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

Press Clippings for the period of August 4th to 17th, 2015
Revue de presse pour la période du 4 au 17 août, 2015

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

AJC in the news – L'AJJ fait les manchettes

Federal prosecutor fired for seeking NDP nomination without permission

Kathryn May, Ottawa Citizen, August 8, 2015

Federal prosecutor Emilie Taman has been fired for abandoning her job when she took an unauthorized leave to seek the NDP nomination in the riding of Ottawa-Vanier for the federal election.

Taman, a prosecutor with the Public Prosecution Service of Canada (PPSC), confirmed she had received a long-expected termination notice last week — a month after she handed over her files and took a leave to run for the NDP nomination despite the objections of the watchdog overseeing the neutrality of the public service.

Taman said she plans to file a grievance to fight her dismissal. The Association of Justice Counsel, which represents federal lawyers, had earlier promised to fight any attempts to discipline or fire Taman.

Taman has been braced for a firing or suspension since she openly defied a Public Service Commission ruling that denied her permission to seek the nomination. She made several pleas to the commission since that ruling to reconsider her case or at least let her go on unpaid leave until the Federal Court rules on her challenge of the PSC's ruling.

The PSC, which has the exclusive authority to decide whether public servants can seek election, refused last December to give Taman leave to run in the Oct. 19 election.

But Taman asked the Federal Court for a judicial review to set aside the PSC decision as "unreasonable" because it failed to balance her obligations to be a loyal and impartial public servant with her constitutional right to seek public office. That case won't be heard until Sept. 1.

The union is backing Taman's case because it fears the commission's decision sets the stage for a "blanket prohibition" on federal prosecutors ever running for office.

Taman didn't formally resign when she announced her intention to seek the hotly contested NDP nomination in Ottawa-Vanier, a Liberal stronghold. She told bosses she

was taking a leave, cleaned out her desk, surrendered her Blackberry and security pass, and turned over her files to colleagues.

She said the termination letter said she was fired for willfully abandoning her position after the PPSC asked her to return to work.

She said the PSC has also launched a new and separate investigation into her "unauthorized political activity" since leaving her job, including a confidential report into those activities.

Taman's grievance, which will take months to wind its way through the system, could help keep her case alive for the Federal Court to rule on whether or not the PSC made a reasonable call in refusing her leave to run.

Another public prosecutor, Maureen Harquail, was in a similar situation as Taman when the PSC refused to grant her leave to run in 2004 federal election. By the time the court heard her case, the election was over and a judge dismissed the challenge as moot.

The judge did, however, say that the PSC's decision was "unreasonable", particularly because the then deputy minister of justice recommended it approve Harquail's request. Harquail has since left the public service and is running as the Conservative candidate in Don Valley East.

Taman argues she has been open and above-board in her actions. She feels she had no choice but to take an authorized leave because she wouldn't have a court ruling on her case before the scheduled Aug. 25 nomination meeting. With the early election call, that nomination meeting could be bumped up.

"I have been transparent from the beginning," she said. "I think they are being rather heavy-handed."

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

Taman's battle for public servants' political rights has become a cause célèbre. She has won the support of former NDP leader Ed Broadbent for her nomination along with that of other NDP MPs. Her mother, former Supreme Court Justice Louise Arbour, also endorsed her while acknowledging her support "could give rise to a reasonable apprehension of bias."

Taman joins another federal lawyer, Claude Provencher, general counsel and regional director in Quebec, who is also taking the PSC to court for refusing him leave to seek the Liberal nomination in the new Quebec riding of Vimy.

Provencher's lawyers have asked the Federal Court to consider their cases back-to-back on Sept. 1.

Provencher's arguments are similar to Taman's but he is going a step further and challenging the constitutionality of the Public Service Employment Act.

Congédiée parce qu'elle cherche à être élue

Radio-Canada, le 10 août 2015

Une procureure du Service des poursuites pénales du Canada, Émilie Taman, a été congédiée la semaine dernière pour avoir défié une décision de la Commission de la fonction publique lui interdisant de briguer l'investiture néo-démocrate dans la circonscription d'Ottawa-Vanier. Elle cherche maintenant à obtenir gain de cause devant la Cour fédérale.

Émilie Taman a annoncé son intention de porter les couleurs du NPD l'automne dernier. Elle s'est cependant heurtée à une décision de la Commission de la fonction publique du Canada, qui a refusé de lui accorder le congé sans solde qu'elle réclamait pour faire campagne, en raison de la nature de son travail. Cet organisme est le seul habilité à décider si un employé de la fonction publique fédérale peut faire de la politique.

Il y a un peu plus d'un mois, Mme Taman a décidé d'aller de l'avant malgré tout. Elle a pris congé, laissant derrière elle son téléphone cellulaire, sa carte de sécurité et ses dossiers sur son bureau. Son employeur l'a alors prévenue qu'elle serait congédiée si elle ne revenait pas sur sa décision, son départ étant considéré comme un abandon de poste. La semaine dernière, elle a bel et bien reçu une lettre confirmant son renvoi.

« Je ne suis pas surprise. Je savais que ça s'en venait », affirme Mme Taman dans une entrevue accordée à CBC. Elle ne cache pas pour autant qu'elle est déçue que cette décision ait été prise avant que la Cour fédérale ne se prononce sur la demande de révision judiciaire qu'elle a déposée pour contester la décision de la Commission de la fonction publique.

« Comme la majorité de mes collègues, probablement, j'ai des opinions politiques. Cependant, nous assumons nos fonctions sans partisanerie. Je crois que la plupart des fonctionnaires ont une idéologie politique. Dans mon cas, c'est tout simplement présenté de façon publique », affirme Mme Taman.

La militante néo-démocrate admet qu'avoir des idées est une chose, mais que les faire valoir publiquement en est une autre. Elle n'en conteste pas moins la décision de la Commission de la fonction publique.

« C'est pour ça que je crois qu'il est important que la Cour fédérale tranche », dit-elle. « Beaucoup de fonctionnaires obtiennent des congés de ce genre et, à mon avis, la Commission de la fonction publique traite les procureurs de manière particulière. »

Selon Mme Taman, le processus auquel elle a dû s'astreindre depuis qu'elle a décidé de se lancer en politique est « frustrant ».

« La Loi sur l'emploi dans la fonction publique indique qu'il revient à la Commission de la fonction publique de déterminer quand un congé peut être accordé dans de telles circonstances, et si un employé qui échoue à remporter une investiture ou une élection

peut reprendre son travail sans que cela ne lui crée un problème, ou la perception qu'il y a un problème », explique-t-elle.

« Ce qui est difficile à justifier, c'est que la plupart des procureurs provinciaux sont autorisés à prendre un congé pour se présenter aux élections, et ils ont essentiellement le même travail que moi », ajoute-t-elle. « J'aurais cru que la Commission de la fonction publique aurait trouvé un équilibre, en prenant en compte mes droits constitutionnels, tout en trouvant des mesures atténuantes pour ce qu'ils tentent de protéger. »

Emilie Taman assure que sa demande de révision judiciaire porte aussi bien sur son droit à se présenter que sur celui de tous ceux et celles qui prendront la même décision par la suite. Elle assure qu'elle respectera la décision de la Cour fédérale.

Si elle perd l'investiture, l'élection et sa demande de révision judiciaire, dit-elle, elle cherchera un nouvel emploi. « J'étais prête à prendre ce risque, et je suis certainement prête à assumer les conséquences si la Cour fédérale ne tranche pas en ma faveur [...] Je vais respecter le résultat de ce processus. »

La Commission de la fonction publique ne commente pas l'affaire, en raison de sa judiciarisation.

Réaction de Thomas Mulcair

En point de presse, le chef du NPD a qualifié le tout de « scandaleux ». « Je vais me battre pour Mme Taman. Elle vient d'une famille qui s'est toujours battu pour le Canada », a déclaré Thomas Mulcair, en faisant référence à la mère d'Émilie Taman, la juge Louise Arbour.

« Ma récompense, et la sienne, serait qu'on la fasse élire », a résumé M. Mulcair.

L'investiture néo-démocrate dans Ottawa-Vanier aura lieu le 25 août. La circonscription est représentée par le libéral Mauril Bélanger depuis février 1995.

Sick leave deal would cause 'irreparable harm'

Kathryn May, Ottawa Citizen, August 13, 2105

Canada’s public servants will suffer “irreparable harm” to their banked sick leave, compensation and collective bargaining rights if the Conservative government forces a new short-term disability plan on its employees during the election campaign, says documents filed by unions in court this week.

Thirteen of the 17 federal unions filed a motion in Ontario Superior Court seeking an injunction to stop the Conservative government from invoking the new powers it gave itself to unilaterally impose a new sick-leave deal for public servants at any time.

A date to hear arguments for the motion has yet to be set, but unions argue the potential for harm “is immediate” because collective bargaining is underway.

