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Press Clippings for the period of September 22 to 29, 2014
Revue de presse pour la période du 22 au 29 septembre 2014

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

OTTAWA CITIZEN

Senate restarts debate on union finance bill

BY JORDAN PRESS, OTTAWA CITIZEN SEPTEMBER 28, 2014

A controversial bill that would force unions to reveal their spending habits may get through the Senate unscathed, despite an earlier attempt by some senators to soften – some say "gut" – its proposals.

Two Conservative senators with union backgrounds have been tapped to push the controversial bill through the upper chamber.

A year ago, the government tried to strong-arm its senators into passing the private member's bill, known as C-377, but the tactic fed a small uprising in June 2013 among senators who did not want their votes on the bill "whipped."

Instead, the Senate overhauled the bill and sent it back to the Commons for approval.

That approval, however, never happened. Parliament was prorogued instead, and this brought the bill back to the Senate minus any changes.

Spearheading the move to get it through this time are senators Jean-Guy Dagenais and Bob Runciman.

"You can't accuse me of being anti-union," said Runciman, who was once with the International Chemical Workers Union. "I served as union president and know the benefits that unions can play."

Dagenais, the lead senator on the bill, is a former president of the provincial union representing Quebec police officers. A spokesman said Dagenais is comfortable with the bill as is.

Some Conservative senators who previously opposed the bill still do. Others who voted to alter it the first time through appear to be softening their position, with Conservative senators suggesting this week the opposition isn't strong enough to stop the legislation.

Also missing is Hugh Segal, the now retired senator who publicly spearheaded opposition to the bill in 2013.

The bill includes mandatory disclosures on union spending of more than $5,000. It also includes mandatory salary disclosures for union officers earning more than $100,000.

The senators who initially opposed it wanted to raise those limits: to $150,000 in the spending instance, and $444,000 in the salary instance. Finally, the amendments said the bill would only apply to unions with at least 50,000 members, cutting the number of unions affected.

The altered figures were meant as a shot at the Conservative party hierarchy, which had helped orchestrate similar changes to a public sector salary disclosure bill in the House of Commons from then-Tory MP Brent Rathgeber.

Conservative senators have yet to discuss the bill in a caucus meeting since returning from their summer break, but general Senate debate resumed Thursday, almost two years after it first came to the floor of the red chamber.

Runciman took aim at unions that he said spent more than the three major parties contesting the 2014 provincial election in Ontario, millions of which was directed towards on anti-Progressive Conservative attacks. A former Ontario cabinet minister, Runciman said the Ontario Liberals' opposition to C-377 was because of its "quid pro quo arrangements with 'Big Labour.'"

"It's the most, in my view, extreme abuse of union dues, if you will, in the way that it distorts democracy in Ontario. It's a situation where the government, obviously in their own interest, is allowing a situation to continue," Runciman said in an interview Friday. "Any person who looks at it objectively says this isn't right."

Judge on government's short list for Supreme Court faces legal obstacle

SEAN FINE, The Globe and Mail, September 24, 2014

The Conservative government's attempt to move an Ottawa-based judge to Quebec has become ensnared in a legal challenge, putting in doubt the judge's availability for a looming vacancy on the Supreme Court of Canada.

Justice Robert Mainville of the Federal Court of Appeal is a specialist in aboriginal issues who represented the James Bay Cree for 25 years as a lawyer. He was on the government's list of six candidates for a Supreme Court vacancy last summer, a Globe investigation revealed in May.

Federal Court of Appeal judges are not eligible for any of the three spots on the Supreme Court reserved for Quebec. In June, the government appointed Justice Mainville to the Quebec Court of Appeal, whose judges are eligible for the Supreme Court.

But Rocco Galati, the Toronto lawyer who toppled a judge sworn in to the Supreme Court last year, filed a challenge to that move, and in late July the Quebec government asked the province's top court to rule on the legality of the appointment. The hearings will not be held until some time in December, the Quebec Court of Appeal confirmed this week. The spot on the Supreme Court opens up on Dec. 1 after the mandatory retirement of Justice Louis LeBel, who is turning 75.

The Prime Minister could delay the appointment past December, but that would leave the court shorthanded – far from ideal, because there would be fewer judges to share the work, and because the court is required by law to have three Quebec members.

Justice Mainville was never sworn in to the Quebec appeal court.

It is not publicly known what the government intended for him. But the view was widely held in Quebec legal circles at the time that Mr. Harper was considering a Supreme Court appointment for Justice Mainville. A show of hands at a Montreal conference attended by 60 top members of the profession, including retired appeal-court judges, indicated that most thought it was on the table, while only two or three couldn't envision it happening. The Quebec justice department, while calling the possibility hypothetical, publicly expressed concern.

The government's attempt to move Justice Mainville to Quebec raised questions partly because it followed the Supreme Court's unprecedented rejection of Prime Minister Stephen Harper's appointee, Justice Marc Nadon, and a bitter public dispute between Mr. Harper and Chief Justice Beverley McLachlin.

"It's hard not to think that they were considering him, given the fact that he has a high profile and was on the list" for the previous Supreme Court opening, University of Montreal law professor Jean-François Gaudreault-DesBiens said in an interview.

The court ruled Justice Nadon ineligible after he had already been sworn in because as a member of the Federal Court of Appeal he lacked current Quebec qualifications meant to preserve the province's unique legal culture.

The Supreme Court was left with eight judges, one short of its usual number, for 10 months during and after the legal battle over Justice Nadon. A similar delay could be in store if the government wishes to appoint Justice Mainville.

Through a spokesperson for the Federal Court of Appeal, Justice Mainville declined comment this week. A spokesperson for Justice Minister Peter MacKay would say only that "these appointments have always been a matter for the executive and continue to be. We will respect the confidentiality of the consultation process and will not comment on specific recommendations."

Mr. Galati argues that it is illegal to appoint a Federal Court judge to the Quebec appeal court, under rules that go back to Canada's founding in 1867 which said that judges of the Quebec courts must be chosen from members of that province's bar.

"At the end of the day, the government has to know there are people out there watching," Mr. Galati said in an interview. "You don't get to spit on the Constitution."

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Ivison: Anti-Tory ad blitz planned by union a compelling reason for Harper to call snap election

John Ivison, National Post, September 25, 2014

OTTAWA — Stephen Harper is wed to his timetable for a fall election next year, despite being urged to drop the writ early.

Some Conservatives have suggested going early because of the Mike Duffy trial, which is set to start dripping bad news (from Mr. Harper's point of view) from next April. The Prime Minister is said to be undaunted.

But there may be an equally compelling reason to go early – to disrupt the massive anti-Conservative advertising blitz planned by Canada's largest private sector union.

There's a new breed of highly politicized union in town – and they're intent on doing to Mr. Harper what they recently did to Tim Hudak in Ontario.

Unifor was created last year from the merger of the Canadian Auto Workers and the Communications, Energy and Paperworkers unions, to lead the fight-back against the Harper government, according to Jerry Dias, the national president.

"The creation of Unifor was a response to the federal government and the unprecedented attack being faced by working class people," he said.

Federal politics has not yet experienced the power of a union formed with the express purpose of defeating one political party.

But in Ontario, the Progressive Conservative party attributes its successive defeats, at least in part, to the negative advertising paid for by the unions.

In the Senate Thursday, Senator Bob Runciman said unions spent $10-million in the recent Ontario election – all on a campaign to "Stop Hudak."

Mr. Runciman was speaking during debate on a private members' bill that would force unions to publicly disclose details of their political spending. The bill — C377 — was gutted by senators last year but is now back in the upper chamber and is a major irritant for unions.

The Ontario campaign may be a harbinger of what Conservative parties across the country can expect to face in the future.

