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

Press Clippings for the period of July 28 to August 5, 2014
Revue de presse pour la période du 28 juillet au 5 août 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

DoJ hunger games

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

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

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

In 2012, the Association of Justice Counsel, the union that represents an estimated 2,700 federal lawyers, negotiated its first collective agreement, which included a 15.25-per-cent salary increase, allowing federal government lawyers to catch up with many of their provincial counterparts. Despite the boost to their paycheques, however, insiders say

morale in the DoJ is just about at rock bottom. Promotions are few and far between. Resources are shrinking almost as fast as the desk space. “Speaking with different members across the country, from different agencies and departments, morale is low,” says former AJC president Lisa Blais. “People are working harder than ever with fewer resources. Depending on where they work, they are being questioned on expenses, on requests for professional development, on requests for leave.”

In April, the department cut 20 per cent of its research budget, roughly $1.2 million. Most of the eight legal research positions cut were in social sciences. “Previous legal research in the department sometimes caught senior officials off-guard . . . and may even have run contrary to government direction,” said an internal report prepared for Deputy Minister William Pentney, obtained by the Canadian Press. The Justice Department’s performance report showed there were 211 fewer people working for the department in the 2012/13 fiscal year than there were in 2004/05. Roughly half of the jobs cut have been lawyers.

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

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

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

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

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

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

Toews, walked through the door in February 2006. Understanding those early days is key.

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

The incoming Conservatives were wary of what many of them saw as Eastern elites, judicial activism, and a public service they believed had been serving a left-of-centre agenda for years. Many had railed in the past against the "Court Party" — reform-minded professionals, academics, and interest groups who were using the Charter of Rights and Freedoms and the courts to achieve change.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Federal job cuts 31 per cent higher than target

Bill Curry, The Globe and Mail, August 4, 2014

The Conservative government’s switch from stimulus to austerity cost more than 25,000 public service jobs over the past three years, a significant overshoot of its target.

The 2012 budget promised to eliminate 19,200 jobs over three years, and the federal Treasury Board's self-assessment said the end result of those budget cuts was the elimination of 19,900 positions, just slightly above the original goal.

However, a review of the Treasury Board's latest data shows a much larger reduction. From 2011 to 2014, the size of the federal public service dropped by 25,214, according to the latest figures from Treasury Board, which were posted online on July 14 without an official announcement.

That is 31 per cent more than the number promised, and further reductions are possible.

Heather Domereckyj, a spokeswoman for Treasury Board President Tony Clement, said the 19,900 jobs were specifically tied to plans for savings that were announced in the budget, while the reduction of 5,314 more public service jobs was due to other factors, such as retirements and the end of some programs.

For political parties looking to cut back, recent history shows it is better politically to underpromise and over-deliver when it comes to shrinking the public service.

That is the clear conclusion for Ontario's Progressive Conservatives, who are analyzing their electoral defeat after campaigning in the spring on a promise to eliminate 100,000 government jobs.

In contrast, their federal cousins in Ottawa have largely avoided political headaches even as they blow past their original job cut target.

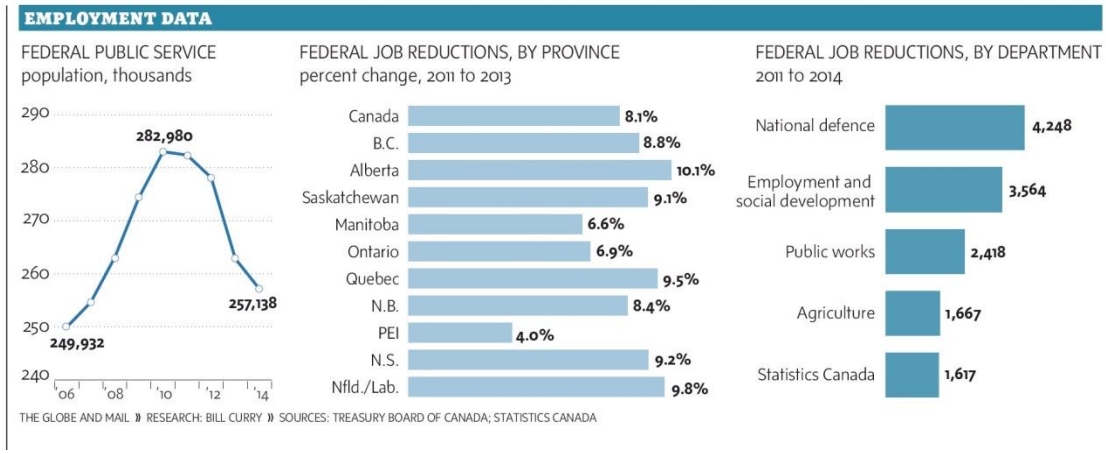
Nearly 2½ years after that budget was released in March, 2012, the Parliamentary Budget Office says it continues to be stymied in its efforts to find out details on those staffing cuts and their impact on public services. That lack of information is likely a big reason specific cuts have created little controversy. Another factor is that the cuts started after the Conservatives had increased the federal public service to record proportions.

The recent cuts have only returned the federal public service to about the size it was in 2006, when Prime Minister Stephen Harper came to power. Stimulus spending explains part of the growth during that time, but the government ranks were expanding well before the economic crisis hit.

Statistics Canada and Treasury Board track the size of the federal public service using slightly different methodology. One big difference: Statscan includes the RCMP, while Treasury Board does not.

According to Statscan, 276,463 people were employed in federal public administration in 2013, which is below the 280,658 employed in 2006 and the recent peak of 300,697 in 2011.

Meanwhile, Treasury Board lists the population of federal government employees at 257,138 in 2014, a 9-per-cent reduction from the peak of 282,980 in 2010 but still 3 per cent above the 249,932 figure in 2006.



Pollster Nik Nanos said the Conservatives have successfully conditioned the public to expect ongoing spending cuts, and the fact that they are spread out across all departments and all parts of the country makes it harder for reductions to become controversial.

“The Conservatives have benefited by not doing targeted cuts, but looking at across-the-board cuts to the size of the public service, by talking about it all the time and desensitizing people,” he said, noting that, from a public policy perspective, it might be better to cut deeply in some places to spare more successful programs. “The risk [of acrossthe-board cuts] is that there’s just a broader compromise in terms of what’s delivered to Canadians.”

The PBO has sent letters, Access to Information requests and even went to Federal Court to gain insight into where the cuts were made, all for naught.

“The government has never actually said and measured and stated how this reduction is going to affect the service level,” said Mostafa Askari, the assistant Parliamentary Budget Officer. “We don’t have that information.”

Still, through data released by Treasury Board, it is possible to see that National Defence, Employment and Social Development Canada, Public Works, Agriculture Canada and Statistics Canada are among the departments that took the biggest staffing hits.

Foreign Affairs (by taking over the Canadian International Development Agency), Citizenship and Immigration and Communications Security Establishment Canada were among the lucky few to see their ranks grow.

Using similar data from Statistics Canada, it is also possible to see how Ottawa has spread the cuts geographically. The data show Ottawa has been relatively even-handed. In terms of percentage change between 2011 and 2013, Alberta was hit the hardest with a 10-per-cent reduction, while Prince Edward Island – which is home to the federal department of Veterans Affairs – only received a 4-per-cent reduction. Most provinces were close to the 8-per-cent national average for staffing cuts during that period.

OTTAWA CITIZEN

PS pension fund seeing healthy growth

BY JORDAN PRESS, OTTAWA CITIZEN, AUGUST 4, 2014

The public sector pension fund posted one of its best returns since the economic downturn in 2008 as it sunk its money into European airports and more Manhattan real estate.

A 16.3 per cent return brings the total value of the investment fund, which is fed by pension plans for public servants, the RCMP and military reserves, to $93.7 billion, according to its annual report. That amounted to an increase of $17.6 billion from the almost $80 billion recorded one year earlier.

If it continues to grow as planned, the fund — the fifth largest in the country — expects to more than quadruple in value over the next 20 years and be worth $425 billion by 2035, just when it will see more money flowing out to pay benefits than it receives in contributions and investment income.

