prescribe it.

But Klineberg advanced the astonishing proposition that the difference between physician-assisted suicide and euthanasia was whether or not a doctor merely prescribes a lethal drug (which the patient takes home), or actually administers it. The overwhelming majority of experts, though, believe the difference between the two is whether or not a person consents to such aid.

Klineberg's interpretation was promptly called out by Liberal MP René Arseneault (Madawaska-Restigouche) and she beat a hasty retreat, saying that there were differing forms of euthanasia, to wit: voluntary (with patient consent); involuntary (against the patient's wishes); or non-voluntary (in which the patient's wishes are unknown).

Klineberg also argued that while Parliament could address such issues as allowing competent minors or patients with mental disorders to qualify for physician-assisted suicide, it could just as easily preclude them from eligibility, without running afoul of the Supreme Court's decision.

Similarly, nothing in the ruling compels Parliament to even address the issue of whether or not a patient diagnosed with dementia or another degenerative neurological disease should be provided access to physician-assisted suicide in cases where they crafted an advanced directive requesting such aid, Klineberg argued.

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Such an advance directive could easily be skirted by requiring that a patient be mentally competent at the actual time he receives medical-aid-in-dying, or by precluding medical-aid-in-dying requested by a substitute decision-maker, Klineberg said.

At the prodding of Conservative MP Michael Cooper (St. Albert-Edmonton), the lawyers also argued that it is entirely within Parliament's purview to introduce a framework for physician-assisted suicide that would compel a patient to obtain advance approval not just from a physician, but also from a judge, or from something like a committee comprised of, for example, a doctor, a lawyer and a mental health expert.

Among other issues identified Monday were whether eligibility criteria should be confined to those near death, whether mechanisms are needed to police the practice and subsequently collect nation-wide data, and whether it's up to the federal, or provincial, government to craft conscientious objection provisions allowing doctors to refuse to prescribe or administer lethal drugs.

Meanwhile, Justice Minister Jody Wilson-Raybould released the final report of ex-Prime Minister Stephen Harper's External Panel on Options for a Legislative Response to *Carter v. Canada*.

Klineberg told the committee that the three-member Harper panel, which was accused of being conflicted and partisan, was instructed after the general election to report strictly on its consultations with the Canadian public, and not make any recommendations to government.

The report concludes that "an important goal in establishing a physician-assisted death framework in Canada should be moving toward consensus. There are divergent views on many aspects of physician-assisted dying, but there are also areas of growing consensus, including a recognition of the need for carefully considered safeguards, oversight and a strengthened palliative care framework to be developed in parallel with one that provides access to physician-assisted dying in accordance with the *Carter* decision. Whatever system is put in place should be rigorously researched and evaluated periodically to foster improvements, if necessary."

In deference to its New Democratic members, who are meeting in Montebello this week for a party caucus, the joint committee will not be hearing more witnesses until next Monday.

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Immigration lawyer says drug charges won't affect stateless man's citizenship bid

Shaamini Yogaretnam, Ottawa Citizen, January 19 2016

The lawyer of a stateless man who has again been charged with drug crimes says the new charges will not affect Deepan Budlakoti's efforts to be declared a Canadian citizen.

Yavar Hameed said he is waiting to hear back on his application to the Supreme Court of Canada for review of a Federal Court of Appeal decision "relating to the factual and legal question of whether or not (Budlakoti) is a Canadian citizen."

The Citizen reported Monday that Budlakoti was charged Dec. 18 with possessing drugs for the purpose of trafficking and possessing property obtained by crime. He was arrested at his Gatineau apartment by the Gatineau police anti-gang squad in a raid that turned up nearly \$10,000 worth of cocaine, a semi-automatic handgun and ammunition.

"These charges have no bearing on that application," Hameed said in a statement to the Citizen.

In terms of removal prospects under immigration law, the new charges do not make him a citizen of India or any other country, so his removal is still unenforceable in law."

According to Hameed, "Canada still bears a responsibility to reduce statelessness by making him a citizen — that is an issue that may be dealt with by the Supreme Court. Failing that, the United Nations."

Budlakoti, who was born in Ottawa in 1989, was previously convicted of drug and gun trafficking and breaking and entering. In October, he was arrested for stunt driving.

He has only ever lived in Canada. His parents were Indian nationals who worked at the Indian High Commission and received Canadian citizenship some 20 years ago, but children born to foreign diplomatic staff are not Canadian citizens by birth.