The Conservatives’ legislation leaves the timing for a deal wide open but Treasury Board President Tony Clement has insisted he wants a deal before the Oct. 19 election.

The unions have already filed constitutional challenges against C-59, the budget bill that allows the Conservatives to override the Public Service Labour Relations Act and impose a new deal whenever it wants. They argue the changes violate the right to free and collective bargaining as guaranteed by the Charter of Rights and Freedoms.

That challenge will take years to wind through the courts, forcing the unions to seek an injunction to put the government’s legislative changes on hold until the court rules on the constitutionality of the law, said Debi Daviau, president of the Professional Institute of the Public Service of Canada (PIPSC).

Court documents show PIPSC asked Treasury Board officials in June if it would use the new powers before the court rules on the constitutional challenge. It received a reply a week before the election was called, but officials wouldn’t confirm whether it would invoke the new powers or not.

In the meantime, the unions want an injunction to stop the government from imposing a deal during the election period.

In the notice of motion, unions argue an injunction is necessary because of the “serious” constitutional issues raised by the Conservatives’ new legislative powers and the “irreparable harm” a new deal would cause unions and the employees they represent.

They also argue the “public interest in meaningful collective bargaining and the status quo” outweighs the public interest in the legislation or the “theoretical” savings the government promised by replacing existing sick leave benefits with a new short-term disability plan.

The government booked a one-time savings of $900 million in 2015-16 in anticipation of unwinding the old sick leave regime — abolishing the banked sick leave socked away by public servants — and shifting them to a new plan. The government has said a new short-term disability plan wouldn’t be up and running before 2017.

The unions argue the C-59’s changes not only violate the collective bargaining rights, but will damage the relationship between the government and unions.

They argue the government’s unilateral power to impose whatever deal it wants – including abolition of sick leave banks — could create “anxiety and uncertainty” among workers who are sick or disabled.

But the unions argue that negotiations are all about tradeoffs and compromise and taking away sick leave benefits will affect all compensation issues being negotiated. If the government can unilaterally take them away, unions have lost any leverage to trade for something else.

”Treasury Board no longer has any incentive to make compromises or tradeoffs that it would otherwise had to in order to achieve its desired goals at the bargaining table,” said the document.

And once the sick leave accumulated by employees is erased and the system dismantled “it will be difficult, if not impossible, to recreate.”

Sick leave is the top issue in this round of bargaining, which began more than a year ago. Negotiations have proceeded slowly and unions say many issues have barely been discussed.

The two sides also couldn’t be further apart. Clement wants to scrap the existing sick-leave benefits that have been enshrined in public servants contracts for 40 years and replace it with a new short-term disability plan. They now get 15 days of paid sick leave a year, which can be banked but those credits disappear when they retire. They can’t cash it out.

Unions seeking injunction to stop sick leave deal during election

Kathryn May, Ottawa Citizen, August 9, 2015

Federal unions are seeking an injunction to stop the Conservative government from imposing a new sick leave deal on Canada’s public servants during the election campaign.

Thirteen of the 17 unions are teaming up to file a motion in Ontario Superior Court early this week for an injunction to stop the Conservatives from using the new legislation contained in the budget bill that gives it the power to unilaterally impose a sick leave deal at any time.

The unions have already filed constitutional challenges against the bill, which allows the Conservatives to override the Public Service Labour Relations Act and impose a new deal whenever it wants. They argue the changes violate the right to free and collective bargaining as guaranteed by the Charter of Rights and Freedoms.

But they are now seeking an injunction to put those new powers on hold until the court rules on the constitutionality of the law.

The Conservatives’ changes left the timing to impose a deal wide open, but Treasury Board President Tony Clement has said he wants a deal before the election.

With the election called, however, the government is bound by the “caretaker convention”, which expects the government to exercise restraint and “restrict itself” in matters of policy, spending and appointments. The caretaker convention kicks in during

the election period — from the dissolution of Parliament until a new government is sworn in.

The Privy Council Office recently released the latest guidelines for conduct during an election, which spells out the convention, along with the Dos and Don'ts for ministers, political staff and public servants.

A "caretaker" government still has the legal authority to govern, but it should be restrained because Parliament is dissolved and can no longer hold the government to account. The government also can't assume it will have the confidence of the next Parliament.

Under the guidelines, the government should restrict itself to matters that are routine, non-controversial, urgent and in the public interest, reversible by a new government without cost or disruption or agreed to by the opposition parties.

By these measures, a deal that replaced sick leave with a new disability plan would violate the spirit of the caretaker convention, said David Zussman, the Jarislowsky Chair on Management in the Public Sector at the University of Ottawa.

Liberal MP Ted Hsu, who introduced a private member's bill to make the convention's guidelines public, said the government would be hard-pressed to defend imposing such a controversial deal as routine business or one of extreme urgency. The deal also comes with a price tag and will bind the hands of an incoming government if a new one is elected.

The big question for unions is whether the government will abide by the moral authority attached to the convention or exercise its legal authority to impose a deal.

"Nobody knows what the government will do … We just don't know what this government is capable of," said Ron Cochrane, co-chair of the joint union-management National Joint Council said. "I would think they should wait until after the election."

The problem with a convention, however, is that the only sanction for breaching a convention is political.

"It's up to the government to judge and decide whether the action meets its own criteria," said David Elder, a former senior PCO bureaucrat and now an adjunct professor at Queen's University's School of Policy Studies.

"It can't be challenged in the House, but the actions can be criticized in the partisan forum created by the election."

This means the government will have to assess the political blowback of forcing a deal on public servants in the middle of an election campaign. Canadians typically show little sympathy for public servants and the Conservatives have made bringing the pay and benefits of public servants in line with the private sector a big part of its agenda.

Cochrane said this isn't the first time that a round of collective bargaining has spilled into an election period, but he said negotiations have historically come to a standstill until a new government is sworn in. He said some unions have a few days of bargaining sessions booked over the coming months, but for most the talks have stopped.

With sick leave as the big issue, they have been the most politically-charged and controversial in decades. Clement wants to scrap the existing sick leave benefits that have been enshrined in public servants contracts for 40 years and replace them with a new short-term disability plan.

The unions argue existing the sick leave regime is the result of "numerous trade-offs" made at the bargaining table and that salary protection in event of illness and disability is a key piece of public servants' compensation packages.

With its new powers, the government can dictate the terms of the three most contentious issues around sick leave: the amount of annual sick leave public servants will be entitled to, the amount they can carry over to the next year, and how existing sick-leave banks will be handled.

2015 Federal Election – Élection fédérale 2015

Canada election 2015: 5 things we learned from the 1st debate

Possibly the only debate with all four leaders of major national parties

By Laura Payton, CBC News, August 7, 2015

The stakes were high in a close three-party race, but no one leader set themselves apart from the rest of the pack. Still, the debate revealed a few important details.

Here are five points to take away from the first leaders' debate of the 2015 election campaign.

1. Stephen Harper can be shaken

If Conservative Leader Stephen Harper needed to look prime ministerial and remind people why they elected him the last time around, he seemed to deliver a mostly steady performance. But not entirely.

Harper is generally unflappable in public but this debate showed a couple of cracks in his rhetorical shield: Harper can be shaken, even on questions about the economy.

The Conservatives want the election to be about economic management and national security, traditional strengths for the Conservatives. But in one exchange, Harper admitted the Canadian economy is on the verge of a recession after it shrank for five straight months. One more month, to close out two quarters, meets the definition of a recession.

Harper also got flustered during the debate section on the Senate, telling the other leaders that Conservative senators vote as they're told by his office, rather than based on what the senators think of legislation.

Senators used to vote less along partisan lines but have in recent years closely mirrored their colleagues in the House.

"We cannot force them to do anything... but we ask them to support the party's position," Harper said.

2. Fighting for the left

For NDP Leader Tom Mulcair and Liberal Leader Justin Trudeau, it would have been important to look stable enough to replace Harper, but different enough to appeal to voters wanting a change. And different enough from each other to look like the best choice for voters seeking a change in government.

Trudeau and Mulcair, who have different visions but are still competing for many of the same voters, spent almost as much time contrasting their policies with each other as they did contrasting them with Harper's.

It led to some notable exchanges, particularly on pipelines when Harper could stand back and watch Trudeau and Mulcair discuss who had the most confusing positions and which leader had said one thing in French and a different thing in English.

3. May held her own

Green Party Leader Elizabeth May's task was to make sure she made an impression during the debate rather than letting the other leaders leave her out, and to remind people the party isn't a one-issue organization.

May avoided being sidelined and brought some important context on issues she's been vocal about — including C-51, which gave more power to Canada's spy agency, CSIS, and the environment.

In particular, she made clear that Mulcair hasn't taken a position on a Kinder Morgan pipeline expansion in Vancouver, forcing him into a series of non-answers during the debate on energy and the environment.