The figures should only add to the ongoing battle between the government and public sector unions about the future and sustainability of the pension plans. Ian Lee from Carleton University's Sprott School of Business suggested the government could use the figure for more leeway in making changes to the pension system, but shouldn't avoid making changes based on the projections.

"The government should not be saying, 'Oh, well, they're projecting a big fat number … so we're clear sailing,'" Lee said.

"Any statement about the future is a projection. It's not a statement of fact."

If things go wrong — such as lower than expected interest rates or bad investments — "the government is on the hook," Lee said.

"They're trying to maximize and get bigger and better returns because they know that down the road they're going to have an awful lot of people claiming (benefits)," he said.

Pension reform has returned to the national agenda earlier this year when the Tories unveiled "target benefit" pension plans for Crown corporations and federally regulated industries. Public service pensions aren't part of that proposal, but unions have expressed concerns that their plans could be next for such change after the government raised the age of retirement and employee contributions.

The government has a $152-billion pension liability that it must fund. That amount could easily rise if public sector pensioners live longer: In May, auditor general Michael Ferguson said an extra year or three could increase that liability by between $4.2 billion and $11.7 billion.

A spokesman for the investment fund said the $152-billion liability is for pensionable service before 2000. After that time, payments come out of the fund.

To remain afloat, the investment board has to keep real investment return — overall returns minus inflation and expenses — at 4.1 per cent annually. In the last fiscal year, the real return was about one per cent above that target.

In the last year, the fund bought a high-rise office building on Park Avenue in New York City; spent $1.5 billion for several airports, including ones in Athens, Budapest and Sydney, that combined handle about 95 million passengers a year; and invested in farmland in Latin America.

“Those assets reduce the risk for the portfolio,” said fund spokesman Mark Boutet. There may come a time when the fund will need to unload those assets to pay for pension benefits, “but that time is far out,” he said.

The top five executives, meanwhile, had their compensation reduced. They earned $13.7 million in compensation, a decrease of 16 per cent from the $16.3 million recorded in 2013.

Those declines came after an outcry from opposition critics last year over a 50 per cent increase in executive payouts between 2012 and 2013.

Gordon Fyfe, who left as CEO in June, took home $4.2 million in total compensation in the last fiscal year, a $1.1 million decrease from the $5.3 million the previous year. Like those of other executives, much of Fyfe’s compensation came from bonuses atop of his base salary of $500,000.

The Public Sector Pension Investment Fund, by the numbers

- **$97.3 billion: Value of the fund at the end of the 2014 fiscal year**
- **$17.6 billion: Increase in value between the 2013 and 2014 fiscal years**
- **35%: Percentage of funds in foreign investments**
- **$13.7 million: Total compensation to the top five executives at the fund**
- **$4.2 million: Total compensation former CEO Gordon Fyfe received in the last fiscal year**
- **4.1%: Average increase, after costs and inflation, in the fund’s value needed to meet future pension obligations**
- **0.9%: Average increase above the 4.1 per cent the fund has achieved over the last decade**
- **$425 billion: Projected value of the fund by 2035**

(Source: Public Sector Pension Investment Fund 2014 annual report)

CBC news

Peter MacKay skipping Canadian Bar Association's annual conference

CBA president says justic minister's 'scheduling conflict' reason for not attending is 'unfortunate'

Catherine Cullen, CBC News, August 1, 2014

For as long as anyone at the Canadian Bar Association can remember, Canada's justice minister has attended the group's annual legal conference.

Not this year.

In a year when the government has faced off with the chief justice of the Supreme Court, and past and former heads of the CBA have called the prime minister's actions into question, Justice Minister Peter MacKay will miss the group's annual get-together Aug. 15 to 17 in St. John's.

MacKay's spokeswoman said the invitation to attend the Canadian Legal Conference arrived in June, when the minister's summer travel was already planned, resulting in a "scheduling conflict."

"The minister has professional working relationships with his various stakeholders, including the CBA, and will pursue these relationships for the benefit of Canadians and strengthening Canada’s already robust criminal justice system," said Mary Anne Dewey-Plante in an email to CBC News.

MacKay attended the event last year.

"He's advised us that it's a scheduling conflict. I have no reason to question that. It's unfortunate," said CBA president Fred Headon.

In May, Headon called the prime minister's clash with Chief Justice Beverley McLachlin "disturbing." In comments on Twitter, Headon said he hoped the disagreement was a misunderstanding and urged the prime minister to clarify that McLachlin acted appropriately.

Eleven former presidents of the CBA also signed an open letter saying Harper's action demonstrated "a disrespect" for the judicial branch of democracy.

In June, the CBA weighed in on another controversy.

MacKay was at a meeting of the Ontario Bar Association when he was asked by a group of lawyers about the challenges of getting more diversity on the bench. MacKay reportedly responded that women aren't applying to be judges for fear that circuit-court jobs would take them away from their children.

Once again, the CBA raised questions.

"We need to wonder whether there is a basis in reality for MacKay's assertions as to why there are fewer female judges," Headon said in an interview with the CBC News at the time.

MacKay later said in a Facebook post that he never made the comments in question.

'Breaking point'

In June, another former CBA president, Simon Potter, told a CBA conference in Ottawa that Harper was "pushing the system to its breaking point."

Headon wouldn't tie any of those remarks to MacKay's decision to not to attend next month's gathering.

"I have no evidence of a chill and I certainly would hope it's not taken that way," he said.

"It's a long-standing relationship. I hope that that will be taken into account by those that might be looking at our comments and understand that we are trying to play that constructive role that we've played in the past."

The CBA says it invited MacKay in June to the St. John's event, and received word "a couple of weeks ago" that he would not be attending.

The CBC represents some 37,000 judges, lawyers, notaries, law teachers and law students.

Ontario reaches tentative agreement with civil servants' union

COLIN FREEZE, The Globe and Mail, August 3, 2014

Ontario's new majority Liberal government has brokered its first deal with a major union, a bellwether for difficult labour negotiations in the months ahead.

While the terms of the agreement have not yet been disclosed, observers say its details will be studied closely by other workers – teachers, jail guards, bureaucrats – whose own contracts are up for negotiation.

Opposition politicians and the province's bond holders will also be taking an interest, given the growing concerns about Ontario's ability to manage its $12.5-billion deficit.

Negotiators announced on Sunday they had resolved a six-month standoff between the province and its white-collar workers in AMAPCEO – the acronym for Ontario's second-largest civil servants' union.

Like other public-sector unions, AMAPCEO had been pushing back against the Ontario government's plan to freeze wages unless savings can be found elsewhere. It was also fighting to keep extended health-care benefits and job-security language.

The negotiations had straddled the June election. Before the campaign began, union leaders had publicly accused Premier Kathleen Wynne's government, which then had a minority in the legislature, of "declaring war" on labour.

Now, the former adversaries are talking about working in partnership.

"This agreement shows that when partners commit to work together to negotiate, the result can be both fair and responsible," Deb Matthews, the MPP in charge of the Treasury Board, said in a statement. Her spokesman, Paul Tye, added in an e-mail: "Our government is committed to eliminating the deficit by 2017-18."

Gary Gannage, president of AMAPCEO, said in an interview on Sunday that he would not publicly discuss details of the tentative agreement before disclosing them to members on Tuesday.

"It's a tricky environment to negotiate in, not only the terms and conditions, but also the length," said Mr. Gannage, who helped negotiate the previous two-year collective agreement between the union and the government. The Association of Management, Administrative and Professional Crown Employees of Ontario represents policy analysts, economists, auditors, scientists and veterinarians.

Supreme Court narrows scope of allowable evidence from 'Mr. Big' police stings

DOUGLAS QUAN, POSTMEDIA NEWS, July 30, 2014

Mr. Big stings — the controversial undercover police operations designed to draw confessions from suspects — run the risk of becoming abusive and producing unreliable evidence, Canada's top court ruled Thursday, as it laid out new rules to protect those targeted by them.

