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

Press Clippings for the period of June 16 to 23, 2014
Revue de presse pour la période du 16 au 23 juin 2014

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

# AJC in the News/L'AJJ fait les manchettes

## Federal justice department to cut 65 lawyers, overhaul services

**Elizabeth Thompson, iPolitics, June 20, 2014**

The federal justice department plans to cut 65 lawyers and 15 managers over the next three years in a bid to save $52 million, iPolitics has learned.

The Association of Justice Counsel, the union that represents 2,700 federal justice department lawyers, fears the cuts will result in fewer lawyers doing more work.

"We're hoping that it won't result in more stress and workload in our members offices but that is something we anticipate could happen," said AJC president Len MacKay.

"The effort is obviously for efficiency and there are some points that they are addressing that may in fact work out, but if they don't the morale in our offices, which is already low, may get lower."

The justice department says the changes being instituted following its Legal Services Review will rein in the growth in the department's spending and "ensure those services are fiscally sustainable in the long term."

"The measures in the proposals will reduce duplication of effort and increase the reuse of opinions and tools, adding consistency and quality," said justice department

spokeswoman Carole Saindon. “They will also provide for faster, more timely and effective services for litigation and advisory. Furthermore, business analytics will allow better business decisions and performance management.”

Saindon said the department plans to cut the positions through attrition between now and 2016/17.

The job cuts appear to be part of a sweeping overhaul of how the justice department handles its legal services.

According to a letter sent to justice department staff and obtained by iPolitics, the department wants to “restructure and rationalize” some areas such as aboriginal law services and work out new agreements with other government departments that use the justice department’s legal services.

Legal research services will be centralized. Virtual libraries will replace traditional ones.

The department wants to increase the use of paralegals and reduce the amount of time that lawyers have to spend on non-legal and corporate activities like paperwork.

There will also be a shift in the way the department approaches cases, the memo suggested with “more systematic use of dispute prevention and resolution mechanisms,” a move that could mean the federal government will be more eager to head off lawsuits or settle cases out of court.

MacKay said the news didn’t come as a complete surprise, given the government’s push to reduce costs but he had been hoping it wouldn’t mean further job cuts.

“Our initial reaction is that this is just another attack on federal lawyers, another hit that AJC members have to take. We have already lost almost 100 positions in our membership.”

MacKay said the AJC is hoping the cuts don’t lead to more outsourcing legal services to expensive private firms.

The announcement also comes in the middle of Public Service Week, when the government celebrates its employees, he noted wryly.

“It is going to greatly outweigh any free hot dog and pop we got this week from the office celebration.”

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LeDroit

# Le ministère de la Justice abolit 80 autres postes

**Paul Gaboury, Le Droit, le 20 juin 2014**

Le ministère fédéral de la Justice abolira un total de 80 postes au cours des trois prochaines années, résultat des compressions imposées aux services juridiques.

Les détails de ces nouvelles abolitions de postes ont été dévoilés jeudi.

Selon les informations avancées, un total de 65 postes de juristes seront abolis, de même que 15 postes de gestionnaires. La majorité des abolitions se feront à partir de 2015-2016. Le gouvernement espère ainsi réaliser des économies de 52,2 millions $ sur trois ans.

À l'Association des juristes de justice (AJJ), syndicat représentant 2700 avocats fédéraux, la nouvelle a été reçue comme une autre tuile, dans le contexte où on dénonce déjà une surcharge de travail résultant d'abolitions précédentes.

On ne sait pas encore où les postes seront abolis, mais 78 % de l'effectif de l'AJJ travaille dans la région de la capitale nationale.

**Des avocats surchargés**

Joint vendredi à Halifax, le nouveau président de l'AJJ, Len MacKay, n'était pas encore revenu de la nouvelle, annoncée en pleine semaine nationale de la fonction publique, une célébration organisée par le gouvernement pour souligner le travail de ses employés.

Le président du Conseil du Trésor avait fait de même, l'année dernière, en annonçant des changements au régime de congés de maladie.

«C'est une autre attaque envers nos membres, après les abolitions déjà annoncées. Le gouvernement organise une semaine nationale pour souligner le travail de ses employés et en profite pour annoncer des abolitions de postes. Voilà la récompense que nous recevons...», a commenté le président de l'AJJ.

Peut-être sera-t-il possible d'abolir les postes par attrition, mais la surcharge de travail et la menace de recourir à des avocats du privé pour exécuter le travail à un coût plus important sèment l'inquiétude chez les membres, explique M. MacKay.

«On nous dit que la majorité des réductions devraient être accomplies grâce à une redéfinition des partenariats du ministère de la Justice avec ses ministères-clients, par l'entremise de la rationalisation additionnelle de ses activités et par la gestion du

rendement organisationnel, a expliqué le président MacKay. Le gouvernement demande donc à nouveau à ses avocats, déjà surchargés, de faire plus avec moins.»

Au cours de la dernière année seulement, 67 membres de l'AJJ travaillant au ministère ont vu leur poste aboli.

«Nos membres sont fatigués et leur moral est au plus bas. Les cas de congés de maladie liés au stress sont de plus en plus nombreux. Lorsque ces autres postes seront abolis, la quantité de travail que nos membres devront faire sera encore plus importante. Ils seront donc encore plus surchargés. Et dans notre profession, nous ne pouvons faire des compromis sur l'éthique; il faut continuer à faire notre travail.»

**Déjà en négociation**

L'AJJ a déjà amorcé les négociations en février, mais elles progressent lentement. Les prochaines rencontres auront lieu à la fin juillet ou au début août.

Comme l'a déjà annoncé le gouvernement, le régime de congés de maladie est au coeur de ces négociations, comme pour le reste des autres conventions qu'il doit renouveler au cours de la prochaine ronde.

Un total de 27 conventions collectives de la fonction publique fédérale doivent être négociées avec 17 différents syndicats au cours de cette ronde.

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# Editorial: Peter MacKay and the mystery of the missing female judges

**The Globe and Mail, June 22, 2014**

Let's start with some indisputable facts: In Canada, one in five citizens belongs to a visible minority. Women and girls comprise just over half of the country's population. Yet the number of individuals from these groups being selected to serve on the federally appointed judiciary by the Conservative government are, respectively, almost nil and pathetic.

The striking lack of diversity among superior court judges is hardly a new phenomenon. In the past 5 1/2 years, Ottawa appointed just a handful of non-white judges out of the nearly 200 first-time justices it has named to the bench, according to a Globe and Mail and University of Ottawa analysis. Female judges account for 383 out of 1,120 judges on federally appointed courts. These numbers raise deeply troubling questions of how justice in this country can be properly served by a bench that is, overwhelmingly, a white, male

bastion. The appointment process itself is disturbingly opaque. Judges are appointed behind closed doors, with virtually no information given as to the reasons why.

Arguably, the best person in the country to offer insight into the process of federal appointments and why the process produces such a demographically skewed judiciary is Justice Minister Peter MacKay. But when asked about the lack of women and visible minorities on federally appointed court benches at an Ontario Bar Association meeting last week, he apparently offered what amounted to a feeble, sexist explanation: Women don't apply to be judges because they fear the job will take them away from their children – and their children need mothers more than their fathers: "At early childhood, there's no question, I think, that women have a greater bond with their children."

Mr. MacKay, a new father, is entitled to his opinion. However, he has offered no evidence that his statement is grounded in fact. The Office of the Commissioner for Federal Judicial Affairs does not track the numbers of visible-minority appointees. When it comes to women, the disproportionately low number of judicial appointees does not reveal the number of women who apply. Nor do the data attempt to capture the reasons why women don't. Mr. MacKay has yet to offer an explanation why the number of minority judges is so shockingly low, when several surveys suggest the pool of qualifying candidates is hardly shallow.

Ottawa should track the numbers of visible-minority and female judicial applicants. Canadians shouldn't have to rely on Mr. MacKay's conjectures to understand the reasons behind the lack of diversity. Unfortunately, without a more open and transparent selection process, we have no choice.

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# Peter MacKay tries to explain lack of diversity on federal courts

**When asked about the dearth of women and visible minorities on federally appointed courts, Justice Minister Peter MacKay stunned several lawyers at a meeting in Toronto when he said they just "aren't applying" for the jobs.**

**Tonda MacCharles, Toronto Star, June 18, 2014**

OTTAWA —Justice Minister Peter MacKay stunned several lawyers at a meeting in Toronto when he appeared to turn aside a question about the dearth of women and visible minorities on federally appointed courts, saying they just "aren't applying" for the jobs.

MacKay went on to say women fear an “old boys” network on the bench would dispatch them on circuit work to hear cases in courthouses across a region — a prospect he described as unappealing for women with children at home.

According to people in attendance last Friday, MacKay said that as a new father he understands women’s reluctance to leave their children because, while he didn’t want to downplay the role that fathers play, women have a special bond with their children.

Several of the men and women at the meeting of the Ontario Bar Association’s council described the remarks to the Star variously as “disappointing,” “bizarre,” “frustrating” or “offensive.”

In the first instance, they said the answer failed to address the issue of diversity. Secondly, they suggested it was presumptuous if not insensitive, and thirdly it betrayed a lack of understanding of, or commitment to, the goal of making the judiciary more representative, they said.

The Ontario Bar Association recorded the session, but refused to release the audio to the Star, saying it was a “private meeting.”

MacKay’s office said it did not have a transcript and declined to urge the OBA to release the recording.

Arleen Huggins, president of the Canadian Association of Black Lawyers, said she asked the Conservative minister in charge of federal appointments to superior trial and appellate courts across the country what steps the government would take to address the lack of diversity and of visible minority judges on the bench, using the example of initiatives it took to boost the number of women in the past.

“His response was then exclusively focused on women,” she said.

Ottawa lawyer Jonathan Richardson said MacKay’s “immediate answer was, ‘Yes there should be more,’ but that ‘they simply aren’t applying.’ ”

Huggins, Richardson and Ottawa lawyer Juliet Knapton recalled MacKay went on to tell the audience of several dozen lawyers, as Richardson put it, he “believed some women would be discouraged from seeking to be judges because of a fear of circuiting . . . because he believed the old boys’ network among the judges — that’s the exact phrase he used — would make these new women judges go circuit. And then this would take them away from their children.”

“He said he now sees the bond that mothers have with their children. And I was just gobsmacked,” said Richardson.

“Firstly, I’m a new father, I’ve got an 11-month old, so who is he to judge which of my wife or I has a more special bond with our child — I’d say it’s absolutely equal. Secondly, who is he to judge what bond any woman may have with her children, or any other potential judicial applicant may have with his or her children?

“It just seemed to be this attitude of, ‘We don’t want to be taking you away, therefore we can justify appointing men to the bench,’ — it just seemed this bizarre justification.”

To Knapton, who has just been re-elected to the Ontario Bar’s council but is now on maternity leave with newborn twins, MacKay “really didn’t deal with the issue of race or aboriginals or any of the other sorts of groups that we would like to see reflected on the bench so that we have a bench that’s more diverse and reflects the population of this province.”