4. Trudeau got in his jabs

Expectations might have been lowest for Trudeau going into the debate, despite his rival's assertion to the contrary. But with his party in third, there was a lot to gain with a strong performance.

While he had some feisty exchanges with Harper, Trudeau also seemed nervous at times and stumbled badly in his closing, sounding stiff and rehearsed before going over his time.

That said, he probably had the most memorable exchange of the evening with Mulcair in the debate over Quebec sovereignty. Mulcair, whose NDP would let Quebec separate from Canada in the case of a clear 50 per cent plus one vote in favour, was pushing Trudeau for his own number.

"You're not answering...you haven't answered," Mulcair pressed.

"You want a number? I'll give you a number. My number is nine," Trudeau said, referring to a Supreme Court decision which he says contradicts Mulcair's policy.

5. Mulcair strong on the offensive

On the offensive, Mulcair was strong against Harper and Trudeau, forcing Harper into admitting Canada is very nearly in a recession, and generally keeping his opponents on their guard.

Mulcair's built a reputation as a tough questioner in the House, but the party has spent a lot of time softening his image, emphasizing his role as a father, son and brother, and putting him in photo ops with animals.

In Thursday's debate, this seemed to manifest itself through a continuous smile on his face. In the end though, forced smile or not, Mulcair's experience in the House served him in the more heated exchanges as he tried to pick at Harper's record and plug his own plans.

Premier débat des chefs: tirs groupés contre Harper

Hugo de Granpré, La Presse, le 6 août 2015

(OTTAWA) Stephen Harper a été forcé de défendre son bilan des 10 dernières années, jeudi soir, devant les tirs groupés de ses adversaires durant le premier débat de la campagne en cours, organisé par le magazine Maclean's.

Les thèmes de l'économie et de l'unité nationale ont donné lieu à certains des échanges les plus musclés entre les quatre chefs présents: Thomas Mulcair, du Nouveau Parti démocratique, Justin Trudeau, du Parti libéral du Canada, Elizabeth May, du Parti vert et Stephen Harper, du Parti conservateur.

M. Harper a été pressé de questions et de critiques dès les premières minutes de la soirée sur l'état de l'économie canadienne et sa gestion des finances publiques depuis 2006.

«J'étais dans le débat des chefs de 2008, de même que M. Harper, M. le premier ministre, nous étions les deux présents», a rappelé Elizabeth May. «Je me souviens très clairement

que M. Harper disait que s'il y aurait une récession, elle serait déjà en cours... Je ne crois pas vraiment qu'il a un bon bilan pour voir quand ce pays est en récession!»

M. Harper n'a pas nié cette fois-ci que le pays pourrait être aux prises avec une récession, au cours d'un échange animé avec le chef du NPD Thomas Mulcair: «Vous essayez de nier le fait qu'au cours des cinq derniers mois, ces mêmes statistiques du gouvernement du Canada ont démontré que l'économie canadienne a ralenti. Nous sommes à un mois d'une récession technique. Mais selon plusieurs observateurs, nous y sommes déjà», a lancé M. Mulcair.

- Je ne nie pas cela, a répondu M. Harper. Ce que je dis, c'est que...

- Vous ne niez pas que nous sommes dans une récession? C'est bien... l'a interrompu M. Mulcair.

- Ce que je dis, a poursuivi M. Harper, c'est que ce ralentissement est presque exclusivement dans le secteur de l'énergie.

Comme il l'a fait tout au long de son mandat, M. Harper a affirmé que la position financière du Canada est avantageuse par rapport à la situation du reste du monde. «Vous savez qu'il n'y a pas meilleur endroit que ce pays pour vous et votre famille», a-t-il déclaré au terme de la soirée.

«Quel est votre chiffre M. Trudeau?»

Le segment sur les institutions démocratiques a lui aussi donné lieu à de vifs débats entre les quatre chefs, en particulier lorsque les échanges ont dévié sur la question d'un référendum sur la souveraineté du Québec et sur le seuil acceptable pour une victoire du Oui.

C'est le chef libéral Justin Trudeau qui a lancé les hostilités sur cette question en accusant son rival Thomas Mulcair d'agir de manière irresponsable en proposant un seuil de 50 % plus un vote pour accepter un vote du Oui dans un éventuel référendum. M. Trudeau a plutôt vanté les mérites de la Loi sur la clarté, élaborée par Ottawa à la suite du Renvoi de la Cour suprême du Canada sur la sécession du Québec, et qui n'établit pas de seuil ferme.

«Quel est votre chiffre? Quel est votre chiffre Justin?» a lancé M. Mulcair à plusieurs reprises au chef libéral.

«Neuf», a fini par répondre M. Trudeau en évoquant le nombre de juges à la Cour suprême. «Ma position est la position de la Cour suprême, qui a dit que le seuil devrait être établi dans le contexte du prochain référendum s'il survient un jour. Et votre tentative d'attirer le vote souverainiste au NPD en attendant à la Saint-Jean que ça continue d'être votre politique n'est pas digne d'un premier ministre!»

Stephen Harper a sauté dans la mêlée en accusant à son tour le chef néo-démocrate d'être irresponsable en tentant d'élaborer des procédures sur la manière de «briser le pays». Lorsque le modérateur a souligné qu'il avait lui-même appuyé ce seuil du 50 % plus un en tant que membre du Parti réformiste, M. Harper a refusé de préciser ce qu'il considère aujourd'hui un seuil acceptable: «Je ne crois pas que ça devrait être revisité», a-t-il tranché.

Nouvelle dynamique de débats

Le débat de deux heures se déroulait en anglais dans les studios de télévision du réseau Omni, à Toronto. Il était séparé en quatre blocs portant sur autant de thèmes: l'économie, l'énergie et l'environnement; les institutions démocratiques et les affaires étrangères; et la sécurité.

Chacun de ces blocs comportait deux questions suivies d'un échange de deux minutes avec le modérateur, le journaliste de Maclean's Paul Wells. Cet échange était suivi d'une réplique et de discussions des autres chefs. Ces blocs étaient aussi suivis d'une analyse en direct de commentateurs politiques. Chaque chef avait deux minutes pour présenter une dernière déclaration au terme de la soirée.

Le chef du Bloc québécois, Gilles Duceppe, n'était pas invité à la rencontre, mais la chef du Parti vert, Elizabeth May, participait à l'affrontement. C'était une première expérience de débats en tant que chefs de partis fédéraux pour Justin Trudeau et Thomas Mulcair.

La question des débats demeure un point d'interrogation tout au long de cette longue campagne, puisque le refus des conservateurs de participer à ceux organisés par le consortium des télédiffuseurs, les 7 et 8 octobre, crée une nouvelle dynamique.

Le NPD a affirmé que Thomas Mulcair ne participera qu'à ceux auxquels Stephen Harper participera. M. Harper a accepté de participer à ceux de TVA, du groupe Munk et à celui organisé par le Globe and Mail et Google.

«Nous avons les leaders de quatre partis politiques nationaux ensemble dans une seule pièce. Nous ne savons pas si cela arrivera encore avant le vote. Je ne sais même pas s'ils le savent eux-mêmes , a lancé le modérateur Paul Wells d'entrée de jeu.

Premier débat des chefs en vue d'un lointain scrutin

Radio-Canada, le 7 août 2015

Le premier ministre sortant « ne nie pas » que l'économie canadienne est au seuil d'une récession. Et même en l'absence du chef du Bloc québécois, Gilles Duceppe, la question d'un éventuel référendum sur la souveraineté du Québec peut s'introduire dans un débat électoral fédéral.

Voilà deux des choses à retenir de la première joute oratoire entre Stephen Harper, Thomas Mulcair, Justin Trudeau et Elizabeth May, à Toronto, organisée par le magazine Maclean's.

« Quel est votre chiffre, Justin? » - Thomas Mulcair

Deux sujets ont dominé les quelque 30 minutes de débat sur les institutions démocratiques : les positions des uns et des autres face à la loi sur la clarté référendaire,

adoptée par le gouvernement Chrétien après le référendum de 1995, et la réforme du Sénat.

C'est le chef du Parti libéral Justin Trudeau qui a ouvert les hostilités en attaquant la décision de son adversaire du Nouveau Parti démocratique Thomas Mulcair de ramener à l'avant-scène la déclaration de Sherbrooke faite par son prédécesseur Jack Layton, qui affirme qu'un référendum remporté par les souverainistes avec une majorité simple serait valable.

Thomas Mulcair a rappelé qu'il s'est battu contre les souverainistes lors des référendums de 1980 et 1995, sans renier la déclaration de Sherbrooke. « Justin Trudeau et Gilles Duceppe sont les deux seules personnes au Canada qui ont hâte de parler de séparation à nouveau », a-t-il lancé.

M. Mulcair a ensuite contre-attaqué en demandant à plusieurs reprises au chef libéral quel était « son chiffre » pour reconnaître un référendum remporté par les souverainistes.

