

AJC in the news/L'AJJ fait les manchettes



DoJ hunger games

By Elizabeth Thompson, Canadian Lawyer Magazine, August 4, 2014

As the election returns rolled in on a cold January night in 2006, few Canadians were watching them more closely than the people who worked at 284 Wellington St. in Ottawa. Conservative Leader Stephen Harper had sent a chill through senior public servants a few days earlier when he reassured Canadians he couldn't do anything rash because the Liberal courts and the Liberal bureaucracy would keep him in check. At the federal Justice Department, that had officials more than a little concerned. "They were all reading the tea leaves and saying . . . this is going to be interesting," says one senior Justice Department official who traded anonymity for candor. "In their case, he doesn't like public servants and he doesn't like courts. Well, that seems to get us from two sides."

Life has indeed been "interesting" since then for the thousands of lawyers, paralegals, researchers, managers, and support staff who work in Canada's Department of Justice. While all ministries have been hard hit by the Harper government's relentless drive to cut costs and restore Canada to the balanced budget it inherited in 2006, some argue Justice has been hit harder than most.

→ In 2012, the Association of Justice Counsel, the union that represents an estimated 2,700 federal lawyers, negotiated its first collective agreement, which included a 15.25-per-cent salary increase, allowing federal government lawyers to catch up with many of their provincial counterparts. Despite the boost to their paycheques, however, insiders say morale in the DoJ is just about at rock bottom. Promotions are few and far between. Resources are shrinking almost as fast as the desk space. "Speaking with different members across the country, from different agencies and departments, morale is low," says former AJC president Lisa Blais. "People are working harder than ever with fewer resources. Depending on where they work, they are being questioned on expenses, on requests for professional development, on requests for leave."

In April, the department cut 20 per cent of its research budget, roughly \$1.2 million. Most of the eight legal research positions cut were in social sciences. "Previous legal research in the department sometimes caught senior officials off-guard . . . and may even have run contrary to government direction," said an internal report prepared for Deputy Minister William Pentney, obtained by the Canadian Press. The Justice Department's performance report showed there were

211 fewer people working for the department in the 2012/13 fiscal year than there were in 2004/05. Roughly half of the jobs cut have been lawyers.

Workforce adjustment, the government's bureaucratic euphemism for layoffs, claimed about 50 positions and, tragically and indirectly, one life. A lawyer in the aboriginal law section with pre-existing mental-health issues was pushed over the edge by the prospect of having to compete against his colleagues to keep his job and committed suicide. The tax law section lost 30 lawyers after a call went out for volunteers to leave. Another 17 lawyer positions were cut in the business and regulatory section in British Columbia.

→ Len MacKay, current president of the AJC, says budget cuts in other departments like the Canada Revenue Agency, have slowed the flow of cases to prosecute because investigators don't have the money to open files and conduct investigations.

Testifying before the House of Commons standing committee on justice and human rights in November, Pentney acknowledged Canada's DoJ has taken a hit. "There are real reductions. We are reducing our complement — and I'm not here to complain — and we are on a downward track. By next year, we'll have reduced by 330 staff, we'll have reduced our budget by \$68 million."

Nor is there any sign the reductions are going to stop anytime soon. The Justice Department's 2014/15 "Report on Plans and Priorities" revealed the government expects 400 fewer people to be working there by 2016/17 than there were in 2004 — down to 4,588 full-time equivalent positions from 4,989 when the Conservatives came to power.

In June, the department informed its staff that 65 lawyers and 15 managers would be cut by attrition over the next three years as part of its legal services review. Aboriginal law services will be "restructured and rationalized." Some services to government departments will no longer be provided or will be provided differently. There will be more use of technology to "streamline document production in litigation" and more use of paralegals.

The cuts in areas such as research and the decision to overhaul aboriginal law services are very much in keeping with an even bigger shift that has been going on within the four walls of 284 Wellington St. — a change that goes far beyond numbers and spreadsheets. Those changes go back to the first moment Stephen Harper's first justice minister, Vic Toews, walked through the door in February 2006. Understanding those early days is key.

Senior insiders on both the Conservative and public service side, who spoke with Canadian Lawyer on the condition they not be identified, paint a picture of a somewhat rocky relationship in the early days as two very different approaches to justice came face-to-face — particularly when it came to areas such as criminal law and human rights law.

The incoming Conservatives were wary of what many of them saw as Eastern elites, judicial activism, and a public service they believed had been serving a left-of-centre agenda for years. Many had railed in the past against the "Court Party" — reform-minded professionals,

academics, and interest groups who were using the Charter of Rights and Freedoms and the courts to achieve change.

On the other side was a Justice Department with a proud tradition of speaking truth to power dating back to Canada's first justice minister, Sir John A. Macdonald. Since the adoption of the Charter in 1982, the department had played a key role in overseeing the changes the Charter and Charter challenges were having on Canada's justice system and Canadian society. The Conservative government felt the department it had inherited from former Liberal justice minister Irwin Cotler was too focused on human rights and not enough on criminal justice. "The Department of Justice was basically the department of human rights," explains one senior Conservative. "Human rights law was everything. That is all they were doing. It was a very left-wing agenda. They had hired a lot of people, practically a whole floor full of lawyers, that were all human rights people."