She was “irked” by the fact MacKay turned the discussion into an issue not just “about gender but about motherhood,” with “the whole push of himself as a new father and somehow evangelicizing women” in his references to a “special bond between a mother and a child that is different from a father.”

Huggins said she was “disappointed” and “extremely frustrated” by MacKay’s replies, including when he was asked a follow-up question by someone else about whether the government would commit to being bound by the candidates put forward by a federal judicial advisory committee — just like the provincial government which is mandated to select judges for provincial courts from a list put forward by the provincial advisory committee.

She said MacKay appeared to suggest the process was much improved because there is more diversity on the judicial advisory committees themselves. However, he made no commitment to pick from a slate.

Indeed, said Huggins, MacKay had no factual basis in the first place to suggest visible minority candidates “are not applying” for seats on the bench because there is no information that the government keeps such statistics.

“They may be applying in droves for all we know, but there is no statistical data that is being kept,” said Knapton.

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# Forget MacKay, a woman’s place is on the bench

**ROSEMARY CAIRNS WAY, ADAM DODEK, CARISSIMA MATHEN AND LORNE SOSSIN, Contribution to The Globe and Mail, June 20, 2014**

Rosemary Cairns Way, Adam Dodek and Carissima Mathen are professors at the University of Ottawa’s Faculty of Law and members of its Public Law Group. Lorne Sossin is Dean of Osgoode Hall Law School

Friday, June 13, was a bad day for women who aspire to be judges in this country. It was also a bad day for all Canadians, who legitimately look to the federal government and the Minister of Justice for leadership in advancing the values of inclusion and equality in our justice system.

On June 13, the Harper government announced eleven judicial appointments. Ten were men. The ratio (more than 9:1) continues a disturbing pattern highlighted earlier this year by Prof. Rosemary Cairns Way. Ms. Cairns Way, who examined all of the Harper government's judicial appointments since 2012, found that the appointment of women continued to lag far behind that of men. In fact, the chief actuary has recently pushed back the date on which he assumes that gender parity will be achieved – to 2035.

The government's track record continues apace at the Supreme Court of Canada, where since assuming power it has appointed eight justices, seven of them men.

On the same day as he publicized the appointments, Minister of Justice Peter MacKay attended an Ontario Bar Association council meeting. He was asked about the government's record, not just with respect to gender, but race and aboriginality as well. Ignoring the latter query, Mr. MacKay is reported to have said that women simply are not applying to be judges, because they fear being separated from their children by a hostile "boys club" that will force them to travel to far-flung locations We say: nonsense.

Federal judicial appointments are highly coveted positions. Judges are well-paid (earning more than $300,000 a year), they have a job until 75 and a superb pension. They remain highly respected by Canadians (notwithstanding the government's long-standing suspicion of them, as exemplified by its recent attacks on the Chief Justice of Canada.) Mr. MacKay essentially suggests that female lawyers have no judicial ambition. But where is his proof? The federal government's Office of Federal Judicial Affairs refuses to publish statistics about the number or breakdown of applicants. It can and it should. Consider Ontario, which does publish such statistics. Between 2006 (the year the Harper government came to power) and 2012, 299 women applied out of a general pool of 636; in other words, 47 per cent. And Ontario appointed 32 of those women to bench (out of a total of 72), or 44 per cent.

Can Mr. MacKay plausibly explain why this pattern would be markedly different at the federal level? We doubt it.

Mr. MacKay's comments perpetuate tired tropes about women, motherhood and professional ambition. Forget the fact that most women applying for or considering judicial office will be well past the stage where they are balancing a toddler on each hip. Forget that the reference to "riding circuit" dates back to times when judges traveled by horse and buggy (some Canadian superior court judges do travel, but none who sit on provincial courts of appeal or the Supreme Court of Canada). Even more troubling is that suggestion that women define themselves by motherhood. Not only is the claim sexist and unsupported by evidence, but it locates the fault for any disparity among women themselves.

Equally disturbing is the government's apparent lack of interest in other aspects of judicial diversity. Statistics from a 2012 Globe and Mail study combined with Ms. Cairns

Way's recent findings suggest that the appointment rate of aboriginal judges hovers at 1 per cent, while the appointment of members of visible minority communities is an abysmal .5 per cent. Clearly, ensuring that the judiciary reflects the community it serves is not a priority for this government.

Make no mistake – the failure to appoint women to the bench is not "a women's issue". It affects us all. It is not the fault of women, either. It is a pattern by a government hostile to the judicial role and apparently indifferent to pervasive patterns of under-representation in our judiciary.

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# Peter MacKay — the kamikaze justice minister: Hébert

**It takes an uncommon degree of societal tone-deafness to assert that women are too busy raising children to apply to be judges**.

**Chantal Hébert National Affairs, Toronto Star, June 20, 2014**

When it comes to assessing the performance of Justice Minister Peter MacKay, one of the main Conservative actors of the just-concluded parliamentary season, the first question is where to start?

Should item one on the list be the minister's Internet surveillance bill, a proposed law whose intrusiveness may not pass muster with the courts?

Bill C-13 would give telecommunications and Internet providers legal immunity for voluntarily handing over their customers' private data to law enforcement agencies.

Privacy experts — including the just-appointed federal information commissioner Daniel Therrien — have called on the government to take the more contentious sections of the legislation back to the drawing board.

Conservative ministers have a history of ignoring contrary expert advice, especially if it runs against the grain of the party's base.

But in this instance, the justice minister will find no solace in the notion that he is taking a hit for the team for, according to a just-released Forum Research poll, a majority of Conservative supporters dislike his bill.

Then there is the prostitution bill that MacKay brought forward last month.

It was never going to be doable to satisfy every party in the prostitution debate. But this bill was brought in with a minimum of public or bipartisan discussion.

It is not clear that it is more Charter-proof than the struck-down law it seeks to replace. Since the government will not ask the Supreme Court for an opinion, it might take years of litigation to get a definitive answer.

The messed-up appointment of Federal Court Judge Marc Nadon to the Supreme Court last fall was unprecedented, as were subsequent Conservative insinuations that Chief Justice Beverley McLachlin had somehow crossed a line in the matter and MacKay had a central role in the episode.

That being said, it is a rare member of any cabinet that survives without being a good soldier. When it comes to government policy, no minister is an island and one's power of initiative is constrained by the collective will of the government and the commands of the prime minister.

But flying solo — far from showcasing MacKay's acumen — seems to bring out the kamikaze in the minister.

It takes an uncommon degree of societal tone-deafness to assert, as MacKay did, that women are too busy raising children to apply to the federal bench . . . and to double-down on the statement by prescribing that, in their early years, children need their mothers more than they do their fathers.

That prompted a tweet from MacKay's Quebec counterpart Stéphanie Vallée who noted that being a mother of two who commutes from Gatineau to Quebec City weekly did not make her a bad parent or a lesser justice minister

As it happens neither Ontario nor Quebec reports a paucity of female candidates for its provincial bench.

Moreover, it is common knowledge that, given a choice between equally able candidates of each gender for the Supreme Court, this government has defaulted to appointing male judges in all instances but one.

More than a few parents would also beg to disagree with MacKay's contention that mothers are more essential to the welfare of their young children than their partners.

That would be news to the 80 per cent of new Quebec dads who take advantage of the province's parental leave program to act as their infant's primary care giver for a number of months.

Work-family balance issues in a fast-evolving societal environment are not part of the ministerial brief of an attorney general. Neither, for that matter, is dispensing parental advice as the minister did this week when, as a father, he condemned the Liberal policy of legalizing marijuana.

If he insists on flashing his new parental credentials from his ministerial pulpit, MacKay might want to ponder the fact that many of the Liberal delegates who supported the pot legalization policy were parents who had a head start on him in raising teenagers in a world where marijuana is, in fact, available for the asking.

The justice portfolio has, on two notable Canadian occasions, been a springboard to national leadership. In this instance history is not in the process of repeating itself.

*Chantal Hébert is a national affairs writer. Her column appears Tuesday, Thursday and Saturday.*

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# New legal battle shaping up over Supreme Court judge

**SEAN FINE, The Globe and Mail, June 17, 2014**

The Conservative government is headed toward another legal battle – perhaps more than one – in its apparent pursuit of another judge for the Supreme Court of Canada.

Fresh from an unprecedented and unsuccessful six-month fight over its choice of a judge for the top court, the government appears to have chosen another judge from the source recently ruled ineligible – the Federal Court in Ottawa. This time, it has taken an intermediate step: It is moving a probable candidate from that court to the Quebec Court of Appeal effective July 1. This would make him eligible to be appointed to the Supreme Court when a Quebec seat opens in December with the retirement of Justice Louis LeBel.

On Monday morning, Rocco Galati, the Toronto lawyer who brought the appointment of Justice Marc Nadon to a screeching halt last October, filed a challenge to the appointment of Justice Robert Mainville to the Quebec Court of Appeal, and asked for a declaration that a subsequent Supreme Court appointment would be illegal.

Justice Minister Peter MacKay appeared to confirm that the government is indeed planning to appoint Justice Mainville, currently of the Federal Court's appeal division, to the Supreme Court, describing him as a judge who is worthy of the highest court in the land. "I believe his wealth of legal knowledge will be welcome at the Supreme Court and will be of significant benefit to the Quebec Court of Appeal," he told the Commons. Later, he said he did not not mean to refer to the country's top court.

The appointment of Justice Mainville, which a source said was worked out about a month ago, would help Ottawa avoid having to ask the Quebec government for a list of candidates, as it did this spring to replace Justice Nadon.

Justice Mainville, an expert in aboriginal law, was on the government's confidential list of six candidates for the previous vacancy, which was obtained by The Globe and Mail. Justice Mainville was also on the list of candidates for the 2012 vacancy, which was filled by Justice Richard Wagner, a source told The Globe.

In the new court challenge, Mr. Galati cited the fact that Justice Mainville was on the government's list of candidates the last time, saying in a court document that it highlights Mr. MacKay's "abuse of his office in circumventing the clear terms of the Constitution, and ruling of the Supreme Court of Canada, in his unconstitutionally obstinate insistence" on naming Federal Court judges to the Quebec courts and to the Supreme Court.

He pointed to Section 98 of the 1867 Constitution Act, which sets out that judges of the Quebec courts must be chosen from members of the Quebec bar, and said that in the Nadon case, the Supreme Court made it clear Federal Court judges are not members of the Quebec bar.

"This is just unbelievable, mind-staggering," he said in an interview. "This government either chooses to or likes urinating on the Constitution. They simply can't accept the ruling of the Supreme Court and they can't accept the clear terms of our supreme law." Three spots are reserved for Quebec judges on the Supreme Court to ensure current knowledge of the province's civil code. Justice Mainville practised law for three decades in Montreal before he was appointed to the Federal Court in 2009.