« Neuf », a fini par répondre M. Trudeau. « Neuf juges de la Cour suprême ont dit qu'un vote ne suffisait pas pour briser le pays ». Il a ensuite accusé le chef néo-démocrate « de se ranger du côté des séparatistes québécois plutôt que celui de la Cour suprême ».

Relancé par le modérateur Paul Wells, Justin Trudeau a fini par dire que le seuil au-delà duquel une victoire des souverainistes serait reconnue devrait être établi dans le contexte d'un prochain référendum.

Le chef du Parti conservateur Stephen Harper a fini par intervenir dans ce débat... pour adopter l'analyse de Justin Trudeau. « Pourquoi ramener le débat au sujet de la loi sur la clarté sinon pour satisfaire les éléments séparatistes de la députation du NPD au Québec? Personne ne parle de ça », a-t-il lancé.

Pris à partie par MM. Trudeau et Harper, Thomas Mulcair a ajouté qu'il était « dangereux » de ne pas reconnaître une majorité simple. En agissant de la sorte, dit-il, des Québécois « pourraient voter oui pour envoyer un message ».

« Vous lancez de l'essence sur un feu qui ne brûle même pas », a rétorqué Stephen Harper.

Au seuil d'une récession

Sans surprise, le premier ministre sortant a été pris à partie par les trois autres chefs, en raison de la situation économique actuelle. Tous ont noté que le Canada est à la veille d'être officiellement en récession, puisque la croissance du pays est négative depuis cinq mois. « Je ne le nie pas », a d'ailleurs fini par admettre Stephen Harper, en notant cependant que la décroissance est presque entièrement attribuable au secteur énergétique. Il argue que la croissance est solide dans les autres secteurs.

Thomas Mulcair et la chef du Parti vert, Elizabeth May, ont par ailleurs tous deux affirmé que la dette publique du Canada a augmenté de 150 milliards de dollars depuis que les conservateurs de Stephen Harper ont pris le pouvoir. Les huit déficits consécutifs enregistrés par le gouvernement canadien ont aussi été soulignés à la fois par MM. Mulcair et Trudeau. « Nous avons un budget équilibré, ce qui n'est pas le cas des autres pays, Tom », a répliqué le premier ministre.

Stephen Harper a d'ailleurs souvent tenté d'esquiver les attaques de ses adversaires en comparant la situation économique du Canada avec celle des autres pays du G7. Il a notamment fait valoir que la baisse du taux d'imposition des entreprises a fonctionné, ce qui explique que le taux de création d'emplois est l'un des plus élevés du G7, a-t-il dit. Comme il l'a fait depuis le début de la campagne, il a accusé ses adversaires de vouloir augmenter les taxes, ce qui nuirait à la création d'emplois.

Les chefs de l'opposition ont évidemment tenté de mettre de l'avant leur plan respectif pour relancer l'économie en difficulté. Justin Trudeau a défendu sa volonté de remettre de l'argent dans les poches de la classe moyenne en augmentant le taux d'imposition des Canadiens les plus riches. Il a aussi attaqué le plan de Thomas Mulcair qui, dit-il, « fait de bonnes critiques, mais n'offre pas de bonnes réponses ».

Il l'a accusé de tromper les Canadiens avec sa promesse d'augmenter le salaire minimum à 15 $/heure, une politique qui ne s'applique qu'aux employés travaillant sous juridiction fédérale. Selon lui, seuls 1 % des Canadiens qui gagnent actuellement le salaire minimum pourront profiter du plan des néo-démocrates.

Thomas Mulcair a quant à lui rappelé qu'il veut créer 1 million de places en garderie pour les familles. Il a aussi fait valoir qu'il comptait diminuer les impôts des petites entreprises qui, dit-il, sont responsables de 80 % des créations d'emploi.

« Mon rôle n'est pas de m'excuser pour les gestes des autres » - Stephen Harper

Au sujet du Sénat, le premier ministre sortant a été placé sur la défensive par une question de Paul Wells, qui lui a rappelé qu'il avait d'abord promis de ne nommer aucun sénateur qui ne serait pas élu, avant d'en nommer 59, pour finalement décider de ne plus en nommer du tout. Il lui a en outre demandé s'il ne devait pas s'excuser auprès des Canadiens pour avoir nommé les sénateurs Mike Duffy, Pamela Wallin et Patrick Brazeau.

Le chef conservateur s'est défendu d'avoir nommé tous les sénateurs qui ont des problèmes à l'heure actuelle, et s'est félicité que le Sénat ait finalement des règles claires, qui sont en vigueur.

« Mon rôle n'est pas de m'excuser pour les gestes des autres », a-t-il ajouté ensuite. « Quand de mauvais gestes ont lieu, le rôle d'un chef est de prendre la responsabilité et de rendre les gens imputables, et c'est exactement ce que nous faisons ».

M. Harper a aussi assuré qu'il avait obtenu un avis constitutionnel reconnaissant son droit à ne plus nommer de sénateurs. « Celui qui vous a dit ça doit retourner à la faculté de droit », a rétorqué Elizabeth May. « Ce que vous faites est inconstitutionnel ».

La chef du Parti vert a par ailleurs vertement critiqué le fait que le Sénat, composé de membres non élus, a pu mettre de côté la loi sur la responsabilité en matière de changements climatiques qui avait été adoptée par le gouvernement en 2010. Elle a accusé M. Harper d'être responsable de ce geste antidémocratique. Thomas Mulcair en a rajouté sur le même sujet.

« On leur a demandé d'appuyer la position du parti, qui n'appuyait pas ce projet de loi », a admis Stephen Harper.

Thomas Mulcair a aussi attaqué le chef libéral au sujet du Sénat. « Justin Trudeau veut de meilleurs sénateurs; je ne veux que d'anciens sénateurs », a-t-il lancé, en rappelant qu'il souhaite l'abolition de la Chambre haute.

Lorsque Paul Wells lui a rappelé que le premier ministre du Québec, Philippe Couillard, notamment, était contre l'abolition du Sénat, le chef néo-démocrate a admis qu'il ne serait pas facile de dégager un consensus auprès des premiers ministres provinciaux.

Il s'est cependant engagé à travailler en ce sens, notamment en engageant un dialogue avec ces premiers ministres. Il a d'ailleurs promis de rencontrer ses homologues provinciaux au moins deux fois par année, soit une fois à Ottawa, et une autre dans une autre ville du pays.

Le chef du Nouveau Parti démocratique, Thomas MulcairLe chef du Nouveau Parti démocratique, Thomas Mulcair Photo : PC/Frank Gunn

Harper ciblé par ses adversaires au sujet de l'environnement

Stephen Harper a affirmé qu'il dirigeait le premier gouvernement dans l'histoire à avoir fait croître l'économie tout en réduisant les émissions de gaz à effet de serre (GES). Le chef conservateur a de nouveau soutenu que son gouvernement s'était donné les cibles les plus ambitieuses de réduction des émissions de GES dans le secteur de l'électricité, alors que la décision de l'Ontario de supprimer ses centrales thermiques en est grandement responsable, comme le rappelle cette épreuve des faits.

« M. Harper, personne ne vous croit », a lancé le chef libéral Justin Trudeau. « Seule la crise économique de 2008 a fait chuter les émissions de GES », a renchéri la chef du Parti vert, Elizabeth May.

Le chef néo-démocrate, Thomas Mulcair, s'est présenté comme un partisan d'évaluations environnementales en profondeur des projets de pipeline. Il a accusé Stephen Harper d'avoir éliminé de nombreuses lois environnementales importantes, faisant en sorte, selon M. Mulcair, d'empêcher les projets énergétiques de démarrer.

M. Mulcair a soutenu que s'opposer à l'avance aux projets de pipeline, comme la chef du Parti vert, était aussi mal que de tous les approuver à l'avance, comme le chef conservateur. Le chef néo-démocrate a estimé qu'il valait mieux évaluer si ces projets de pipeline pourraient permettre d'éviter la circulation de superpétroliers ou de trains dangereux.

Tentant une attaque, Justin Trudeau a soutenu que M. Mulcair avait un double discours sur le projet Énergie Est, selon la langue officielle utilisée, ce qui n'est pas le cas, selon cette épreuve des faits. Le chef néo-démocrate a répliqué que M. Trudeau avait pour sa part appuyé Énergie Est, en entrevue à Radio-Canada. Il avait cependant précisé que son appui tenait « à certaines conditions ».

EI et C-51

La lutte contre le groupe armé État islamique (EI) a sans surprise lancé la portion du débat sur la politique étrangère et la sécurité.

Comme au sujet de l'environnement, Thomas Mulcair a encore une fois tenté de se présenter comme une voix modérée entre l'opposition d'Elizabeth May et l'adhésion automatique de Stephen Harper. Il a promis que le NPD aurait une approche « subtile » en tenant compte, par exemple, de l'absence d'appui de l'OTAN à la mission actuelle en Irak et en Syrie.