Budlakoti learned of his unusual citizenship status in 2010 when he was sentenced to three years in prison for weapons and drug trafficking. Officials said the serious nature of those convictions necessitated deportation, but Indian authorities refused to take him. He had earlier been convicted of two counts of breaking and entering. He has fought to remain in the country since.

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Budlakoti sought leave to appeal at the Supreme Court of Canada to argue that the government infringed his Charter rights when it revoked his citizenship.

He is in custody and is scheduled to appear in court Friday.

Undoing the Tories: A guide to ‘Harperisms’ that the Liberals have or might kill

Alexandra Keck, Canada.com, January 21 2016

In the 79 days Justin Trudeau has been in office, his government has announced plans to revoke or change many of the policies of his predecessor, Stephen Harper. So far, the Liberals have reversed at least four “Harperisms.” The latest to fall is Canada’s tougher pardons system. On Thursday, Public Safety Minister Ralph Goodale announced he would reverse changes that made getting a pardon for a criminal offense much more difficult.

Here is a list of the Harperisms Trudeau has targeted:

- *Changes to the Criminal Pardons system*

The Harper government made changes to the system almost four years ago that made it significantly harder to get a pardon. The fees nearly quadrupled and applicants had to wait much longer to apply.

- *Revoke changes made to strip citizenship from those charged with terrorism*

A policy introduced by the Conservative government sought to revoke the citizenship of those charged with terrorism. Trudeau plans to repeal this law.

- *Reinstate the mandatory long-form census*

The day after he took office, Trudeau announced that he is reinstating the 61-question census for 2016.

- *Revoke rules and regulations on government scientists*

By early November, government scientists were once again allowed to openly speak about their findings with the media.



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- *Abandon challenge to niqabs at citizenship ceremonies*

On Nov. 16, the Liberal government dropped Harper's appeal to the Supreme Court of Canada, which fought to keep women from wearing the garment during the oath-taking citizenship ceremony.

- *Revoke the changes around appeals for refugee claims*

In early January the Liberals announced that they would not be keeping the rule that stops denied refugee claimants from deemed safe countries like Croatia, Hungary and Romania from appealing.

Failed Promise:

- *To pull fighter jets out of Iraq*

Although he did not set a deadline, in Trudeau's first news conference he said he was going to end Canadian air strikes in Iraq and Syria. In accordance with Harper's plans, six Canadian Cf-18 fighter jets are to stay in the region until March. Those jets have continued to strike ISIL targets, while the prime minister says he is searching for other solutions.

In the Works:

- *Overhaul Bill C-51*

The Liberals voted for Harper anti-terror legislation that gives greater powers to Canada's spy agency. Now Trudeau says he wants to make changes to the "problematic" elements of the bill.

- *Medical coverage for failed refugee claimants*

The Liberals promise to revoke a Harper policy that keeps those whose refugee claims were denied from accessing health-care coverage while in Canada.

- *Repeal mandatory minimum sentencing*

Trudeau said in September that mandatory minimum sentencing takes the discretion away from judges, ultimately resulting in longer jail terms.

- *Reverse cuts to CBC funding*



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A letter from the minister of Canadian heritage said that the government would be restoring funding to CBC/Radio-Canada, which faced \$115 million in cuts to annual funding, as well as adding \$35 million.

- *Repeal bills C-377 and C-525*

The Liberals have vowed to kill these bills, which require unions to disclose their spending as well as the salaries of those making more than \$100,000

- *Cancel the Northern Gateway Pipeline*

The pipeline, which was approved by the Harper government, is a project proposed by Enbridge that would run from Edmonton to Kitimat, B.C., then load the oil tankers off the coast. The project has faced criticism from environmental groups over the danger of oil spills. Both Trudeau and Mulcair promised to kill the project before the election.

- *Re-open the Maritime Rescue Subcentre and Kitsilano Coast Guard which was closed by the Harper Conservatives in 2012 and 2013, respectively.*

The closures were part of a federal plan to consolidate resources.

- *Stop the plan to end door-to-door mail delivery*

Canada Post announced in late October that it is halting the move to make community mailboxes and will continue door-to-door service. Trudeau pledged during his campaign that he would reverse the Harper cuts to postal delivery. Some residents vehemently protested the community boxes in Ontario as well as Newfoundland and Labrador, by standing or lying on the dirt piles where they were to be built.

- *Re-open 9 Veterans Affairs service centres*

The regional offices, which the Conservative government closed, are said to be re-opening. However, in November the Veterans Affairs Minister said that they might not be in the same locations.