Justice Nadon had just been sworn in to the Supreme Court in early October when Mr. Galati filed his challenge. Justice Nadon stepped aside pending the outcome of the challenge. The government later asked the Supreme Court for an advisory opinion on the legality of the appointment. It ruled 6-1 in March that Federal Court judges are not eligible because they lack current Quebec qualifications as set out under the Supreme Court Act. The court was short one judge for 10 months, until last week, when Justice Clément Gascon of the Quebec Court of Appeal was sworn in.

Whether Justice Mainville will be sworn in to the Quebec Court of Appeal is not clear, and he did not respond immediately to a request through the Federal Court of Appeal for comment.

Legal experts interviewed in Quebec were not sure whether the appointment is legal. Some felt it is, saying that most judges on the Quebec Court of Appeal were appointed from the Quebec Superior Court, where they were not deemed members of the Quebec bar either. (Mr. Galati rejects this point, saying the move is a promotion, not a new appointment.) Justice Joseph Robertson of the New Brunswick Court of Appeal was appointed by a Liberal government from the Federal Court of Appeal in 2000. The wording that covered his appointment, found in Section 97 of the Constitution Act, is largely the same as that covering the appointment of Quebec judges in Section 98.

Even if the appointment is ruled legal, the Supreme Court would be asked to decide if a subsequent appointment to the top court met the spirit and letter of its ruling in the Nadon case.

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thestar.com

# Toronto lawyer tries to block another Harper government judicial appointment

## Rocco Galati filed a legal challenge Monday to block a move by the Conservative government to name a Federal Court judge to a Quebec judicial seat.

**Tonda MacCharles, Toronto Star, June 16, 2014**

OTTAWA — Toronto lawyer Rocco Galati filed a legal challenge Monday to block a move by the Conservative government to name a Federal Court judge to a Quebec judicial seat.

Anticipating a move to slide Federal Court of Appeal judge Robert Mainville into the next Supreme Court of Canada seat by first moving him to the Quebec Appeal Court, Galati filed a legal challenge Monday of his eligibility for either job.

Galati is seeking an injunction in Federal Court to block Mainville's swearing in as a Quebec Court of Appeal judge, and asking that Mainville not be named to the opening in November to fill retiring Justice Louis LeBel's vacancy until the legal issues have been decided.

Justice Minister Peter MacKay announced late Friday afternoon the transfer of Mainville from the Federal Court to the Quebec Court of Appeal.

Mainville's name surfaced as one of three names on the shortlist of candidates for an opening on the Supreme Court of Canada that his federal court colleague Marc Nadon won.

But Nadon's appointment was eventually invalidated by the Supreme Court of Canada after Galati challenged it, forcing Ottawa to refer the question of a Federal Court judge's eligibility directly to the high court.

The high court said the Constitution requires that judges for any of the three Quebec seats on its bench be chosen from among current members of the bar, or the Quebec Superior Court or Court of Appeal.

And any changes to the court's composition for Quebec representation could only be made via constitutional amendment with unanimous support of the provinces, the court ruled in March.

Last week, after railing against the decision for two months, Prime Minister Stephen Harper named Quebec Court of Appeal judge Clément Gascon to the opening Nadon was ineligible for.

However, Galati says the same reasoning the Supreme Court of Canada followed to invalidate the Marc Nadon appointment to the high court in March means Mainville cannot simply be transferred to the Quebec Court of Appeal.

In an interview with the Star, Galati said the Conservatives "simply can't do that."

In documents filed with Federal Court on Monday in Toronto, he cites s. 98 of the 1867 Constitution Act which says, in the French version, judges of Quebec courts "will be chosen from among the members of the bar of this province." Galati says Mainville "is not a member of the Quebec bar, but a judge of the Federal Court of Appeal."

Galati said s. 98 must be read along with s. 97 of the Constitution, a section originally set out to ensure that the common law regimes of each province, which initially differed quite a bit, were well reflected on the provincial trial and appellate benches. For the common-law provinces, those regimes are now all but indistinguishable, Galati argues, but Quebec's civil law regime is still distinct and separate. He said it is "actually an easier argument to make than in the Nadon reference" because the requirement to choose from the Quebec bar "is already constitutionalized."

"I'm beside myself," he said in an interview, adding that the appointed showed "no respect for the Constitution at all."

Furthermore, Galati writes that Ottawa is duty-bound to bring another reference to the high court to determine the matter in order to resolve the legal questions.

He cites MacKay for "abuse of his office" and failing in his duties as federal attorney general for "trying to appoint Federal Court (of appeal) judges, to the Quebec Courts, and as Quebec Judges to the Supreme Court of Canada, by any unconstitutional means possible."

MacKay is acting "contrary to his constitutional role as Attorney General and outside the scope of his authority, in his clear attempts not only to circumvent the constitutional requirements with respect to the appointment of Quebec judges, but also in subverting the rule of law in ignoring the ruling of the Supreme Court of Canada," argues Galati in documents filed in support of his challenge.

Galati also seeks any of the legal opinions sought or received by the offices Harper or MacKay regarding the shift of a Federal Court judge to the Quebec Court of Appeal.

University of Montreal law professor Paul Daly suggested on his blog that the Mainville appointment could be contentious although he disagreed with Galati about the strength of the legal argument.

"These arguments are, at first glance, weaker than those advanced in the Nadon reference. A Quebec Court of Appeal judge certainly satisfies the letter of the Supreme

Court Act. And s. 98 might be construed as including ‘former’ members of the bar. Certainly, s. 3 of the Judges Act takes that view, permitting the appointment of lawyers with 10 years’ service in the past and of current judges.”

Daly notes Mainville was “long a member in good standing of the Barreau du Québec” prior to becoming a judge.

“But, of course, the Judges Act would be trumped by the Constitution in the case of a conflict, and the question whether a brief stay on the Quebec courts allows a Federal Court judge to circumvent the criteria in the Supreme Court Act is one that can only be assessed on the facts of a particular case.”

Daly says the Quebec government “might consider referring the eligibility question to the Quebec Court of Appeal — a decision in which would probably not be reached before Justice LeBel replacement is named.”

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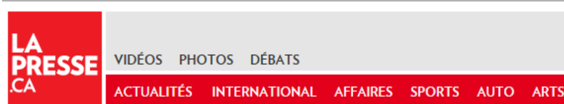


# Une nouvelle nomination judiciaire du gouvernement Harper contestée

**Hugo de Granpré, La Presse, le 16 juin 2014**

(Ottawa) Rocco Galati frappe encore. L'avocat de Toronto qui avait été le premier à contester la nomination du juge Marc Nadon à la Cour suprême du Canada demande à la Cour fédérale d'annuler une nouvelle nomination judiciaire du gouvernement Harper.

Le ministre fédéral de la Justice a annoncé vendredi après-midi la nomination de Robert Mainville, un juge de la Cour fédérale, à la Cour d'appel du Québec. Cette nomination a fait sourciller dans les milieux politiques et juridiques : en mars, la nomination de Marc Nadon comme l'un des trois juges du Québec à la Cour suprême a été invalidée parce qu'il s'est avéré inadmissible en tant que juge de la Cour d'appel fédérale.

Dans sa requête déposée à la Cour fédérale lundi, M. Galati affirme que cette nomination du juge Mainville à la Cour d'appel du Québec contrevient à l'article 98 de la Loi constitutionnelle de 1867, qui stipule que « les juges des cours de Québec seront choisis parmi les membres du barreau de cette province ».

L'avocat ajoute qu'il s'agit d'une « tentative claire [...] de passer outre la règle de droit en ignorant la décision de la Cour suprême du Canada ».

Il craint en effet que le gouvernement tente de faire indirectement ce qu'il ne peut faire directement en nommant le juge Mainville au plus haut tribunal du Québec d'ici quelques

mois. Un nouveau poste de juge du Québec sera à combler en novembre avec le départ à la retraite de Louis Lebel.

Cette crainte est accentuée par le fait que le nom de Robert Mainville se serait trouvé sur la courte liste des candidats du gouvernement Harper durant le processus qui a mené au choix de Marc Nadon.

M. Galati demande donc à la Cour d'empêcher ou d'annuler cette nomination, et au ministre de la Justice de renvoyer l'affaire directement à la Cour suprême pour lui demander son avis sur la constitutionnalité de cette nouvelle démarche.

Il propose enfin que l'affaire soit entendue à Toronto, à moins que la Cour fédérale n'en décide autrement.

Robert Mainville est originaire de Montréal et il a été nommé à la Cour fédérale en 2009. Il dirigeait auparavant le groupe de droit autochtone au sein du cabinet Gowling Lafleur Henderson. Il se spécialise également en droit administratif et constitutionnel.

La nomination du juge Mainville à la Cour suprême du Canada serait d'autant plus surprenante que les trois sièges québécois seraient occupés par des hommes et qu'aucun des trois magistrats ne proviendrait de la région de Québec, comme le veut la tradition. Stephen Harper n'a jamais nommé de Québécoise au plus haut tribunal du pays, malgré le départ de Marie Deschamps il y a quelques années.

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LE DEVOIR
Libre de penser

ACTUALITÉS OPINION CAHIERS SPÉCIAUX

# La nomination de Robert Mainville contestée en cour

**Marie Vastel, Le Devoir, le 16 juin 2014**

Et de deux. L'avocat torontois qui a contesté — avec succès — la nomination du juge Marc Nadon à la Cour suprême récidive. Cette fois-ci, Rocco Galati s'oppose à celle du juge Robert Mainville à la Cour d'appel du Québec.

Me Galati a déposé une contestation judiciaire à la Cour fédérale, ce lundi matin, dénonçant la nomination du juge Mainville à la Cour d'appel du Québec. Celle-ci contrevient à la Constitution, dit l'avocat, car le texte de loi prévoit que «les juges des cours du Québec seront choisis parmi les membres du barreau de cette province». Or, en devenant juge à la Cour d'appel fédérale, en 2009, le juge Mainville a automatiquement cessé d'être membre du Barreau du Québec.

Sa nomination ne tient donc pas, plaide Me Galati dans des documents déposés à la Cour fédérale et transmis au Devoir.

Qui plus est, Me Galati tente de bloquer le gouvernement fédéral sur un deuxième front en réclamant qu'en attendant que sa cause soit entendue, le juge Mainville soit déclaré «inéligible» à remplacer le juge québécois Louis LeBel à la Cour suprême en novembre.

Dans la saga de la nomination du juge Marc Nadon à la Cour suprême, le Globe and Mail avait fait état de la liste de juges qu'aurait soumis le bureau du premier ministre et le ministère de la Justice pour combler le poste du juge québécois Morris Fish au plus haut tribunal du pays. Quatre juges de la Cour fédérale y auraient figuré (un indice qu'Ottawa voulait d'un juge du tribunal fédéral à la Cour suprême). Dans le lot, le juge Nadon et le juge Mainville.

**Contournement**

«Le fait que l'honorable Robert Mainville était le troisième nom de cette 'courte-liste' dans la 'nomination Nadon' souligne l'abus que fait le Procureur général de son poste en contournant les termes clairs de la Constitution, et le jugement de la Cour suprême du Canada [sur le juge Nadon], avec son insistance inconstitutionnelle obstinée à nommer des juges de la Cour fédérale à des tribunaux du Québec, et en tant que juges du Québec à la Cour suprême du Canada, par quelque moyen inconstitutionnel que ce soit», écrit Rocco Galati dans sa contestation judiciaire partagée au Devoir.

