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

Press Clippings for the period of August 31st to September 8 2015
Revue de presse pour la période du 31 août au 8 septembre, 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

NDP candidate Taman appeals to overturn prosecutor election ban

Kathryn May, Ottawa Citizen, September 1st 2015

Ottawa-Vanier NDP candidate Emilie Taman appealed to the Federal Court Tuesday to overturn the Public Service Commission's refusal to let her run in the federal election.

In the day-long hearing, Taman's lawyer 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. It's unclear whether the judge will have a decision before the election Oct. 19.

Taman has been fired from her job as a federal prosecutor with the Public Prosecution Service of Canada (PPSC) for abandoning her job when she took an unauthorized leave to seek the NDP nomination.

Taman said the outcome will have little impact on her because she made the decision to defy the PSC's decision, but could help future prosecutors who may want to seek office.

The PSC has the exclusive authority to decide who can seek nominations and run in elections. Public servants who get approval can take leave without pay during the election period. If elected, they must leave the public service.

The Association of Justice Counsel, which represents Justice Canada lawyers, is backing Taman in her challenge because it fears the PSC's decision sets the stage for a "blanket prohibition" on federal prosecutors ever running for office.

A big concern is that the prosecution service's management recommended the PSC reject Taman's leave because her ties to a political party would undermine the office's independence and her perceived impartiality if she lost and returned to work.

"What I want now is to get some clarification and well-reasoned direction for future PSC decision-makers on how to deal with other prosecutors who could find themselves in my shoes."

Senior or regional Crown prosecutors can't run as federal candidates but prosecutors have the right to seek election in all provinces other than in New Brunswick. Taman said the

provinces have found ways to mitigate any concerns about impartiality if they return to their jobs.

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 arguments are similar to Taman's, but he's going a step further and challenging the constitutionality of the Public Service Employment Act. His case will be heard in Montreal on Sept. 8.

Emilie Taman défend sa cause

Paul Gaboury, Le Droit, le 1er septembre

La candidate néo-démocrate dans Ottawa-Vanier, Emilie Taman, était en Cour fédérale mardi matin pour tenter de faire infirmer la décision de la Commission de la fonction publique fédérale de lui accorder un congé sans solde pour participer à l'élection fédérale.

En présence d'une vingtaine de personnes dans la salle d'audience, Me Christopher Rootham a longuement plaidé en matinée que la décision de refuser à Emilie Taman le droit d'être candidate à l'investiture néo-démocrate était «disproportionnée» par rapport à l'emploi qu'elle occupait comme procureure au Service des poursuites pénales, limitant ainsi ses droits prévus à la Charte canadienne des droits et libertés d'être candidate à une élection.

Décision «raisonnable»

Pour sa part, l'avocat du gouvernement fédéral a plaidé que la décision de refuser le congé sans solde à la procureure Taman était une décision «raisonnable», respectant les pouvoirs conférés à la Commission de la fonction publique concernant les activités politiques des fonctionnaires fédéraux.

Il a mentionné que les décisions prises par rapport aux demandes faites par les fonctionnaires étaient évaluées «au cas par cas», et a aussi rappelé que les droits reconnus par la Charte ne permettaient pas aux fonctionnaires fédéraux une liberté d'expression «illimitée».

Équilibre

Cette décision de la Commission, a par ailleurs expliqué l'avocat Rootham, ne cherchait pas à trouver le juste «équilibre» entre les droits prévus à la Charte et les obligations de loyauté de la fonctionnaire Taman envers son employeur.

Il a aussi remis en doute les motifs invoqués par la Commission dans son refus, qui visait davantage une catégorie d'emploi, celui de «procureur», plutôt que le travail spécifique effectué par Mme Taman.

Sauf au Nouveau-Brunswick

Dans toutes les provinces, sauf au Nouveau-Brunswick, les procureurs ont le droit, sauf exception, de participer activement à des élections notamment en étant candidat. Dans plusieurs cas, ils doivent demander un congé sans solde, dans d'autres, ils peuvent être mutés pendant la campagne électorale. «Mais rien n'interdit à un procureur d'être candidat à une élection, sauf dans la province du Nouveau-Brunswick», a d'ailleurs mentionné Me Rootham.

Il a aussi plaidé que la Commission ait motivé son refus par la visibilité de Mme Taman, et qu'elle puisse parler aux médias dans son rôle de procureur. Sauf qu'au cours des sept années où elle a agi comme procureur, Me Rootheman a rappelé que sa cliente n'avait jamais eu à parler aux médias dans son rôle de procureur.

Il a aussi fait valoir que la Commission de la fonction publique aurait pu accorder un congé sans solde à sa cliente, tout en lui imposant certaines conditions, ce qu'il n'a pas fait en lui refusant un congé sans solde, pour ensuite la congédier face à son refus de respecter la décision, a-t-il indiqué.

Son congédiement fera l'objet d'un grief ultérieur à la démarche entreprise devant la Cour supérieure, a-t-on confirmé à l'Association des juristes de justice, qui appuie Mme Taman dans sa requête en Cour fédérale.

Ottawa-Vanier profile: NDP candidate Emilie Taman

The former federal prosecutor hopes to turn Ottawa-Vanier NDP orange.

Michael Woods, Metro Ottawa, September 7, 2015

Election candidates all make sacrifices, but Emilie Taman's was a big one: she got fired from her old job to run for member of Parliament.

Taman made news as a federal prosecutor for defying a Public Service Commission ruling forbidding her from seeking the NDP nomination.

She lost her job, but won the party nomination on Aug. 25. Now, she has to convince voters to turn to the New Democrats in a riding that has always been Liberal red.

“People who don’t live in the riding invariably say to me, ‘Why would you go up against Mauril Bélanger? He’s beloved, he’s entrenched.’ But that’s not consistent with what I’m finding at the door,” she said.

“It’s not that people have huge animosity to him or anything, but I think people feel that he’s had his time, and they’re ready for someone with the energy and the capacity to represent them in a meaningful way in Parliament.”

Taman, the daughter of former Supreme Court Justice Louise Arbour, has a passion for justice policy and says she's a sincere, straightforward consensus-builder.

"I think because I'm relatively new to politics, I bring a particular openness," she said. "I'm just not constrained by having been a politician for a long time."

She is confident this is the NDP's time in Ottawa-Vanier. The party's membership in the riding has grown exponentially this summer, she says, and she thinks many new members are disaffected Liberals.

Public servants who have never been involved in politics before have reached out wanting to support her, unsure how publicly they can do so for fear of repercussions at work. She said they see her as a candidate who understands their perspective.

"I think that says something a lot, too, about the climate and the energy in this election. People who haven't been personally engaged are saying 'What can I do?'" she said.

Incumbent Bélanger has particularly strong support among the riding's large francophone population. Taman, who is fluently bilingual, also said she's looking forward to meeting

with leaders of the Franco-Ontario community to persuade them that she'll advocate for the "just as much, if not more than Mr. Bélanger has been."

And she hopes, though she can't be certain, that she would be an active and engaged MP under NDP leader Tom Mulcair.

"I think Mr. Bélanger has been a relatively passive, not central figure, especially given how long he's been there," she said.

And she says the NDP is progressive voters' best strategic choice, both because it has more incumbents than the Liberals and because of its national momentum.

"I think people deserve better than just not Harper. That seems to be people's overriding motivation, but I think they're lucky enough to also be presented with a party that is going to deliver on a really progressive platform."

Public servants brace for war against Conservatives

Kathryn May, Ottawa Citizen, September 8, 2015

A federal scientist who wrote a folk song urging people to dump Prime Minister Stephen Harper.

A record 34 public servants given permission to seek a nomination and run in the election.

A federal prosecutor, refused permission to run, who took the government to court over it.

Federal unions campaigning against the Conservatives, and taking the government to court top stop it from imposing its sick leave deal.

These have all opened a national debate about the political rights of public servants and what's happening to the very nature of Canada's neutral, anonymous and non-partisan public service.

And they raise questions about whether Canadians will see an all-out war between the public service and the Conservatives as the election campaign heats up.

The popularity of Tony Turner's song Harperman on the Internet has also exposed how social media is broadening the way public servants can get politically involved with such

speed and permanence that the lines are being blurred between their private and public lives.