In the Ontario election, the Workers' Rights Campaign operated more like a shadow political party than a union, with its own war-room, field organizers and campaign strategy. In previous campaigns, certain unions backed the Liberals; others supported the NDP. In 2014, there were strenuous efforts made to avoid splitting the anti-Conservative vote.

Sid Ryan, president of the Ontario Labour Federation, said the labour movement came together in a way he had not seen in 20 years.

The key difference between Ontario and federal elections is that third parties cannot advertise federally once the writ is dropped. But, thanks to fixed election date legislation, the unions know exactly when the next election is going to be — and can do pretty much what they please until the writ officially drops a month before voting day.

Mr. Dias dismissed speculation that Mr. Harper might call a snap election. "Nah, nah. He will drop a feel-good budget and then spend months on a travelling roadshow paid for by the taxpayer."

Conservative MPs have suggested Unifor may have up to $40-million to spend trying to bring down Mr. Harper. (When Unifor was created last year, it said it had $50-million to spend on organizing over five years — $10-million a year to "organize" new members and attract citizens to social causes.)

"That's utterly ridiculous," Mr. Dias said of the idea of a $40-million, anti-Tory war chest. "There's no question that pre-writ we can do all kinds of things. But to suggest we

will spend $40-million is quite ridiculous. We certainly have resources and we are a very politically engaged organization in the defence of working people's interests. But those decisions will be made by the national executive board," he said.

Mr. Dias said the Ontario campaign provided a confidence boost for a labour movement that has been in decline for 30 years – only 16% of workers in the private sector are union members.

"Ontario showed we can mobilize and win," he said. "We will certainly be involved where we can make a difference."

Mr. Dias said that organized labour took a battering during the recession. "But here we are in 2014 and things have turned around significantly."

Voices inside the Conservative caucus have urged Mr. Harper to call an early election to disrupt Unifor's pre-writ advertising buys.

Sources say the Prime Minister is concerned that breaking his own fixed election date legislation in a majority-government context would appear opportunistic — particularly in advance of Mr. Duffy's trial.

But in sticking with that timing, he is gifting his union opponents the chance to influence a federal election in a way we have not seen in a very long time.

LeDroit

Autre manifestation contre les compressions dans la fonction publique

Paul Gaboury, Le Droit, le 26 septembre 2014

Les syndicats du secteur public fédéral ne manquent pas une occasion de dénoncer les compressions du gouvernement Harper dans les services publics. Et d'ici aux prochaines élections fédérales, ils entendent multiplier les rassemblements dans la rue pour se faire entendre.

Environ 200 membres du Syndicat des employés de l'impôt (SEI), élément de l'Alliance de la fonction publique, réunis en colloque à Ottawa, ont tenu une manifestation vendredi matin au centre-ville d'Ottawa pour dénoncer les compressions, en particulier celles annoncées à l'Agence du revenu du Canada.

Ils voulaient aussi dénoncer les changements proposés aux congés de maladie dans la fonction publique, et la lenteur des négociations pour le renouvellement de leur contrat de travail.

Le SEI, qui compte 25 700 membres, en baisse de plus de 1000 membres depuis les deux dernières années, négocie pour le renouvellement d'un nouveau contrat de travail échu depuis le 31 octobre 2012.

Et après plusieurs tentatives infructueuses à la table de négociations et en conciliation, les deux parties devront se présenter devant une commission de l'intérêt public le 8 et 9 octobre prochains.

La liste s'allonge

Pour le vice-président du SEI, Marc Brière, la liste des compressions continue de s'allonger et les membres du syndicat s'inquiètent de l'impact sur les services et leurs emplois.

«Le moral des employés est à son plus bas et nous voulions manifester contre les compressions qui touchent l'ensemble de la fonction publique, l'assurance-emploi, les Anciens combattants et tous les autres services. Chaque fois que nous pourrons le faire, nous descendrons dans la rue pour dénoncer ce gouvernement d'ici les prochaines élections fédérales», a indiqué M. Brière.

Depuis avril dernier, l'AFPC au Québec tient des manifestations le 19 de chaque mois. «C'est pour souligner que le 19 octobre 2015 est la date prévue pour les prochaines élections fédérales (à date fixe). Les syndicats un peu partout au pays devraient emboîter le pas pour dénoncer le gouvernement Harper», a expliqué M. Brière.

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Ottawa veut étendre l'usage du bracelet électronique

MARC THIBODEAU, La Presse, le 26 septembre 2014

Le gouvernement conservateur compte propager l'usage du bracelet électronique à grande échelle au pays pour surveiller les délinquants «à haut risque» à leur sortie de prison. Une mesure qu'il entend mettre en place avant les prochaines élections fédérales.

En entrevue à La Presse cette semaine, le sénateur Pierre-Hugues Boisvenu a déclaré que cette approche pourrait toucher à terme de «10 à 15%» des quelque 15 000 personnes détenues dans les pénitenciers fédéraux.

Son estimation, a-t-il précisé, correspond au pourcentage de ces délinquants qui ont commis un crime grave et qui présentent, en théorie, un haut risque de récidive.

«On poursuit un objectif de protection de la société. On ne peut pas arriver avec un projet qui va toucher seulement cinq ou six individus», a relevé hier M. Boisvenu, qui se présente comme porte-parole du gouvernement dans ce dossier.

La surveillance électronique pourrait notamment être utilisée pour les détenus qui profitent d'une libération conditionnelle ou qui font l'objet d'une ordonnance de surveillance de longue durée.

Le sénateur a précisé qu'Ottawa espérait procéder rapidement pour que l'initiative figure au bilan du Parti conservateur avant le prochain scrutin.

Un système de surveillance électronique constituerait un «outil de contrôle» de plus mais non une panacée, note M. Boisvenu.

Ottawa avait déjà introduit dans la loi omnibus C-10 un article permettant au Service correctionnel du Canada (SCC) d'imposer un «dispositif de surveillance» à des détenus soumis à leur libération à des restrictions géographiques.

Le règlement d'application définissant à quel «type de crime» et en fonction de quels critères la surveillance électronique doit être retenue est en voie d'être élaboré par le ministère de la Sécurité publique et le ministère de la Justice, a précisé M. Boisvenu. Ce sera ensuite au SCC de l'appliquer «au cas par cas».

Aucun délinquant sous l'autorité du gouvernement fédéral n'est soumis pour l'heure à une telle surveillance. L'approche est cependant utilisée par une demi-douzaine de provinces pour la gestion des peines, généralement à petite échelle et sur des détenus à faible risque.

Le sénateur a affirmé que le recours au bracelet électronique devrait permettre de réduire à la fois le taux de récidive et le taux d'incarcération, générant suffisamment d'économies pour «autofinancer» l'infrastructure de surveillance électronique.

Projet-pilote

La décision du gouvernement fédéral survient alors même que le SCC s'apprête à lancer en 2015 un projet-pilote visant à évaluer l'efficacité et la rentabilité de cette approche.

Une porte-parole du SCC, Véronique Rioux, a précisé par courriel que «les résultats de recherche du projet-pilote ainsi que les meilleures pratiques et les leçons apprises aideront à prendre les décisions relatives à la prestation future de services de surveillance électronique».

L'étude à venir fait écho à un rapport du Comité permanent de la sécurité publique et nationale. Ses auteurs relevaient en 2012 que «les travaux de recherche effectués au sujet de la surveillance électronique dans le domaine correctionnel ne permettent pas de confirmer ou d'infirmer l'efficacité de cette méthode de surveillance».