Si le ministre de la Justice Peter MacKay est si convaincu que sa nouvelle nomination tiendra la route constitutionnelle, il a «le devoir de présenter une référence sur la question à la Cour suprême» somme l'avocat dans les documents de cour.

Le ministère de la Justice a annoncé discrètement sur son site Internet vendredi en fin de journée la nomination du juge Mainville à la Cour d'appel du Québec, prévue pour le 1er juillet. Le juge Louis LeBel prendra sa retraite et quittera le banc de la Cour suprême le 30 novembre prochain.

Au fil des révélations qui ont entouré la nomination du juge Nadon au plus haut tribunal du pays, le réseau Global avait fait état d'une rumeur — jamais infirmée — voulant que le bureau de Stephen Harper ait demandé au juge québécois de démissionner de la Cour d'appel fédérale pour devenir à nouveau membre du barreau du Québec — ce qui l'aurait alors rendu éligible à rejoindre la Cour suprême.

Fin mars, le tribunal a invalidé la nomination du juge Nadon, car il n'était pas un membre actif du Barreau du Québec.

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LA PRESSE .CA
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# La « manœuvre » Mainville

**Yves Boisvert  La Presse, le 18 juin 2014**

À première vue, ça sent la manœuvre : au mois de mars, la Cour suprême a dit à Stephen Harper qu'il n'avait pas le droit de nommer un juge de la Cour fédérale à l'un des trois postes « québécois » au plus haut tribunal au pays.

Un candidat à la Cour suprême doit être un avocat du Québec ou un juge de la Cour supérieure ou de la Cour d'appel.

Vendredi dernier, Ottawa nomme le juge Robert Mainville, de la Cour fédérale, à la Cour d'appel du Québec.

Résultat : si jeudi le juge Mainville n'était pas admissible à la Cour suprême, ce matin, il l'est. Ainsi, quand le juge Louis LeBel prendra sa retraite au mois de novembre, hop, on le remplacerait par le juge Mainville.

La théorie est d'autant plus crédible que le nom du juge Mainville circulait comme candidat potentiel – avant que la Cour fédérale ne soit officiellement « bannie » de candidature…

Le Globe and Mail a d'ailleurs révélé que le juge Mainville était sur la liste de six candidats soumise par le ministre de la Justice, Peter MacKay, au comité de sélection, en 2013. On se demande d'ailleurs comment on a pu préférer le juge Nadon au juge Mainville, un expert en droit constitutionnel et autochtone qui jouit d'une bien meilleure réputation – et qui n'est pas semi-retraité…

Est-ce vraiment le moyen de rendre le juge admissible ? « C'est aussi évident que la cause de mon embonpoint : je mange trop ! », me dit l'avocat Rocco Galati.

L'avocat, qui a contesté avec succès la nomination du juge Nadon, a déposé lundi (en Cour fédérale) une requête pour faire invalider la nomination du juge Mainville à la Cour d'appel du Québec.

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Son argument est simple : le texte de la Constitution (la Loi constitutionnelle de 1867) ne le permet pas.

L'article 98 stipule que « les juges des cours du Québec seront choisis parmi les membres du barreau de cette province ».

Lu littéralement, cela voudrait dire qu'on ne pourrait même pas « élever » un juge de la Cour supérieure à la Cour d'appel, qui est le plus haut palier judiciaire au Québec.

Galati dit cependant que les deux cours sont assimilables au plan constitutionnel et, donc, qu'on peut passer de l'une à l'autre, pourvu qu'on ait été nommé en provenance du barreau.

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Je doute que cette requête ait du succès, cette fois. L'affaire Nadon était fondée sur l'interprétation de la Loi sur la Cour suprême, qui énumérait les sources de candidature – en oubliant la Cour fédérale.

Cette fois, l'argument de Galati se heurte à la Loi sur les juges, qui dit qui peut être nommé juge à une cour de nomination fédérale : ou bien un avocat d'au moins 10 ans d'expérience, ou bien un ex-avocat ayant exercé « des fonctions de nature judiciaire ».

Donc, autant un juge de la Cour du Québec qu'un régisseur ou… un juge de la Cour fédérale.

Si Galati avait raison, d'ailleurs, il faudrait annuler la nomination de deux juges de la Cour d'appel qui sont issus de la Cour du Québec – donc pas directement du barreau.

Même s'il pense que ce sera « encore plus facile » que dans le dossier Nadon, je lui prédis donc beaucoup de difficulté avec cet argument.

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Tout ce passionnant débat juridique mis de côté, notons tout de même deux, trois trucs : d'abord, le juge Mainville a une très bonne réputation et, en soi, sa nomination n'est pas controversée du tout.

Deuxièmement, c'est effectivement à sa demande qu'il a été transféré à cette cour pour siéger à Montréal pour des raisons familiales – ça arrive.

Troisièmement, tout le monde, même les conservateurs, pense que le prochain juge du Québec à la Cour suprême sera… une juge. Il n'y a que trois femmes sur neuf juges, et les trois du Québec sont des hommes. En outre, la tradition veut qu'il y ait un juge de la région de Québec (le juge LeBel). Bref, son nom n'est virtuellement plus sur la liste. Bref, je ne crois pas à la manœuvre.

Stephen Harper s'est discrédité dans le dossier Nadon. Il a même été odieux avec la juge en chef. Mais pour l'instant, malgré les apparences et la tentation de lire un plan machiavélique, cette nomination n'a rien de choquant, et probablement rien d'inconstitutionnel non plus.

Quant à Rocco Galati, ce n'est ni sa première ni sa dernière contestation judiciaire au nom des principes constitutionnels. C'est lui qui a défendu les droits d'Omar Khadr, prisonnier à Guantánamo. Il ne se fera pas beaucoup d'amis supplémentaires à la Cour fédérale… « Je travaille pour la Constitution, pour mon pays, pour mes enfants, pas pour me faire des amis. Même ma mère était fâchée contre moi ! »

Ce contradicteur est achalant, mais il ne me déplaît pas du tout.

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# Unions ask members to boycott Public Service week

**KATHRYN MAY, Ottawa Citizen, June 16, 2014**

Unions are boycotting the national Public Service Week — which they lobbied to create more than 20 years ago to celebrate the accomplishments of federal bureaucrats — to protest against the Conservatives' attacks against labour and reductions in services.

Public Service Week quietly kicked off Monday with praises from Gov. Gen. David Johnston, Prime Minister Stephen Harper and Privy Council Clerk Wayne Wouters for workers' contributions, while unions posted appeals to members to boycott the week's events.

It's the first time all 17 unions have agreed to boycott and it's unclear how many of their members will follow suit.

The move comes as unions ramp up for a much-anticipated showdown over sick leave and disability at the upcoming round of negotiations.

A new sick leave regime, coupled with a sweeping new set of ground rules for collective bargaining, was the final push for unions' decision to withdraw from events. The new rules significantly reduce the bargaining clout of unions and puts Treasury Board in the driver's seat.

The unions have still never got over last year's National Public Service Week when Treasury Board President Tony Clement decided to announce his sick leave reforms, as part of a drive to reduce absenteeism in the public service, on the kickoff of the week's events. He infuriated public servants with estimates that public servants annually take 18.2 days off work with illness and injury — a number that the Parliamentary Budget Office concluded inflated the actual time off in paid sick leave.

Public Service Week began under the Mulroney government. The idea came from the Professional Institute of the Public Service of Canada (PIPSC) and was adopted in a private member's bill by former Liberal MP Marlene Catterall.

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LeDroit

# Un appel au boycottage des activités

**Paul Gaboury, Le Droit, le 16 juin 2014**

La Semaine nationale de la fonction publique, qui souligne le travail des 400 000 fonctionnaires fédéraux travaillant partout au pays et à travers le monde, se déroule encore cette année alors qu'un appel au boycottage des activités a été lancé par des syndicats du secteur public fédéral.

Créé en 1992, l'événement qui se déroule jusqu'au 21 juin se veut l'occasion pour les ministères et organismes fédéraux de reconnaître la valeur des services rendus par les employés de la fonction publique fédérale et de souligner leur contribution à l'administration fédérale.

«Le gouvernement du Canada ne fonctionnerait pas sans l'engagement des personnes qui forment la fonction publique» a indiqué par voie de communiqué le premier ministre Stephen Harper dans son message à l'occasion de la Semaine nationale de la fonction publique.

«Elle constitue une période idéale pour être créatifs et inclusifs, alimenter la fierté dans notre propre collectivité et établir des partenariats avec d'autres collectivités. Nous sommes persuadés que, grâce à votre travail acharné et à votre enthousiasme, la Semaine de 2014 connaîtra autant de succès que par les années antérieures» a indiqué pour sa part le greffier du Conseil privé, Wayne Wouters.

Mais leur optimisme et leurs bons mots tombent à un moment où la fonction publique fédérale vit des moments difficiles avec des compressions budgétaires et une vague d'abolitions de postes. Elle survient aussi au moment où les syndicats se préparent à négocier le renouvellement de 27 conventions collectives des employés de l'État fédéral.

À l'Institut professionnel de la fonction publique du Canada, la présidente Debi Daviau a rappelé à ses membres pourquoi ils devraient boycotter l'événement cette année.

«Pour la première fois depuis 1993, l'Institut boycottera les activités officielles de la Semaine nationale de la fonction publique pour s'opposer aux attaques continuelles menées par le gouvernement Harper contre les employés de la fonction publique et leurs syndicats, a indiqué la présidente Daviau.

Elle souligne que le conseil d'administration de son syndicat n'a pas pris la décision de la boycotter «à la légère» en raison de la relation de longue date avec la Semaine nationale de la fonction publique «que nous avons conceptualisée, défendue et à laquelle nous avons participé tous les ans» a-t-elle expliqué.

Parmi les mesures que le gouvernement a prises justifiant ce boycottage, le présidente Daviau a nommé la décision du gouvernement de «court-circuiter» les négociations en annonçant qu'il remplacera les congés de maladie négociés par un nouveau régime d'invalidité de courte durée, dont l'administration sera impartie à une compagnie d'assurance privée.

«De plus, après avoir déjà supprimé 19 000 emplois, il a promis de faire augmenter le taux de licenciement des employés fédéraux, et a appuyé une loi visant à rendre plus difficile la formation de syndicats et plus facile la révocation de leur accréditation. Il s'est arrogé le pouvoir de rendre les grèves illégales et de priver à volonté les syndicats du droit d'aller en arbitrage lors des négociations», a-t-elle souligné.

«Même si les membres du CA et moi même, par solidarité avec les autres syndicats de la fonction publique fédérale, n'assisteront pas aux activités de la SNFP, nous comprenons que beaucoup de nos membres puissent ne pas être placés pour refuser d'y participer. Que les membres choisissent ou non de boycotter, nous espérons qu'ils pourront saisir l'occasion de faire reconnaître symboliquement le respect que tous les employés de la fonction publique et leurs syndicats méritent».