But the activity of the public servants themselves defy predictions by some that the Conservatives would have been the ones on the campaign offensive, exploiting the image of the privileged public servant. Some predicted the Conservatives would position themselves as prudent managers who would take on unions and rein in the $45-billion annual compensation bill for public servants.

Ian Lee, a business professor at Carleton University's Sprott School of Business, was the most outspoken champion of this looming war on public servants. He predicted that reducing the cost of the public service would be the Conservatives' new "law-and-order"agenda for the 2015 election.

Instead, "the tables have turned and the public service unions are going to war against the government," said Lee. "Before the writ was dropped, the unions were on the offensive to get their criticisms of the government out there … and I think they have been effective getting their views across."

A month into the campaign, there has been not a peep about the public service from any party. Even Treasury Board President Tony Clement has gone underground on public service issues and hasn't taken a jab at bureaucrats.

In fact, the unions are still waiting for the various political parties to reveal their positions on a list of public service issues, including cuts in services from coast guard to food inspection, investments in government science, collective bargaining rights, and the long-form census.

"Frankly we've been doing overtime defending public services from the Harper government's attacks and that's not right," said PIPSC president Debi Daviau. "In any sane universe, it would be the government's job to build and protect public services, not tear them down."

Lee said the unions are taking a page out of the 2014 Ontario election playbook, when labour campaigned against then-Progressive Conservative Leader Tim Hudak, which helped to keep the Liberals in power.

But Lee believes that will change now that Labour Day has past and the parties are gearing up their campaigns in advance of Oct. 19. He believes the Conservatives will ramp up their attack on public service pay and benefits and that the NDP and Liberals will be loathe to look appear soft on such a pampered group.

“I think they are keeping their powder dry and will roll out the heavy artillery in mid-September … and will run on a promise to reform sick leave as part of a larger reform of the public service,” Lee said.

Donald Savoie, Canada Research Chair in Public Administration and Governance at the University of Moncton, says Turner’s folksy Harperman song is throwing the spotlight on the divide between politics and public service and could put the role of the public service more broadly on the national agenda for the first time in decades.

He said the song drives home that something is wrong with the relationship between the public service and politicians.

“This guy Turner has launched the debate, and it is catching fire, so let’s have it. I happen to think the traditional view works best and I don’t want a partisan public service,” said Savoie who has widely written on the problems with the public service and has pressed for a national review of its role.

With the popularity of Harperman, Lee said, the Conservatives will want to “change the narrative” of public servants being suppressed and treated poorly by the government, and what better way that taking aim at the pension and benefits that most other Canadians don’t enjoy.

Lee said Turner’s highly political song clearly crosses the line.

“People are allowing their anger or hostility to the government to confuse their judgment on the larger issues of independence and non-partisan public service,” said Lee. “This is not ambiguous. It is crystal clear. You can either be a folksinger and call for the overthrow of the government, or be a public servant. Life is about making choices.”

Asked about election promises for the public service, Conservative spokesman Stephen Lecce said the government has taken “concrete steps” to ensure compensation is “affordable and reasonable” and aligned with other employees. Sick leave is still an issue, and he said the Conservatives are “committed” to a new disability and sick leave management system.

It’s unclear when Environment Canada — Turner’s employer — will make a decision on whether the singer breached the ethics act with his song. This will turn on whether he can still be perceived as objective and impartial at his job, which is tracking migratory bird patterns.

But Savoie and Lee agree on one thing: the partisan Harperman performance could undermine any party’s trust in the neutrality of public servants and could particularly reinforce the Tories’ long-held view that bureaucrats are mostly a bunch of Liberals.

“The public service should be concerned about this,” said Savoie. “If the Conservatives are re-elected … they can question if they can really get policy advice that supports their agenda without fear or favour,” he said.

“If Harper sees this video he might say, ‘We can’t trust public servants’ advice …. so let’s go somewhere else.’ This doesn’t help a relationship that has been strained for years.”

Les syndicats de fonctionnaires en guerre contre Harper

Paul Gaboury, Le Droit, le 3 septembre 2015

Après la campagne de 2,7 millions de dollars lancée par l'Alliance de la fonction publique du Canada (AFPC) pour déloger le gouvernement Harper, lancée juste avant le début de la présente campagne électorale, un autre syndicat du secteur fédéral met la main à la pâte à son tour en lançant des publicités dénonçant les répercussions des compressions et des politiques du gouvernement Harper sur la science gouvernementale.

En pleine campagne électorale, l'Institut professionnel de la fonction publique (IPFPC) a mis en ondes jeudi deux publicités radio dans lesquelles le syndicat se moque particulièrement du contrôle excessif du gouvernement Harper et des problèmes créés par les compressions imposées à la science gouvernementale.

«Nous voulons encourager nos membres et tous les Canadiens à voter pour le changement le 19 octobre prochain et nous espérons que ces annonces y contribueront», a indiqué la présidente de l'IPFPC, Debi Daviau.

Dans la première publicité, une recrue du cabinet du premier ministre se fait dire comment on fait pour que les faits servent les fins du premier ministre.

Dans l'autre, un représentant du gouvernement chantonne d'une voix forte pour tenter d'étouffer les faits que le gouvernement ne veut pas entendre.

Rappelons qu'un des membres de l'IPFPC, Tony Turner, un scientifique d'Environnement Canada, a été suspendu à seulement un mois de sa retraite pour une chanson anti-Harper mise en ligne sur les réseaux sociaux. Jeudi matin, elle avait été vue déjà 525 000 fois sur YouTube. Le député libéral Mauril Bélanger a commenté la décision de «stupide» en début de semaine.

L'IPFPC est le syndicat de 55 000 professionnels de la fonction publique, dont 15 000 scientifiques du gouvernement fédéral.

Fonctionnaire suspendu à un mois de la retraite

Une décision «stupide», déplore Mauril Bélanger

Paul Gaboury, Le Droit, le 31 août 2015

Le député sortant d'Ottawa-Vanier, Mauril Bélanger, a qualifié de «stupide» la décision du gouvernement fédéral de suspendre à un mois de la retraite le fonctionnaire et

scientifique fédéral Tony Turner qui a diffusé une chanson critiquant le premier ministre Harper.

«C'est stupide. Il n'y a pas de raison pour cette décision. Le fonctionnaire l'a fait sur son temps et à sa façon» a commenté le député Bélanger au sujet de la suspension avec solde du fonctionnaire par Environnement Canada.

M. Bélanger a déploré que cette décision ait été prise à seulement un mois de la retraite de ce fonctionnaire qui compte plus de 19 années de service au gouvernement fédéral.

Après l'élection, il soutient qu'un gouvernement libéral verrait à ce que le fonctionnaire puisse récupérer tout salaire qu'il pourrait perdre à la suite de sa suspension. «Absolument» a indiqué sans équivoque M. Bélanger.

Une vidéo populaire

La vidéo de la chanson anti-Harper, diffusée depuis le mois de juin, avait été vue hier déjà plus de 408 000 fois sur You Tube, en forte hausse depuis que l'affaire a été rendue publique en pleine campagne électorale.

La diffusion de cette chanson satirique contreviendrait au code d'éthique et des valeurs de la fonction publique, selon Environnement Canada.

L'Institut professionnel de la fonction publique a déjà indiqué qu'il allait défendre le droit d'expression de M. Turner, membre de ce syndicat.

La chanson satirique anti-Harper est interprétée par le fonctionnaire chanteur folk d'Ottawa, bien connu dans la communauté. Il est accompagné d'une chorale fantaisiste formée par un groupe de paroissiens aux costumes multicolores.

Folksinger to folk hero: 'Harperman' makes PS an election issue

Kathryn May, Ottawa Citizen, August 31, 2015

The suspended federal scientist whose political protest song Harperman has taken the Internet by storm is becoming a folk hero and might unwittingly make the role of Canada’s impartial public service into an election issue.

The suspension of Tony Turner, an Environment Canada scientist in habitat planning, for writing and performing the song has opened a Pandora’s box of colliding views over public servants’ political rights, freedom of expression, government control, and the very tradition of a non-partisan public service.