While the technique has proven valuable and resulted in hundreds of convictions, confessions can sometimes come from "powerful inducements" and "veiled threats," the Supreme Court of Canada said in its long-awaited decision.

Trial judges must consider the circumstances in which the confession was made, including the extent of inducements offered and the presence of threats, as well as the sophistication and mental health of the accused, the top court said.

Trial judges must also examine the confession for "markers of reliability," including the level of detail and whether the accused has provided details of the crime that have not been made public.

"Wrongful convictions are a blight on our justice system. We must take reasonable steps to prevent them before they occur," Justice Michael Moldaver wrote for the majority.

In a Mr. Big operation, officers posing as members of a criminal organization befriend the suspect — typically a murder suspect — and then gain the suspect's trust with money, booze and companionship. They get the suspect to carry out jobs for the group and slowly involve him in staged criminal acts, such as money laundering and drug trafficking.

Eventually, a meeting is set up with the group's boss, Mr. Big, designed to get the suspect to cough up details of a past crime. The suspect might be told that police are onto him and he needs to tell the boss everything. Or the suspect could be told he needs to share his past because it's the only way the organization can ensure his loyalty.

The willingness of the accused to join a criminal organization and participate in simulated crimes can have a prejudicial effect on a jury, the court said. It is up to the Crown to show, on a balance of probabilities, that the probative value of the confession outweighs the prejudicial effect of the "bad character" evidence, the court said.

Judges must also be vigilant for police abuses, the court said, suggesting that police cannot be allowed to "overcome the will of the accused and coerce a confession." Violence or threats of violence are unacceptable; so too are operations that prey on a suspect's vulnerabilities, such as mental health problems or youthfulness.

Thursday's decision stemmed from the case of Nelson Lloyd Hart, convicted in 2007 in Newfoundland of two counts of murder in the drowning deaths of his twin three-year-old daughters, Krista and Karen.

Hart, who has a Grade 5 education and was living on social assistance, was the target of a four-month Mr. Big sting. Officers pretending to be part of a criminal gang befriended Hart and assigned him to be a courier for the group. They paid him $16,000 cash, put him up in fancy hotels and fed him nice meals. Hart came to view them like "brothers."

When it came time to meet the group's boss, Hart initially denied involvement in his daughters' deaths, insisting he had suffered an epileptic seizure — the same story he had originally told police. But the boss refused to accept Hart's answer, repeatedly telling him, "Don't lie to me."

Hart changed his answer and said he had drowned his daughters because he was worried his brother would gain custody of them. A couple days later he took an undercover officer to the scene of the drowning and explained how he had pushed his daughters into the water.

In 2012, a majority of the Supreme Court of Newfoundland and Labrador's Court of Appeal overturned Hart's conviction and ordered a new trial, questioning the reliability of his confession. The Crown appealed to the Supreme Court of Canada.

The top court Thursday said that the financial and social inducements provided to Hart raised serious doubts about the reliability of Hart's confession. There was also significant potential for prejudice. After all, here was a man who had bragged about killing his children.

"It would be unsafe to rest a conviction on this evidence," the court said. However, it left up to the Crown to decide whether to have a new trial.

While Justice Thomas Cromwell agreed with the bulk of the majority's decision, he said the admissibility of Hart's statements should be determined at a new trial.

Mr. Big stings have come under increasing scrutiny in recent years. In June, an Ontario Superior Court judge threw all out the evidence gathered by police in a Mr. Big sting against Alan Dale Smith, who was charged in a 1974 murder.

The Toronto Star reported that the judge said that the sting carried out by Durham Regional Police elicited a confession from Smith with holes so big you could "drive a Mack truck" through them.

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La Cour suprême restreint l'admissibilité des opérations «Mr. Big»

Hugo de Granpré, La Presse, le 30 juillet 2014

La Cour suprême du Canada a maintenu la validité des opérations de type Mr. Big, mais elle en a restreint leur admissibilité en preuve, dans une décision rendue jeudi.

Le dossier émane de Terre-Neuve: un père de famille, Nelson Lloyd Hart, était soupçonné par les policiers d'avoir tué ses deux filles jumelles de 3 ans, mortes noyées en 2002.

Les enquêteurs ont mis sur pied une organisation criminelle fictive pour l'enrôler et l'emmener à confesser ses crimes. M. Hart a tout avoué à la tête dirigeante après quatre mois et une soixantaine de « scénarios » qui lui ont rapporté plus de 15 000 $ et l'ont fait voyager à Montréal, Halifax, Ottawa, Toronto et Vancouver.

La question était de savoir si les confessions recueillies dans ce contexte étaient admissibles en preuve. La Cour suprême avait déjà répondu oui à cette question dans les années 1990.

Ces opérations policières sont communes au Canada, où plus de 350 ont été menées depuis 30 ans. Ça a été le cas notamment dans l'enquête sur le meurtre de la jeune Joleil Campeau.

Mais la technique soulève des préoccupations quant à la fiabilité des aveux recueillis, à des abus possibles par des policiers et à la participation à une organisation criminelle, même fictive, qui est susceptible d'entacher la crédibilité de l'accusé.

ST : «Pas de protection suffisante»

Dans les circonstances, la Cour a décidé de ne pas admettre les admissions recueillies dans le cadre de l'opération Mr Big et a laissé aux procureurs la décision de réclamer ou non un nouveau procès.

L'accusé a été décrit comme un homme isolé socialement, qui ne travaillait pas et qui vivait de l'aide sociale. Les policiers sont devenus ses amis, lui ont fait goûter à une vie de luxe et lui ont fait miroiter d'éventuelles opérations encore plus lucratives, à condition qu'il confesse ses crimes.

« L'intimé s'est alors trouvé devant un choix déchirant : faire des aveux ou être considéré comme un menteur par l'homme qui dirigeait l'organisation à laquelle il voulait tant appartenir », a écrit le juge Michael Moldaver au nom de ses collègues.

« Je suis d'avis d'exclure de la preuve les trois aveux de l'intimé, car chacun a été recueilli grâce à des incitations quasi irrésistibles, a-t-il ajouté. Leur fiabilité est de ce fait

douteuse, sans compter que nul élément de corroboration n'est susceptible de les rendre dignes de foi à nos yeux. »

Le juge spécialisé en droit criminel a conclu que selon lui, « le droit actuel n'offre pas de protection suffisante à l'accusé qui avoue un crime dans le cadre d'une opération Monsieur Big ».

La Cour a formulé un test en deux volets pour mieux encadrer l'admissibilité de ces aveux en preuve à l'avenir. Plus restreints, ces critères pourraient compliquer la tâche des policiers et de la poursuite dans l'avenir dans le cadre de telles opérations.

« Je propose que l'aveu [...] recueilli soit présumé inadmissible, peut-on lire dans le jugement. Cette présomption d'inadmissibilité pourra être réfutée si le ministère public établit, selon la prépondérance des probabilités, que la force probante de l'aveu l'emporte sur son effet préjudiciable. »

RCMP to keep ‘Mr. Big’ sting tactic

DANIEL LEBLANC, The Globe and Mail, August 1, 2014

The RCMP will refine a controversial sting operation technique known as “Mr. Big” and keep using it to obtain confessions after the Supreme Court called for new safeguards to prevent wrongful convictions and police misconduct.

The technique, contentious in legal circles, involves undercover officers who integrate suspects into a purported criminal operation in the hopes they will confess their crimes to a superior, referred to as “Mr. Big” or “the boss.”

“Mr. Big isn’t going anywhere any time soon,” Inspector Scott Sheppard, who is in charge of undercover operations at the RCMP, told The Globe and Mail after Thursday’s ruling. “It is the undercover technique that we continue to work on and refine, and that will continue to evolve as it has since we started our program in the early 1970s.”

In its ruling, the Supreme Court said the Mounties “preyed” on the vulnerabilities of Nelson Hart, a poor, uneducated Newfoundland resident who was convicted of murder in 2007 for the death of his twin three-year-old daughters. The provincial court of appeal ordered new trial.