Stephen Harper a insisté sur le danger que représente l'EI. « Ce serait absolument fou de ne pas combattre ce groupe avant qu'il se rende à nous », a-t-il dit.

Justin Trudeau a répliqué qu'il fallait être « réfléchi » quant à l'approche à utiliser et en évaluer les résultats potentiels. Aussi, M. Trudeau a reproché aux conservateurs de laisser tomber les militaires à leur retour de mission, ce qu'a nié Stephen Harper, vantant des investissements de son gouvernement dans l'aide aux vétérans.

M. Trudeau a dû défendre l'appui de son parti à la Loi antiterroriste issue du projet C-51. Il a affirmé qu'il était prêt à revoir les éléments critiqués de la loi, estimant qu'il fallait trouver « un équilibre entre les droits et la sécurité ».

Message syndical aux fonctionnaires fédéraux : détrôner Harper, sans diviser le vote

Radio-Canada Ottawa, le 5 août 2015

Le Parlement maintenant dissous, l'Alliance de la fonction publique du Canada (AFPC) fait le saut dans la campagne électorale 2015 et demande à ses membres de voter de façon stratégique. Le message est clair : il faut qu'un vent de changement souffle sur Ottawa.

À en croire le vice-président directeur régional de l'AFPC, Larry Rousseau, pour faire barrage aux conservateurs, il faudra voter stratégiquement. Cependant, il n'est pas question d'indiquer aux membres de l'organisation sur qui doit se porter leur choix.

« Lorsqu'il s'agit de diviser le vote, les gens sont capables de comprendre qu'il faut aller se rallier derrière un parti ou une tendance pour s'assurer qu'il y ait un véritable changement. Et c'est clair qu'on ne dira pas à nos membres comment voter, mais nous sortirons l'information dont ils ont besoin pour faire leur propre choix », précise M. Rousseau.

Ce dernier, qui est un militant néo-démocrate et qui s'est déjà présenté à l'investiture du parti dans la circonscription de Bourassa, affirme néanmoins à mots à peine couverts qu'il apprécie la tendance qui se dessine : selon divers sondages, les troupes orange ont actuellement le vent dans les voiles.

Les conservateurs sceptiques

Près d'un mois avant le déclenchement officiel de la campagne électorale, l'AFPC avait lancé les hostilités avec une campagne publicitaire pour dénoncer les compressions faites dans les bureaux du gouvernement fédéral par Stephen Harper.

Le candidat conservateur dans la circonscription de Gatineau, Luc Anger, rappelle pour sa part que, malgré les réductions budgétaires, il y a 10 000 emplois de fonctionnaires qui ont été créés dans la région de la capitale nationale depuis 2005.

Il croit qu'en fin de compte c'est aux employés de la fonction publique fédérale qu'il revient de décider ce qui est mieux pour eux et non aux syndicats d'influencer leurs choix.

« Ces syndicats reçoivent des cotisations des employés, et ces employés ne sont pas tous, ne font pas tous partie des partis adversaires du Parti conservateur », souligne-t-il.

La plupart des fonctionnaires fédéraux rencontrés par Radio-Canada souhaitent quant à eux que leur syndicat reste à l'écart de la campagne.

Election call slows down PSAC's anti-Conservative ad campaign

By Michael Woods, Metro News Ottawa, August 5, 2105

Stephen Harper's election call on Sunday kickstarted what is sure to be an 11-week barrage of political party advertisements, but it scaled back a separate advertising campaign that was already in full swing.

The Public Service Alliance of Canada's sweeping, $2.7-million national anti-Conservative advertising campaign, launched just three weeks ago, has to scale back because of strict limits on third-party spending during election campaigns.

PSAC National President Robyn Benson admitted in an interview that the election call has put a damper on the union's vote to stop the cuts campaign, which criticizes Conservative government cuts to public services.

PSAC had to take down billboards, pull advertisements from the radio, and will need to spend advertising dollars judiciously until the Oct. 19 election, even though they had been planning for a writ drop as early as Sunday.

"Anything that we pay for we'll have to watch very carefully," Benson said. "We will be strategic."

However, while more traditional and expensive mediums such as radio and print may be limited, Benson said the campaign has taken off online. The website has been visited more than 420,000 times and the English video has more than 3.1 million views on YouTube and Facebook combined.

“We’re not done for, to be clear,” she said. “Canadians right now can go to our website anytime they want. … They can learn about what the Harper government has done.”

Outside of elections, third parties can spend unlimited amounts of money on political advertising in Canada. At the PSAC national convention earlier this year, members voted to devote $5 million toward raising awareness about the cuts.

But during a writ period, which began on Sunday, their spending is limited. For a 78-day campaign, according to Elections Canada formulae, the limit is about $430,000.

Benson said PSAC will continue to talk to its membership about the need to vote, and to spread the word about replacing the government.

But PSAC, though it has endorsed candidates in the past, is is not endorsing a particular candidate or party. Benson said the resolution passed at the convention called for condemning the Conservative government.

“It also clearly articulated that we would work to elect a party that cared about working people and cared about public services,” she said. “It was felt by our convention floor that folks knew what party cares about working people and what party cares about public services.”

Other News – Autres nouvelles

James Cowan: Government is now abusing its own rules to make its own laws

Senator James Cowan, Contribution to The National Post, August 6, 2015

Senator James Cowan, *appointed under Liberal Prime Minister Paul Martin, is the leader of the Opposition in the Senate.*

The last act of Canada’s 41st Parliament is the story of the Harper government in a nutshell. The government broke Parliamentary rules to pass a bill that is widely viewed as unconstitutional and a gross violation of Canadians’ privacy. The bill’s passage leaves Canadians questioning the role of the Senate in a 21st century democracy. But the story of Bill C-377 serves as a warning to those who advocate for abolishing Parliament’s second chamber.

Bill C-377 is a private member’s bill brought forward by Conservative backbencher Russ Hiebert and is thus not a government bill. It ostensibly seeks transparency and accountability for trade unions, but its real goal is to tie unions up in red tape (something

that the government usually likes to say it is reducing) and to discourage businesses and individuals from working with, or for, unions.

The debates over this bill in the House of Commons failed to identify a number of critical problems with it. The Senate played its traditional role, taking the time to thoroughly analyze the bill. We found that:

- The bill will be challenged in court. Numerous experts told us it will be found unconstitutional. That is because it deals with labour relations, a matter of provincial, not federal, jurisdiction. This structural flaw in the bill was completely missed by all parties in the House of Commons.
- The bill is opposed by seven provincial governments, representing 80 per cent of the Canadian population. This stunning caution did not emerge until Senators asked the provinces for their input.
- The bill creates an unprecedented invasion of privacy, according to two privacy commissioners of Canada. It requires names, salaries and an accounting of time spent on and off the job to be published on the Internet.
- The bill is so poorly drafted, it reaches far beyond trade unions to doctors in medical associations, screenwriters, the NHL Players Association and the businesses that supply products and services to unions.
- Most shocking, the bill applies to over 9,000 mutual funds. Millions of ordinary Canadians who have no connection to a labour union will have their names and personal information posted on the Internet, just because they invested in a fund, in which someone in a union might also invest.

As the troubling scope of problems became better understood, it seemed likely that this deeply flawed private member's bill would die, as many do. But the Harper government so badly wanted it in its suite of "achievements," it broke Senate rules to assure the bill's passage by using fast-track procedures that are only supposed to be used for government legislation.

If there had been no Senate, this malevolent legislation would have governed our practices for over two years already

When the impartial speaker of the Senate — himself a Harper appointee — ruled that this was not proper Parliamentary practice, the Conservative majority voted to overturn the ruling. Institutional authority was usurped in a wholly unprecedented manner by the government itself.

This marks a dangerous turning point: Parliament is now passing laws that govern Canadians by breaking the laws that govern itself. Rules no longer apply, unless the government wants them to.

Does the Senate matter? If the Senate's rules had not been broken, Bill C-377 would not be law. If there had been no Senate, this malevolent legislation would have governed our practices for over two years already, though it's unlikely to survive a court challenge.

Our insistence that Bill C-377 be thoroughly examined, not rubber-stamped, bought Canadians time. Reporting requirements will not come into play until well after October's federal election. If a new government is elected, this act could be repealed

before millions of taxpayers' dollars are squandered in the courts by the Harper government's inevitable attempts to defend the indefensible.

Importantly, before Bill C-377 entangles millions of people in unnecessary bureaucracy, Canadians have an opportunity to pass their own judgment about a government so determined to make this its last act, that it broke the rules in order to do so.

That reckoning may make Bill 3-377 well and truly the Harper Government's last act.

Accountability needed: Why was Justice Russell Brown appointed to the top court?