- *Cancel the plan to buy the F-35 fighter jets*

Harper invested hundreds of millions into the fighter jet program, but in the federal election campaign, Trudeau said he would scrap the plan and opt for the most efficient models. He plans to save money on jets in order to expand spending on the navy.

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Minister attacked on two fronts over prosecutorial independence

Allegation is political pressure can be brought to bear on matters

Cristin Schmitz , The Lawyers Weekly, January 22 2016

Military justice reform has unexpectedly shot to the top of the agenda for the federal government and the Supreme Court via two Charter challenges to the prosecutorial independence of the minister of national defence.

In the first case, *R. v. Gagnon* [2015] CMAC 2, the Court Martial Appeal Court (CMAC) struck down the power of the defence minister in late December, under Section 230.1 of the *National Defence Act* (NDA), to launch appeals to the CMAC of acquittals, stays, sentences etc.

The ruling relates to cases involving Canadian Armed Forces (CAF) members prosecuted under the Code of Service Discipline for crimes and other federal infractions, as well as military disciplinary offences.

In striking down Sec. 230.1, Appeal Court Chief Justice Richard Bell, and Justices Guy Curnoy and Alexandre Deschênes, agreed that reposing the quasi-judicial power to decide whether to appeal a case to the CMAC in the defence minister — a politician and member of the executive bound by Cabinet solidarity — violates s. 7 of the Charter. Section 7 prohibits the state from depriving people of their liberty, except in accordance with the principles of fundamental justice.

“The minister has simply no objective institutional independence required for the independent exercise of a function that can lead to imprisonment of one of his employees or [the employee’s] dismissal,” Justice Curnoy explained in translation from French.

Or, as put more bluntly by defence counsel in their factum, “the minister is the very antithesis of a prosecutor who is independent of political pressure — the minister himself is the political pressure.”

Ottawa military lawyer Michel Drapeau, a retired CAF colonel and co-author of *Military Justice in Action: Annotated National Defence Legislation*, said pushing through a legislative “quick fix” by transferring the minister’s appeal powers to the director of military prosecutions (DMP) —

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who reports to the judge advocate general (JAG) — would not rectify the many contradictions and flaws in the Canadian military justice system.

The problems include that the training, promotions, assignments, postings, and non-renewal of service of frontline military prosecutors (and defence counsel) depend on decisions by the advocate general — who is appointed at pleasure of and reports to the defence minister, he explained.

“I think it’s just the tip of the iceberg,” Drapeau told *The Lawyers Weekly*. “The military justice system in Canada is broken, [and]...behind the times in a substantial way.”

The three judges deciding *Gagnon* suspended their declaration of invalidity for six months. That leaves the new Liberal government scant time to enact new legislation.

At press time, the Department of National Defence (DND) declined to say whether Defence Minister Harjit Singh Sajjan will try to appeal *Gagnon* to the Supreme Court.

However seeking leave might not be straightforward since the defence minister’s right to appeal to the Supreme Court from a CMAC decision, under s. 245(2) of the NDA, is also under attack at the top court by military defence counsel in a second Charter challenge — *Cawthorne v. The Queen* — that also contends that the minister lacks prosecutorial independence.

According to the CAF’s director of military prosecutions “the minister of national defence, as represented by the director of military prosecutions, can seek leave to appeal the decision of the military appeal court to the Supreme Court of Canada by virtue of s. 245 of the NDA.”

Such leave must be filed with the Supreme Court within 60 days of the decision,” Colonel Bruce MacGregor told *The Lawyers Weekly* via email.

He added, “the effect of the declaration has been suspended...to June 21, 2016, which will preserve the minister of national defence’s ability to seek leave to appeal while allowing Parliament to formulate and pass an appropriate legislative response if applicable.”

If Ottawa does nothing within six months, military prosecutors will no longer be able to appeal to the military appeal court — not a road the majority Liberals are expected to take.

However, no legislative response would be the best-case scenario for the two respondent military members in *Gagnon* who face separate prosecution appeals from the dismissal of their sexual assault charges in the military courts below.



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The military appeal court made the declaration of invalidity in an interlocutory decision in response to a preliminary defence motion to quash the minister's appeal notices because his appeal power is unconstitutional.

In a move described by defence counsel as "very novel," rather than granting the respondents a remedy dismissing the defence minister's appeals, the judges made and suspended the constitutional declaration, and then adjourned the cases, to be resumed for argument on the merits if Parliament passes a new law enabling the appeals to go ahead. Depending on what Parliament does, a new defence challenge could emerge if the cases resume.