Un premier projet-pilote mené par le SCC en 2008 et 2009 n'avait relevé «aucune diminution du taux de récidive chez les délinquants». Selon le comité parlementaire, il portait cependant sur des délinquants à faible risque de récidive qui étaient donc, par définition, peu susceptibles de commettre un nouveau crime.

Registre public de pédophiles

Le sénateur a précisé les intentions du gouvernement relativement à la surveillance électronique alors qu'il réagissait à un dossier de La Presse sur le traitement des délinquants sexuels en Floride et au Canada.

M. Boisvenu a rappelé que le gouvernement fédéral entendait aller de l'avant avec l'adoption d'un registre public pour les délinquants sexuels ayant ciblé des enfants qui présentent un haut risque de récidive. Il précisera leur ville de résidence ainsi que leur «arrondissement» sans aller jusqu'à révéler leur adresse comme le font les registres en place aux États-Unis.

Plusieurs provinces canadiennes ont adopté l'approche retenue par Ottawa depuis longtemps sans susciter de controverse, souligne M. Boisvenu, qui insiste sur la nécessité de trouver un équilibre entre «le droit du détenu à la réhabilitation» et «le droit du public à la protection».

Le sénateur - qui juge le modèle américain trop «extrême» - a précisé par ailleurs que le gouvernement n'entendait pas imposer de restrictions résidentielles générales aux délinquants sexuels comme le fait la Floride.

Plusieurs municipalités de l'État américain empêchent les délinquants sexuels de se loger à moins de 750 m d'écoles, de services de garde ou de parcs fréquentés par des enfants, rendant leur établissement en milieu urbain très difficile.

Surveillance à distance

Le bracelet électronique, qui se porte à la cheville, permet de relever à distance la position de la personne surveillée. Il peut envoyer un signal d'alarme lorsqu'elle se trouve dans une zone qui lui est interdite par ses conditions de probation.

Le système peut fonctionner avec un émetteur GPS, qui utilise un réseau satellitaire, ou un émetteur de fréquence radio. Une surveillance à distance peut aussi être effectuée avec un appareil biométrique qui permet de vérifier que la personne ciblée se trouve à l'endroit requis à une heure donnée.

PM appoints new deputy clerk at PCO

KATHRYN MAY, Ottawa Citizen, September 27, 2014

Prime Minister Stephen Harper has made senior bureaucrat Michael Wernick the next deputy clerk of the Privy Council Office, the second-highest rank in Canada's public service.

Wernick will take over the post from Janice Charette, whom Harper earlier picked to become the country's top bureaucrat, replacing Wayne Wouters, who is retiring Oct. 6. As deputy clerk, Wernick is also the associate secretary to cabinet.

Wernick comes to the job after eight years as deputy minister at Aboriginal Affairs and Northern Development, considered one of the toughest portfolios in government with its many statutory obligations, historical grievances, endless legal challenges and personal relationships to be managed. It also has province-like responsibilities, providing social, health and education services.

As deputy, Wernick stickhandled the federal government's attempts to reform First Nations education, which the Conservatives abandoned after the country's aboriginal chiefs disagreed on the necessary reforms.

Wernick joined the public service in 1981 as a social policy analyst at Finance and began climbing the ranks, including various senior jobs at PCO and Canadian Heritage. His last PCO job was as deputy secretary to cabinet for plans and consultations. He left Aboriginal Affairs in July and has been a senior advisor to the PCO since then.

Des centaines de dénonciateurs se confient à l'ARC

Paul Gaboury, Le Droit, le 25 septembre 2014

Les fraudes fiscales et l'évitement fiscal à l'étranger suscitent l'attention ici comme ailleurs dans le monde.

Aux États-Unis, la Securities and Exchange Commission vient d'octroyer une somme record de 30 millions$ à un dénonciateur vivant à l'étranger qui a divulgué des informations ayant permis de lever le voile sur un stratagème frauduleux. Ni le nom, ni les détails des acteurs impliqués n'ont été dévoilés. Le programme américain a déjà permis de récompenser plus de 14 dénonciateurs, qui peuvent toucher de 10 à 30 pour cent des sommes mises en cause.

Au Canada, l'Agence du revenu du Canada (ARC) vient de mettre en place le Programme de dénonciateurs de l'inobservation fiscale à l'étranger.

Lancé officiellement en janvier 2014, ce programme offre «des récompenses financières aux particuliers qui détiennent des renseignements concernant des cas importants d'inobservation fiscale internationale donnant lieu à l'établissement d'une cotisation de l'impôt fédéral de plus de 100000$ ainsi qu'à son recouvrement».

Ce programme avait enregistré en date du 31 juillet 2014 plus de 1000 appels, dont 310 provenaient de dénonciateurs.

«Un certain nombre d'autres dossiers qui ne répondent pas aux critères du programme ont été transférés à d'autres secteurs de l'ARC pour que des mesures d'observation soient prises», a confirmé Philippe Brideau, porte-parole de l'ARC.

Divulgations volontaires

En l'espace de neuf mois, l'ARC a déjà reçu 5296 divulgations impliquant un revenu de source étrangère, le même nombre que l'année dernière. Au rythme actuel, ce chiffre pourrait doubler d'ici la fin de l'année.

Selon l'ARC, ces augmentations résultent des mesures prises pour contrer l'évasion fiscale à l'étranger. Une somme de 30 millions$ a été investie à la suite de l'adoption du budget 2013, notamment pour les transferts électroniques de fonds entrants.

La semaine dernière, l'Institut professionnel de la fonction publique du Canada dénonçait la décision du gouvernement de muter plusieurs vérificateurs spécialisés dans la lutte à l'évasion fiscale internationale à des équipes de vérification générales, ce qui pourrait nuire à récupérer des sommes importantes d'impôts à l'étranger.

L'ARC avait alors répliqué qu'elle ne réduisait aucunement le nombre de ses spécialistes chargés des questions d'évasion fiscale et d'évitement fiscal, pas plus qu'elle ne réduit le nombre de ses vérificateurs. L'agence avait mentionné que les réductions annoncées sont limitées à des postes de gestionnaire, et visent à s'assurer que les programmes sont exécutés de la façon la plus efficace et efficiente possible.

LeDroit

Selon le directeur parlementaire du budget

Difficile d'évaluer l'effet des compressions au fédéral

Paul Gaboury, Le Droit, le 25 septembre 2014

Alors que son plan de réduction des dépenses est en avance sur le calendrier et sera mis en oeuvre comme prévu, le gouvernement Harper refuse toujours de communiquer des données qui permettraient au public d'évaluer les effets des réductions proposées et de déterminer si celles-ci sont tenables à long terme, constate le directeur parlementaire du budget, Jean-Denis Fréchette.

Dans son rapport sur le suivi des dépenses des trois premiers mois de 2014-2015, le directeur du budget a fait une analyse détaillée des dépenses gouvernementales qui démontre que les réductions de dépenses prévues ont fait un bond de 3,8 milliards $, avec la présentation du budget 2014, passant à 14,6 milliards $ par année en 2014-2015.

«Le gouvernement s'attend à ce que, à la suite des réductions prévues, la part des dépenses de programme directes (dépenses de fonctionnement, en immobilisations et certains paiements de transfert) dans les dépenses de programme totales tombe à un niveau jamais atteint depuis 1998-1999 et représente la plus petite part du produit intérieur brut depuis 2001-2002», note M. Fréchette.

Selon l'examen, 1% seulement des économies prévues par les mesures de compressions du budget de 2012 risquaient de ne pas être réalisées. Toutefois, il reste difficile d'évaluer l'impact des réductions proposées puisque le gouvernement refuse toujours de publier les données à cet effet.