Adam Dodek, contribution to The Globe and Mail, August 5, 2015

Adam Dodek *is a founding member of the University of Ottawa's Public Law Group and the author of The Canadian Constitution.*

There is no question that the public hearing for Justice Russell Brown would have been the most interesting questioning of a Supreme Court nominee ever. We'll never know just how fascinating it would have been because Prime Minister Stephen Harper abandoned those public hearings after Globe and Mail reporter Sean Fine's exposé of the Justice Marc Nadon fiasco.

The Nadon hearing in 2013 was the last of four that had begun in 2006 with the appointment of Justice Marshall Rothstein. The others occurred in 2011 (Justice Andromache Karakatsanis and Justice Michael Moldaver) and 2012 (Justice Richard Wagner). In a study on changes to the appointment process from 2004 to 2014, I concluded that the public hearings had failed to deliver on their promises of increasing transparency and accountability in the appointment process. Things have only gone downhill since then.

The last three justices – Justice Clément Gascon and Justice Suzanne Côté in 2014 and now Justice Brown – have been appointed by news release. The sum total of the Prime Minister's explanation for appointing Justice Brown is so thin that it can be quoted here in its entirety: "I am pleased to announce the appointment of Mr. Justice Russell Brown to the Supreme Court of Canada. Mr. Justice Brown brings to the court wide experience as a law professor and legal scholar, a barrister, and a judge at both the trial court and appellate levels. His appointment is the result of broad consultations with prominent members of the legal community and we are confident he will be a strong addition to Canada's highest court." A total of 76 words that are more description than explanation.

The appointment of Justice Brown is attracting attention because before being appointed as a judge in 2013, he was a prolific blogger at the University of Alberta. He left a "digital trail" of provocative posts that included attacks on the Supreme Court, Justin Trudeau and cheerleading for Mr. Harper.

In Canada, we are not used to the appointment of judges who have said much of anything interesting, let alone controversial. While this surely should not disqualify Justice Brown from appointment, it would be reassuring for Canadians to hear directly from him that he will hear each case with an open mind.

What Canadians really need, however, is to hear from the Minister of Justice or from the Prime Minister as to why they chose Justice Brown over many other supremely qualified candidates in Alberta, Manitoba and Saskatchewan. Some have expressed the view that Justice Brown was chosen precisely because he had expressed such strong pro-Conservative and anti-opposition views.

Neither Justice Minister Peter MacKay nor Mr. Harper has said anything to disavow this sentiment. In fact, neither of them has uttered one word to explain why Justice Brown was chosen. This is despite Mr. Mackay's musings last month on the need for more transparency when it comes to the Supreme Court. He is absolutely right and that transparency should start with him and his boss. They owe the Canadian people an explanation. The cancellation of public hearings on Supreme Court nominees mean that we won't get one that way.

However, Mr. Harper may not be able to escape accountability completely on this appointment. We have now embarked on a long election campaign. He will face daily media questioning that he regularly is able to avoid. I hope that the media asks him why he chose Justice Brown, why he did not choose someone from Saskatchewan and what he expects from Justice Brown on the Supreme Court of Canada.

With such questioning, maybe Canadians will be able to get some of the accountability that the Prime Minister has successfully escaped so far in appointing Supreme Court judges.

Why we need a constitutional challenge on judicial appointments

JOSEPH ARVAY, SEAN HERN AND ALISON LATIMER, contribution to The Globe and Mail, August 6, 2015

Joseph Arvay, Sean Hern and Alison Latimer *are lawyers with the Vancouver firm Farris LLP*

The current processes of judicial appointment and promotion undermine public confidence in Canada's courts and invite a two-pronged constitutional challenge.

First, the principle of the independence of the judiciary creates a constitutional requirement for transparent and impartial judicial appointment and promotion processes. Second, these processes should reflect the constitutional norms and values of equality, democracy and protection of minorities.

The Constitution empowers the governor-general to appoint judges to trial and appeal courts, but sets no process to follow for same. Since 1867, this power has been asserted by the prime minister and cabinet behind closed doors. The practice since 1988 has been to appoint judges only from a list of individuals recommended for judicial appointment by the Judicial Advisory Committee (JAC). These recommendations are to be made with merit as a central consideration.

Yet, the secrecy of the process occludes the standard on which merit is determined, and there is concern that the bar is set too low or omits important factors. Worse is the lack of transparency in the process that follows, where cabinet decides whom to appoint from the JAC's recommendations.

Also worrisome, there are no JACs or equivalents for promotion of trial judges to courts of appeal. Those promotions are made solely by the prime minister and cabinet.

These processes are systemically vulnerable to political strategizing and a majoritarian disregard for the importance of diversity on the bench.

The principle that upon judicial appointment, a lawyer puts aside all partisan political considerations and becomes an impartial, independent adjudicator is one on which the public relies. This does not mean candidates are expected to come to court without their own values or that those values will not change; nor that judges appointed by way of a process that includes political strategizing will conduct themselves in a manner that is other than independent and impartial.

But such strategizing compromises the perceived independence of the judiciary. It suggests government itself does not believe that appointees graduate out of their political persuasions and results in an appointment process that is cynical of judicial independence.

As to the process of promotion from trial courts to appellate courts, when litigants bring cases against government or its interests, they must be free of all reasonable concern that the presiding judge could be influenced by a desire to be promoted. Justice must be seen to be done as well as done. Appointment processes protected from political interference will enhance the public's confidence in the independence of the judiciary, and foster confidence in the justice system and democracy.

Just as the Supreme Court of Canada has held that an independent judicial compensation commission is constitutionally required to ensure the independence of the judiciary for matters of judicial compensation, so too – indeed, even more so – is an independent appointment and promotion commission constitutionally required.

Further, as the judiciary is the guardian of the Constitution and the Constitution is the supreme law, it is of significance that its interpretation be adjudicated by a judiciary that reflects the diversity in Canadian society in light of principles of equality, protection of minorities and democracy. These principles do not require perfect representation, but a gross disparity between the makeup of the judiciary and the public threatens access to, and quality of, justice.

Access to justice is negatively affected when portions of the population do not see themselves reflected in the court system and may therefore avoid or mistrust it. Quality of

justice is negatively affected because the development of the law is hindered without a multiplicity of perspectives.

As public confidence in the process is failing, the time has come to ascertain the constitutional parameters of the appointment and promotion processes. Such a case will be of profound importance to the legal system as a whole and all of its participants.

10-year limit on tribunal appointments could have serious negative impact

Tali Folkins, Law Times, August 3, 2015

The Ontario ombudsman has “serious concerns” about the possible impact of a rule putting a 10-year limit on the terms of administrative tribunal appointments, according to the annual report released by his office last week.

In the report, André Marin says his office is monitoring the impact of a 2006 directive from the Ontario cabinet that places a limit of 10 years on appointments to regulatory or adjudicative agencies. The report cites a study by the Society of Ontario Adjudicators and Regulators, released in February, warning that, if the government doesn’t alter its policy, “tribunals might be unable to fulfil their statutory mandates.

“The Ombudsman has expressed serious concerns to the government about the need for careful planning to mitigate the impact of this rule on administrative tribunals and their operations. Our Office will monitor developments closely,” the report states.

Voy Stelmaszynski, SOAR vice president, says the impact of the directive will be dramatic when it comes into effect, because many of the province’s adjudicators have already served 10 years or more.

“It will remove some of the most experienced adjudicators — the ones who are given the most complex cases to determine,” he says. “It will remove the mentoring quality that they bring to more junior adjudicators. Unless the government ramps up or speeds up its appointment process, it will leave a bunch of vacuums in tribunals beginning in early 2016.”

Among the tribunals likely to be hardest hit, according to the SOAR report, are the Workplace Safety and Insurance Appeals Tribunal and the Ontario Labour Relations Board.

By January 2017, WSIAT is forecast to lose 56 per cent of its adjudicators, and the average experience of its remaining adjudicators is forecast to drop to three from 10 years. By January 2018, the OLRB is expected to lose 48 per cent of its adjudicators, and the average experience of those remaining is forecast to drop to 3.5 from 10.3 years -.

Stelmaszynski says he believes when the government first introduced the rule, it didn’t intend to apply it as rigidly as it now appears intent on doing.

Apart from concerns that the quality of judgements could be impaired because of the loss of experienced adjudicators, SOAR is also concerned the rule will mean delays in processing cases.

“If there are fewer people, that means it’ll take longer to schedule things and longer to complete them if they go multiple days,” he says.

It may also take the less experienced adjudicators more time to hear cases.

“I think the government should stop and take a breath,” he says. “I think they should perhaps think about either staggering how they want to implement this, or offer some exemptions to it for particular tribunals that rely on expertise, and generally have more of a dialogue with the administrative justice community.”

In a statement to Law Times, the Ontario Bar Association says it has raised the issue with the government and has had meetings to discuss options.

“Like the ombudsman, we are now waiting to see what will be done,” says the OBA.

Robert Lattanzio, executive director of ARCH Disability Law Centre, says he shares the ombudsman’s concerns.