The military appeal court ruled that it is a Charter principle of fundamental justice that a prosecutor must be independent, and make his or her decisions free from political or other extraneous considerations — the most explicit appellate recognition of that principle to date.

"The minister is at the top of the chain of command of the Canadian Forces" yet "the military justice system must be independent of the chain of command," reasoned Justice Cournoyer.

Seventeen years ago, that concern (among others) prompted retired Supreme Court of Canada Chief Justice Brian Dickson to categorically recommend in his Report on the *Quasi-Judicial Role of the Minister of National Defence* that "the minister should not be involved in prosecution decisions," including appeals.

Dickson advised the Liberal government of the day to transfer to an independent director of military prosecutions the defence minister's ss. 230.1 and 245(2) NDA powers of appeal to the military appeal court and Supreme Court.

Instead, the Liberals passed amendments (Bill C-25) in 1999 that put some institutional separation between the investigative, prosecutorial, defence and judicial functions of the military justice system, but which did not fully eliminate the defence minister's quasi-judicial role.

Drapeau argues *Gagnon* should spark a much broader rethink and reform of the military justice system.

"The rights of our soldiers are significantly diminished by serving in the military," he said. "A member facing a court martial does not have a right to a jury trial...whether it's a sexual assault, or whatever serious criminal offence. What they have instead is a panel of five officers selected by the military."



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Other aspects of the civilian criminal justice system notably absent from the military justice system include hybrid offences, preliminary inquiries and suspended sentences. Moreover in summary trials, where an accused may face detention, there are no rules of evidence, no right to counsel, no transcript and no appeal, he said.

“There is a wide, wide, wide gulf between what is taking place in...[many] countries including Britain, and Canada,” Drapeau remarked. “We are more U.S. than the U.S. in our administration of martial law, and that seems to make no sense to me.”

Whatever changes happen in the wake of *Gagnon*, the military appeal court’s decision has broken important new constitutional ground, say the respondents’ counsel, Lieutenant-Commander Mark Létourneau and Lieutenant-Colonel Jean-Bruno Cloutier — the same defence team piloting the Charter attack in *Cawthorne*.

Not only did the military appeal court recognize that prosecutorial independence is a s. 7 Charter principle of fundamental justice, but it went on to strike down a provision based on the lack of prosecutorial independence — a Canadian first, they said.

“No law has ever been declared unconstitutional on the basis of a violation of this principle,” Létourneau told *The Lawyers Weekly*.

Cloutier said the reasoning on prosecutorial independence applies equally to the defence minister’s parallel power in s. 245(2) of the NDA to appeal military appeal court decisions to the Supreme Court of Canada.

“Why should a military member not be entitled to an independent prosecutor, an independent judiciary and an independent bar?” — just as he or she is in the civilian justice system, Cloutier queried. “I have never heard any evidence, or read anything, that would support...to have a [justice] system that doesn’t meet those requirements.”

SCC could topple landmark decision on without-cause dismissals

Jennifer Brown, Canadian Lawyer Magazine, January 18 2016



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Almost a year to the date the Federal Court of Appeal overturned almost 40 years of arbitral law, tomorrow the Supreme Court of Canada will hear Joseph Wilson's leave to appeal the decision in *Wilson v. Atomic Energy Ltd.*

Last February, management-side labour and employment lawyers called the Federal Court's decision in the case involving former Atomic Energy of Canada employee Joseph Wilson a "victory" for federally regulated employers such as banks, telecommunications companies, and certain transport agencies.

It signalled employers in those sectors now had more flexibility in the right to "hire and fire" non-unionized, federally regulated workers.

The appeal court dismissed arguments that federally regulated employees can only be removed with just cause. It reportedly resolved a long-standing divergence in the case law. It is hoped the SCC will resolve the debate once and for all.

Wilson alleged he was unjustly dismissed because he had complained about improper procurement practices on the part of AECL. He refused to sign a release granting him six months' severance (under the Canada Labour Code, he would have been entitled to just 18 days severance for his 4.5 years on the job). He remained on the payroll until the severance period ended, at which time he brought an arbitral motion under the code alleging unjust dismissal.

An adjudicator found in his favour, determining AECL could not terminate him without cause. The case went to the Federal Court of Appeal, which ruled in favour of AECL.