In a ruling on Thursday, the Supreme Court upheld that decision, and said the confessions obtained by RCMP undercover officers in the case cannot be used against Mr. Hart if the Crown goes ahead with a new trial.

Civil libertarians, legal experts and defence lawyers had hoped the Supreme Court would put a stop to such scenarios, stating that the threats of violence or promises of financial rewards involved lead to false confessions.

“These kinds of investigations are designed for the police to get the answers that they want,” Ottawa lawyer Leo Russomanno said.

RCMP officials said they will abide by the new guidelines in the Supreme Court ruling, including considering the age, education level and economic condition of their targets before they decide whether a Mr. Big sting is appropriate.

In addition, the RCMP will strive to ensure that investigators obtain confirmatory evidence, not just a dramatic confession. The Mounties are also expected to try to shorten the operations, with suspects and undercover officers undertaking fewer activities, and to use new technologies to record more of the interactions.

Pioneered by the RCMP, Mr. Big scenarios have been used for decades to obtain confessions from people suspected of murder, rape and other crimes. The RCMP said the technique has evolved in the decade since it was used against Mr. Hart, and that further refinements are already under way.

“We don’t take any pleasure in the fact that two young girls are deceased, and nothing we can do can bring them back,” Chief Superintendant Eric Slinn said. “However, from a practical standpoint and a legal standpoint, going forward as a law-enforcement organization … this guidance from the courts is of tremendous benefit to us.”

No such investigations are currently under way in the national police force. Still, the Mounties said the technique remains effective, even though the way suspects are led to confess to a police officer masquerading as a gang leader has been described frequently in the media.

“The reason that people fall for it is that it is based on real life,” Inspector Sheppard said. “It is based on what criminal organizations are doing at the time, and we simply mimic them.”

The RCMP insisted that, in addition to convicting criminals, these investigations can also exonerate suspects. Officials pointed to cases in which the RCMP recorded confessions, and then determined they were false.

The undercover officers involved in the operations always urge suspects to be honest, hoping to force “bad guys to tell us their secrets.”

“We do everything in our power to get people to become truthful,” Inspector Sheppard said. “You can lie to your wife, you can lie to your girlfriend, you can lie to your boss, but you don’t lie to us.”

He added that the biggest misconception about the operations is that the RCMP cares only about getting a confession.

“It’s about uncovering the truth,” Inspector Sheppard said.

CBC news |

Mountie who played 'Mr. Big' upset with Nelson Hart decision

Elaborate sting involving fake crime boss criticized by Supreme Court of Canada

The retired RCMP officer who played "Mr. Big" in the Nelson Hart murder investigation says Thursday's Supreme Court of Canada decision will hurt future investigations into serious crime.

"I feel horrible. I feel horrible to the point … I can't tell you the feeling in my gut," said the former Mountie, who cannot be identified because of a publication ban.

Canada's top court upheld a decision ordering a new trial for Hart, who had confessed to murdering his twin three-year-old daughters to the Mountie, who had pretended to be an underworld boss wanting to know whether he could trust Hart with criminal tasks.

The court also took aim at the so-called Mr. Big scenario, in which police have pretended to be criminals in order to lure suspects into confessing crimes. The technique has also led to the discovery of missing bodies.

According to the Supreme Court of Canada decision, the RCMP may have abused its power, making Hart's confession unreliable. The Crown's case against Hart in his 2007 conviction was based largely on evidence collected through the sting.

In an interview with CBC Radio, the retired officer said he still believes the investigation produced a meaningful confession.

'Mr. Big' sting confessions get stricter rules from Supreme Court.

"To believe Mr. Hart is going to get out of jail and walk away with killing his two twin daughters — it's just overwhelming in Canada they'd allow that to happen," he said.

Hart's lawyers say they feel vindicated by the Supreme Court of Decision, having argued that the RCMP manipulated an impoverished, naive man with a Grade 5 education into believing he would become rich if he told a supposed crime lord what he wanted to hear.

Hart led 'through the looking glass'

In the court's decision, Justice Andromache Karakatsanis wrote that the "state conduct in this case was egregious" against Hart.

"The police led Mr. Hart through the looking glass into a parallel universe where, for many months, they employed extensive state resources to prey on his lack of education, intellect, and life experience; his social isolation; and his extreme poverty," she wrote.

Justice Michael Moldaver was also critical.

"The circumstances left the respondent with a stark choice: confess to Mr. Big or be deemed a liar by the man in charge of the organization he so desperately wanted to join," he wrote.

"In my view, these circumstances, considered as a whole, presented the respondent with an overwhelming incentive to confess - either truthfully or falsely. Having determined that the circumstances in which these confessions were made cast serious doubt on the reliability of the respondent's confessions, the next question is whether these confessions contain any indicators of reliability. In my view, they do not."

Scenario was necessary: retired officer

But the retired Mountie said playing Mr. Big was necessary in the Hart case.

There were no witnesses to what happened at Gander Lake in 2002, where Hart's twin daughters Krista and Karen drowned. Hart had claimed he had driven back to town for help, although police were skeptical of his claims.

The retired officer — who still believes that Hart is guilty of killing his daughters — said he believes Thursday's ruling to lead to appeals in other convictions.

"They'll examine a lot of them and decide if they can be pursued. But it's what they do and it's what they believe in. Let them believe in it and let them try it," he said in an interview with the Central Morning Show.

The retired officer said he thinks police investigators will adapt the technique to abide by the limitations the court has placed on the Mr. Big scenario. However, he said he fears that RCMP managers will be reluctant to use it, and that guilty people will not be convicted.

OTTAWA CITIZEN

Prominent Ottawa judge strikes down mandatory victim surcharge

BY ANDREW SEYMOUR, OTTAWA CITIZEN, JULY 31, 2014

An Ottawa judge who is recognized as one of the country's most pre-eminent legal minds has struck down the Conservative government's mandatory victim surcharge as unconstitutional.

In a carefully reasoned, 31-page decision released Thursday, Ontario Court Justice David Paciocco found that a reasonable person who was properly informed would find $900 in mandatory victim surcharges for addicted, impoverished and troubled Inuit offender Shaun Michael so grossly disproportionate that it would outrage the standards of decency.

Paciocco found the surcharge amounted to cruel and unusual punishment.

The 26-year-old Michael was facing the fines after a series of what the judge described as "nuisance" crimes committed while he was extremely intoxicated. Michael stole a bottle of rye from a downtown LCBO and then kicked a loss prevention officer and police officer, confronted a snowplow operator and broke a shelter window, and lashed out at police after being stopped wandering down the middle of a busy street.

Each of the nine offences Michael pleaded guilty to carried separate $100 surcharges.

Michael, who grew up in group homes and on the street, survives below the poverty line on a street allowance of $250 a month. Each of the $100 victim surcharges amounted to 40 per cent of his monthly income and the total was an "otherworldly sum" that Michael was never likely to repay, the judge said.

"This is a crushing amount for him, beyond his foreseeable means. It is a sum that, in relative hardship, is many multiples of what a moneyed offender would have to pay," Paciocco wrote. "Simply put, Mr. Michael is being treated more harshly because of his poverty than someone who is wealthy."

Paciocco's decision is the latest blow for the mandatory surcharge, which has been the target of ire for defence lawyers and some judges since the amount was doubled and made mandatory in October of last year. Michael was the first offender in Ottawa to formally argue the constitutionality of the surcharge, although more legal challenges are expected this fall. Several other judges have declared the provision unconstitutional, although several of those decisions were made without hearing proper legal arguments.

The government made the surcharge mandatory after complaints by victims groups that judges weren't imposing the measure properly. Judges routinely waived the fee when offenders were sentenced to jail or without inquiring about their ability to pay the surcharge, which funds victim services.

In his decision, Paciocco — who has authored books on criminal law and is considered one of Canada's foremost experts on evidence — dismissed Crown arguments that the surcharge wasn't a punishment so therefore couldn't be found to be cruel and unusual.