“It’s so important that the tribunal members who sit and hear these cases have that experience, in terms of ensuring that there’s access to justice and that the right result is reached,” he says.

One of the tribunals ARCH deals with most frequently is the Human Rights Tribunal of Ontario. According to the SOAR study, HRTO stands to lose 50 per cent of its adjudicators by 2019, and have the average experience of its members drop to 3.2 from 6.2 years.

It was only recently made a requirement that members of the HRTO have a minimum amount of experience in human rights, says Lattanzio.

“The human rights bar fought to get some kind of acknowledgement in the legislation that some level of expertise was required, and there was a reason for that: We want to make sure that claimants who go before tribunals are not dealing with even more barriers than they already have to deal with.

“One of the things that ARCH finds incredibly important is that adjudicators understand disability and how disability manifests, and the type of interactions that people with disabilities have when they’re trying to access services or gain employment,” as well as the relevant legislation, he says.

The Hill: Bill C-51 challenge has silver linings for Conservative election prospects

By Richard Cleroux, Law Times, August 3, 2015

The Conservative government is heading back to court, where it usually loses, as it faces yet another constitutional challenge over one of its laws.

Earlier this year, thousands of people marched in the streets of 14 Canadian cities against a new law that limits the right to free speech and privacy amid growing fears of terrorism.

Last week, two organizations launched a challenge of Bill C-51 under the Charter of Rights and Freedoms. The two groups, the Canadian Civil Liberties Association and Canadian Journalists for Free Expression, have filed a case in the Ontario Superior Court challenging five sections of the new law.

They say they're willing to take their case all the way to the Supreme Court of Canada if they have to. And well they might.

One of the lawyers representing the two groups, Paul Cavalluzzo, says "terrorism is a problem" but he argues that doesn't mean the fight against terrorism should put the rights of ordinary people who aren't terrorists at risk.

"It is important to challenge a government that has overstepped its authority," says Cavalluzzo.

The groups say in their court application that the law gives the Canadian Security Intelligence Service powers that are "too broad, with wording which is too vague, and oversteps the Charter of Rights."

It's particularly harsh in its application of a national no-fly list and on refugees seeking asylum in Canada. The journalists say the wording of the law is so vague that those who publish any statements or positions taken by terrorists could go to jail for five years.

Prime Minister Stephen Harper has repeatedly told Parliament the new law is necessary should Canada face more terrorist attacks.

NDP Leader Thomas Mulcair replied that the government must fight terrorism but not at the expense of civil liberties. His party voted against a law that passed with the Liberals voting in favour of it along with the Conservatives because Liberal Leader Justin Trudeau liked some, but not all, parts of the legislation.

A major electoral factor was at play. If the Liberals had voted against the legislation, it would have given the Conservatives an opening during the general election campaign to say that Trudeau was on the side of terrorists, which is what the Conservatives are saying right now about Mulcair and his New Democrats.

Mulcair promises that if elected to a majority government, he'll repeal the new law and CSIS and the police will have to continue working under the current anti-terrorism laws that seem to have served Canada so well.

Trudeau promises, if elected to a majority government, to repeal some, but not all, parts of the law.

The Harper government says it will change nothing. The law, as it is, will be to fight terrorism, although in the House of Commons, the government was unable to cite a single

case of terrorism in Canada that the legislation would have prevented had it been in place during the past three decades.

Forcing the adoption of his anti-terrorism law through Parliament just prior to an election wasn't a dumb move by Harper.

First of all, there are a great many Canadians who don't care a fig about the Charter of Rights, individual freedoms, privacy, and those sorts of things. What they want are tough police and a Canadian spy service with more power to do what it likes.

And most of the people who care about values of freedom and liberty aren't looking to Harper to stand up for them.

Going to the courts to face a challenge to a new law isn't a big deal for the Harper government. It has often gone to court and, whether it wins or loses, it's still the taxpayers who pay the cost. There are plenty of government lawyers to go around.

Conservative MP Costas Menegakis said last week: "Let's take it to court and get some kind of opinion on it." The New Democrats fired back that it would have been better and less costly for the government just to ask for the legal opinion of a government lawyer instead of going to court. There won't be a judgment, of course, before the election, something that suits the Conservatives just fine.

The case will give the Conservatives an opening to accuse the NDP of being on the side of terrorists during the election campaign.

It will also give the Conservative party a golden opportunity to keep addressing the issue of how well it's fighting terrorism in comparison with what the Liberals and NDP would do.

Making Bill C-51 a big election issue is a lot better for the Harper government than spending its time on the hustings defending former Conservative senator Mike Duffy, former parliamentary secretary Dean Del Mastro, and the remaining cases of corruption and fraud in Conservative ranks.

The NDP has already begun to run slimy, negative TV ads about alleged corruption in Conservative ranks.

For the governing party, it's much better to talk about whether CSIS spies aren't going far enough in the fight against terrorists than spending their days defending Harper against the various corruption allegations.

That's how politics and the courts serve each other in Ottawa these days.

Court's decision revives hope of payout for Nav Canada's female employees

Don Butler, Ottawa Citizen, August 7, 2015

A Federal Court of Appeal decision has brought female Nav Canada workers a step closer to a wage-discrimination settlement that could be worth thousands of dollars for each employee.

The new decision comes more than 15 years after female employees at the agency lost out when the federal government and the Public Service Alliance of Canada reached a historic, $3.6-billion pay equity deal in 1999. That settlement ended decades of wage discrimination and put money in the pockets of thousands of federal workers in female-dominated jobs.

Female employees of Nav Canada — almost all classified as CRs, a female-dominated clerical category — received pay equity cheques for the years between 1985 and 1996 that they worked at Transport Canada, which operated Canada's civil air navigation system prior to the creation of Nav Canada in 1996.

But they got no wage adjustment for their work at Nav Canada, even though the Crown corporation continued to use allegedly discriminatory pay categories until 2011, when it adopted a new, gender-neutral classification system.

The PSAC has been challenging that since 2002, when it filed a complaint with the Canadian Human Rights Commission alleging that Treasury Board and Nav Canada discriminated against the female employees by not extending pay equity adjustments to them.

In 2012, the human rights commission dismissed the PSAC's complaint without an investigation, ruling that it fell outside of its jurisdiction — a finding later deemed reasonable by the Federal Court.

But in a July 28 decision, the Federal Court of Appeal has revived hope that the female Nav Canada workers might yet receive compensation. The appeal court rejected the human rights commission's conclusion that the PSAC's complaint against Nav Canada as an individual employer lacked reasonable grounds.

"It was not reasonable for the commission to conclude that PSAC's complaint plainly and obviously did not contain reasonable grounds to suggest that wages at NAV are discriminatory," the court found.

PSAC lawyer Andrew Raven said the appeal court decision "has important implications for all pay equity complainants."

In the Nav Canada case, "what it means, in our view, is that the (human rights) commission is going to have to do a proper investigation now."

The commission will now have to consider the PSAC's evidence that Nav Canada's classification system was discriminatory, which could lead to a formal hearing by the Canadian Human Rights Tribunal.

That raises the possibility that female Nav Canada employees could be in line for retroactive wage adjustments covering the years 1997 to 2011.

The amounts could be substantial, Raven said. For example, federal workers classified as CR4s got wage adjustments of about $2,500 a year between 1997 and 2000.

At any one time, as many as 100 Nav Canada employees worked in female-dominated classifications, Raven said.

But because female employees at Nav Canada came and went during the period when retroactive payments would apply, the number of people affected is "substantially higher," Raven said. "It could be several hundred."

CRA likely to impose more adviser penalties in light of SCC decision

Jennifer Brown, Legal Feeds Blog, Canadian Lawyer, August 4, 2015

A Supreme Court of Canada ruling that administrative monetary penalties don't offend constitutional rights because they are not criminal in nature could open the doors to greater use by government bodies.

The SCC's decision was a tax case but will have implications for securities law, the Competition Act, telecommunications, and other instances in which the government is pursuing AMPs against professionals including lawyers and accountants.

The SCC's decision was a tax case but will have implications for securities law, the Competition Act, telecommunications, and other instances in which the government is pursuing AMPs against professionals including lawyers and accountants.

While Guindon v. Canada dealt with a tax case, the decision has implications for securities law, the Competition Act, telecommunications, and other instances in which the government is pursuing AMPs against professionals including lawyers and accountants.

Four of the seven SCC judges reached the decision which was released July 31, while the other three declined to deal with the issue, ruling the constitutional argument shouldn't be considered because Julie Guindon, the lawyer who launched the appeal, failed to give proper notice to federal and provincial authorities.

The case involved adviser penalties found under s. 163.2 of the Income Tax Act, which imposes monetary penalties on anyone who makes false statements that could be used by another person for the purpose of the act.

Guindon is a lawyer practising mostly family and estate law. In September 2001, she gave a legal opinion about the Global Trust Charitable Donation Program. At the time, she signed the opinion she had not reviewed the documents she said she had relied on.