Tous les membres de l'IPFPC sont invités à porter des insignes distinctifs au cours de la semaine.

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# Le régime de retraite du fédéral loin d'être trop généreux

**Paul Gaboury, Le Droit, le 18 juin, 2014**

Le président de l'Association canadienne des employés professionnels, Claude Poirier, s'est porté encore une fois à la défense du régime de retraite de la fonction publique, qui n'est pas aussi généreux qu'on le dit et qui devrait être analysé sur la base de ses performances à long terme.

À la tête d'un syndicat dont l'effectif est composé de plus de 11 000 économistes et autres professionnels du secteur public fédéral, M. Poirier soutient que le régime de retraite des employés fédéraux fait l'objet d'attaques qui ne sont pas justifiées, ce qui inclut celle venue récemment du vérificateur général Michael Ferguson, qui a recommandé des changements à la gouvernance du régime.

«Le plus souvent, ce sont des organisations idéologiques comme l'Institut Fraser ou le CD Howe Institute qui s'en prennent à la capitalisation ou à la solvabilité de ce régime, sans toutefois étayer leurs accusations de faits vérifiés et vérifiables. Plus récemment, le

vérificateur général du Canada mentionnait qu'il souhaitait des changements sur la gouvernance du régime. Mais le plus souvent, toutes ces analyses oublient d'évaluer les performances à long terme du régime, seule manière valable de faire une telle évaluation», soutient M. Poirier.

Avec 40 % de la population qui a accès à un régime de pension fourni par l'employeur, il peut sembler facile de pointer du doigt les fonctionnaires et leur régime trop «généreux», note le président de l'ACEP.

«Pourtant, chaque fois qu'on compare le régime de retraite de la fonction publique, il faut se rappeler que ses bénéficiaires reçoivent à 65 ans, comme tous les Canadiens, leurs prestations du régime de pension du Canada ou du Régime des rentes du Québec, note M. Poirier. À ce moment, les prestations de retraite puisées du Régime de retraite de la fonction publique sont réduites d'un montant équivalant à la rente payée par le RPC-RRQ.»

De plus, même le président du Conseil du Trésor véhicule des faussetés sur le régime de retraite, selon M. Poirier. Lors d'une récente entrevue accordée au sujet des négociations à venir, M. Clement a assuré que la question du régime de retraite ne sera pas discutée à la table des négociations.

«Le président du Conseil du Trésor doit certainement être au courant que la législation fédérale empêche la négociation de bonne foi du régime de retraite, tout comme sur les questions de classification et de dotation. Laisser entendre que la réforme des retraites n'est pas à l'ordre du jour des négociations est trompeur», ajoute M. Poirier.

Alors que les instituts CD Howe et Fraser présentent les régimes comme étant trop généreux pour être viables à long terme, «le portrait réel est différent», fait valoir le président de l'ACEP.

«Les analyses du régime sont toujours effectuées sur une période trop courte, ce qui fausse l'évaluation. Il faut les évaluer, comme le font les actuaires, sur le long terme. C'est une erreur qu'a commise le vérificateur général dans son rapport», dit-il.

Selon M. Poirier, le partage 50-50 des coûts du régime fera en sorte que les employés devraient avoir «une place égale» sur le conseil d'administration du régime de retraite pour influer sur les décisions d'investissement et de gouvernance.

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# Respect the public service

**Comment by Tom Mulcair, Ottawa Citizen, June 20, 2014**

On public service week, it is fitting to see a spirited debate in these pages about the role of the public service and its relationship to the government it serves.

I have had the rare privilege of serving on both sides of this relationship. Over the course of my 30-year career in public service I have had the opportunity to serve at the deputy minister level in Quebec's civil service, as a minister in the provincial government, and currently as leader of Canada's official Opposition.

These experiences gave me a deep respect for the professionalism and non-partisanship of the public service, as well as an understanding of the prerogatives of the elected government. I saw first-hand how providing good public administration depends on mutual respect and understanding each other's roles.

Unfortunately, it is obvious to any careful observer that the current relationship between the federal public service and the current government has become fraught with problems and characterized by a lack of respect.

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# Federal executives lack training, flexibility, expert says

**BY KATHRYN MAY, OTTAWA CITIZEN, JUNE 18, 2014**

The problem behind the "crisis" in the relationship between ministers and public servants is that senior executives don't have the training to handle the toughpolicy and management issues facing governments today, says a former deputy minister.

Ruth Hubbard, who is also a former president of the Public Service Commission, said senior executives are smart, engaged and committed but don't have the "ability to serve the government of the day as well as Canadians have a right to expect."

Hubbard draws her conclusions from a series of confidential discussions she and University of Ottawa Prof. Gilles Paquet held with more than 100 executives between 2006 and 2009 about thorny topics the public service doesn't like to publicly air or even acknowledge – from disloyalty, security and ethics to in-house operational and institutional challenges.

"In our view, the state of mind of senior executives has come to be tainted by a multitude of bad habits: creeping cognitive dissonance and political correctness, erosion of critical thinking. These bad habits of the mind have unwittingly led to reprehensible behavior; rewarding failure, punishing success; failure to confront, disloyalty," the pair wrote in a recently released book.

They argue this state of mind, coupled with the lack of capabilities, could, if left unchecked, lead to the further "deterioration" or "fading away" of the public service.

Academics have warned for years that the role of the public service is changing, and have flagged bureaucrats' deteriorating relationship with ministers, political staff and MPs as a critical issue.

The problem was recently thrown into the spotlight when think-tank Canada 2020 released a policy paper calling for a "charter of public service" or moral contract that would help safeguard the neutrality of Canada's public service. The charter would include new rules that would help draw the line between political and public service behaviour.

But Hubbard said the paper's diagnosis of the problem between politicians and public servants is "just plain wrong."

"Presenting the root problem of the public service as the need to protect its neutrality is grossly misguided," she said. "A more worrying source of concern would appear to lie in the seeming inability of the senior public service to fulfil its main function as well as it should. And this calls for more than a moral contract."

She and Paquet have written about their observations of "malaise" among executives in the book Probing the Bureaucratic Mind: About Canadian Federal Executives, concluding there are significant gaps in their "capabilities and capacity" that must be resolved if they are to serve effectively in a rapidly changing world shaped by technology, globalization and an inundation of information and data.

These forces have increased the number of complex policy issues – from the environment to security – that decision-makers face These problems aren't well-defined, nor are and the means to resolve them.

The two argue public servants are still working in the mindset of big government, where the state did everything, and haven't made the transition to the era of small government, which is networked and collaborative and "where nobody is fully in charge."

Public servants seem "blinded" to the new realities and are hanging onto myths and antiquated beliefs of "someone must always be in charge; the necessity of centralization, state centricity as a must, the belief in mythical Canadian values."

Hubbard said executives need to think more creatively and critically; have broader perspectives; longer time horizons and appreciate "learning by doing." They need to get out "zones of comfort and nonchalance," work harder at "understanding the unfamiliar" and show "courage to expose deceit."

"There are significant gaps in the cognition and behaviour of executives that have to be addressed if the senior public service is to be able to serve as well as it should. This shortcoming inevitably generates significant additional tension at the political-bureaucratic boundary," she said.

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# Ruth Hubbard: The real problem with the public service

**RUTH HUBBARD, Contribution to the Ottawa Citizen, June 17, 2014**

Canada 2020's newly-released policy paper Public Service Renewal: Toward a Charter of Public Service, by Ralph Heintzman, argues that the current problems at the (federal) political-bureaucratic interface cry out, above all, for new ways to protect public service neutrality.

In my view, this is just plain wrong.

Heintzman's paper creates caricatures of the two parties involved that are too simplistic. The public service is neither as professional (i.e. capable) nor as neutral in its behaviour as one might expect; and the "Harper government" is still the democratically elected government and, as a result, the legitimate authority – acting neither better nor worse than those who came before.

The central problem is not neutrality but the competencies of the public servants in dealing not with routine problems but with strategic issues.

The executive ranks of the public service are full of engaged and intelligent people but it cannot be assumed automatically that they necessarily have the ability to serve the government of the day (of any political stripe) as well as expected.

In a recent short book, Probing the Bureaucratic Mind: About Canadian Federal Executives (Invenire, 2014), Gilles Paquet and I studied the capabilities and capacity gaps of federal executives, and concluded that there are significant gaps: they can deal well with operational issues but not so well with corrective actions and the design of new initiatives. These failings mean, necessarily, that they cannot serve their political masters as capably as they should. Recent remarks by former minister David Emerson and an APEX report have confirmed this. So the answer is not philosophizing about neutrality but improving the competencies of the bureaucrats.

Contrary to the view expressed in Heintzman's paper, my own long experience interacting with ministers (of various political stripes) tells me that this Conservative government is acting in the same way all other governments I have known have done to implement the program they were elected to carry out.

The paper is particularly off base in his treatment of many who have cooperated with governments. Having spent many years working closely with various ministers, I am here to say that much of the behaviour he ascribes to "capturing" is pure fantasy. Working collaboratively with ministers is a necessary and important part of the job of senior bureaucrats. Indeed, being able to integrate the wishes of the elected government with the best advice about how to translate them constructively into legal, and implementable actions is the essential part of the job.

**Only a very bizarre and unfit public servant would suggest:**

(1) that the technocracy should always oppose the political, and would conclude that, when there is accord, there must have been promiscuity; and

(2) that a senior bureaucrat should not work collaboratively with his minister unless the minister has a notion of the public interest aligned completely with his own.

Such would appear to be Heintzman's views, and they are unreasonable.

Presenting the root problem of the federal public service as the need to protect its neutrality is wrong, and the quest for a moral contract is certainly not a first-order priority. The seeming inability of the senior public service to fulfil its main function of strategic advisor to the ministers is the main problem, and it calls for improved competencies, not philosophical quibbles.

*Ruth Hubbard is a Senior Research Fellow at the University of Ottawa's Centre on Governance, former federal deputy minister, and former President of the Public Service Commission.*

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The ChronicleHerald

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# Peter MacKay claims government, high court agree on info privacy

**PAUL MCLEOD, OTTAWA BUREAU Halifax Chronicle-Herald, June 17, 2014**

Justice Minister Peter MacKay stunned critics Tuesday by suggesting the Supreme Court's landmark privacy ruling last week upheld the government's position all along.

On Friday, the Supreme Court ruled that police cannot ask telecoms for customer data without a warrant.

MacKay had defended this practice as legal. One government bill, C-13, would have given telecoms legal immunity for the volunteering of information to police. Another, S-4, would allow companies to share customer information with other companies without telling the customer.

Despite the apparent contradiction, MacKay said in the House of Commons that the Supreme Court agreed with government because C-13 would not let police demand information without a warrant; they could only ask for it.