Turner was sent home several weeks ago on leave with pay pending the department’s investigation into the making of Harperman. The song trended on Twitter and gained tens of thousands of plays on YouTube after revelations of Turner’ suspensions. From about 50,000 views by last Friday, the song had racked up more than 416,000 by Monday.

Turner is being investigated for a breach of the public service's ethics code. The issue is whether Turner breached the code's conflict of interest provisions, with his private interests as a songwriter conflicting with his work as a public servant.

Donald Savoie, Canada Research Chair in public administration and governance at the University of Moncton whose latest book is What is Government Good At, has long argued the public service has "lost its way" and called for a national debate on the role of public service in policy and delivering services to Canada.

"I think Turner's sharp tune may have inadvertently launched a national debate on the role of the public service. I have been writing books about this for years, but it takes a video. Good for him, in a way. He has put it on the agenda."

The tune, which calls for the ouster of Prime Minister Stephen Harper is highly political, and most agree flouts the tradition of an invisible, neutral public servant who stays in the shadow and away from the political stage.

The debate revolves around where that line between politics and public service should be drawn. It's difficult to find a consensus among public servants, and several longtime senior bureaucrats privately say they don't think he should be fired.

That line has been blurring as power moved increasingly to the Prime Minister's Office over the past 30 years, and the Internet and social media have made finding that boundary even more difficult.

Savoie said Turner's song has struck a chord in a bureaucracy, where morale is rock-bottom and frustration is high. Public servants want to "break out and speak out", but he warned that it is a "slippery slope" if they become political players.

"I don't think it is healthy for a public service to become part of an election campaign and become political in a partisan sense," he said. "Call me a traditionalist, but I don't think the public service should be partisan."

University of Ottawa professor Ralph Heintzman — a key player in developing the original values and ethics code — said ethics of the situation are "not black and white."

"When you look at the specific circumstances, they are not easy to come to terms with on the right or wrong of it," Heintzman said. "He wasn't out there taking a public stand … It's complicated, and I have not yet reached a view. I have sympathy for both sides."

Turner, a well-known singer-songwriter on Ottawa's folk music scene, won a contest with the song in May. Two of his friends — Chris White, a folk scene mainstay, and

videographer Andrew Hall — teamed up to record the song and posted it on You Tube as part of an ambitious project to stage a national singalong of Harperman on Sept 17.

Those plans seemed up in the air last week, but the pair, caught off guard by the song's popularity and public sympathy to Turner's plight, are doubling down on their plans. Their initial plan for a singalong on Parliament Hill and 14 cities on Sept. 17 has snowballed into plans for singalongs in 40 towns and cities across the country.

"Tony's punishment tuned out to be a huge gift. … It is totally in keeping with the song and backfired by drawing massive attention to the song they didn't want anyone to hear," said White in an interview.

“The core issue is all about freedom of expression and political control over someone working for the government and the extent of that control, and that is exactly what the song is about. That is the beauty of this situation.”

It’s unclear whether Turner will be leading or even attending the Parliament Hill event, which White says already has more than 2,000 people signing to attend.

The pair’s initial plan to crowdsource funds for the project lost steam, raising about $950 over several months toward the $73,000 they wanted for sound equipment, technicians and publicists. But that jumped to nearly $11,000 over the past three days.

The project also has a website (Harperman.ca), and Facebook page, and White said they are looking into developing an app so people can use their cellphones to sing Harperman and join the Sept. 17 sing along online.

White said T-shirts, bumper stickers and lawn signs are being made with the chorus as logo — “Harperman, it is time for you to go.” White said he hopes the lawn signs will appeal to public servants who are too afraid to put candidates’ signs on their lawns.

White said he has been “overwhelmed” by the response to Turner as hero for freedom of expression. He even likened him to American civil Rights activist Rosa Parks or folksinger Pete Seeger, who was blacklisted during the McCarthy era.

“If any reasonable person with an open mind thinks about this, they can’t help but think this is not right … because the implications if they do is that we live in a political dictatorship.

Newsmaker: Tony Turner, the scientist turned ‘Harperman’ star

He’s been suspended by Environment Canada. But Turner has a minor hit on his hands with the protest song ‘Harperman’

Meagan Campbell, Maclean’s, August 31, 2015

Most protesters voice their opinions with chants. Tony Turner composed his into a ditty. “Who’s the king of secrecy? Harperman, Harperman. Who has slashed the CBC? Harperman, Harperman.” With a choir bobbing in the background and a soloist performing one verse, Turner strums his acoustic guitar to a tune that got nearly half a million Youtube views since posted in June—more than 200,000 Youtube views this weekend alone.

Turner was working as a scientist with Environment Canada, specializing in GPS mapping. “He’s not a political animal,” says Andrew Hall, the producer who recorded Harperman. “But the bureaucrats are frightened to death of him right now.”

Environment Canada has suspended Turner while investigating his musical fame, suspecting it could violate the public service's code of ethics. Among the lyrics: Harper "won't buy into climate change until it's sold on the stock exchange. Harperman, it's time for you to go." Meanwhile, Turner is on paid leave, laying low as his union takes the frontline.

Turner was inspired to write the song after skimming a pamphlet advertising Harper misdeeds. Adding to the list, he debuted the protesting jingle at a May Day celebration in Ottawa, where Hall recognized the potential for a video. Now, the song has snatched headlines overseas, and a Harperman website calls for Canadians to record their own renditions, as well as join a Parliament Hill sing-along on Sept. 17.

Turner may never finish the environmental project he was working on—a mapping of migratory birds—but was due to retire this month anyway. Hall says the scientist may miss the unfinished work but always planned to have a post-retirement music career, and this week's turbulence will help. "The notoriety of this is a godsend. He'll be well-known around the world as the guy who got expelled for singing an anti-Harper song." Right now, says Hall, Tony is probably sitting at home and strumming his guitar.

Ex-Tory Senator Segal: Why I Fought Anti-Labour Bill C-377

Law threatens worker rights 'basic to a free market economy.'

By Hugh Segal, Contribution to TheTyee.ca, September 1st 2015

*[Editor's note: A month before calling this election, Stephen Harper saw his party's senators pass Bill C-377, the so-called Union Transparency Act opposed by most provinces and destined for the courts. It's not just labour leaders who call the law "an act of contempt for unions." **A Conservative senator, Hugh Segal,** once challenged and amended the bill, which died -- only to be revived zombie-like in its original form and passed two years later. Missing from that June 30, 2015 vote was Segal, because he had retired from the Senate. The Tyee asked Segal, now Master of Massey College, to explain what is at stake if C-377 is implemented by a re-elected Conservative government.]*

Bill C-377 was a Private Members Bill touted as one to provide transparency and accountability to the public and union members relating to the business of unions and where and how money was spent.

My opposition to this bill, when it reached the Senate of Canada, reflected several serious concerns expressed by various expert witnesses who appeared during Senate Committee hearings after second reading.

The Canadian Bar Association questioned its constitutionality, as it sought to circumvent normal provincial jurisdiction over labour relations and trade unions by imposing Canada Revenue Agency reporting requirements via federal statute.

There was also the issue raised by many witnesses before the committee that reporting relationships for small expenditures being imposed on unions and union locals were not being imposed on other corporate or charitable/not-for-profit groups. This imbalance during labour negotiations would put those negotiations at peril.

'A violation of the constitution'

It was significant that no major business group, the Council of Chief Executives, the Canadian Chamber of Commerce, etc., appeared before Committee in favour of the proposed private member's proposed legislation. But organizations like the Mutual Fund Industry and the Canadian Life and Health Insurance Association did appear against the bill because of the way in which its provisions, as drafted, would violate the privacy of millions of Canadians who might have an annual payout for insurance or redemption of mutual funds at, or above, the annual cumulative threshold established by the proposed law.

This badly drafted bill, whatever the stated intent of "transparency," was a violation of the constitution, a violation of privacy and a direct attack on the right to organize and run unions, a right basic to a free market economy and the give and take essential to balance and fairness, first legislated by Sir John A. Macdonald's government five years after Confederation.

The right to invest and make a fair profit has always been balanced in Canada with the right to free collective bargaining. This bill would seriously hurt that balance.