One of the first things to be shut down when the Conservatives came to power was the Law Commission of Canada, which had a number of studies in the works on everything from policing and "what is a crime" to indigenous legal traditions, vulnerable workers, and the growing influence of international law on domestic law. "The loss of the Law Commission will deprive the government, Parliament, and the judiciary of independent advice from an entity that drew on the ideas of some of the best experts of various disciplines, including jurists, philosophers, criminologists, sociologists, economist etc.," Yves Le Bouthillier, the outgoing president of the law commission, told the Commons justice committee in November 2006. "More importantly, it will deprive Canadians of a non-partisan forum in which they were invited to debate fundamental questions for our society."

The Conservatives, however, saw it differently — particularly Harper and his chief of staff at the time, Ian Brodie. "That was just all left-wing propaganda stuff," explains one Conservative. "A useless waste of money." The government also took an axe to the Court Challenges Program, eventually backing off on the decision to cut funding for court challenges by linguistic minorities.

"The Court Challenges Program was just an industry of people who lived off this thing," the senior Conservative explains.

But the biggest difference between the Conservatives and the Justice Department has been a fundamental question of which should prevail: the Charter and the Constitution or the will of a democratically elected House of Commons.

In former minister Cotler's 2004/05 departmental performance report, there were 24 references to the Charter, sprinkled liberally through the 86-page document. In Justice Minister Peter MacKay's most recent 2012/13 performance report there was one lone mention of it, a passing reference to the need to ensure government legislation complies with the Charter. It's not an accident. Party insiders say Harper and other Conservatives consciously avoid mention of the Charter. "There's a thing in this party against putting the Charter up on a pedestal and everybody tugging a forelock as they walk by or genuflecting."

That fundamental difference in viewpoints has, at times, resulted in tension as a Conservative government with a tough law-and-order agenda and a Parliament-should-prevail attitude has had to work with a Justice Department steeped in the Charter. Where DoJ officials were used to offering the justice minister a certain range of options when giving advice, they suddenly found their usual range of options were rejected and they were being sent back to the drawing board. “We were in an uncomfortable period because we were debating things that in many instances we hadn’t been considering for a long time and there is no question there was a skepticism about the courts and an unwillingness to take as an automatic ‘well that shuts the argument down, you tell me there’s a risk the court may rule against it, that’s the end of it,’” recalls one source. “They wanted us to come back and say try harder. Come back with some fresh ideas. That’s fair. It was uncomfortable but it was fair.” The Conservatives, meanwhile, saw the Justice Department as deliberately dragging its feet and felt top officials disagreed with their law-and-order agenda. “The Department of Justice is far too prone to tell me why I can’t do something instead of how I can do it,” says a senior Conservative. “My argument . . . is I don’t want to know why I can’t do this. I want you to tell me how I can do it.”

The Conservatives were also less likely to be dissuaded by the prospect of their legislation being struck down by the courts. “I think they were prepared to accept a higher risk of a successful challenge than the previous government had been,” says one government source.

That willingness to risk Charter challenges was highlighted in 2012 when former Justice Department lawyer Edgar Schmidt took his own government to court, alleging the government wasn’t taking adequate steps to ensure laws it was adopting respected the Constitution.

Conservative insiders say the government also sensed the court and Chief Justice Beverley McLachlin were against them, and that they had received reports McLachlin had made negative comments about the Conservative government at social functions. That tension came to the fore in the spring when Harper publicly criticized McLachlin in relation to a call she made to the PMO regarding possible concerns of the appointment of a Federal Court judge (before Marc Nadon’s name actually came up) to the Supreme Court.

NDP Justice Critic Françoise Boivin says a higher risk of Charter challenges means a higher cost to taxpayers. “When you go to the Supreme Court, it’s not cheap.”

Cotler sees a lot of changes since he left the department. “The agenda has been much more of a crime-and-punishment agenda and the larger issues that a Justice Department can engage in and should engage in have not been part of it. For example, you take the Charter of Rights and Freedoms. We saw this as a centrepiece of our justice work.”

Cotler says the Charter transformed the lives of Canadians and took Canada from being a parliamentary democracy to a constitutional democracy but the Conservative government has tried to “marginalize it and mute it. This whole issue of the promotion and protection, not only of the Charter but the promotion and protection of human dignity as a central role of the minister and the department, seems to have been marginalized.” That marginalization also extends to the pursuit of international justice, the responsibility to protect doctrine or prosecuting international war criminals, he adds.

Cotler says the Conservatives continued the work he started to democratize the appointment of judges and to make appointments more transparent and inclusive and went forward with the appointment of Justice Marshall Rothstein that he was about to make when the government changed. However, where MPs were a minority on his selection panel, Conservative MPs now form the majority, he points out.

Public service insiders say they are concerned about the long-term impact of the changes in the Department of Justice — particularly the cuts, the lack of promotions, and the change in the work atmosphere for Canada's federal government lawyers.

→ MacKay agrees the DoJ is a different place than it was just a few years ago. "I think the public may have the view sometimes of the public service being a nice, cushy job and I think some people come to public service because it used to have a reasonable work/life balance. The trend is away from that now, if it was there at all, and people are working tremendously hard and it's not really being recognized."