"The Supreme Court's decision actually confirms what the government has said all along, that Bill C-13's proposals regarding voluntary disclosures do not, I repeat, provide legal authority for access to information without a warrant," said MacKay.

Asked for his response, Liberal justice critic Sean Casey broke into laughter for several seconds before saying, "You can quote me on that."

NDP ethics critic Charlie Angus said MacKay brought his own credibility into question by twisting the meaning of the court's decision.

In an interview before MacKay's comments, privacy commissioner Daniel Therrien said the government treated basic customer data as relatively benign, which may have been reasonable at the time.

But now that the Supreme Court has ruled that this information deserves a high level of privacy, the government needs to take C-13 and S-4 back to the drawing board, he said.

"The premise under which this legislation was constructed has been held to be invalid," said Therrien.

He said of the voluntary disclosure section in C-13, "at a minimum it becomes meaningless or irrelevant" and parts of S-4 should also be redrafted in light of the decision.

"This is, we think, a huge victory for Canadians and a huge development in privacy law in Canada."

But so far the government has shown no sign of amending either bill. On Monday, the Senate passed S-4 without any major amendments. C-13 has not yet passed the House of Commons, but 42 opposition amendments have already been shot down.

Government parliamentarians also refused to change a third key privacy bill, C-31, the budget implementation bill.

That bill would allow Canada Revenue Agency employees to give private tax information to police without a warrant if they believe there is evidence of a crime.

The Senate nearly overhauled S-4 but the opportunity vanished due to the slip-up of a Liberal senator.

While the Senate transport and communications committee studied the bill, Liberal senator George Furey proposed an amendment that would have removed the clause allowing disclosure to other companies, mandated telling a customer if their information is shared, and required companies to make public quarterly reports about how much customer data they share.

Liberal senator and committee chairman Dennis Dawson called for the vote and said he would abstain.

Then Conservative senator Michael MacDonald surprisingly broke ranks and voted with the Liberals for the amendment.

This led to a tie 4-4 vote. Committee chairs normally break ties and Dawson announced he was voting for the amendment. But because he had already said he was abstaining, he could not vote and the amendment, needing majority support, failed.

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# Conservatives must review privacy bills after top court's ruling, watchdog says

**JOSH WINGROVE, The Globe and Mail, June 17, 2014**

Canada's privacy watchdog is calling on the Conservative government to consider amending a pair of controversial bills after a Supreme Court ruling that online data is deserving of some privacy protection – a ruling the watchdog says makes a key plank of one particular bill "meaningless."

In an interview with The Globe and Mail, newly appointed Privacy Commissioner Daniel Therrien said Tuesday that Bill C-13 and S-4 should be reviewed in light of last week's court ruling that online subscriber information is generally considered to be private, because each bill allows that type of information to be shared.

C-13 gives companies, such as telecommunications giants, immunity for handing private subscriber information voluntarily to police. S-4, meanwhile, overhauls rules around how private companies can share client information with each other.

"All of the discussion in and around C-13 around how sensitive subscriber information is, and whether it deserves privacy protection under law – in this case, under the Charter – has now been put to bed. The Supreme Court agrees that this is sensitive information, that it is entitled to constitutional protection. That is a huge clarification from the Supreme Court," Mr. Therrien told the Globe during an interview at the Privacy Commissioner's office in a Gatineau, Que., government building.

"...At a minimum, I would say the immunity clause in Bill C-13 becomes essentially meaningless as authority for [telecommunications companies] to share information with law enforcement. So [government] may or may not wish to amend the clause in question. It's either meaningless or it would have to be amended to more directly accord with what the Supreme Court is saying."

Mr. Therrien likened subscriber information, such as a name associated with a computer's IP address, to information obtained during a search of someone's home – at odds with the suggestion by some Conservative MPs that the basic subscriber information was on par with what's found in a phonebook.

"In the old days before the Internet and new technologies, police could not – cannot – enter a house and search for documents without the appropriate court authorization. And what the court is saying here, in [this case], I think is that personal information of a sensitive nature that people put online should be treated in a similar way and that law enforcement agencies should have proper lawful authority, normally a warrant, before they get access to that information," Mr. Therrien said.

Government, however, has only said it will review last Friday's ruling in what's known as the Spencer case, and senators on Monday passed Bill S-4 after the Government Leader in the Senate, Claude Carignan, dismissed suggestions the court ruling would affect the bill.

"On the contrary, the pre-study shows that the [court] decision has no impact and confirms our view on the matter," Mr. Carignan said Friday in speaking about the bill, before deferring a vote until Monday. "…We are not doing this because we think this changes the bill – quite the contrary," Mr. Carignan added. S-4 now needs to pass the House of Commons, where it could be amended.

Mr. Therrien – whose predecessor, interim commissioner Chantal Bernier, largely supported S-4 – took a different view from Mr. Carignan, saying the Supreme Court ruling will affect the bill.

"That would be an issue I think parliamentarians should look to," he said, asked about S-4. "Because clearly, again, the starting point of the Supreme Court's analysis is subscriber information linked to sites people visit is sensitive information and deserves a high level of protection from a privacy perspective. That is true for sharing information with law enforcement, but that is equally true for sharing information between private companies. So yes, I think there's certainly an issue to look at by parliamentarians on this. Now, that being said, S-4 has many positive features that are in line with recommendations made by this office before," he said.

Mr. Therrien was nominated on May 28 as Canada's privacy watchdog, and confirmed eight days later. The NDP opposed the nomination, saying his career as a government lawyer left him too close to government data-collecting programs to be an effective watchdog. However, Conservatives, as well as Liberals in the Senate and the House of Commons, supported Mr. Therrien's appointment.

It was revealed Mr. Therrien was among the final two candidates, and that some privacy experts' perceived frontrunners didn't make the final cut. On Tuesday, Mr. Therrien said he applied for the job late last year after the resignation of Jennifer Stoddart, and was told all along he was on the list of candidates.

"The idea I was not one of the top candidates is inconsistent with what I've been told. I was there at every step, including the last one," he said. Asked about the criticism of his appointment, he replied: "Obviously, I was not pleased, but I think I will leave it at that."

Mr. Therrien wasted little time in the job – his third official day of work, June 10, included an appearance before a government committee where he criticized Bill C-13 and urged government to amend it. The calls were ignored by Conservatives on the committee, which later voted down all proposed amendments, except for one minor one requiring the law be reviewed in seven years.

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# B.C. court ruling orders Google to block sites worldwide

**JEFF GRAY, The Globe and Mail, June 17, 2014**

In an unprecedented ruling, a B.C. court has ordered Google Inc. to block a group of websites from its worldwide search engine – a decision raising questions over how far one country's courts can exert their power over the borderless Internet.

The temporary injunction, issued by B.C. Supreme Court Justice Lauri Ann Fenlon on June 13, came despite arguments from Google's lawyers that Canada's courts did not have the jurisdiction to tell Google, based in Mountain View, Calif., to block access to the websites anywhere in the world.

In an e-mailed statement, Google said it was disappointed in the decision and said it would launch an appeal. It declined requests for an interview.

Legal observers say the court order raises broader questions – questions increasingly dogging judges around the world – about just whose rules should prevail as the Internet continues to blur or erase national borders.

It follows a landmark decision by the European Union Court of Justice on the so-called "right to be forgotten" that forces Google to take down certain information about private individuals if asked.

The B.C. injunction, which orders Google to comply within 14 days, is part of a court fight launched by Burnaby, B.C.-based Equustek Solutions Inc., which makes and sells complex industrial networking devices.

According to the ruling, the company alleges that a group of former associates stole its trade secrets in order to manufacture competing products, which they continue to sell through a network of websites, in "flagrant" defiance of numerous previous court orders.

Google's current procedure would allow it to block search results for offending website addresses on its Canadian website, Google.ca. But most of the defendants' sales occur outside Canada, the ruling says; even within Canada, the defendants simply switched URLs, turning the exercise into "an endless game of 'whac-a-mole.'"

In her ruling, Justice Fenlon determined the B.C. court had jurisdiction over Google, noting the company sells ads in British Columbia and uses its search technology to target those ads to British Columbians. She granted the plaintiffs an injunction that she said no Canadian court had granted before.

"Google is an innocent bystander but it is unwittingly facilitating the defendants' ongoing breaches of this Court's orders," her ruling reads.

"The Court must adapt to the reality of e-commerce with its potential for abuse by those who would take the property of others and sell it through the borderless electronic web of the internet," she writes.

Canadian courts, and others around the world, have been increasingly extending their reach across borders in a variety of areas. And Canadian courts have in the past issued orders affecting people or entities outside its borders, such as injunctions demanding the freezing of assets.

But University of Ottawa law professor Michael Geist slammed the recent Google decision in a blog post on Tuesday, warning that it could lead to other countries demanding Google censor content worldwide, putting free speech at risk. "While the court does not grapple with this possibility, what happens if a Russian court orders Google to remove gay and lesbian sites from its database? Or if Iran orders it remove Israeli sites from the database?"

In an interview, Prof. Geist said he agrees the court has jurisdiction over Google but disagrees that it should have the power to issue an essentially global injunction: "That seems to be to be a very dangerous overreach."

Robert Fleming, the lawyer for the Vancouver plaintiffs who won the injunction against Google, said no court elsewhere in the world would recognize such extreme orders against Google as those Prof. Geist suggests. Unlike Prof. Geist's hypothetical cases, Mr.

Fleming said, his case is an intellectual property dispute over which U.S. and other courts would clearly recognize the B.C. court has jurisdiction – not a question of free-speech.

And in his case, he said, the main defendant, Morgan Jack, has repeatedly breached previous court orders and has failed to show up for court proceedings. According to court documents, Mr. Jack has "disappeared," although his websites allegedly continue to operate.

This has forced Mr. Fleming's clients to take the steps they have against Google. "Things happen so quickly and on the Internet they are so borderless, the courts have to be able to adapt," he said.

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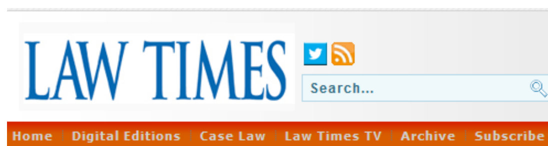


# Law firm standards applied to associations

### Court holds groups of lawyers to conflict, confidentiality protocols

**Yamri Taddese, Law Times, Law Times, June 16, 2014**

If lawyers who work in association with each other "hold themselves out as law firms," they're subject to the same stringent conflict and confidentiality protocols expected of law firms, a Superior Court judge has found.

In a ruling this month, Justice David Stinson set aside a 2013 master's decision that rejected a presumption that lawyers who work in association with each other are sharing confidential client information.

In an employment law case, *Jajj v. 100337 Canada*, the defendants sought to remove lawyer Kenneth Alexander of the Davenport Law Group as the plaintiff's counsel due to conflict of interest concerns. The defendants had previously consulted with a lawyer who works in association with Alexander. The defendants argued for a presumption that the lawyer, Kevin Fox, had shared information with Alexander.