Back from the dead

I proposed amendments to Bill C-377 in order to dilute and weaken the worst excesses in it and sent it back to the House of Commons for reconsideration, which is why we have a bi-cameral system of two Houses of Parliament.

With the support of 16 of my colleagues, these amendments passed and C-377 was to be sent back to the House of Commons for reconsideration. That reconsideration never occurred as Parliament was prorogued (ending the parliamentary session) to allow for a new Throne Speech (not for any reason related to C-377).

Under senate rules, any bill amended and sent back to the House, and not dealt with there before prorogation, begins the cycle again, bringing this or any bill back un-amended into the Senate. By the time C-377 had come full circle back to a debate and vote and re-sent to Senate Committee, I had retired from the Senate to come to Massey College.

I noted that there was spirited opposition to the Bill from Opposition members in the Red Chamber as well as Senator Diane Bellemare and others on the government side, including Senator John Wallace of New Brunswick and Senator Nancy Ruth of Ontario. Sadly, the bill passed. However, regulations have yet to be written and I am confident that at the first legal challenge it will be struck down by the courts for all the reasons laid out by expert Committee witnesses two years ago.

Union financial information to be published annually on the internet

Jordan Kirkness and Mark Mendl, Canadian Labour and Employment Law Blog, August 27, 2015

On June 30, 2015, the Canadian federal government passed a law ("Bill C-377″) requiring unions to publically disclose sensitive financial information within six months of their year-end. The information will be published on the internet by the Minister of National Revenue.

Unless this law is repealed, it will come into force on December 30, 2015. Unions who fail to comply may be fined $1,000 per day of non-compliance, up to a maximum of $25,000.

The information unions must disclose includes (among other things):

6) a balance sheet

2) a statement of income and expenditures
3) statements showing purchases and sales of investments and fixed assets
4) statements of accounts and loans payable
5) a statement of disbursements to officers and employees with compensation of over $100,000

Perhaps Bill C-377's most sensitive information disclosure requirement is the statement of disbursements to officers and employees with compensation of over $100,000. Union executives with high levels of compensation may face greater scrutiny from union members whose dues are used to pay their compensation.

Unions have expressed a strong opposition to Bill C-377, but its justification is compelling. Greater financial transparency encourages greater financial accountability. Union members will have the ability to access their union's financial information and see how their money is being spent. Where a union's finances are mismanaged, members will be able to raise compelling, fact-based, objections.

Internationally, Bill C-377's financial transparency requirements are not unusual. For example, in the United States, the Labor-Management Reporting and Disclosure Act establishes strict reporting requirements, including the disclosure of detailed financial statements, and statements of disbursements to officers and employees who received more than $10,000. The contents of these reports are made public. Likewise, in the United Kingdom, the Trade Union and Labour Relations (Consolidation) Act requires unions to disclose detailed financial statements, including details concerning the compensation of union executives.

Even within Canada, Bill C-377 is not unprecedented. For example, registered charities who enjoy tax exemptions similar to that of unions are required to file an annual information return that includes detailed financial statements. This information is publicly disclosed at www.cra.gc.ca/charitylists.

The full text of Bill C-377 is available here. Although Bill C-377 has been passed, it will be interesting to see whether it will be affected by the upcoming federal election. The NDP and the Liberals appear to strongly oppose it. For example, Justin Trudeau has referred to Bill C-377 as "a direct attack on Canadian workers and an attempt to weaken Canada's labour movement", and he has confirmed that the Liberals are committed to repealing it.

We will be watching this bill as December 30, 2015 approaches, and we will provide further information as it becomes available.

Relationship with courts among key election issues for lawyers Featured

By Tali Folkins, Law Times, September 7, 2015

That the upcoming federal election will mean for legal and justice issues in Canada is certainly hard to say given the nearly three-way tie the major parties are currently sitting at in the polls. But whatever the final result, a few particularly politically minded lawyers predict the election will be a crucial one on a number of fronts.

Bob Rae, a former NDP premier of Ontario, interim federal Liberal leader, and now a senior partner at Olthuis Kleer Townshend LLP, says that among the most important legal and justice issues now hanging in the balance are the relationship between the government and the courts and what he says has been a marked increase in the politicization of judicial appointments.

Prime Minister Stephen Harper, "in my view, made a major error in judgment in deciding that he would take on the Supreme Court of Canada in a very personal way," says Rae. "I think most Canadians, including most Conservatives, were offended by that, and that's something that I hope we never see a repeat of.

"I think equally significant is the question of judicial appointments and I think the fact that the politicization of the appointment process has been an ongoing challenge and Mr. Harper's taken it to another level. The process needs to become more transparent and it needs to be much less based on the whim of the government of the day. And that's my own view, but I don't think we'll see that under Mr. Harper. I hope we'll see it under the other two parties. I think it's an area that needs to change."

After 10 years of what he says has been "essentially a Reform government," Rae says too many Canadians are going to jail and the Criminal Code has become too complex.

Rae admits that the NDP has committed to changes on a number of key legal and justice issues such as repealing Bill C-51 and holding a commission of inquiry into the issue of murdered and missing aboriginal women in Canada. He believes, however, that the Liberal platform addresses legal and justice issues more thoroughly than the NDP's proposals. For example, he notes the Liberals have pledged to increase parliamentary oversight on security issues and strengthen the Security Intelligence Review Committee.

The Liberal pledge to amend Bill C-51 includes eliminating a provision allowing the Canadian Security Intelligence Service to apply for court warrants to break Canadian laws. The Liberals have also called for an inquiry into murdered and missing aboriginal women.

Among Liberals, according to Rae, there's also "a recognition that our drug laws, particularly with respect to marijuana, are proving to be counterproductive." The Liberals have promised to legalize the sale of marijuana. An NDP government, meanwhile, would decriminalize certain offences.

Garry Wise, founder of the Wise Law Office in Toronto and a legal and political commentator via his blog, agrees that the future of the relationship between the prime minister's office and the courts is likely to depend to a great extent on what happens next month.

"We have seen a disturbing record of confrontation and contempt by the Harper government for the judiciary and the Supreme Court of Canada in particular," says Wise.

"One can only hope, with a change of government, for the restoration of a modicum of respect and decorum by the [prime minister's office] and government for the judicial branch."

But Geoff Pollock, a sole practitioner who ran for the Conservatives in the 2013 byelection to replace Rae as an MP, says he believes the alleged conflict between Harper and the courts has been "overblown."

"There's a conversation between the executive, the legislative, and the judiciary, but there's always been a conversation between them," he says.

The Conservative agenda, he says, emphasizes making Canadian families more secure both physically in their homes and in their wallets. A key plank in the party's platform, he says, is its legislation aimed at ensuring that the most violent criminals go to jail for life with no chance of parole.

Hugh Scher, an employment, human rights, and disability lawyer who has taken part in a number of federal and provincial government consultations, says the Conservatives' priority on protecting victims of crime, punishing criminals, and making them accountable contrasts starkly with the approach of the other two main parties.

He cites, for example, a recently announced NDP plan to increase the number of shelters for victims of domestic abuse that would allow them to safely escape their abusers and Liberal tax proposals aimed at reducing income disparities and "improving the situation of middle-class Canadians in a way that will ultimately create greater equity and equality in society."

Pollock, however, says Conservatives have always agreed that it's important to get at the root causes of crime by targeting poverty. That's one of the reasons why the party places so much emphasis on growing the economy and reducing the tax burden, she says.

There's also a difference among the three parties, according to Scher, in their approach to the question of assisted suicide in the wake of the Supreme Court of Canada's ruling to lift the ban on it last February.

The Conservatives, he says, seem intent on examining the recommendations of a panel they've recently formed "to try to review and implement the terms of the Supreme Court of Canada [ruling] in what they consider to be a responsible way that looks at the issue out of concern for the abuse of vulnerable Canadians," he says.

The NDP position, he says, seems to be in line with the Quebec approach of legalizing assisted suicide under strict conditions. The Liberals voted last winter to allow assisted suicide, but their exact position seems uncertain, he notes. "It's not clear what particular safeguards they will be looking at putting in place."