«Le gouvernement refuse de publier des données qui permettraient au public d'évaluer les effets de réductions proposées et de déterminer si celles-ci sont tenables à long terme, mais les ministères et les organismes confirment pour la plupart, dans leurs états financiers trimestriels, que le plan gouvernemental de réduction des dépenses est en avance sur le calendrier et sera mis en oeuvre comme prévu», indique le rapport du directeur parlementaire du budget.

Dépenses salariales

Les dépenses liées au personnel de la fonction publique a diminué de 1% pendant les trois premiers mois de l'exercice 2014-2015, par rapport à la même période de l'année précédente, pour atteindre 7,9 milliards $.

Comme l'avait déjà mentionné M. Fréchette dans son rapport d'avril sur le suivi des dépenses, les documents de planification à moyen terme des ministères et des organismes prévoient que 8900 autres postes devraient être éliminés d'ici trois ans. Ces abolitions s'ajouteront aux 25 000 postes déjà abolis depuis le début des compressions en 2010.

Même si le directeur parlementaire du budget soutient que les réductions de poste sont le moyen le plus sûr de réaliser des économies à court terme, il est nécessaire, pour permettre des gains de productivité permanent, «d'éliminer ou de réduire des programmes et des services ou de restructurer les activités gouvernementales».

CAPE Blog: Sick leave proposals reveal the hypocrisy of Tony Clement and the Conservative government

By Claude Poirier, CAPE President, September 25, 2014

All is revealed! Treasury Board has started tabling its proposals on sick leave benefits and its new income replacement program for workers who are off work for extended periods. The proposals were first unveiled at the bargaining tables of the Public Service Alliance of Canada during the week of September 8. At a meeting held on September 17, CAPE's TR group received proposals identical to those presented to PSAC.

I don't intend to analyse these proposals here. CAPE will publish an initial analysis on its website, with examples illustrating what it would mean if the proposals were to come into force as they currently stand. Like my colleagues Robyn Benson of PSAC and Debi Daviau of the Professional Institute of the Public Service of Canada, I can assure you that CAPE has no intention of acquiescing to this unacceptable roll-back of our members' working conditions.

What I'm interested in today is challenging the Conservative government and its most visible spokesperson, Tony Clement, on their hypocrisy. It's important to put the government's offers in perspective and to recall what its objectives really are. But let's start with a simple observation about the Treasury Board President: does anyone still believe Tony Clement, when most of his statements are routinely contradicted by organizations with far more credibility, like the Parliamentary Budget Officer and Statistics Canada? Of course, none of this has stopped him from spreading the grossest lies at every opportunity.

Protecting young workers

Last year, as you may recall, Tony Clement stood, hand on heart, and argued for the need to protect young public service employees who hadn't accumulated sick days and would have no pay if they had the misfortune to get sick for an extended period of time. The system, said the Treasury Board President, "discriminates against newer and younger employees, while disproportionately benefitting those who have been with the government for years." His solution? Take away everyone's benefits and let young employees fend for themselves without pay.

With the system being proposed by the government in this round of bargaining, once workers' five sick days are used up, they will need to find other means of subsistence for seven days (the "waiting period") before they can access short-term disability benefits. If episodes of illness reoccur during the year, the seven-day "waiting period" will be reapplied each time. I fail to see how new and younger workers are being protected if they don't get paid until they can access the new disability insurance plan. Unless Tony Clement has become an ascetic who can live on air for seven days and wants to impose his lifestyle on the entire public service, the new proposals certainly don't meet my definition of "better protection."

Too many employees have too few accumulated sick days

Tony Clement never tires of repeating that the current system doesn't protect everyone and, for once, he's right. He states that 60% of public service employees don't have enough banked sick days to bridge the gap until long-term disability insurance kicks in. Skillful as always at fudging the facts for maximum impact, the Treasury Board President fails to mention that while it's true that six out of every ten public service employees do not have a sick day "cushion," the situation he describes will affect only 2% of public servants in any given year. We exposed this myth in our document on the myths about paid sick leave (it's myth No. 6). I urge you to take the time to read all nine myths – you'll discover that Mr. Clement lives in a very different world from the rest of us.

We will present a complete set of proposals at the bargaining tables to ensure that new and younger workers are better protected – and our proposals would cost a lot less than those being put forward by the employer. For a government that brags about protecting taxpayers, it's interesting to see how ready it is to implement a complex and costly system when simple solutions are out there. When you're blinded by your obtuse ideology, I suppose it's hard to see any solutions but your own.

We will continue to bargain in good faith and to listen to the employer's proposals in this round. However, we need your support because even the most rational arguments may be to no avail when they come up against the prejudices of this Minister. Many outraged voices will be needed if we hope to have any chance of impressing this government and getting it to change course.

Blog de l'ACEP : Des propositions sur les congés de maladie qui démontrent l'hypocrisie de Tony Clement et du gouvernement conservateur

Par Claude Poirier, président de l'ACEP, le 25 septembre 2014

On a éventé la mèche. Le Conseil du Trésor a commencé à déposer ses propositions concernant les congés de maladie et son nouveau programme de remplacement de revenu pour les travailleurs absents pour une période prolongée. C'est aux tables de négociation de l'Alliance de la Fonction publique du Canada que les propositions ont été dévoilées en premier durant la semaine du 8 septembre. Le groupe TR de l'ACEP a reçu des propositions identiques à celles de l'AFPC lors de la rencontre du 17 septembre.

Je ne ferai pas ici l'analyse des propositions. L'ACEP va prochainement publier sur son site une première analyse sur les propositions et donner des exemples de ce que cela signifierait si elles entraient en vigueur tels que soumis. Je vous rassure, comme mes collègues Robyn Benson de l'AFPC et Debi Daviau de l'Institut professionnel de la fonction publique, l'ACEP n'a pas l'intention d'accepter ces reculs inacceptables dans les conditions de travail de nos membres.

Ce qui m'intéresse aujourd'hui c'est de dénoncer l'hypocrisie du gouvernement conservateur et de son porte-étendard le plus visible, Tony Clement. Car il faut mettre les offres du gouvernement en perspective et se rappeler les objectifs du gouvernement. Mais allons-y avec une première observation sur le président du Conseil du Trésor : qui croit Tony Clement aujourd'hui, alors que ses affirmations les plus fréquentes sont constamment contredites par des organismes autrement plus crédibles que le ministre comme le Directeur parlementaire du budget et Statistique Canada? Cela ne l'empêche pas de semer à tout vent ses faussetés les plus énormes.

Protéger les jeunes travailleurs

Si vous vous rappelez bien, Tony Clement, la main sur le cœur, disait l'an dernier qu'il faut protéger les jeunes employés de la fonction publique, ou ceux récemment embauchés, qui n'ont accumulé de congés de maladie et qui seraient alors sans salaire s'ils devaient s'absenter pour une période prolongée en cas de maladie. Ce système disait le président du Conseil du Trésor, « est discriminatoire à l'endroit des nouveaux employés et des plus jeunes tout en étant excessivement avantageux pour ceux qui travaillent au gouvernement depuis des années. » Alors sa solution c'est d'enlever les avantages à tous et à laisser les jeunes se débrouiller sans paie pour des périodes plus ou moins longues.