"In my view, where lawyers who practise 'in association' nevertheless hold themselves out to the public and to their clients as a law firm, they should be treated as such and be held to the same conflict requirements and professional obligations as a law firm," wrote Stinson.

The lawyers used the same telephone and fax numbers, company letterhead, and e-mail domain, all of which gives outsiders the impression that the Davenport Law Group is a law firm, the judge found.

“Nowhere on their letterhead or on Mr. Fox’s business card is there any indication that DLG is not a law firm name under which various lawyers practise as partners,” he wrote in Jajj.

When Master Benjamin Glustein found the two lawyers hadn’t discussed the case in his decision on the matter last year, he simply took Fox’ word for it, according to Stinson. The judge added Fox’ evidence didn’t provide “insight” into the workings of the office space he shares with Alexander and how the lawyers prevent inadvertent communication of client files.

“In the present case, the respondents’ evidence that there is no cause for concern is, in essence, based on the assurance of Mr. Fox that there is no conflict, and that he can be trusted to respect Rule 2.03(1),” wrote Stinson.

“Despite having held himself out (as has Mr. Alexander) as a member of DLG, he now assures the court (after the fact) that he will not share any confidences with Mr. Alexander. For clients such as the defendant, having entrusted its confidences to another lawyer at DLG, that is cold comfort.”

Lawyer Ben Hanuka, who had said Glustein’s ruling “sets a dangerous precedent” at the time of the original finding, says the judge got it right in the June 5 decision.

“Modern versions of law firms, as important as they are, should not take priority over the protection of the public,” he says.

In this particular case, Stinson was right to find nothing indicates to the public or clients that the Davenport Law Group isn’t a law firm, says Hanuka, noting lawyers should be careful about how they portray themselves.

“It’s not enough to say, ‘We’re not a firm,’” he adds.

But Alexander tells Law Times the move to remove him was simply a question of “tactical advantage.” He says he’s representing the same client in a separate action against the same defendants and notes that in that case, the defendants haven’t attempted to remove him.

Stinson failed to identity exactly what confidences he and Fox could have shared, he says, noting the theoretical basis for the decision to remove him.

As to the Davenport Law Group, “it’s a group of lawyers, it’s called a group,” he says.

“It’s a street address. That’s all it says.”

Although the Davenport Law Group isn't a law firm, other practices that call themselves law groups are in fact law firms. Frank Addario of the Addario Law Group says his practice is "a strict firm."

It's important that lawyers working in association erect "substantial barriers" to confidentiality breaches and have evidence to back up their assertions, says Addario. "It seems fair that people should take up the opportunity to create the evidentiary basis for establishing that they're not as things appear," he says. "If it looks on the appearance of it that there's a single shared network of lawyers but the reality is different, it's not that difficult to put that in front of the courts."

To Stinson, although it's "desirable" to allow lawyers to be mobile and work in association, putting up the appearance of a law firm could be a tactic used by sole practitioners to attract clients.

"Indeed, in the absence of any public disclaimer, the logical inference is that one of the reasons [the lawyers at DLG] choose to represent themselves in such a fashion, utilizing a common firm name, is to create the impression for clients and others that outsiders are somehow dealing with a group of lawyers, and not merely with a sole practitioner, or at the very least a lawyer who has resources available beyond those which might be available to a lawyer who practises alone," he wrote. Stinson also suggested lawyers who work in association should put in place the same conflict search system as law firms and implement measures to ensure confidentiality.

But according to Alexander, that proposition is "dangerous" as lawyers who work in association would have to reveal their clients to each other in order to perform a conflict search. Law firms doing conflict searches don't have to worry about that issue as all clients are theirs, he says.

Still, the Davenport Law Group will make it "a little bit more explicit" that it's not a law firm, says Alexander. "We could maybe say association on [our letterhead] but . . . at the end of the day, most of these things are tactical," he says.

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# Here's why the Supreme Court made it tougher to look into your online life

**JILL PRESSER, Contributed to The Globe and Mail, June 16, 2014**

We are all Internet users now. This means that we are all affected by the recent Supreme Court of Canada decision dealing with online privacy.

To understand the decision, let's start with the basics. Your Internet identity is made up of three things: your Internet name, your "IP address" and the match between the IP address and who you are in the real world. Internet privacy is all about the barriers between the people who can see your Internet activity (hey, it's a public place) and their ability to match your IP address with your real-world identity. The matchup info is held in trust by your Internet service provider, usually one of the big four telecom companies.

Friday's case was about how hard it should be for the police to make the telecom companies match IP addresses to real-world identities. Once the telecom provider gives the police the matchup info, all of your Internet activity – which you've conducted under the veil of your online identity – becomes irrevocably linked to your real-life identity.

What you watch and what you say and what you read on the Internet is up to you. You may choose to make it clear who you are, to spell out your real-world identity. Or you may stay behind an online identity. You can see things, read things, and say things that are against the law or within the law. This case writes new rules about what happens when you perform Internet activities behind your veiled online persona.

**So here are a few key things Internet users need to know:**

- Law-breaking is still illegal. Canadians online must not interpret Friday's decision as a permit to write hate literature, view child pornography or listen to pirated music. No laws were overturned in Friday's decision. The rules are still the rules. They should be obeyed. And if you don't like them, ask Parliament to re-write them. Don't go thinking the Court just re-wrote them for you and don't try to re-write them yourself;

- You are still in control of whether you reveal your real-world identity or not. Friday's decision, broadly speaking, makes it harder for those who want to monitor your online activity to link it to your real-world identity;

- If you are being investigated for unlawful Internet activity, e.g. hate speech, child pornography, Internet fraud, it just got harder for the police to obtain your real-world identity. Before this decision, law-enforcement officials were obtaining increasingly routine access to telecom company data matching IP addresses with real-world identities. The key question before the Court was whether a search warrant is needed for police to seek out the matchup data from the telecom company. The Court ruled that a warrant is required. That makes it somewhat tougher for law enforcement to catch cybercriminals.

Readers may ask at this point why the Court just made it somewhat harder to catch cybercriminals. The answer lies in the right to be free from unreasonable search under the Canadian Charter of Rights and Freedoms. The Charter is the supreme law of Canada. It is an expression of the very high value Canadians place on this fundamental human right. Our right to privacy is expressed as a right to be free from state intrusion through unreasonable search. The Supreme Court correctly put this right ahead of making it a little easier for the police to do their job.

The Supreme Court has considered the new territory of the Internet and set the borderline between the power of the police and the privacy of the individual in an expansive way. A great deal of space has been reserved for privacy. Indeed, within that space, a reasonable

expectation of privacy through anonymity has been laid out. What does this mean? It means that it will take some convincing for a government actor to persuade a court that a consumer or online user's interest in remaining anonymous should give way to a law-enforcement objective. And, in fact, the prospect of having to argue about this in court at all may operate to powerfully restrain governments and businesses from pushing into the domain of consumer anonymity.

The effect of this ruling may well be felt most acutely in the cutting-edge government and corporate cyber-communities. Those who are planning "smart billboards" that recognize real-world individuals and spew consumer information at them will likely need to reprogram. Biometric surveillance, which looks at individuals, not at records, data and online behaviours, may come under pressure. Consumers may feel the effects of this decision more in what does not occur than in what does.

Friday's decision is indeed a landmark, marking out an expansive domain of privacy deep into the new world of cyberspace.

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# Privy Council Office defends top federal bureaucrat

**BY KATHRYN MAY, OTTAWA CITIZEN, JUNE 16, 2014**

The Privy Council Office says Canada's top bureaucrat didn't cross the line to become a "political spokesman" for the Conservative government when he defended deputy ministers' refusal to make available details of the 2012 budget's $5.2 billion in spending cuts.

Privy Council Clerk Wayne Wouters – head of Canada's professional public service – recently came under the spotlight when a study by think-tank Canada 2020 concluded he had shown a lack of neutrality in his showdown with then-budget watchdog Kevin Page over the Conservative government's decision to block information about the spending cuts.

But Raymond Rivet, a PCO spokesman, said a letter from Wouters to Page at the time was intended to publicly explain the public service's position, not the government's. The letter was not written "on behalf of government, but rather as head of the public service," Rivet said in an email to the Citizen.

The Canada 2020 analysis, written by University of Ottawa research professor Ralph Heintzman, argued that the language of Wouters's correspondence with Page –"in our view" – crossed the line and could have come directly from "the mouth of the prime minister." He said the clerk should never have publicly justified or defended a "contestable political decision" and made it his own.

But Rivet said the public service must respect the rule of law, and after consulting with the Justice department, it was determined that the information Page wanted was beyond his mandate.

"The clerk communicated that departments had done their due diligence in operationalizing the reduction plan and that the public service had provided all of the data required, within the PBO's legal mandate, in an open and transparent manner," Rivet wrote.

The public showdown with Wouters led Page to go to court to try to get departments' spending plans, particularly the nature of the cuts and the impact on service levels.

Page had argued that deputy ministers, as accounting officers personally responsible for managing their departments, are obliged to give those numbers to Parliament. He argued that deputy ministers should have provided that information and not relied on the clerk to speak for them.

But Rivet said it was "appropriate" for the clerk to inform Page that he had confidence in his senior team of deputy ministers and that they would be able to "effectively execute their plans" to meet the targeted spending cuts.

Page argued MPs are entitled to know how the cuts could affect the quality and level of service when deciding whether to vote on them or not. However, he never accused Wouters of straying into political territory or undermining the neutrality of the public service.

"Did the clerk cross the proverbial 'line'? Yes. Was this a politically inspired action? I do not know," Page said. "I think the clerk thought he was supporting the public service and the government with his decision not to provide the information to Parliament and Canadians. I think the public service and the government's fiscal plan is weaker for it. I think the trust and confidence in the public service is lower for it. "

In his paper, Heintzman used the tug-of-war between Wouters and Page as evidence of the need for a new "charter of public service" to protect public servants' neutrality and govern the relationship between them, ministers and MPs. The charter would set the boundaries between politics and public service.

But Page said the dispute raised questions about public servants' "commitment to core values" in delivering policy, financial analysis and services to Canadians.

"The issue demonstrates a serious misunderstanding of the roles, responsibilities and functions of responsible parliamentary democracy," said Page.

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# Federal government should track unpaid internships, MPs say

**BENJAMIN SHINGLER, THE CANADIAN PRESS, June 20, 2014**

OTTAWA - The Harper government is taking a look at an NDP bill aimed at ending the exploitation of unpaid interns in Canada, but wouldn't say Monday whether...

Interns are mostly female, underpaid or unpaid, says upcoming study

OTTAWA - Preliminary findings from an upcoming study on internships in Canada show that the majority of interns are young women who make less than the...

Province pushed to crack down on illegal unpaid internships

The Alberta government is facing fresh calls to crack down on illegal, unpaid internships by randomly checking businesses for violations, sending a message...

A new report by the Commons finance committee says the federal government should take steps to ensure unpaid internships are in line with the country's labour laws.

The report, which looked at the challenges of youth employment, recommends Ottawa work with provinces and territories to protect unpaid interns under the relevant labour codes.