"All extrinsic sources confirm that the victim surcharge was enacted to make offenders pay for their crimes," wrote Paciocco. The name of the law, the Increasing Offenders Accountability to Victims Act, and statements made by the justice minister and other politicians are "situating this legislation among tough-on-crime initiatives" designed to deter offenders and hold them responsible for their actions.

An offender's ability to apply for an extension of time to pay the surcharge doesn't reduce its disproportionate impact, Paciocco found.

The judge also took aim at the government's decision to remove the judicial discretion that once allowed judges to waive the surcharge in cases where it would cause undue hardship.

"Making the victim surcharge mandatory is one solution to the failure of judges to impose it where it should be imposed. Another, one that keeps the baby after the bathwater has been thrown out, is for the Crown to appeal or seek to review decisions where the victim surcharge is inappropriately waived," Paciocco wrote.

Michael's lawyer, Stuart Konyer, called the decision "a victory for the rights of impoverished accused persons."

"Given the number of different courts across the country which have now declared the victim surcharge amendments to be unconstitutional, it is time for the federal government to rewrite this law in a manner that complies with Charter standards," said Konyer, who is also the president of the Defence Counsel Association of Ottawa.

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DROITS LINGUISTIQUES

L'unilinguisme devant la Cour suprême

Deux francophones de l'Alberta se battent pour la tenue de procès civils dans leur langue

Philipe Orfali, Le Devoir, le 1er août 2014

La Cour suprême du Canada entendra la cause de deux francophones de l'Alberta qui souhaitent forcer leur province et, par extension, la Saskatchewan à tenir des procès civils et à publier leurs lois en langue française. Des procédures judiciaires aux allures de chasse au trésor, le tribunal devant se pencher sur la teneur de documents remontant aux balbutiements de la Confédération canadienne.

Gilles Caron et Pierre Boutet ne pensaient pas se retrouver un jour devant le plus haut tribunal au pays lorsque, chacun de son côté, ils ont contesté des contraventions émises en anglais par le gouvernement de l'Alberta.

Entente entre la reine Victoria et Louis Riel

Les deux hommes ont appris jeudi que les juges de la Cour suprême du Canada (CSC) trancheront, l'an prochain, dans la bataille qui les oppose depuis cinq ans à l'Alberta. Après avoir obtenu gain de cause en première instance, les deux hommes ont été déboutés à deux reprises avant de se retrouver devant la CSC. Comme les lois fondatrices de l'Alberta et de la Saskatchewan sont pratiquement identiques, la décision affecterait les deux provinces.

Les deux hommes prétendent que l'Alberta et la Saskatchewan doivent, à l'instar du Manitoba, reconnaître des droits linguistiques importants à leurs populations francophones, en vertu de décrets impériaux centenaires. « La cour va devoir interpréter des documents constitutionnels qui n'ont jamais vraiment été étudiés par la CSC, tel le décret en conseil sur la Terre de Rupert et les Territoires du Nord-Ouest, qui remonte à 1870 », explique François Larocque, l'un des avocats qui représentent M. Boutet et l'Association canadienne-française de l'Alberta devant le tribunal.

En somme, la cour devra établir si la reine Victoria a bel et bien promis à Louis Riel de préserver l'ensemble des droits des francophones et des Métis de l'Ouest canadien, en échange d'une adhésion pacifique à la Confédération et, dans l'affirmative, si ces engagements tiennent toujours en Alberta et en Saskatchewan 150 ans plus tard.

Le cas échéant, la cour pourrait ouvrir la voie à des procès tenus en français, comme c'est le cas en matière criminelle.

L'équipe juridique de MM. Caron et Boutet argue que la vente de la Terre de Rupert et des Territoires du Nord-Ouest au dominion du Canada par la Compagnie de la Baie d'Hudson, pour la somme de 300 000 livres sterling, prévoyait la reconnaissance des droits des habitants de l'endroit.

« Quand le Canada a par la suite créé l'Alberta et la Saskatchewan, les attentes étaient que tous les droits négociés et appliqués lors de la création du Manitoba allaient également valoir dans ces nouvelles provinces, explique Me Larocque, qui est aussi professeur de droit à l'Université d'Ottawa. Mais les lois fondatrices de l'Alberta et de la Saskatchewan ne mentionnent pas spécifiquement les droits linguistiques. C'est sur cela que s'appuie le gouvernement de l'Alberta » pour limiter le statut du français.

100 000 francophones

La partie n'est toutefois pas gagnée d'avance. La Cour suprême a statué en 1988 que les provinces pouvaient développer leurs propres mesures législatives en matière de droits linguistiques. Ce qu'avait fait l'Alberta, avec sa Loi sur les langues, qui précise que « toutes les lois et réglementations peuvent être promulguées et publiées en anglais seulement ».

Ces dernières années, l'Alberta a accueilli un très grand nombre de Québécois, attirés par la manne des sables bitumineux. Alors que la population francophone connaît une certaine croissance, une décision du tribunal viendrait donner une plus grande légitimité aux revendications de la communauté franco-albertaine, en rétablissant l'égalité de statut entre les deux communautés linguistiques, selon l'avocat.

Près de 100 000 francophones de l'Ouest canadien sont concernés par la future décision de la CSC. Quelque 81 100 Albertains ont le français pour langue maternelle, ce qui en fait la troisième communauté en importance, après l'Ontario et le Nouveau-Brunswick.

OTTAWA CITIZEN

Supreme Court nominee Marc Nadon doesn't need to repay salary: MacKay

JORDAN PRESS, Ottawa Citizen, July 30, 2014

Justice Minister Peter MacKay has decided Marc Nadon won't have to repay any of the salary he earned as a Supreme Court of Canada justice before being declared ineligible to sit on the high court.

The Supreme Court's registrar, who oversees payments to judges, reviewed the rules around salaries ever since March when the top court nullified Nadon's appointment. The ruling meant Nadon went back to being a semi-retired judge on the Federal Court of Appeal.

MacKay didn't take long to make a decision. In a statement, a spokeswoman for MacKay said the government won't make Nadon repay any part of his Supreme Court salary.

"The government won't be retroactively changing Judge Nadon's pay," Mary Ann Dewey-Plante said in an email.

The Supreme Court rejected Nadon's appointment in a landmark ruling in March.

The Supreme Court Act requires that nominees for one of Quebec's three seats on the high court be either a member of the provincial bar, a member of the province's Superior Court or a judge on the Quebec Court of Appeal. The top court said a Supreme Court nominee from the province had to be a current member of any of those bodies, which Nadon was not.

(Three months after the ruling, the government appointed Justice Clément Gascon to the vacant seat.)

Nadon didn't take part in any hearings or deliberations while the top court reviewed his eligibility. He did, however, draw a salary, at the time valued annually at $351,700.

The court's registrar was left to determine if Nadon was required to repay what he earned — estimated to be about $146,500 — or the difference between what he earned on the Supreme Court and what he would have earned on the Federal Court of Appeal.

At the time, five months of salary at the Federal Court of Appeal would have been $123,125, or about $23,375 less than the pay for a Supreme Court judge for the same period.

Nothing in the legislation guiding judges' salaries envisioned the scenario Nadon and the government found themselves in March. Supreme Court registrar Roger Bilodeau reviewed the rules and decided Nadon's Supreme Court salary wasn't improper.

"The registrar has reviewed the facts and the statutory framework and has concluded that he is not in a position to make a determination about whether or not there has been any overpayment of salary or allowances to Justice Nadon," the Supreme Court said in a statement.

"When the payments were made to Justice Nadon, they were made properly and in accordance with the provisions of the Judges Act."

Bilodeau said it was up to MacKay to decide.

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MacKay ne forcera pas le juge Nadon à remettre son salaire

La Presse Canadienne, le 30 juillet 2014

Le gouvernement ne forcera pas Marc Nadon à remettre le salaire en trop qu'il a perçu lors de son passage en tant que juge de la Cour suprême, a annoncé le cabinet du ministre de la Justice, mercredi.