Car le système proposé par le gouvernement dans cette ronde de négociation signifie qu'une fois les cinq jours de maladie utilisés, l'employé doit trouver d'autres moyens de subsistance que son salaire pendant sept jours, la période « d'attente » avant d'avoir accès au nouveau régime d'assurance invalidité à court terme. Si des épisodes de maladie se répètent durant l'année, la période « d'attente » de sept jours est à nouveau calculée. Je ne vois pas comment cela protège les nouveaux et jeunes employés s'ils ne sont pas payés durant la période avant laquelle le nouveau régime d'assurance-invalidité débuterait. À moins que Tony Clement ne soit un ascète qui peut vivre sans ressources pendant sept jours et qu'il souhaite imposer ceci à l'ensemble de la fonction publique, ce n'est pas ma définition de « meilleure protection. »

Trop d'employés n'ont pas assez de jours dans leur banque

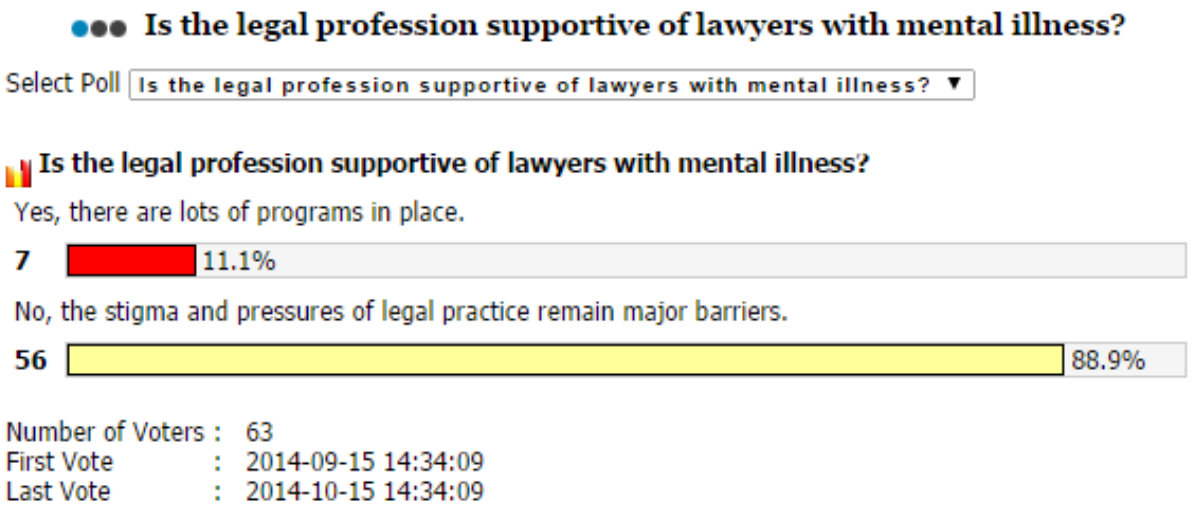
Tony Clement répète à l'envi que le système actuel ne protège pas tout le monde et, pour une fois, il ne ment pas… Il indique que 60 % des employés de la fonction publique n'ont pas assez de congés dans leur banque pour faire le pont entre jusqu'au moment où le régime d'assurance invalidité à long terme débute. Encore une fois habile à mélanger des données pour en assurer l'impact, le président du Conseil du Trésor ne mentionne pas que s'il est vrai que six employés sur 10 n'ont pas ce coussin de congés de maladie, c'est une situation qui, bon an mal an, ne frappe que 2 % des fonctionnaires. Nous avions débusqué ce mythe dans notre document sur les mythes entourant les congés de maladie. C'est le numéro 6, mais prenez la peine de lire les neuf mythes, vous verrez que le monde dans lequel vit M. Clement n'est pas le vôtre.

Nous ferons des propositions complètes aux tables de négociation pour assurer une meilleure protection des jeunes et nouveaux employés, propositions qui coûteraient pas mal moins cher que celles mises de l'avant par l'employeur. Pour un gouvernement qui se vante de vouloir protéger les contribuables, il est curieux de constater qu'il est prêt à mettre en place un régime coûteux et complexe alors que des solutions simples sont disponibles. Mais lorsque vos lunettes sont teintées d'une idéologie obtuse, cela vous empêche de voir d'autres solutions que les vôtres.

Nous continuerons donc de négocier avec bonne foi et à écouter les propositions de l'employeur durant cette ronde. Nous aurons toutefois besoin de votre appui, car tous les arguments les plus rationnels risquent de se briser sur le mur des préjugés du ministre. Il se peut que le cumul de nos voix exprimant notre outrage soit nécessaire pour impressionner et faire changer d'avis ce gouvernement.

Weekly poll results from Law Times

Law Times, September 26, 2014



Ontario group to examine aboriginal justice issues

Yamri Taddese, Law Times, September 19, 2014

A new advisory group set up to examine aboriginal justice issues in Ontario will hold its first meeting today.

Representatives from the Law Society of Upper Canada, Legal Aid Ontario, and aboriginal communities are part of the 12-member advisory group, which will look into the challenges First Nations communities face in the justice system.

The committee is a response to one of the recommendations of former Supreme Court Justice Frank Iacobucci's 2013 report on aboriginal representation on juries. His report found the relationship between the justice system and First Nations is "quite frankly in crisis."

Iacobucci's report highlighted the estrangement of aboriginal communities from the justice system despite being incarcerated at a much higher rate than the general population.

Former Ontario deputy attorney general Murray Segal and Warren White, the grand chief of Grand Council Treaty 3, chair the new committee.

"There is much our government still needs to learn about the ways aboriginal peoples experience our justice system. I know that the advisory group members' wisdom will help us better understand current challenges, and I'd like to thank the members for the work they are doing," said Ontario Attorney General Madeline Meilleur in a statement. "I am confident that we will be better able to overcome these challenges with greater collaboration between government and our aboriginal partners."

David McRobert, a member of the Ontario Bar Association's aboriginal law section, says he hopes the committee will look at aboriginal justice issues in the context of broader problems facing First Nations communities. The committee shouldn't "tinker around the edges of problems aboriginals . . . have lived with and known for decades, if not for centuries," he says.

"I just hope that they get the only way some of these problems are really going to be addressed in the long term is through a deeper social change, which is going to require the government to look at what is happening in these northern communities," he says, adding unemployment, education, lack of access to clean water, and mental health are all issues that should be considered.

McRobert adds he's hoping the leaders of the Idle No More movement will step up to contribute to the work of this committee.

His concern, McRobert says, is some of the members of the advisory group may be more powerful and able to sway the conversation more than others.

"I believe the effectiveness of the advisory group would be enhanced if the representatives of First Nations communities and constituencies are properly resourced and supported so they can participate fully," he says. "Otherwise the representatives of larger and more powerful stakeholders such as the LSUC and the LAO may shape the recommendations offered."

THE LAWYERS WEEKLY
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Going it alone

Survey paints troubled picture of litigants who represent themselves

By Nicholas Bala and John-Paul Boyd, The Lawyers Weekly, September 26, 2014

There is growing concern about the increasing numbers of family law litigants without representation, regarding the negative effects for these vulnerable individuals and their children, and about the costs for the justice system. Our recent survey of Canadian lawyers and judges confirms this is a serious and growing problem, but also reveals that the issues related to self-representation are complex and defy simple solution. While judges are striving to be fair to these who are self-represented, these litigants face significant challenges but also impose costs on those who have lawyers.

With the support of the Canadian Research Institute for Law and the Family and the collaboration of Rachel Birnbaum, we surveyed the lawyers and judges attending July's National Family Law Program at Whistler about a number of issues, including self-represented litigants. About a third of those attending participated in the survey.

The 176 respondents, 13 per cent of whom were judges, were from across Canada. Though the West was somewhat better represented — not surprising given the locale of the conference — there were no significant differences in the responses by region. Respondents were quite senior, with an average of 18 years' experience in their current profession.

In the past year, 15 per cent of lawyers' cases and 46 per cent of judges' cases involved a self-represented party for all of the litigation process. Further, 78 per cent of respondents reported that in their experience the number of self-represented family litigants increased over the past three years; only one lawyer reported a decrease.