Federal lawyers maintain PM made no decision not to fill Senate vacancies

iPolitics, Joan Bryden, Canadian Press, September 1st, 2015

Stephen Harper may be surprised to learn that he has not made a decision to let vacancies in the scandal-plagued Senate go unfilled.

There are now 22 empty seats in the 105-seat chamber and Harper has signalled he has no intention of filling them — or any others that arise — in the foreseeable future.

He has not appointed a senator since March 2013.

In July, the prime minister formalized his practice of refusing to fill Senate vacancies, announcing a moratorium on appointments.

Yet, the federal government is in court arguing that the prime minister has made no decision to leave Senate seats unfilled.

The court case was filed by Vancouver lawyer Aniz Alani who believes it's unconstitutional to allow Senate vacancies to pile up indefinitely.

The Constitution stipulates that the governor general "shall" fill vacancies in the Senate when they occur. By convention, the governor general acts only on the advice of the prime minister.

As part of the court case, Alani requested that the Prime Minister's Office provide a record of "all materials" considered by the prime minister and bureaucrats in the Privy Council Office "in making the decision not to advise the Governor General to fill the currently existing vacancies."

In response, federal lawyer Jan Brongers wrote the court: "The respondents advise that there was no 'decision not to advise the Governor General to fill the currently existing (Senate) vacancies' as alleged by Mr. Alani."

Accordingly, Brongers adds, there will be no material provided to the court.

Brongers' letter is dated June 15, a little more than a month before Harper formally announced his moratorium on Senate appointments.

But it had been clear long before then that Harper had made a deliberate choice to let the empty seats go unfilled.

As far back as August 2013, Harper made it clear he had no interest in appointing senators so long as government legislation passed by the House of Commons continued to make it through the Senate.

“Obviously we’ll keep an eye on whether the legislation passed by the elected house is able to keep moving. As long as it is, I have no immediate plans,” he said then.

Last December, Harper noted there was no public demand for more senators.

“I don’t think I’m getting a lot of call from Canadians to name more senators right about now,” he said.

“We’re able to continue to pass our legislation through the Senate, so from our standpoint the Senate of Canada is continuing to fulfil its functions.”

When he formally announced his moratorium on Senate appointments in July, Harper reiterated that it will apply only as long as the Conservatives have the numbers in the Senate to ensure passage of government legislation, which he said “should not be a problem for several years.”

Alani is asking the Federal Court to declare that the prime minister has a constitutional duty to fill Senate vacancies within a reasonable time.

The federal government is in the process of appealing the court’s refusal to dismiss the case outright.

Unions must give better case in rights fight, says labour leader

By Keith Doucette, iPolitics, September 5, 2015

HALIFAX – Unions have to do a better job of connecting with the public as governments attempt to roll back hard-fought labour rights, says the head of Canada’s largest labour organization.

Canadian Labour Congress president Hassan Yussuff said more has to be done to talk about the value of unions and their role in society.

In a recent interview, Yussuff said union advances that have benefited people beyond the labour movement, such as workplace health and safety, pensions and employment standards have gone largely unappreciated.

Many people often assume the improvements have come about as a result of the generosity of governments and they haven’t seen unions as being at the forefront in advocating for change, he argued.

“All of these things come about because of the advocacy of the labour movement in this country,” said Yussuff. “We have got to do a better job in telling the story.”

He said that’s the idea behind a fairness campaign started by the congress, which he hopes also catches the attention of governments, as many pursue austerity programs that often target public sector unions.

Yussuff also points to Supreme Court of Canada rulings as bolstering labour’s case to the public. The top court has “rebalanced the scale” in a series of decisions that have affirmed collective bargaining rights, the right to strike, and the right to freedom of association, he said.

But Larry Haiven, a professor of management at Saint Mary’s University in Halifax, said part of labour’s problem is that governments have calculated there isn’t much downside to attacking unions, particularly in the public sector.

Haiven said for many workers the enemy has become “someone with a pension” and that’s something governments have exploited as they seek to rein in costs.

And while Haiven agrees that courts have generally upheld the constitutional rights of unions, he said those decisions have typically taken five years or more to wind their way through the system.

He said while some court challenges have helped unions, they also give governments breathing room.

That’s partly why the Nova Scotia government pushed ahead with essential services legislation that ended a nurses strike in Halifax in April 2014, he said, despite a Supreme Court challenge over a similar law in Saskatchewan.

The court struck down the Saskatchewan law in January as being unconstitutional.

“For the government, if the options come down to angry workers in the streets and eloquent lawyers in the courts, the choice is a no-brainer,” said Haiven.

He said governments can usually delay in changing legislation following a court order to the point where it’s the better part of a decade before something is done.

Nonetheless, when it comes to the public relations battle, Yussuff believes it’s up to organized labour to capitalize on its court victories with the public.

“These are rights on behalf of all Canadians,” he said. “Canadians have to see them in their totality, not see them as a special interest group gaining something.”

Supreme Ontario appeals Justice Marc Rosenberg never sat on top court

Kirk Makin, The Globe and Mail, September 4, 2015

He was arguably the best judge the Supreme Court of Canada never had.

Many a lawyer or judge dreamed of seeing Ontario Court of Appeal Justice Marc Rosenberg appointed to the top court; that dream died on Aug. 27, when he succumbed to brain cancer.

In truth, however, few actually expected the 65-year-old jurist to end up in the top court. Greasing the wheels of the federal appointment process through social and professional connections was anathema to him. Moreover, Justice Rosenberg was an outspoken advocate of the Charter of Rights, fair trial rights and enlightened sentencing, placing him entirely out of tune with a government known for its tough-on-crime posture and its chilly embrace of the Charter.

“I think he would have been a brilliant Supreme Court judge,” said Michal Fairburn, an Ontario Superior Court judge and top appellate lawyer prior to her appointment. “He penned some of the most significant decisions that came out of his court. He had the skills and drive to do absolutely anything he set his mind to.”

In his 20 years on the bench, Justice Rosenberg wrote close to 2,500 judgments. He was as conversant with evidence, criminal procedure and Charter of Rights jurisprudence as he was with the quarterly law reports and annual Criminal Code of Canada volume that he helped to annotate and publish each year.

Above all else, his commitment to trial fairness was profound. “His reputation for honesty, integrity and professionalism was second to none,” said Supreme Court of Canada Justice Michael Moldaver, a long-time friend. “He was constantly trying to find the right balance between the rights of the accused and the state.”

Some of those in the legal world were puzzled that his death last week was accorded none of the media clamour that surrounded the 2014 death of his former law partner, Edward Greenspan. The juxtaposition says much about two men, who were dominant in their criminal law field.

Colourful, charismatic and always ready with a bon mot, Mr. Greenspan loved to expound on the law to a public audience. While “Fast Eddie” seemed at home in a television studio having makeup applied, the mild-mannered and down-to-earth Justice Rosenberg was in his element while poring over musty law books in a quiet alcove.

Justice Rosenberg was content to teach and lead his profession by example, and forever reticent to become the story.

“He wrote dozens and dozens of bread-and-butter-type judgments, but rarely did they receive public notoriety,” Justice Moldaver said. “Like most things Marc did, he did not seek or get a lot of public glory. His judgments were the ‘bricks and mortar’ of the criminal law. He left the ornaments to others.”

Marc Rosenberg was born to Morris and Ethel Rosenberg on Jan. 4, 1950, in Don Mills, a neighbourhood in North York, Ont. He and his sister, Teddy, and brother, Herschel, enjoyed a typical middle-class upbringing. Young Marc attended local elementary schools and Don Mills Collegiate Institute, where he met his future wife, Martha, at a party.

They married on Aug. 22, 1971, and brought up their own children, Daniel and Debra, in the same neighbourhood.

After graduating from the University of Western Ontario in 1971, he earned a degree from York University's Osgoode Hall Law School in 1974. He was called to the bar in 1976 and practised law for nearly two decades at the powerhouse firm he had set up with Mr. Greenspan, eventually joining the small fraternity of defence lawyers who had a stranglehold on criminal appellate work. He also spent a year as a senior official in the Ministry of the Attorney-General. In 1995, he was appointed to the Ontario Court of Appeal.