La nomination de M. Nadon a été invalidée en mars puisqu'elle violait les dispositions particulières au Québec de la Loi sur la Cour suprême.

Le registraire de la Cour, Roger Bilodeau, a mentionné que M. Nadon a reçu le salaire et les allocations d'un juge de la Cour suprême entre le 3 octobre 2013 et le 21 mars 2014 selon la Loi sur les juges.

Un juge de la Cour suprême touche presque 60 000 $ par année de plus qu'un juge de la Cour d'appel fédérale, le tribunal où siégeait M. Nadon. Celui-ci a donc reçu plus de 25 000 $ en plus au cours de cette période.

M. Bilodeau, qui est indépendant de la Cour, a déclaré qu'il avait vérifié les faits et le cadre législatif et qu'il avait conclu qu'il n'était pas en position de déterminer si M. Nadon avait été trop payé.

Il avait dit que la décision appartenait au ministre de la Justice, Peter MacKay.

Cependant, la directrice des communications de M. MacKay, Mary Ann Dewey-Plante, a indiqué mercredi que le gouvernement «n'allait pas changer de manière rétroactive le salaire du juge Nadon».

Alberta breaks pledge on civil-servant pay freeze

DEAN BENNETT, THE CANADIAN PRESS, July 28, 2014

The Alberta government acknowledged Monday that it broke its promise to freeze salaries for top managers and has instead given them 7-per-cent raises.

That will boost salaries for top civil servants to more than $300,000 a year by 2016.

Government spokeswoman Jessica Jacobs-Mino said while the government promised in 2013 to freeze salaries for three years, things changed this spring when the government struck a deal with the Alberta Union of Provincial Employees.

That deal provides an $1,850 lump-sum payment and a 6.75-per-cent salary increase over three years.

Ms. Jacobs-Mino said the government's standard practice has been to give managers the same deal that unionized staff get.

"We're looking at treating all public servants fairly here," Ms. Jacobs-Mino said.

The union represents rank-and-file employees from prison guards to social workers. It ratified a new contract last month after more than a year of bitter debate and court action against the province.

To show it was serious in keeping salaries lean, the province announced in February, 2013, that it would freeze the salaries of all top managers.

But the opposition Wildrose party on Monday revealed documents showing that cabinet quietly approved the senior manager pay increases last week.

Wildrose finance critic Rob Anderson said the decision puts to rest any notion that the culture of entitlement that has plagued the Tory government was all former premier Alison Redford's fault.

"It's just the blatant dishonesty," said Mr. Anderson. "How many times do they think they can just flat-out lie to Albertans about what they're going to do, and that Albertans are just going to forget about it?"

Changes afoot for aboriginal treaty talks and resource development

Bill Curry and Kathryn Blaze Carlson, The Globe and Mail, July 28, 2014

The Conservative government is launching more flexible options for aboriginal treaty talks after setbacks to its ambitious resource development plans.

The announcement signals Ottawa's desire to give its stagnant British Columbia treaty process a boost by negotiating smaller, incremental treaties where possible and signing deals with aboriginal groups outside the formal treaty process.

It is also promising to improve its nation-wide approach to aboriginal consultation, which has been at the heart of a string of court defeats for the federal government as it attempts

to speed up resource projects like mining and new pipelines, particularly in Western Canada.

Aboriginal Affairs Minister Bernard Valcourt made the announcement on Monday in Vancouver via a news release and was not available to answer questions.

The plans are in response to recommendations in a November, 2013, report from Douglas Eyford, who was appointed last year by Prime Minister Stephen Harper as Canada's special federal representative on West Coast energy infrastructure.

Mr. Eyford's report called for better relations between governments and aboriginals in order to build the trust required to reach agreement on resource development. However, trust is in short supply at the moment when it comes to aboriginal relations and the Harper government.

While the Prime Minister won high praise with his 2008 apology for Canada's residential schools history, his government has inspired resentment over its approach to resource development and education reform. The Assembly of First Nations is leaderless because of internal disagreement over how to work with Ottawa.

Mr. Valcourt's announcement also comes on the heels of a Supreme Court ruling in June that for the first time recognized the existence of aboriginal title on a particular site in B.C. – a decision that put aboriginals on a new footing, in part because it said they still own their ancestral lands if they did not surrender them through treaties.

Anne Johnson, a Queen's University community relations expert and PhD candidate in mining, said Ottawa appears to be redoubling its efforts to persuade First Nations people they would benefit from resource projects such as the Northern Gateway pipeline to the B.C. coast.

"It's a step forward," she said. "But I think the government is looking at it through their own lens, which is that development is the highest good and a desirable outcome."

Historic treaties and modern land agreements cover most of Canada, but B.C. is a clear exception. According to Aboriginal Affairs and Northern Development Canada, 57 groups representing two-thirds of all First Nations people in the province are currently participating in the B.C. treaty process. Since the negotiations were launched in 1993, the government has signed and implemented three modern treaties.

Grand Chief Stewart Phillip, the president of the Union of British Columbia Indian Chiefs, called the government's announcement a "misguided" attempt to calm jitters among industry stakeholders.

"This is a pathetic effort to revitalize the treaty process in the aftermath of a dramatic change to the legal landscape," he said, referring to the Supreme Court decision. "It's going to take more than that."

Monday's announcement includes an offer from Ottawa to facilitate shared territory disputes between aboriginal groups in relation to major resource development projects. It

is also offering to stop clawing back federal transfers for health, education and social development based on an aboriginal government's own sources of revenue. Ottawa will also resume treaty fisheries negotiations in B.C., which had been deferred as part of a public inquiry into the Fraser River Sockeye population.

"Our goal is to work in partnership so we can seize opportunities to promote prosperous communities and economic development for the benefit of all Canadians," Mr. Valcourt said in a statement.

The courts and the veil: Justice for some?

By Natasha Bakht and Jordan Palmer, iPolitics, July 31, 2014

Natasha Bakht is an associate professor of law at the University of Ottawa. Jordan Palmer is a PhD candidate at the University of Ottawa's faculty of law.

They say justice delayed is justice denied. No one knows that better than 'NS', a Muslim woman forced to remove her niqab (full-face veil) in order to testify against two relatives she alleges sexually assaulted her as a child.

She has never deviated from her allegations. The case, initiated in Toronto in 2008, ended last week when the Crown prosecutor withdrew the case, citing "no realistic possibility of conviction."

NS is understandably distraught that the matter will never reach a verdict. Six years of stress for her and the accused men — not to mention the cost to the taxpayer — and nothing to show for it. The accused are innocent until proven guilty and the Crown must act as an impartial servant of justice — but the treatment NS received highlights grave flaws in our justice system.

First, this case took an inordinate amount of time merely to determine whether NS could testify at the preliminary hearing wearing her veil, as mandated by her religious beliefs. After rulings by two provincial judges, two superior court judges, three court of appeal judges and seven Supreme Court of Canada judges, the result for women like NS is … inconclusive. Niqabs are neither automatically accepted nor banned in Canadian courts, and judges may still take whatever measures they see fit.

The about-face by the Crown — made even more stinging by defence lawyers who sneered that the Crown's decision supported their claim that NS's allegations were 'fabricated' — reminds sexual assault victims of how precarious their place in the legal system is.

Both judges who had to apply this muddy law denied NS the ability to follow her religious beliefs while testifying. Most of the judges in this case held tightly to the belief that seeing the face is an important tool for credibility assessment. That belief flies in the face of much social science research saying the precise opposite: No one can reliably tell if someone is lying simply by looking at a facial expression.

Second, the withdrawal of charges at this late stage — after NS testified without her niqab at the preliminary hearing and the judge committed the case to trial — undermines the principle of public justice. In its decision to drop the case, the Crown cited "new information" — and refused to say what it was. NS and the accused are already protected by publication bans and cannot be named. If a Crown prosecutor is going to wield such awesome discretionary power to dismiss the case, should we as citizens not know more about what shaped his decision, especially as there is no recourse for NS? Courts are open to the public for a reason.