The vast majority of respondents said the primary reason litigants represent themselves is because they can't afford to retain, or continue to retain counsel. However, half also said that some litigants choose to proceed unrepresented because they believe that they know enough to manage their case themselves. Further, 41 per cent said that some litigants think that counsel will increase the time and cost necessary to resolve their case, and 24 per cent thought that some believe that hiring counsel will exacerbate the adversarial nature of their case. Almost half of respondents think that men tend to be self-represented for somewhat different reasons than women, with women having primarily financial reasons for not having a lawyer, and men being more likely to proceed without a lawyer in the belief that this would not negatively affect the outcome for them.

When litigants proceed without counsel, 83 per cent of respondents said that settlement before trial is less or much less likely when one party is self-represented, and 47 per cent said that settlement is less or much less likely when both parties are self-represented. This low rate of settlement may be attributable to unrepresented parties' assumptions about how their cases will turn out. Almost half of the judges and two-thirds of lawyers said that self-represented parties always or usually have unrealistically high expectations for the outcome of their cases.

Making matters worse, cases involving unrepresented litigants tend to take longer to resolve than cases in which all parties are represented. More than 90 per cent of respondents said that challenges always or usually arise because of self-represented litigants' unfamiliarity with the law of evidence, the legislation applicable to their case, the rules of court, and hearing and trial processes. Less than six per cent of respondents said that these problems arise only sometimes or rarely.

When cases involving self-represented litigants are resolved, their unrealistic expectations of outcome pair with results that are worse than what would have been achieved with counsel. However, two-thirds of respondents believe that judges treat self-represented parties "very fairly," and only one thought that judges treat these litigants unfairly. The perception is that self-represented litigants do worse than represented litigants on economic issues. They may do a slightly better job with parenting issues, but only six per cent of respondents said that self-represented litigants achieve better results on parenting arrangements, and only two per cent said they achieve better results on support issues.

Litigants without counsel are often caught in a downward spiral. They generally have unrealistically high expectations for the outcome of their cases, which reduces the likelihood that their cases will be resolved without trial. When they do proceed to trial, their lack of knowledge of the governing legislation, the rules of evidence, the rules of court and court processes frequently causes additional problems and doubtless increases the length of trials and the number of adjournments, and when their trials do complete, self-represented parties usually achieve worse results than they would have with counsel. Not surprisingly given these results, 84 per cent reported that the fact that one party is self-represented increases the cost of dispute resolution for a represented party.

Respondents were also asked their views on how to improve self-represented litigants' use of the court system. Almost half the judges and more than a third of the lawyers said that it would help to have plain-language guides to court processes, the rules of evidence and the legislation. More than a third of judges and almost half of the lawyers support requiring parties to attend a mandatory information program following the commencement of proceedings. About half of the judges and lawyers supported giving paralegals a limited role in family law disputes.

Interestingly, the measures that received the least support included actually simplifying court processes, the rules of evidence and legislation, or the appointment of counsel as amicus curiae. When all parties are unrepresented, about a quarter of judges and lawyers support the adoption of an inquisitorial approach, and 23 per cent of judges and 36 per cent of lawyers supported the use of a mediation-litigation hybrid process, in which judicial mediation is attempted and trial ensues if settlement is not achieved.

Nicholas Bala is a professor of law at Queen's University, and John-Paul Boyd is the executive director of the Canadian Research Institute for Law and the Family. They gratefully acknowledge the collaboration of Dr. Rachel Birnbaum of Western University in this study.

Supreme Court of Canada judge outlines six ways to increase access to justice

By Jacob Morgan, Metro, September 25, 2014

Justice Thomas Cromwell of the Supreme Court of Canada called for meaningful change to the justice system during his keynote talk at the National Pro Bono Conference on Sept. 25 in Regina.

Cromwell addressed the audience at Radisson Plaza Hotel Saskatchewan, many of whom were young lawyers and students, and referred back to a 2013 report from the Action Committee on Access to Justice in Civil and Family Matters.

"There is a serious access to justice problem in Canada. The civil and family justice system is too complex, too slow and too expensive," states the document, Access to Civil and Family Justice: A Roadmap for Change.

It adds that few of the nearly 12 million Canadians who experience a legal problem in a three-year period have the resources to solve them, and poor groups face more problems than high-income earners.

Six principles for reform are outlined in the report, which Cromwell emphasized at the conference.

1. Put the public first

This refers to everything from "the way we conduct a hearing to the way we organize changing the system," Cromwell told Metro after his speech.

A possible approach, he explained, is to bring the people the system is designed to help into the conversation.

Although extensive consultations are costly and complex, Cromwell said that doesn't mean "you cannot bring those perspectives into the thinking in a lot of different ways."

The report states that court processes such as language, location and sitting times are often convenient for the litigators and not the litigants: "The focus must be on the people who need to use the system… especially members of immigrant, aboriginal and rural populations and other vulnerable groups."

2. Collaborate

Cromwell said the report advocates for Access to Justice Implementation Commissions (AJIC) in every jurisdiction.

"For coherent, collaborative and coordinated change to occur, mechanisms need to be available in all provinces and territories," states the report.

These AJICs, said Cromwell, should be places where individual leaders from the legal profession and members of the public come together.

"Across the country we're seeing different models set up," he said. "From quite small high-level committees to much larger more consultative groups."

He added that there is a need for increased communication between the various individuals and organizations within the access to justice world.

3. Educate

The report also includes preventative measures under the access to justice umbrella.

"What we're really thinking here… is trying to help members of the general public be more aware of legal rights and responsibilities, and also trying to do more at an earlier stage to avoid disputes becoming matters that have to go to court," said Cromwell.

4. Simplify

One way to simplify the system, said Cromwell, is to introduce more small-claims tribunals with less formal procedures.

"Here in Saskatchewan, especially, we've been very active in trying to get more front-end mediation and trying to get people to resolve the dispute by agreement," he said.

But both Cromwell and the report itself indicate there is a lot more work to be done.

"The civil and family justice system is still too complicated and largely incomprehensible to all but those with legal training," states the report, adding that "everyday legal problems need everyday solutions."

5. Action

In order for Canada to improve its situation, Cromwell said ideas and models are not enough – a united effort among the legal profession and the public is required.

“We’d like to make sure all these individual efforts are designed to be doing some larger plan to bring about a more sustainable system,” he said.

6. Outcomes

Is the judgment actually enforceable? Were all those court appearances necessary?

These are the questions Cromwell said must be asked to create a shift in concentration from processes to results.

“It’s really just trying to focus on whether we’re producing just and practical outcomes for people and their problems,” he said.

Criminal lawyers on the defence in Alberta

Jennifer Brown, Canadian Lawyer Magazine, September 23, 2014

The associations representing criminal lawyers in Alberta say the justice minister in that province is doing “damage to the administration of justice” and should resign.

Recently Alberta’s minister of justice and solicitor general, Jonathan Denis, said the province would look at an increase in funding for legal aid for next year if the federal government wouldn’t fund a bump to the budget. But according to a report in the Edmonton Journal, he told a CTV news reporter: “If we are going to give legal aid additional funds, I want it to go toward increasing the eligibility requirement and not more money for criminal defence lawyers.”

Denis made the comment as a group called Mothers in Support of Fair Trials was protesting the fact current legal aid funding levels have denied subsidized lawyers to those receiving Assured Income for the Severely Handicapped.

In response, the association representing criminal trial lawyers in Alberta sent a letter yesterday to Premier Jim Prentice asking for Denis to step down.

“Who do you think is providing the services to legal aid? It’s not the Crown prosecutors. It is criminal defence,” says Shannon Prithipaul, president of the Criminal Trial Lawyers Association based in Edmonton.