It also suggests the federal government examine unpaid internships to understand their impact on the job market.

Estimates suggest as many 300,000 young Canadians work as unpaid interns, but there is little hard data available because employers aren't required to report the numbers to federal authorities.

In all, the Conservative-dominated committee put forward 23 recommendations to help address youth unemployment, which has climbed in recent years.

A section prepared by the NDP argued for additional, tougher measures, including changes to the federal labour code to protect interns' working conditions.

The report, released Friday, comes after months of heated debate in Canada over the merits of unpaid internships.

Many young people take part in unpaid internships in hopes of earning workplace experience or a full-time job.

Critics argue the practice amounts to a form of exploitation and limits participation to those who can afford to work for free.

The committee heard testimony from several groups calling for a crackdown during its hearings in March and April.

The Association of Canadian Community Colleges, for instance, called for "national employment standards" protecting any unpaid interns who aren't completing the work as part of a post-secondary program.

The head of the University of Toronto Students' Union, meanwhile, argued students struggling with a heavy debt-load are often most affected.

"Those who cannot afford to work for free lose out on networking opportunities, can suffer from skills degradation, and often can have their skills fall behind innovation, making it more difficult to enter their field, if given the opportunity," Yolen Bollo-Kamara told the committee.

The unemployment rate for youth aged 15 to 19 climbed from 15.7 to 20.1 per cent between the first half of 2008 and the first half of 2013, according to the report.

The unemployment rate for youth aged 20 to 24 climbed from 9.4 to 11.1 per cent during the same period.

Other suggestions in the report included offering tax credits for businesses that hire Canadians aged 18 to 30, and examining the approach of countries like Germany, which uses partnerships between schools, employers and unions to better meet the demands of the labour market.

It's unclear what the Harper government will do with the recommendations.

A spokesman for Labour Minister Kellie Leitch did not immediately return a request to comment on Saturday.

On Monday, Andrew McGrath said the government is considering an NDP bill aimed at ending the exploitation of unpaid interns in Canada, but wouldn’t say whether it plans to support the move or bring in legislation of its own.

In the meantime, provinces are taking their own steps to crack down on unpaid internships.

Saskatchewan and Ontario recently introduced stricter measures, while Alberta is under pressure to do the same. Unpaid internships in British Columbia are illegal unless the

internship provides "hands-on" training as part of a formal educational program or specific professional training.

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# Cracks showing in national recognition of common law degrees

**By Philip Bryden, Canadian Lawyer Magazine, 4Students Blog, June 16, 2014**

In the spring of 1963, Bob Jarvis graduated with an LLB from the University of Alberta. He moved to Ontario and wanted to enter the Law Society of Upper Canada's bar admission program. He was informed his University of Alberta LLB did not satisfy the LSUC's education requirements for entry into the program.

Jarvis was not someone who was easily deterred, and he set about appealing this ruling. At the end of the day, the LSUC relented and acknowledged it would henceforth recognize LLB degrees from the University of Alberta as satisfying its education requirements. Jarvis was called to the bar and went on to have a very distinguished career as a lawyer and politician in Ontario.

To this day, he remains proud of the role he played in developing national recognition of Canadian common law degrees for bar admission purposes.

The national system for professional recognition of Canadian common law degrees that emerged in the 1950s and 1960s was essentially run by the Law Society of Upper Canada, with other law societies following Ontario's lead. The LSUC developed standards in 1957 that it used initially to evaluate the programs at Ontario law schools and then applied those standards to schools from other provinces.

The standards were revised in 1969, but once a law school's degree was recognized, no ongoing monitoring took place to determine whether the program at a recognized law school continued to meet the standards.

As law school curricula evolved and many schools offered greater flexibility in the upper years of their programs, the mismatch between the 1969 criteria and what law schools were actually doing became increasingly obvious. Moreover, graduates of foreign law schools had their academic credentials evaluated for bar admission purposes by the National Committee on Accreditation using different standards, more onerous than the standards for graduates of Canadian common law schools.

As more foreign law graduates began seeking access to the Canadian bar by obtaining a certificate of qualification from the NCA, it became apparent to the Federation of Law Societies of Canada this regime was unsatisfactory. The federation created a task force, chaired by John Hunter, and in 2009 developed a new set of national standards for Canadian common law degrees.

These standards were adopted by the law societies of all common law provinces and territories and the FLSC has been working with Canadian law schools to implement them by 2015.

The new standards apply to both existing degree programs and new programs. The first three proposals for new programs that came forward for consideration (from Thompson Rivers, Lakehead, and the University of Montreal) were given conditional approval without incident. The fourth proposal, made by Trinity Western University, was also given conditional approval, but this time things did not go so smoothly.

For reasons familiar to anyone acquainted with the law school scene in Canada, the Trinity Western proposal was controversial. Trinity Western's covenant prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman," has long been perceived to discriminate against gay and lesbian students. In turn, TWU has long argued the covenant is an essential element of its faith-based approach to private university education.

In the context of its teacher education program, this contest between equality rights and religious freedom made it to the Supreme Court of Canada in 2001, in a case that Trinity Western won. The FLSC committee that addressed TWU's application sought legal advice and was informed the Supreme Court's 2001 decision is still good law. Some lawyers and scholars disagree, and the matter is currently being tested in the courts and in the court of public opinion.

In the meantime, law societies were faced with a difficult choice. Should they delegate decisions concerning recognition of common law degree programs to the Federation's Canadian common law program approval committee, thereby endorsing the principle of national recognition of common law degree programs? Or should they reserve the decisions to themselves, thereby creating the potential to undermine national recognition, if only in this particular instance?

Different law societies chose different approaches. Alberta opted for delegation to the committee, and thus accepted its decision to give conditional approval to Trinity Western's program. In British Columbia, Ontario, and Nova Scotia, the benchers decided to make their own decisions. The Law Society of British Columbia decided to approve the Trinity Western proposal and the Law Societies of Upper Canada and Nova Scotia rejected it, at least in its present form. Thousands of B.C. lawyers at a special meeting last week voted to reject TWU's law school, but the vote is not binding on LSBC benchers.

Whatever happens in B.C., it appears likely we are headed toward a situation where Trinity Western's program will be recognized by the law societies of some provinces but not others. This is not completely unfamiliar territory, since it recalls the situation facing

Jarvis in 1963. On the other hand, the world of legal regulation has come a long way since then.

The National Mobility Agreement requires the law societies of one signatory province to accept as members those who are lawyers in good standing in another. This raises questions for law societies that do not approve TWU's program. For example, if Alberta licenses a lawyer who has a Trinity Western law degree, will the LSUC refuse to accept her credentials if she decides to practise in Toronto?

Both sides of the debate about Trinity Western's program are passionate in their views, and it is likely the issue will wend its way back up to the Supreme Court of Canada. In the meantime, the national system for recognizing law school programs for bar admission purposes will continue, but its foundations are starting to show cracks.

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# Judges With Daughters More Often Rule in Favor of Women's Rights

**Adam Liptak, The New York Times, JUNE 16, 2014**

WASHINGTON — It was, Justice Ruth Bader Ginsburg later said, "such a delightful surprise."

In a 2003 Supreme Court opinion, Chief Justice William H. Rehnquist suddenly turned into a feminist, denouncing "stereotypes about women's domestic roles."

Justice Ginsburg said the chief justice's "life experience" had played a part in the shift. One of his daughters was a recently divorced mother with a demanding job.

Justice Ginsburg's explanation, though widely accepted, was but informed speculation. Now there is data to go with the intuition.

It turns out that judges with daughters are more likely to vote in favor of women's rights than ones with only sons. The effect, a new study found, is most pronounced among male judges appointed by Republican presidents, like Chief Justice Rehnquist.

"Our basic finding is quite startling," said Maya Sen, a political scientist at the University of Rochester who conducted the study along with Adam Glynn, a government professor at Harvard.

The standard scholarly debate about how judges decide cases tends to revolve around two factors: law and ideology. "Here, we've found evidence that there is a third factor that matters: personal experiences," Professor Sen said. "Things like having daughters can actually fundamentally change how people view the world, and this, in turn, affects how they decide cases."

The new study considered some 2,500 votes by 224 federal appeals court judges. "Having at least one daughter," it concluded, "corresponds to a 7 percent increase in the proportion of cases in which a judge will vote in a feminist direction."

Additional daughters do not seem to matter. But the effect of having a daughter is even larger when you limit the comparison to judges with only one child.

"Having one daughter as opposed to one son," the study found, "is linked to an even higher 16 percent increase in the proportion of gender-related cases decided in a feminist direction."

The authors also looked at the same judges' votes in a separate set of 3,000 randomly chosen cases. There was no relationship between having daughters and liberal votes generally. Daughters made a difference in only "civil cases having a gendered dimension."

Researchers have found similar "daughter effects" in other areas. Members of Congress with daughters are more likely to cast liberal votes, particularly on abortion rights, one study found. Another study showed that British parents with daughters were more likely to vote for left-wing parties, while ones with sons were more likely to vote for right-wing parties.

The new study on judges considered some possible explanations. Perhaps judges wanted to shield their daughters from harm. But the voting trends showed up in only civil cases, like ones involving claims of employment discrimination, and not criminal ones, including rape and sexual assault.

Or perhaps daughters tend to be liberal and succeed in lobbying their parents to vote in a liberal direction. But the judicial voting trends were limited to civil cases in which gender played a role.

The study was lukewarm about the possibility that judges acted out of economic self-interest — to avoid, say, having unemployed daughters.

The most likely explanation, Professor Sen said, was the one offered by Justice Ginsburg. "By having at least one daughter," she said, "judges learn about what it's like to be a woman, perhaps a young woman, who might have to deal with issues like equity in terms of pay, university admissions or taking care of children."

In the 2003 decision that so delighted Justice Ginsburg, Nevada Department of Human Resources v. Hibbs, the Supreme Court considered whether workers could sue state employers for violating a federal law that allowed time off for family emergencies. Chief

Justice Rehnquist, who had long championed states' rights, had not been expected to be sympathetic to the idea.

Instead, he wrote the majority opinion sustaining the law. It was, he said, meant to address "the pervasive sex-role stereotype that caring for family members is women's work."

Chief Justice Rehnquist was 78 when he wrote that. He died a couple of years later, in 2005. In the term he wrote the opinion, he sometimes left work early to pick up his granddaughters from school.

"When his daughter Janet was divorced," Justice Ginsburg told Emily Bazelon, a journalist, in 2009, "I think the chief felt some kind of responsibility to be a kind of father figure to those girls. So he became more sensitive to things that he might not have noticed."

I asked Professor Sen what her study suggested about how to think about the Supreme Court.

"Justices and judges aren't machines," she said. "They are human, just like you and me. And just like you and me, they have personal experiences that affect how they view the world.

"Having daughters," she said, "is just one kind of personal experience, but there could be other things — for example, serving in the military, adopting a child or seeing a law clerk come out as gay. All of these things could affect a justice's worldview."

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