Justice Rosenberg was a devoted father. He was a frequent spectator at his children's sporting events, often with transcripts or casebooks in hand. Weekends and summers were spent at the family cottage on Lake Huron.

"When he was busy, he was very busy," recalled his son, Daniel, a 31-year-old freelance director in the film and music field. "But to us, he was just a normal father who cooked meals and [we] went cross-country skiing as a family. He loved swimming and watching storms come up over the lake. You could count on him for anything."

Debra, a Toronto criminal lawyer, recalled that her father instilled one primary lesson in the children: Do your best. "You didn't have to get As in school," she said. "My father always said that we should do whatever it is we want in life. Just try your best."

Justice Rosenberg drove aging cast-off cars supplied by relatives or friends. He habitually wore a modest zip-up windbreaker. He was not notably religious, but spent a period as president of Temple Emanu-El synagogue, later giving that up to be an usher. A superb cook, he enjoyed golf and read voraciously about science, astronomy, history and international politics.

He was always available to help colleagues. Justice Fairburn recalled that early in her career as a Crown prosecutor, she was flailing her way through a sexual assault case one day when Marc Rosenberg, who was then representing the defence, approached her during the morning break. "This is why your argument is never going to fly," he told her, "and this is how you should tweak it."

"I realized later that I had been clearly irritating the court," she said. "He was giving me the tools to save face. It was a real learning moment for me – not just about maintaining credibility with the court, but about how senior counsel ought to treat junior counsel."

In the lingua franca of appellate courts, judges are typically perceived as being either defence-oriented or Crown-oriented. Justice Rosenberg, whose honours included the Criminal Lawyers Association's G. Arthur Martin Criminal Justice Medal for lifelong contributions to criminal law, was unquestionably defence-oriented. Yet, he was also scrupulously fair and gave prosecutors every chance to make their case.

"You knew it was going to be a good day in court when you were going before Justice Rosenberg," Justice Fairburn said. "Regardless of the result, you knew that you would have a completely engaged judge and justice would be served."

Justice Rosenberg's recall of the law was breathtaking. He could synthesize a wide range of facts and variables within a case and spot its logical linchpins or fatal weaknesses. In a eulogy, Ontario Appeal Court Justice Russell Juriansz said that when sitting on appeal panels with other judges, Justice Rosenberg would invariably remain silent while his colleagues would pepper lawyers with questions. Eventually Justice Rosenberg would chime in with a polite but telling question that immediately exposed a key flaw.

“The penny would drop,” Justice Juriansz said. “The lawyers would stammer. The case was over.”

Justice Rosenberg cared deeply about impecunious defendants and those who were not savvy to the labyrinthine court system. He became a driving force behind a program to bring Court of Appeal judges to detention centres where they could hear appeals brought by indigent prisoners or defence lawyers working for them pro bono.

An authority on sentencing, he favoured creative sanctions over the reliance on imprisonment. Overcome with frustration over penal policy in recent years, he spoke at a 2009 Criminal Lawyers Association convention about the justice system having fallen into a state of disrepair, highlighted by a flurry of punitive federal legislation such as mandatory minimum sentences.

“Something has gone terribly wrong,” he said. “This increasingly punitive approach places an immense burden on you to protect your clients from unjust punishments.”

His speech helped coalesce opposition to the Harper crime agenda, at the same time effectively scotching any faint hope there might have been for a future Supreme Court appointment.

Justice Rosenberg wrote lasting decisions on search and seizure, arbitrary detention, the exclusion of tainted evidence and the right to silence. He overturned Steven Truscott’s conviction for murdering a young girl; approved the use of medical marijuana for a man with epilepsy; and broke legal ground in cases dealing with DNA evidence and confessions extracted by police using the so-called Mr. Big technique.

Justice Rosenberg was also part of a panel that struck down prostitution laws in Ontario in 2012 and reversed a stay of proceedings in a high-profile case of alleged police brutality, R. v. Schertzer.

His involvement in a slew of wrongful convictions that arose from unreliable testimony given by pathologist Dr. Charles Smith affected Justice Rosenberg deeply. The defendants had pleaded guilty to killing their children rather than risk facing a trial where the influential Dr. Smith would testify for the Crown. Justice Rosenberg began to openly

question the coercive aspect of plea-bargaining that tempts the innocent to plead guilty in return for a lenient sentence.

Justice Katherine Corrick of the Ontario Superior Court, another close friend of Justice Rosenberg, said that unfairness “drove him crazy. For him, to be able to fix unfairness or correct systemic problems was hugely rewarding.”

About a dozen years ago, Justice Rosenberg embraced a second vocation: teaching judges. He was a pioneer in problem-based training, a learning technique in which students listen to actual witnesses or legal arguments being delivered and then engage in active decision-making.

In class, Justice Rosenberg’s native reserve would melt and he would become animated and engaged. Law professors and conference organizers would line up to book him as a guest lecturer.

In one such course he designed for the National Judicial Institute, Justice Rosenberg focused on the causes of wrongful convictions: the frailties of eyewitness testimony;

police abuses; the undue credence that is often given to questionable testimony from expert witnesses; and the opaque motives that can induce jailhouse informants to lie.

“You would be hard pressed to find a judge anywhere in Canada who hasn’t been exposed to Marc’s teaching in the past decade,” said George Thomson, former executive director of the NJI.

Justice Rosenberg also travelled abroad numerous times – to destinations including Ukraine, China, Tanzania and Brazil – to conduct judicial seminars.

Teaching was a natural extension of his judicial career, Justice Corrick said: “Writing appellate decisions is kind of like teaching the lower courts what they should be doing. He was a very creative decision-writer. So, teaching was a continuation.”

In 2009, when his sister died, Justice Rosenberg dealt with the shock by throwing himself into work. Three years later, his family was rocked again when his wife had a fatal heart attack. Justice Rosenberg seemed to take stock of his life, opting to lessen his workload by adopting supernumerary status. Soon afterward, he began a romantic relationship with a long-time friend, Priscilla Platt, and they travelled extensively.

During a trip to Switzerland in June, 2014, Justice Rosenberg had a seizure. He was swiftly diagnosed with brain cancer. He was placed in palliative care last winter and was constantly surrounded by friends who fed, read and tended to him.

“It was a level of devotion I found extraordinary,” Ms. Platt said. “I think that is what kept him alive for so long.”

He leaves Ms. Platt; his children, Debra and Daniel; his mother, Ethel Rosenberg; and his brother, Herschel.

Justice Rosenberg came to grips with his impending death because life had been good to him, Ms. Platt said: “It just shows you that there is some justice. He was loved. He was given a position where he could exercise his skills and use them to a good end. He had a wonderful life.”

Ontario appeal court refutes judge’s hockey insights in assault case

Sean Fine, The Globe and Mail, September 1st 2015

It was the most Canadian of legal cases: a recreational hockey player charged with aggravated assault over an alleged bodycheck in a no-contact league. The players on each team giving biased views of what occurred in support of their teammate. And a trial judge who used her knowledge of hockey strategy to determine that what happened was not an accidental collision.

But in a country in which hockey knowledge is presumed to be widespread, judges have no right to use their personal sense of the game to determine the facts of a case, Ontario’s top court said this week in overturning a conviction in the case and ordering a new trial.

“From the sports pages to social media, it is abundantly clear that reasonable Canadians often disagree about what constitutes a rational hockey strategy in a given situation,” Ontario Court of Appeal Justice William Hourigan wrote, joined by two other judges. “Nor is there any source of indisputable accuracy by which to settle these disagreements.” Judges who use their hockey knowledge are merely “speculating,” Justice Hourigan said.

The accusation against Gordon MacIsaac, a 31-year-old PhD engineering student who was playing in a senior men’s league in Ottawa at the time of the 2012 incident, was extremely rare, if not unprecedented. It involved not a fight, but an allegation of an illegal check known as a “blindside hit” because the opponent cannot see it coming. The National Hockey League banned such hits in 2010. Mr. MacIsaac was sentenced to 18 months probation.

The charges were laid at a time of intense public interest in concussions in hockey. The other player, Drew Casterton, suffered a serious concussion with debilitating headaches, lost two front teeth and had lacerations to his face.