Denis wasn’t available for comment today, according to his spokeswoman, Jessica Jacobs-Mino.

Prithipaul says there is a list of reasons why Denis should resign. Lawyers who accept legal aid cases make $84 an hour, a rate that hasn’t changed in six years.

“This was the cherry on the top of the sundae. If you asked a civil lawyer to work for $84 an hour, I think they would laugh. We have lawyers with 20-25 years experience working for $84 an hour.”

The list of issues Alberta’s criminal lawyers have with Denis is getting longer and defence counsel are “totally ticked off,” according to Prithipaul.

“If they want to start a war with defence counsel they may get it and they may really regret it,” she says. “He’s suggesting that defence counsel are the problem when they are not. With those kind of comments, it’s our submission he is bringing the administration of justice into disrepute.”

Alan Pearse of the Criminal Defence Lawyers Association calls Denis “a train wreck” who’s “biding his time.”

“He’s been awful on the traffic unit reforms. He couldn’t care less. I’ve never seen a less effective justice minister,” says Pearse. “This is the last straw. We have sent so many letters to him.”

Prithipaul adds that Denis has previously said the government was going to “pick and choose” which Rowbotham applications the government would actually fund but then claimed it was a misunderstanding.

“He has been purposely starving the legal aid system and now it appears that there has been a policy to keep defence counsel working at abysmally low rates for quite a long time. That’s a real concern,” she says. “He doesn’t seem to really care about real justice.”

Denis has also said to the benchers of the Law Society of Alberta that he had extended an invitation to the CTLA to speak with him about legal aid but that he had never received a response from them.

“We were very troubled by that and we got back to him with a clarification letter indicating if we had received an invitation we would have obviously wanted to respond,” says Prithipaul.

In response to the concerns, Denis said: “Our first priority is ensuring these important services are accessible to Albertans who need them. As stated in the premier’s mandate letter, legal aid funding remains a priority of our government, and as we determine

appropriate funding levels, we will do so with the intention of making sure the eligibility requirements for legal aid extend its reach to Albertans who need it.

“The comments made by the CDLA and the CTLA misrepresent my ongoing commitment to Legal Aid Alberta. While Alberta does fund about 80 per cent of the program, legal aid is, and has always been, a shared funding responsibility that includes not just the provinces but the federal government. I will continue to advocate for additional federal funding when I attend next month’s federal-provincial-territorial justice ministers' meeting, alongside my provincial counterparts who face similar legal aid funding challenges. Should the federal government fail to increase its funding proportional to our own, then our department will examine all our options as a part of the budget process for the coming year. ”

Can RCMP pass criminal case info to law firm for civil action?

Jennifer Brown, Canadian Lawyer Magazine, September 16, 2014

The Superior Court of Justice has granted leave to appeal in a case that considered whether law enforcement can hand over information from a criminal case to a law firm acting in a civil action.

In Massa v. Sualim Justice Thomas Lederer looked at whether or not the RCMP was authorized to disclose information concerning Alex Sualim to a lawyer at a private firm acting for Leon Massa.

“I have little difficulty in finding that establishing how the tension between privacy, on the one hand, and access to information, on the other, is to be resolved is important, even fundamental, to the relationship of Canadian citizens and residents to our government institutions. The proposed appeal involves matters of such importance that leave to appeal should be granted,” said Lederer in his Sept. 12 decision.

The motion before Lederer was for leave to appeal an order granting the motion of the plaintiff to continue a Mareva injunction which had initially been granted ex parte; that is, without notice to, or participation of, the defendants.

Massa claims to be the victim of a fraud. He believes the fraud was perpetrated by Sualim. Massa has never met or spoken to Sualim but took part in what he understood was a venture to distribute silicon germanium, a semi-conductor product used in

computer chips. Massa wired funds pursuant to instructions received by e-mail and claims he advanced and lost $840,000.

Lederer wrote in his decision: “In granting the injunction, Justice Stinson noted that Leon Massa had never met Alex Sualim. Despite this, he found that there was strong circumstantial evidence to support the conclusion that Alex Sualim was the fraudster or otherwise complicit in the fraudulent activity of which Leon Massa was a victim. On this basis, he concluded that there was a strong prima facie case that Leon Massa had been defrauded by Alex Sualim.”

The injunction was granted by an order of Justice David Stinson on Dec. 5, 2013. It was continued and re-stated on Dec. 12, 2013. On Dec. 20, 2013, as a result of a motion brought by the defendant, Sandra Sualim, an order was made capping the value of the injunction at $1.6 million.

In January of this year, the parties (all of them) appeared before Justice Elizabeth Stewart to determine if the injunction should be continued on its merits. This was joined by a motion to strike parts of the material filed in support of the injunction. The motion to strike was dismissed and the injunction continued. It is that order which the defendants were seeking leave to appeal.

At issue is whether the RCMP was authorized to send material from the case on to the law firm acting on behalf of Massa or whether it breached Alex Sualim’s right to privacy when it did so.

“At its root,” Lederer said, “the question the case asks is whether the release of information to a private lawyer, for use in a civil action, can be justified as consistent with the purpose for which the information was obtained, particularly in the absence of a request to, and consideration by, the “head of a government institution.”

He went on to say: “To my mind, there is a serious question as whether the justification for the release of the documents by the RCMP to a lawyer to be used in a civil matter is properly established by a subsequent finding of a prima facie case in the civil proceeding. For one thing, the burden of proof is different. The reasons of Madam Justice Stewart depend on the presence of a crime, but there is a serious question as to whether this can be taken as having been established by a finding that is based on the civil standard (balance of probabilities) as opposed to the criminal standard (beyond a reasonable doubt). Under the legislation relied on, in the absence of a crime, there can be no justification for the release of the material to a lawyer for the purpose of pursuing a civil fraud. In such circumstance, its release is not for a purpose consistent with the use for which it was obtained.”

Conflicts for in-house counsel are unavoidable and complex

By Julius Melnitzer , Lexpert – The Legal Magazine for Lawyers, September 2014

In-house lawyers have a deeper knowledge of their client than external lawyers. So when they move among competitors, conflicts are unavoidable and complex

The release of the Supreme Court of Canada's decision in Canadian National Railway Co. v. McKercher LLP in mid-2013 rounded out the SCC's "conflicts trilogy" that spanned over a decade and included R. v. Neil and Strother v. 3464920 Canada Inc. While they clarified the law, all three cases involved fact situations that revolved around the private Bar [see "Clarity brought to conflicts of interest but grey areas remain," Lexpert, May 2014]. None even mentioned the conflicts rules in the context of their application to in-house counsel. The thrust of the ensuing discussions and commentary, then, also focused on the private Bar.

Yet the pillars of the conflicts rules, which is to say both the duty of confidentiality and the duty of loyalty, apply, at least in principle, to in-house counsel as much as they do to the private Bar. But as the Manitoba Court of Appeal noted in its 1998 decision in Canadian Pacific Railway Company v. Aikins, MacAulay & Thorvaldson, the application of conflicts to in-house counsel could be quite different in practice than it applies to external lawyers.

When conflicts issues have arisen for the private Bar, they have done so mostly in the context of conflicts between clients, existing or former. Not so for in-house counsel, where the conflicts that have drawn the bulk of the attention are those between the duty to the client, which is to say the corporation or other employer, and the administration of justice. The advent of the corporate whistleblowing phenomenon accentuated this focus.

The upshot is that issues surrounding conflicts engaging in-house counsel's duties to clients and former clients has scarcely arisen in Canada, or if it has, remained largely below the radar. But that could change, particularly with the pervasive mobility that is now a common characteristic of the profession.