The program involved a tax reduction scheme that involved the donation of vacation ownership weeks in a timeshare.

The taxpayers would donate the undervalued VOWs to a registered charity and, in return, receive charitable tax receipts in the amount of the fair market value of the VOWs.

It was later revealed that no timeshare units were ever legally created and no VOWs were actually donated to charity. The only charity to become involved in the program was Les Guides Franco-Canadiennes District d'Ottawa, a registered charity that Guindon was president of from 1999 to 2004. On Dec. 31, 2001, 135 tax receipts were signed by Guindon and the charity's treasurer.

The CRA assessed adviser penalties of $546,747 against Guindon. The SCC's decision from last week means she must now pay the AMP.

Peter Aprile, of Counter Tax Lawyers in Toronto, has been watching the case as it moved through first the Tax Court, then the Federal Court of Appeal.

"What was interesting to me was listening to the statements the CRA was making at various accounting conferences through all of this," says Aprile. "We know the CRA wanted to get the word out there about the possibility of substantial fines being levied in the civil context without having to cross over to criminal prosecution."

During the Guindon appeal period, Counter Tax Lawyers filed an access to information request just before the Federal Court of Appeal released its decision to determine how many penalties the CRA had issued.

In March 2013, its research revealed the CRA had issued 77 s. 163.2 penalties to tax preparers, planners, and promoters totalling approximately $119.5 million. There were 47 on-going audits and 14 of those involved tax preparers and 33 were tax promoters (i.e. promoters of tax shelters).

Between 2000 and 2007, the CRA had only issued nine assessments. In 2012, it issued 19 assessments. Between the Federal Court of Appeal decision and the SCC decision the numbers jumped to $137 million in penalties. All assessments were stuck at the objection level while Guindon went through the courts.

"Two things are happening," says Aprile. "The CRA has held every other one in abeyance pending resolution of Guindon, and so we will start seeing those move through the courts. And it's obvious with the Federal Court of Appeal decision, the CRA gained some confidence it would stand the test of the Supreme Court.

"I have little doubt we are going to see more imposition of these penalties as well as more activity in the court to determine what rises to the level of culpable conduct and what an appropriate due diligence defence will look like."

Aprile says the threat of penalties will have a chilling effect.

"I think the CRA is using the threat of this as a pretty good tool to change behaviour even in instances in which behaviour shouldn't or doesn't need to be changed," he says.

Australia's 'assembly-line' legal firm eyes Canadian market

JEFF GRAY, The Globe and Mail, August 5, 2015

Critics have derided it as “cookie-cutter” law or even “Wal-Mart” law: a massive personal injury law firm run with the ruthless efficiency of a publicly traded corporation – because it is a publicly traded corporation.

Australia’s Slater & Gordon Ltd. became the first law firm in the world to be listed on a stock exchange in 2007. And despite its critics, it has since been busy growing revenue at a rapid clip, gobbling up rivals at home and in Britain. It now has its eyes on Canada.

However, before Canadians injured in car accidents will be able to call up a Slaters’ call centre, regulators here would have to loosen rules that largely ban non-lawyer shareholders from owning law firms, reforms Australia and England and Wales have already enacted.

A divisive debate is under way in the legal profession on the concept in Canada and in the United States, where it also remains mostly banned. A report from a working group of the Law Society of Upper Canada, the Ontario legal profession’s self-regulatory body, outlined possible rule changes last year and the Canadian Bar Association endorsed the idea.

But since then, critics here have become increasingly vocal. The concept was an issue in Law Society of Upper Canada elections earlier this year. The Ontario Trial Lawyers Association (OTLA), which represents personal injury lawyers likely to face competitive pressure if Slater & Gordon enters Canada, endorsed a list of candidates opposed to the idea. Twenty-seven of the 40 lawyers who won what are known as “bencher” seats on the law society’s governing body were OTLA-approved. A follow-up report on the idea is expected to come before the law society this fall.

Proponents say allowing law firms to attract capital from non-lawyers means they can use it to expand and provide innovative new legal services, such as those offered in kiosks in department stores or via the Web. They say these new services will help deal with the “access to justice” problem, which sees many Canadians unable to afford a lawyer.

But naysayers warn the reforms would force lawyers to answer to bottom-line-focused shareholders, instead of just to their clients and the greater good. They say this would create new ethical and conflict-of-interest land mines, if the interests of a law firm’s owners and its clients clash. Critics also charge that there is no evidence these new structures help those who cannot afford a lawyer to hire one.

In a phone interview from Melbourne, Andrew Grech, the managing director of Slater & Gordon, confirmed Canada is on the firm’s expansion radar if rule changes make it possible. And he said his critics are more interested in protectionism than protecting consumers: “It doesn’t surprise me, frankly … Their perception is their particular patch will be affected by competition, and therefore they have a vested interest in protecting their patch.”

That patch, however, could change dramatically. In Australia, Slater & Gordon is estimated to now control as much as 25 per cent of the country’s personal injury market, with it and just two other firms – including Shine Lawyers, which is also publicly listed – controlling close to 45 per cent.

Worse, critics charge, this more profit-centric model of law firm aims to “commoditize” personal injury cases, fit them into formulas and steer clients toward quick settlements rather than costly trials.

“If the model that we have seen in the U.K. and Australia progresses, it will absolutely mean fewer choices for the consumer,” said Maia Bent, president of the Ontario Trial Lawyers Association and a partner with Lerners Personal Injury Group in London, Ont. “The choice that you have is going to be a much more cookie-cutter, assembly-line type of legal service.”

Slater & Gordon does use what it calls modern “practice management” and “case management” systems to process large volumes of injury claims. But Mr. Grech dismissed the criticism, saying his firm takes on large, controversial class actions and test cases, runs more litigation than any other firm in Britain or Australia, and is now the biggest provider of family law in Australia.

“That’s kind of an interesting sort of fairy tale, but that’s just what it is,” he said.

But being able to raise capital on the stock market also comes with a downside. Slater & Gordon’s stock has been punished in recent weeks, losing about 50 per cent of its value on the Australian Stock Exchange after a series of accounting revelations.

In June, British authorities said they were investigating accounting irregularities at British insurance claims processor Quindell PLC, which sold its professional services division to Slaters last year for about $1.16-billion (Canadian). Then Slaters confirmed it was facing a probe by the Australian Securities and Investment Commission over its own accounting practices and that the firm had found “cash flow errors” in its accounting for its British business. It has since been dogged by short sellers and critics. And on Wednesday, Britain’s Serious Fraud Office said it had launched a criminal investigation of Quindell’s past accounting and business practices.

Speaking last week, Mr. Grech declined to comment in detail on the probes his firm was facing, but said “fundamentals of the Slater & Gordon business remain the same.”

Everyone agrees that sweeping regulatory changes, such as giving law societies jurisdiction over not just individual lawyers, but law firms as a whole – whoever owns them – are needed to accommodate any new ownership rules. England and Wales and Australia have brought new regulatory regimes to try to ensure that lawyers in what are known as “alternative business structures” are held to the same ethical standards.

“We’re not saying it should be open slather,” Mr. Grech said, using an Australian slang term that translates as a free-for-all. “… Provided it is properly regulated, there is much more to gain than there is to lose.”

Slater & Gordon

Long history

Personal injury law giant Slater & Gordon was founded in Australia in 1935, and has a long history of working for the country’s unions. In 2007, it took advantage of Australian legal reforms to become the world’s first publicly traded law firm. It expanded into

Britain, after England and Wales also loosened the rules around lawyer ownership, with the acquisition of London-based Russell Jones and Walker in 2012.

Growth, stumbles

After several years of rapid expansion, Slater & Gordon now has 1,400 staff in 80 offices across Australia and 3,800 people in 27 offices in Britain. But it has recently run into controversy after regulators in Britain launched an investigation of accounting practices at Quindell PLC, which sold its professional services division to Slater & Gordon last year for $1.16-billion (Canadian). On Wednesday, Britain's Serious Fraud Office said it had launched a criminal investigation into Quindell's past "business and accounting practices."

Focused on personal injury

In 2014, according to the firm's annual report, 80 per cent of Slater & Gordon's $418.5-million (Australian) in revenue came from personal injury law: 46 per cent from its Australian practice and 34 per cent from its British practice. What the firm calls "general law," including family law, wills and estates, commercial, employment, class actions and criminal law, made up the remaining 20 per cent.

Interested in expanding to Canada?

"Absolutely. It's a vibrant jurisdiction where English is spoken, where you share the same common law traditions that we share in Australia. With our presence in the U.K., it would probably make a lot of sense for us to at least investigate that and look at it carefully. And we are trying to do that, understanding that there is a movement to change the law in Canada to bring it into line the United Kingdom and Australia [and allow non-lawyer shareholders to own law firms]." – Andrew Grech, managing director, Slater

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