Mr. MacIsaac’s lawyer at his appeal, Frank Addario of Toronto, argued the hit was accidental, and that players should be deemed to consent to hockey’s dangers unless someone attempts to cause serious bodily harm and such an injury actually occurs.

But the appeal court did not decide the tricky question of whether a bodycheck could be a criminal act. Instead, it said the judge had improperly speculated on the facts.

Justice Diane Lahaie of the Ontario Court of Justice doubted that one of the witnesses from Mr. MacIsaac’s team had been on the ice, because that would have meant three defenceman playing in the last minute of a game that the team was losing by two goals.

But Justice Hourigan said there was evidence that teams put on their best players, regardless of position, late in a game.

Justice Lahaie also did not believe Mr. MacIsaac’s claim he was trying to steal the puck from near the other team’s net and score, because he was a defenceman and should not have been so far up the ice. Justice Hourigan disputed that understanding of hockey strategy, saying that with the team losing in the last minute, it was natural to take a risk.

And Justice Lahaie also said that if Mr. MacIsaac was right that Mr. Casterton had the puck when they collided, then Mr. Casterton would have had his head up. But Justice Hourigan said that, because the league banned bodychecking, players sometimes carried the puck with their head down.

“Just as in a hockey game, litigants and judges are confined by the rules – acting only on evidence,” Mr. Addario said in an interview.

But judges do use their knowledge of life to determine facts.

“Life and common sense are one thing, but how people would behave during a structured exercise like a hockey game is another thing,” Mr. Addario said. He added that, on a scale of Canadianness from one to 10, the case was an 11.

A spokesman for the Ontario Attorney-General said it would be inappropriate to comment yet on whether it will seek a new trial.

Mr. Casterton, a kinesiologist specializing in the care and prevention of injuries, said in an interview that he suffers post-concussion syndrome, with migraines lasting well over two years. He did not wish to comment further without speaking to his lawyer and family.

Lawyer Patrick McCann of Ottawa, who represented Mr. MacIsaac at his trial, said in an interview on Tuesday that in his research, he did not come across a single case of an assault charge laid over a bodycheck.

Eye-opening

Cover Story

By Mervin Brass, Canadian Lawyer, September 7, 2015

The Truth and Reconciliation Commission held its closing ceremony in Ottawa earlier this year with much attention and promise that Canada and its first peoples will finally be able to reconcile after years of damage caused by the Indian Residential School experience. For many, the TRC offered former students a chance to share their

experiences in the church- and government-run institutions that stripped away their language, culture, and childhood. For others, it was a time to reflect on the last 20 years when the first residential school lawsuits started to make their way through Canada's judicial system and leak into the media. At that time, the public knew very little about Indian residential schools, but was about to learn of the horrors that went on inside those mostly unknown-to-the-public institutions.

Canada's dark secret comes to light

It was a quiet December evening for Regina Leader Post beat reporter Trevor Sutter. The large, dimly lit newsroom was empty with all the other reporters calling it a day hours earlier.

"You're on alert to pick up whatever coverage needs to be picked up overnight," recalls Sutter describing the graveyard shift. He was keeping an ear to the police scanner finishing up some stories when around midnight the phone rang. "He didn't make much sense at first, but he kept on mentioning being abused at the Gordon Residential School," says Sutter. The guy on the other end didn't want to give out his name and sounded distraught, but Sutter managed to get his telephone number.

The next day, Sutter tracked down the midnight caller, who lived just a few blocks from the newspaper. Sutter knocked on the door and remembers the man had two little kids running around when the door opened. At first, the guy denied calling Sutter the previous evening, but, after some discussion, he began to repeat what he told the reporter over the phone.

After their meeting, Sutter headed down to the federal courthouse and found a file that contained more information with details that had a calculated amount for the lawsuit settlements.

“He gave me enough information to allow me to do searches in the court. He gave me details and names and stuff like that,” says Sutter. “Somebody left a list of out-of-court settlements of the names and the amount paid. Normally, that doesn’t go into the court record. It was a hand-scribbled note. It had about 20 names and the amount was pretty significant.”

Sutter found a cache of information containing lawsuits filed by former Gordon Indian Residential School students against the federal government and the school’s top administrator, William Peniston Starr. The statement of claims arose from a 1993 conviction that found Starr guilty of 10 counts of sexual assault against students from the residential school over a 16-year period. “The conviction planted a seed in my head the conviction might not be an isolated case,” says Sutter. He was right. Starr later admitted to abusing hundreds of students over a 30-year period.

Jeff Scott is a Regina lawyer who represented many of the former Gordon Residential School students who filed the claims against Starr and the Government of Canada. Scott grew up about 72 kilometres north of the George Gordon First Nation. “I didn’t even know about the Indian Residential Schools until I was retained in the early 1990s.” It wouldn’t take long for Scott to learn about the institutions. He recalls feeling shocked when he first heard his client tell of the abuse at the hands of Starr. “And the shock probably extended to wondering how did this happen, how were these individuals abused

by these former employees, by this former employee for this period of time without any intervention,” says Scott. “It was shock and bewilderment and a great deal of concern for my client and then my clients.”

Scott started getting more and more clients as word spread among other former students. He developed a reputation as someone who would listen and could be trusted. “I think he had the right approach. He listened to stories and he wasn’t just building cases,” says Sutter about the impressions he got from Scott while following the story. “Lawyers are a lot like journalists as they tend to listen for things to help them build their case. He was a rare one, but what came after that scared me, the quick lawsuits, the ones that ran around door knocking on reserves to sign people up and I think that did happen.”

Scott says: “I was told by my clients I was the first individual they felt they could trust and really come out with all the details as to what occurred. They needed to tell me in order for me to be able to fully represent them. For a lot of these clients, it wasn’t even just the compensation, it was the acknowledgment that this occurred to them and it had to be addressed.”

Once these initial cases were settled, other lawyers and their firms started actively gathering clients for class action lawsuits. At the same time, First Nation and Metis politicians began calling for an inquiry into Indian Residential Schools. The Royal Commission on Aboriginal Peoples made a similar call. The pressure was mounting and, finally, in 2006, the Indian Residential Schools Settlement Agreement was reached.

Independent Assessment Process

Eleanor Sunchild recalls a trip to northern Saskatchewan to the small Cree-speaking community of Pelican Narrows to sign up former students for the Independent Assessment Process. She was listening to their stories when she met a man in his early fifties. “He had his IAP application rolled up in the back of his pocket and he took it out and told me in Cree, ‘I’ve been carrying this around for six months because I can’t find

anybody to help me fill it out. I was going to ask my friend who can read and write English to help me, but I was too ashamed.'

While he talked Cree, I filled in his application for him," says Sunchild. "He told me a horrible tale of sexual abuse and being repeatedly raped by a supervisor from the Prince Albert Indian Residential School over a period of five years. He was crying and shaking and, at one point, he even threw up."

The IAP is part of the Indian Residential Schools Settlement Agreement, the largest class action settlement in Canadian history. It involved representatives of aboriginal groups, churches, the Government of Canada, and the legal profession. The IAP provided residential school abuse survivors a way to settle their claims quickly and out of court. "The Independent Assessment Process (IAP) is a claimant-centred process that supports healing and reconciliation among former students, their families and communities," wrote chief adjudicator Dan Shapiro about the process in 2013. "The IAP provides former students with an opportunity to come forward and speak of their experience at residential schools in an atmosphere of safety and respect. For many claimants, this opportunity is a transformational moment."

Sunchild was called to the bar in 1999 and began practising criminal and family law as well as providing legal services to First Nation bands. In 2005, she opened up Sunchild Law. Four years later, she turned her focus and began to specialize in IAP claims to help former Indian residential school students deal with their abuse claims against the federal government.

"I started collecting the files and stories from the former students. I originally only wanted 100, but quickly it grew," says Sunchild. Her firm has handled around 1,200 IAP files in the last six years. "I have my own story of being in foster care for a period of my life. So when I started hearing the stories from the claimants, I was triggered by the content." She says the stories reminded her of being isolated and very lonely. Sunchild spent her childhood, from the age of two until her teens, living in care. When she returned home, her grandparents spent a lot of time teaching her about her culture, something Sunchild credits for helping her do the work she does today. "So, when I first started doing the stories, I had to embark on intensive therapy," she says. "As I think we all who have been involved in this process, at some point, it really makes you question your own humanity."