But these issues pale in comparison to the bigger problem. The anti-niqab aspects of the case likely have discouraged other niqab-wearing Canadian women from seeking justice in cases of sexual assault. Let's remember that sexual assault is one of the most underreported crimes in this country — and when it is reported, it's also the most likely to be tossed out by police based on the belief that it is 'unfounded'.

The about-face by the Crown — made even more stinging by defence lawyers who sneered that the Crown's decision supported their claim that NS's allegations were "fabricated" — reminds sexual assault victims of how precarious their place in the legal system is. Sex assault cases that end in convictions tend to involve women and situations that courts consider "believeable" — in other words, white women who are assaulted by strangers. Black and aboriginal women fare poorly in such prosecutions. NS is Muslim and she wears the niqab; she doesn't fit the typical 'victim' stereotype, and is less likely to believed.

To chill the rights of sexual assault victims is to discourage them from coming forward. To discourage reporting is to allow impunity for sex crimes — a huge step backward for our legal system and society.

Truth in Sentencing Act declared unconstitutional in N.W.T.

By David Dias, Legal Feeds blog, Canadian Lawyer, July 17, 2014

A judge at the superior court level has for the first time directly responded to a Charter challenge of the Truth in Sentencing Act — Ottawa's attempt to limit credit for time served — deeming provisions within the act to be unconstitutional and of no force or effect.

The declaration, by Supreme Court of the Northwest Territories Justice Louise Charbonneau, was made as part of a sentencing decision in R. v. Nadli, a sexual assault case in which the accused had spent 744 days in remand.

In April, the Supreme Court of Canada, in R. v. Summers, issued its own controversial ruling that allowed judges to offer the maximum "enhanced" credit of 1.5 to 1 for time served.

The accused in this case, however, did not qualify for this enhanced credit due to a technical provision in the act stipulating if the accused is denied bail for prior convictions, he or she will be ineligible for the enhanced credit.

Peter Harte, counsel for the accused, argued this provision violated the Charter on multiple grounds:

1) it discouraged the accused from exercising his or her right to apply for bail hearing;

2) it punished the accused twice for the same crime; and

3) it resulted in a grossly disproportionate sentence.

Charbonneau agreed on all points.

As the decision states: ". . . the accused will certainly know the risk: a denial of bail based on the criminal record will mean that credit for remand time will be limited to a 1:1 ratio instead of being limited to 1.5:1, a difference of 50%. The prospect of spending 50% more time in custody when all is said and done, is not insignificant. It is hard to see how it would not act as a deterrent to apply for bail.

"Is this deterrent enough to constitute a breach of paragraph 11(e) [of the Charter]? In my view, it is."

Harte says this ruling will reverberate across the country: "Regardless of what went on in Mr. Nadli's case, that standalone declaration that the provisions are unconstitutional apply now in theory to other accused people in the territory and eventually elsewhere."

The fundamental problem, he says, is the arbitrariness of a provision that allows a justice of the peace, in granting or denying bail for whatever reason, to limit the discretion of a superior court judge in deciding whether to grant enhanced credit.

“Why should an accused, who has the right to seek bail, have a penalty of losing presentence or pretrial custody credit imposed as a result of losing a bail hearing?”

From this primary Charter violation stem the other two: a convict denied bail will, all things being equal, spend more time in custody than a convict who had been granted bail (punished twice for the same crime). And the resulting sentence would be 50-per-cent longer (grossly disproportionate).

Harte says the act’s provision on bail hearings has led defence counsel to advise clients to forego their rights.

“I've told clients, ‘Look, you're going to get detained. Just stay put. Don't run a bail hearing.’ And I know the situation is the same for my colleagues.”

It’s a situation that is fundamentally unfair, he says, and will ultimately lead to further challenges. “I just don't think it will withstand constitutional scrutiny.”

CBC news |

Benjamin Perrin, former PMO lawyer, won't face B.C. Law Society probe

Lawyer's emails were sought as part of RCMP investigation into MIke Duffy-Nigel Wright affair

Rosemary Barton, CBC News, July 30, 2014

The Law Society of British Columbia will not pursue an investigation into the conduct of Benjamin Perrin, the prime minister's former legal counsel, for his role in a $90,000 payment to Senator Mike Duffy, CBC News has learned.

A spokesperson for the Law Society says Perrin's file was closed on July 14 under one of its rules, which states it can do so "if we are satisfied that the complaint is not valid, or its validity cannot be proved."

The Law Society would not say who or what prompted it to look into the matter, but media reports last November said University of Ottawa law professor and activist Amir Attaran lodged a complaint about Perrin with the society.

In a statement to CBC News, Perrin said, "I am pleased that the Law Society has closed this file and did not find any concerns with my conduct as a lawyer."

He said he looks forward to continuing his work on public policy issues.

Perrin worked as a legal affairs and policy adviser to Prime Minister Stephen Harper in 2012-13.

Perrin's name was cited a number of times in court documents filed by RCMP as part of their investigation into a $90,000 payment to Duffy from Nigel Wright, Harper's former chief of staff, to repay Duffy's ineligible Senate expenses.

The documents said Wright told the investigating officer Perrin was aware of Wright's decision to give Duffy the $90,000, though Wright added Perrin was not involved in that decision in any way.

According to the RCMP, Perrin was also involved in legal negotiations with Duffy's lawyer around the alleged deal, including the conditions under which it would happen and the "media lines" that would be used by Duffy.

There were also concerns Perrin's emails had been deleted after he left his position in the Prime Minister's Office, but the Privy Council Office was subsequently able to retrieve the emails and handed them over to the RCMP.

Since leaving the Prime Minister's Office, Perrin has returned to his position as professor at the University of British Columbia, where he has most recently been working on improving the justice system for victims of crime.

Toujours pas d’excuse de Harper

Agence QMI, le 28 juillet 2014. Droit-Inc. Québec

Stephen Harper reste imperturbable devant les demandes formulées par un organisme juridique international, qui réclame des excuses à l’endroit de la juge en chef de la Cour suprême.

Stephen Harper et le ministre de la Justice Peter MacKay ont accusé en mai dernier la juge en chef Beverley McLachlin d’avoir agi de manière inappropriée lorsqu’elle a tenté, l’été dernier, d’avertir le ministre MacKay d’un potentiel problème relativement au choix

du juge de la Cour fédérale Marc Nadon pour pourvoir à un poste vacant à la Cour suprême.

M. Nadon a finalement été déclaré inéligible par la Cour suprême mais la querelle entre le gouvernement fédéral et le plus haut tribunal du pays a incité des juristes canadiens à demander à Stephen Harper et Peter MacKay de s'excuser.

Des avocats canadiens ont écrit une lettre à la Commission internationale des juristes au début du mois de mai, demandant une enquête sur les affirmations du gouvernement voulant que la juge McLachlin avait eu tort de tenter de communiquer avec le gouvernement pour discuter de la nomination du juge Nadon.

La Commission a étudié le dossier et a conclu que la juge n'avait pas agi de manière inappropriée, blâmant plutôt MM. Harper et MacKay.

« Le premier ministre et le ministre de la Justice pourraient remédier à leur empiétement sur l'indépendance et l'intégrité de l'appareil judiciaire en retirant publiquement ou en s'excusant pour leurs critiques publiques de la juge en chef.»

Le porte-parole du premier ministre, Jason MacDonald, a déclaré qu'il n'avait pas vu la lettre.

« Nous avons vu la lettre et en avons pris note, a-t-il dit. Je n'y rien de plus à ajouter à votre histoire.»

Managers, EXs and Profanities: is it Tolerated in the GoC?

By The Public Servant, an online magazine for public servants, July 28, 2014

You're at your desk when all of the sudden, you hear a discussion taking place around the corner between a member of senior management, a manager and an employee. At its core, it's just a casual conversation and all three individuals have a seemingly good dynamic. However, the member of senior management laces their sentences with "f-bomb" this and "f-bomb" that for anyone else on the floor to hear.

What would be your reaction to this colourful discussion happening right outside your office?