When the decision came down last year, many labour and employment lawyers said even if it did go to the Supreme Court they would be surprised to see a different outcome since, in their opinion, Justice David Stratas provided a well-reasoned and "exhaustive" decision.

However, others suggest the SCC will spend a lot of time on the standard of review as it tends to give administrative tribunals a principle of deference and will say the standard of review by the Federal Court was not correct.

Since *Dunsmuir v. New Brunswick*, the SCC has erred on the side of deference to administrative decision-makers.

Stratas applied a "correctness" standard that allows the court to substitute what it thinks is the right interpretation. However, Hendrik Nieuwland, of Shields O'Donnell MacKillop LLP, says



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since 2008 when it comes to labour relations issues, the SCC has indicated the standard of review by administrative decision-makers should be based on a “reasonableness” standard, which is much lower and allows for inconsistencies in decisions.

“If they ultimately apply the reasonableness standard, I think the chance of success for Wilson goes up exponentially,” says Nieuwland. “The outcome of the standard of review will be important from the perspective of who wins this case. If the SCC thinks the Federal Court of Appeal applied the wrong standard, I think Mr. Wilson wins.”

Wilson’s lawyers argue in their factum to the SCC that the appeal court’s interpretation discourages employers from providing reasons for dismissal: “With the burden of proof on the employee to prove the dismissal unjust in all cases where the employer asserts no cause, a prudent employer would avoid furnishing any explanation.”

Wilson believes he was dismissed in retaliation for whistleblowing on corrupt procurement practices. His lawyers argue the Federal Court decision created uncertainty in a regime that had operated well and shifts the burden of proof to the employee.

Wilson’s lawyer James LeNoury states: “When it comes to reprisal, while the employee bears the ultimate burden of proof, the creation of a right to a just dismissal without just cause legitimizes the employer’s silence when it comes to withholding reasons. Requiring reasons as the proper measure for just cause, on the other hand, ensures an employer’s corresponding silence can reasonably be construed to mean that, at minimum, the dismissal was arbitrary or, where the circumstances otherwise support such an inference, that it was motivated by reasons the employer prefers to conceal.”

Nieuwland says he doesn’t think that argument will fly and that the burden will always remain with the employer.

“If employers don’t give reasons, as they predict, it doesn’t help them — it makes it worse,” he says. “If they don’t give reasons, what a decision-maker is left with is I have reasons from the employee as Mr. Wilson did, and no reasons from an employer. The burden shifts to the employer to respond.”

However, Stratas’ decision does limit the remedies to employees in the federal sector that were available prior to the decision.

“You only get to employ the remedies if the termination is unjust, and if not just cause then we’re limited to bad faith conduct, and it’s hard to imagine that happening in a lot of cases,” he



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says.

In their factum submission, Wilson's lawyers also write:

“Mr. Wilson submits as a relevant consideration that AECL commenced its judicial review application prior to conclusion of the administrative proceeding. Joseph Wilson has not yet had the opportunity to present his case and argue that his dismissal was in retaliation for reporting workplace corruption. The intervening passage of time reduces the likelihood that evidence concerning reprisal will be as fulsome — the events grow more distant, memories fade, documents go astray, and witnesses move on. Even in the event of an affirmative finding of reprisal, meaningful remedial consequences are less likely in relation to distant events: personnel and/or organizational changes allow organizations to minimize the relevance of improprieties and culpability.”

For its part, AECL's lawyers argue the CLC's dismissal provision mirrors that of provincial employment standards.

It also argues the code's s. 240(1) unjust dismissal provision does not displace an employer's right to dismiss without cause. Rather, it simply provides an administrative regime that engenders greater flexibility, efficiencies, and remedial possibilities than what exists civilly to challenge both just cause and without cause terminations.

Appearing at the SCC as interveners in the case will be the Canadian Association for Non-Organized Employees, Federally Regulated Employers — Transportation and Communications, the Canadian Association of Counsel to Employers, as well as the Canadian Labour Congress. FETCO and CACE submit that the dismissal provisions do not prohibit an employer from terminating an employee without cause.

The CLC is putting forward two submissions — first that the Federal Court of Appeal's decision to apply a correctness standard of review on the basis of “inconsistency” was contrary to established precedent and wrong in principle. Second, that the adjudicator's interpretation of the unjust dismissal protections of the Canadian Labour Code as precluding an employer from dismissing without cause so long as it provides adequate notice was “not only reasonable but correct.”

It is expected the SCC's decision won't be released until later this year, leaving federally regulated employers and their in-house lawyers in a grey area where they should be aware of the risk that terminating without cause can still be challenged under the unjust dismissal provisions of the code.