The firm's main office is located on reserve land owned by the Poundmaker Cree Nation south of of Battleford, Sask. Sunchild Law consists of seven lawyers, a dozen staff members, three First Nation elders, and a psychologist. Clients have access to the elders and the psychologist. "We don't force anybody to partake in any of those services, but we do offer it and encourage them to because the content of their hearing and the content of their stories are very traumatic," says Sunchild. "It makes my role easier in helping the claimant. That goes for all of our lawyers. We use that support for them as well, when the stories get too tough to hear or when they become overwhelmed or showing signs of burnout." In addition, the firm has a monthly talking circle to help its lawyers debrief and, in some instances, a counsellor may be brought in to debrief the legal team.

"Having heard these experiences, it does forever change the lives of the people that hear them," says Shapiro, the IAP's chief adjudicator. "I think there is a renewed understanding, first of all, an appreciation for aboriginal traditions and culture, but

understanding of what folks went through and the ripple effect of what they experienced in their family and their communities.

That's something that's bound to change a person."

Shapiro replaced Dan Ish as the head of the IAP in 2013. He's been around since the IAP was established in 2007, when he held the position of deputy chief adjudicator. Prior to that, he was a senior adjudicator with the alternate dispute resolution system, the precursor to the IAP. Just before he started the ADR job, the Saskatoon-based lawyer read as much as he could get his hands on to learn about Canada's history with residential schools. "We really can't go forward as a nation without understanding the full legacy of the residential school experience," says Shapiro. "Yes, absolutely it's a painful and dark chapter of our shared history, but it doesn't go away by not knowing about it or addressing it."

The Independent Assessment Process is one way for claimants, church organizations, the federal government, and even the perpetrators to address the residential school experience. The IAP provides compensation to former students for proven sexual abuse, serious physical abuse, and certain other wrongful acts. The Indian Residential Schools

Settlement Agreement also provided the Common Experience Payment for former students. Once a former student proved he or she attended a recognized residential school, he or she would be eligible to receive $10,000 for the first year he or she attended and $3,000 for every year after that. Shapiro describes the CEP settlement as a compensation for "cultural wrongs."

The other three components include the Truth and Reconciliation Commission, healing, and commemoration initiatives, says Shapiro.

In order to qualify for the IAP, a former student had to fill out an application that proved they attended one of the residential schools listed in the settlement agreement. Next, the applicant had to allege an act of abuse that, if proven, is compensable under the IAP. If the application moved forward, then all those involved, including the claimant, churches, and the government, had to provide certain documents under the IAP. "Typically, once those documents are provided, the case goes before an IAP adjudicator," says Shapiro. "The adjudicator gathers sworn or affirmed testimony from the former student, any witnesses, and, in some cases, the alleged perpetrators."

Once the allegations are proven, the adjudicator can then award compensation on a scale based on the types of physical and sexual abuse and the loss of probable opportunities. In the standard track for compensation, including future care, the award can be up to $290,000. The complex track includes a probable income loss in which the settlement award can be as much as $445,000.

"There is the ability to put forward a claim for actual income loss to a maximum of $250,000. So, in that case, a person would have to have shown that they had a career or employment that was delayed or interrupted as a result of problems from residential school attendance. So, in other words, they would have established an earnings history of actual income that was then lost for a period of time," says Shapiro. "I know there have been awards close to if not at the actual maximum. I can't tell you for sure the exact dollar, but there certainly have been awards that have been close to those."

IAP adjudicators' responsibilities included reviewing documents related to claims, hearing the testimony of claimants and witnesses in hearings, rendering decisions, and helping parties to talk through a negotiated settlement, as well as reviewing legal fees. There had been some very public issues with some lawyers and others taking advantage of the process and profiting at the expense of IAP claimants. In June 2012, the British Columbia Supreme Court ordered the removal of David Blott and Blott & Co. from representing claimants. Honour Walk Ltd., the Residential School Healing Society of Canada, and Hands Free Office Services were also removed.

The aim is to complete all its hearings by April 2016. According to the IAP web site, as of April 30, 2015, the IAP secretariat had received 37,965 applications for compensation. More than 84 per cent (31,970) of the claims have been resolved, and $2.789 billion has been paid out in compensation by the federal government.

After much debate on the issue, in August 2014, Justice Paul Perell of the Ontario Superior Court ordered the destruction of IAP records following a 15-year retention period, a decision Shapiro heralded as important to maintain the promise of confidentiality given to IAP claimants.

Truth and Reconciliation

When the settlements agreement was reached, one of the components included the Truth and Reconciliation Commission. The TRC went across the country holding seven events that provided an opportunity for former students to share their stories. Sutter attended the Saskatchewan TRC event in the summer of 2013. No longer a reporter, he was still very much interested in learning and listening to the stories from these former students. "These people wanted to talk, they wanted to tell their story, they wanted to be heard. And that's the value, that's part of the healing process. That's the value of the Truth and Reconciliation Commission," says Sutter. "It just allowed people to be heard. The stories are now real and are no longer invisible."

Aside from offering an opportunity for former students to continue with their healing process, the TRC also helped to educate the public about the schools. "Indian residential schools weren't even on the radar screen for most Canadians. Very few people outside of the native community, the federal government, the churches, or those who were employed in those schools were even aware of the existence of Indian residential schools, and that certainly applied to lawyers and judges," says Regina's Scott. "There were no Saskatchewan-based Indian residential school lawsuits when I got involved. I think there were only a handful of lawsuits in all of Canada. None of those lawsuits outside of Saskatchewan were being actively pushed forward."

Shapiro says lawyers and their law firms did a lot of work in advancing the residential school cause by bringing it into the public eye. "Members of the public . . . are often critical of lawyers. The reality is without the leadership and the significant risks taken by lawyers across the country these issues would not have seen the light of day," says Shapiro. "They would not necessarily have been brought to the courts and they would not have resulted in a settlement of this magnitude. So, I think the lawyers need to be given a significant degree of credit for that." Shapiro says lawyers had to face huge issues including taking on church entities, the federal government, vicarious liability, and time limits.

There were no judgements to refer to and at the time it was a very up-in-the-air question, Scott says about what he faced when he started the original claims. "And there were very

few judgements involving the responsibility of an employer for the wrongful actions of its employees; more importantly, whether an employer might be responsible for the sexual misconduct of its employee."

Despite the hard work and challenges, Scott can now put the cases into perspective. "It was the highlight of my career," he says. "It laid the groundwork for everything that followed. I do recall being told the Gordon Indian Residential School litigations led the way in Canada when it came to residential schools. There is a sense of professional satisfaction."

Sutter agrees that those first cases laid the groundwork. "Those stories started the flood gates. It's not breaking the news because those stories were out there for years, but nobody really listened to the whole story." Sutter quotes Mark Kindrachuck, a lawyer for the federal Department of Justice, who was up against Scott at that time. "This is really the first case of this kind the federal government has had to deal with and I think it could be the tip of a very large iceberg."

Nobody could have predicted the size or the magnitude the Indian residential school experience would have on the Canadian public and the country's legal profession. About 253 law firms have been involved with 365 lawyers handling active IAP claims. As of the end of June, $2.8 billion has been paid out through the process.

During the Saskatoon Truth and Reconciliation event, Sunchild was walking to her car when one of the volunteers in a golf cart pulled up and offered her a ride. Sunchild was curious why this "Caucasian" man was helping out at the event and why he was interested in residential schools. The man told her he used to work in northern Saskatchewan's forest. One day he was doing some work near a lake and he saw all these people gather at a dock. He told Sunchild he saw these people come across the lake in boats with their children. He then saw some more people come out of the bush with children. Then these yellow school buses pulled up to the dock. The parents hugged their children saying their goodbyes and the children got on the buses. After the buses left, the man could hear the parents crying until their cries faded away as they crossed the lake returning home.

Sunchild says the man telling the story told her he witnessed something really terrible and it stayed with him his entire life. "He didn't know what it was until he started hearing about residential schools," says Sunchild.