A recent article describes how swearing by execs is becoming less and less tolerated in the private sector and points to a number of recent examples in the media.

"People are often playing to the audience and in many cases you have [an exec] trying to motivate people to change, to get a message across," the article says.

Swearing is also a tension release as, "the f-bomb, the blasphemous GD, the [s-word] and the derogatory term AH were used 254 times by top executives in calls from 2004-2014, according to a Bloomberg analysis.

The article goes on to say, "one reason to keep the levels of profanity low in the workplace is that doing that will keep down other inappropriate behaviour, argues P.M. Forni, author of the book 'Choosing Civility: The Twenty-Five Rules of Considerate Conduct,' who has been advocating for more politeness for 15 years. [Swear words are used] as an intensifier, which is often what people do and they think it does no harm, [Forni says]. But in many environments, that is still beyond the pale."

But what about swearing by managers and EXs in the GoC? Is there a culture of acceptance or indifference and inaction, or is it addressed and corrected? Ultimately, whatever one's attitude is towards managers and EXs swearing, it does set the tone for the work atmosphere as senior leaders are supposed to know better and set an example.

This is timely as the Public Service Employee Survey (PSES) comes out in less than a month where all public servants have the opportunity to have their voice heard and paint a picture of their work atmosphere and corporate culture, whether it be a healthy or toxic one.

What is the Public Servant?

We are: an online news magazine for federal public servants.

What we're not: an official Government of Canada publication nor do we represent the views of the Government of Canada or federal public servants.

We're a bit of "what you need to know" for public servants with a little fun and juicy sensationalism mixed in. After all, what would life be without a little excitement and a little mystery? We're also a non-partisan central hub for federal public servants to converge, get informed and discuss issues of importance that matter to them if they choose to do so. Because not everybody wants to sign up for something; not everybody has a blog or an account on Facebook, Flickr, Twitter, Tumblr, GCPedia, GCConnex, GCForums or has time to stay up-to-date with whatever the latest iteration of social media is. Sometimes, a person just wants a registration free, no hassle, no terms of service, one-stop shop to see the headline of the day, see what other people are saying and maybe, if they feel like it, have a voice and chime in. Anonymous or otherwise.

We're a space where no labels, job titles or hierarchies exist. Here, we're all equal and it's our voices that matter. It's time for a different way of doing things.

The new constitutional order

A counterpoint to Bob Rae

Written by Peter Best, Contribution to Canadian Lawyer, July 28, 2014

Peter Best is a lawyer in Sudbury, Ont., with 39 years of practice under his belt.

Bob Rae's sunny and upbeat assessment of the state of aboriginal law, in the July edition of Canadian Lawyer, warrants a counterpoint response.

No doubt, as a partner in his new law firm, it's "an exciting time to be practising aboriginal law." In this area of litigation and "bargaining table" legal activity, win or lose, counsel for Indian bands usually get their legal fees fully paid by the Canadian taxpayer.

But Rae is wrong and unfair to our British and Canadian ancestors to state the written treaties were "forced on" the Indian bands who signed them, and that they were deliberately "starved into submission."

This totally unsupported assertion is gravely insulting to our forefathers, who generally acted honourably and sympathetically towards the Indian bands with whom they were treating.

In the recent Grassy Narrows First Nation v. Ontario (Natural Resources) case, both the litigants and the courts, at all levels, relied on Alexander Morris' account of the treaty deliberations at issue. Morris' account gave rise to no suggestion of coercion and the courts found none.

Nor is it correct for Rae to say, at the time of the signing of the treaties, the Indian bands concept of them was "a sharing of the land, water, food, and resources." There is no evidence for this in history or in any of Morris' or anyone else's treaty deliberation accounts.

This “sharing” concept is basically a recent legal invention of the Supreme Court of Canada, primarily in Haida Nation v. British Columbia (Minister of Forests), and has become one of the profound, harmful (to the Canadian welfare), and unintended consequences of the enactors of s. 35 of the Charter of Rights not knowing “exactly what the implications of these changes were,” (Rae’s words).

Edmund Burke wrote that in relation to the “science” of reforming a nation’s constitution “. . . very pleasing commencements have often shameful and lamentable conclusions.”

Such has been the case with the passage of s. 35 of the Charter.

Haida Nation and its legal successors, now capped off by Tsilhqot’in Nation v. British Columbia, have created something like a “separate but equal” constitutional regime, with, in large areas of Canadian life, one set of laws for native people and another set of laws for the rest of Canadians.

This is retrograde and racist (albeit unintentionally and benignly so). It’s illiberal. Nelson Mandela must be turning in his grave.

These court decisions have also radically amended the Canadian constitutional order by creating a third fount of constitutional sovereignty. The federal and provincial Crowns being the first two and now small, often poorly organized, self-seeking, technically totally dependent, geographically scattered Indian bands.

Now, with Tsilhqot’in Nation, we see the even worse prospect of semi-sovereign Indian bands whose aboriginal title, in all but “pressing and substantial” matters, ranks superior to Crown title.

Will the Queen’s writ still automatically extend to aboriginal title lands? Will fee simple titles come under question? Rae’s firm should be standing by for more taxpayer-funded litigation and “bargaining table” activity on these and hundreds more similar questions.

The harmful effects of all this devolutionary, revolutionary jurisprudence are already happening: the emasculation of crucial Crown sovereignty; the weakening of the tax and revenue spine of the country; diminishment of the rule of law; the “consult and accommodate” obligation being used as a weapon of economic coercion; important undertakings of great benefit to Canadians being delayed or shelved; and demands for new, taxpayer-funded “Indians only” schools, to name only a few.

With all this new wealth and power being transferred to Indian bands, the opposite of the Supreme Court’s vaunted goal of “reconciliation” is occurring.

Indian bands across Canada have been handed positions in the Canadian economic and legal order partially akin to 19th century rentiers, except their new-found wealth and power, rather than being inherited, will be coerced from anyone wanting to engage in hitherto untethered (except for the obligation to pay taxes), normal, entrepreneurial activity on their now (as decreed by the Supreme Court), either “traditional lands” or “aboriginal title” lands. (Either way they pretty well have the entire country covered.)

As this tribute-like new money increasingly flows into Indian bands, as this new Indian-controlled capital continues to amass and increase (tax-free?), this new wealth will indeed take on more and more of the characteristics of the passive, indolent, and civically unhealthy wealth of those 19th century rentiers, with Indian elites, propped up by "bought," mainly non-Indian, expertise, acting essentially as coupon-clipping absentee landlords.

I found it disturbing to read Rae's glowing take on all this. He spent his entire political career as a small-l liberal-progressive who championed a strong, activist state possessing the fiscal and legal power to advance the causes of equality under the law and social justice.

The new constitutional order he is now so excited about, despite the progressive gloss he applies to it, is the opposite of that.

LAW SCHOOLS (In the USA)

Which law schools received the most applications?

By Debra Cassens Weiss, ABA Journal (Law News Now), July 28, 2014

Though law school applications are down 37 percent since 2010, some schools aren't feeling the pain.

U.S. News has compiled a list of the 10 law schools that received the most full-time applications for fall 2013, based on data from ranked schools that submitted data. All of the schools on the list are in the top 25 law schools in the overall rankings by U.S. News.

Harvard, ranked second overall by U.S. News, was among the 10 law schools receiving the most applications, but top-ranked Yale was not.

The average number of full-time applications per school was 1,891, but these schools with the most full-time applications far surpassed the average:

1) Georgetown University, 7,257 applications

2) University of Virginia, 6,048 applications

3) George Washington University (DC), 6,005 applications

4) University of California at Berkeley, 5,885 applications

5) College of William and Mary (Marshall-Wythe), 5,849 applications

6) Columbia University, 5,797 applications

7) New York University, 5,730 applications

8) University of California at Los Angeles, 5,562 applications

9) Harvard University, 5,485 applications

10) University of Pennsylvania, 5,283 applications

At the other end of the spectrum, the University of South Dakota had only 263 full-time applications and was the school with the lowest number.