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Supreme Court ponders whether, for some, job security is a legal right

Leslie MacKinnon, ipolitics.ca, January 19 2016

It is another potentially groundbreaking case: whether a federal non-unionized employee can be fired without cause, allowing a company to retain the power to dismiss someone it simply doesn't like.

Like similar cases before the Supreme Court of Canada last year — about the constitutional right to strike or the rights of RCMP employees to collective bargaining — the case of Joseph Wilson versus Atomic Energy of Canada has the potential to dramatically overturn almost 40 years of labour relations in Canada.

At heart is whether the Canada Labour Code gives non-unionized employees the same rights as union members over dismissal without cause. That's what the Code seemed to mandate in 1978 when it was amended by the then Liberal government to dictate that non-unionized employees with at least one year of service could not be dismissed without a reason.

The only exception is in the case of an economic layoff, where there is no work for the employee.

Two provinces — Quebec and Nova Scotia — have the same legislation in their labour codes, protecting employees from being fired without just or sufficient cause, although Nova Scotia's is limited to workers with at least 10 years on the job.

Opponents to Wilson's case insist the meaning of the Labour Code is that a non-unionized employee can be fired without cause as long as sufficient notice or severance is given. Otherwise, they say, the law "would impose unique and onerous restrictions on federal employees."

At stake are the rights of half a million federal non-unionized employees working for the banks, telecommunications and transportation companies and some Crown agencies.

Labour groups intervening in the top court case argue if the reasons for dismissal aren't apparent, labour tribunals should decide if the employee is to be either reinstated with back pay or compensated in some other way.



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Joseph Wilson started working for AECL, a nuclear energy Crown corporation, in 2005, and was eventually promoted to the position of procurement supervisor for tooling. In 2009 he was dismissed, and given a severance package of about six month's pay.

Wilson was 38, had a clean disciplinary record, and may have given up a good job to come to AECL or looked forward to a long career at the nuclear agency. Not only did he face what his lawyers say is the severe financial and psychological trauma of being fired — labour adjudicators liken job dismissal to capital punishment — he claimed he was let go for a reason AECL didn't want to admit: he'd reported corrupt procurement practices he'd witnessed to his bosses.

When Wilson demanded a reason in writing for his dismissal, as the Labour Code says he had a right to do, AECL's lawyer provided a letter, saying, "Joseph Wilson was terminated on a non-cause basis and was provided a generous severance package that well exceeded the statutory requirements." This, say Wilson's lawyers, "tells him nothing. It is not a denial his dismissal was related to his whistleblowing.... It only allows an odious inference."

Before the top court Tuesday, AECL's lawyer, Ronald Snyder, admitted, "In hindsight, reasons should have been included in that letter."

He didn't elaborate on the reasons for Wilson's dismissal, but presented a hypothetical case in which a legal secretary or an administrative clerk might gradually not be a good fit for a company any more.

"You find that there's a bit of personality change in the administrative clerk, not a reason to dismiss for just cause, but the relationship is not as comfortable as it once was, the rapport is not the same.... Now, (in Wilson's lawyers' view) you are saddled with these employees until they decide to leave. That is, they are to be treated as if they are unionized employees with permanent job security," Snyder told the court.

After a labour adjudicator found in Wilson's favour, AECL asked for a judicial review of the decision, a step that hasn't been taken since the Labour Code was changed in 1978.

The Wilson case reached the highest court after Justice David Stratas, writing for the Federal Court of Appeal, found a non-unionized employee can be dismissed without cause as long as "sufficient" notice, or pay in lieu of notice, is given. Stratus's decision led to him being named as one of 25 "most influential" in the 2015 legal field by Canadian Lawyer Magazine. "Many federally regulated organizations including banks, telecommunications and transportation companies view the decision a victory," the magazine said.

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The justices at the top court struggled with what Justice Michael Moldaver called notions of “just cause, a cause, or no cause.” What if, Justice Russell Brown asked Wilson’s chief lawyer, James LeNoury, an employer considers an employee “not a good fit, or didn’t like the cut of his jib?” Would there be a basis, he wondered, within the scheme to consider (those kind of) reasons that were given for termination?

“Well, that’s exactly what the scheme is, Justice,” LeNoury replied, explaining that during the last 35 years, under the Labour Code, thousands of unjust dismissals and the reasons for them have been judged by labour adjudicators, not courts. Until now.

The court reserved its decision.