These issues, however, have been rife in the US. for some time. Indeed, the case of former Coca-Cola North America general counsel Thomas Haynes may be a harbinger of what's coming to Canada.

In 2001, following a corporate reorganization, Haynes lost his job after spending 16 years as an in-house lawyer with Coca-Cola. With the company's blessing, he took a job as chief executive officer for the Coca-Cola Bottlers Association.

Haynes obtained written assurances from Coca-Cola that conflicts were not an issue, apart from several matters from which Haynes agreed to abstain. Coca-Cola even issued a

news release saying that it was “pleased” that Haynes would “continue his leadership in the Coca-Cola family.”

Five years later, Coca-Cola changed its mind when it became embroiled in a lawsuit with its bottlers. It offered to pay Haynes to leave his job. When he refused, the company alleged he had violated his professional and legal obligations. In response, Haynes argued that many of the matters he worked on during his employ at Coca-Cola engaged business, not legal, advice and therefore were not covered by attorney-client privilege.

Coca-Cola eventually settled with the bottlers, leaving the issues regarding Haynes unresolved.

Where Canadian courts have dealt with in-house conflicts regarding former clients, it is the duty of confidentiality that has absorbed courts' attention.

“When we see disqualification motions relating to in-house counsel, they tend to be based on breach of confidentiality grounds,” says Gavin MacKenzie of Davis LLP's Toronto office, one of Canada's leading experts on professional ethics.

Most recently, the confidentiality issue reared its head in the in-house context early in 2014 in the Federal Court of Appeal's decision Valeant Canada LP v. Canada (Health), a patent dispute between two pharmaceutical companies.

After discovering that a member of Cobalt Pharmaceuticals Company's law department had spent two years working for a law firm that had represented Valeant's predecessor on litigation involving the same patent now in issue between the two companies, Valeant moved to have the lawyer disqualified from working on the case. The motions judge so ordered.

The FCA upheld the disqualification, but reasoned that the motions judge had done so on an improper basis. Relying on the inference that lawyers share confidences among themselves and that no precautionary measures had been taken, the motions judge attributed the law firm's knowledge of confidential information to the lawyer. But the FCA reasoned that because the evidence showed that the lawyer had in fact received confidential information himself, the inference was not necessary.

When discussing in-house conflicts issues, it's useful to separate current client [administration of justice] and former client issues. The former client issues are out there, but they just haven't shown their head yet.

“In this case,” the FCA wrote, “Mr. Migus had confidential information and so his disqualification is automatic.”

What's interesting about Valeant is that the disqualified lawyer's status as an in-house counsel was not a fact around which the decision turned: there's little doubt that the result would have been the same had he been employed by a law firm that was adverse in interest to Valeant.

“Valeant certainly espouses the principle that there is no reason why the conflicts rules set out in the leading cases wouldn't apply equally to in-house legal departments,” says Terry O'Sullivan of Toronto's Lax O'Sullivan Scott Lisus LLP.

Equality in principle and equality in practice, however, are not always equal.

“Unlike external counsel, in-house lawyers will know their client in a deeper, richer and broader way,” says Mercer. “So when you start to get them moving among competitors, you could end up with a very different sort of conflicts playbook than we're used to.”

There's a distinction to be made, however, between the duty of confidentiality and the duty of loyalty. In the case of the duty of confidentiality, the prohibition is absolute: without consent or overriding ethical considerations, a lawyer may simply not disclose confidential information. Indeed, the prohibition applies whether or not the person to whom the disclosure is made is adverse in interest or not and regardless of the nature of the confidential information. It is only when adverse interests are in play, as Valeant demonstrates, that the prohibition morphs into a disqualification.

But for the most part, as Chief Justice Beverley McLachlin noted in McKercher, disqualification issues arise in the context of litigation.

“What the court didn't clarify was whether disqualification could be appropriate in transactional matters,” MacKenzie says. “That remains an open question.”

It is also a question that could assume increasing importance: as in-house lawyers continue to take on greater corporate responsibilities and their work becomes more intertwined with the business workings of a corporation, they are bound to align themselves ever more closely with their company's strategic business goals. As Professor Geoffrey Hazard of the University of Pennsylvania Law School and the University of California's Hastings College of the Law has observed, “more and more law gets practiced at higher levels” in-house.

“And so the problem of sensitivity correspondingly increases,” he told the Wall Street Journal's Law Blog.

To deal with the problem, judges may come to regard in-house conflicts in the context of the duty of loyalty, which is broader than the duty of confidentiality and which does not require disqualification as an automatic consequence.

Here, it is instructive to review the Supreme Court of Canada's formulation of the duty of loyalty in McKercher. As the court saw it, the duty is comprised of three elements: a duty to avoid conflicting interests; a duty of commitment to the client's cause; and a duty of candour. The general rule was a bright-line rule: lawyers and their law firms could not represent clients adverse in interest without first obtaining their consent. This rule applied where a situation engendered an inescapable conflict of interest, applied to concurrent representation in both related and unrelated matters, and could not be rebutted.

But the bright-line rule was limited in scope: it applied only where the immediate interests of clients were directly adverse to the matters on which the lawyer was acting. It

also applied only to legal interests, not to commercial or strategic interests. It could not be raised tactically and did not apply where it was unreasonable for a client to expect that a law firm would refrain from acting against it in unrelated matters.

Where the bright-line rule was inapplicable, the SCC stated, the issue became whether the concurrent representation created a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

From this formulation, it is apparent that the duty of loyalty is a more complex and discretionary beast than the duty of confidentiality. Indeed, the formulation of the test where the bright-line rule does not apply gives courts the leeway to extend the duty of loyalty to commercial and strategic interests, and then determine the remedy, including disqualification, by weighing the risk involved.

Arguably, the duty of confidentiality does not – or at least so far has not – allow for that kind of analysis. In McKercher, for example, the court gave little heed to Canadian Pacific's argument that the law firm's knowledge of its litigation strategies was prejudicial to the company.

“But that argument could get a very different reception in the future if we were talking about the strategic knowledge of in-house counsel,” Mercer says.

Or it could not, if the 1998 decision of the Manitoba Court of Appeal in Canadian Pacific Railway Company v. Aikins, MacAulay & Thorvaldson, suggesting that conflicts rules will be applied less strictly where in-house counsel are concerned, is any indication.

The case involved an appeal by Aikins MacAulay & Thorvaldson, one of Manitoba's largest law firms, from an order enjoining it from representing the Canadian Wheat Board in an action against both CPR and CNR before the Canadian Transport Agency. The railways based their application on the grounds that a member of the firm, Winston Smith, was at one time the regional counsel for CPR in Winnipeg, a position that made him the senior legal officer for most legal matters arising in the Prairie region consisting of Manitoba, Saskatchewan and Northern Ontario.

In his position, Winston Smith controlled and maintained all CPR legal files in Winnipeg. Smith did not provide legal services relating to grain transportation matters and the lawyers in Smith's office handling grain-related files reported directly to other senior legal officers in either Montreal or Calgary. Indeed, CPR had a department that dealt exclusively with grain transportation, of which Smith was not a part. Smith did, however, participate in conference calls and annual conferences along with other senior legal officers, in which there was an exchange of information regarding legal, strategic and operating issues concerning CPR.

In 1995, CPR closed the Winnipeg regional office and Smith joined Aikins' transportation practice.

The Court of Appeal overturned the disqualification order. In an operative part of the judgment, the court wrote:

"While the onus on the party alleging the conflict is no higher in the case of in-house counsel, the burden of discharging it does require a more precise and definite evidentiary basis. In the world of private practice, it is relatively easy to identify specifically the client by whom a solicitor was retained and what the exact nature of the retainer was. In the case of a monolith, like CPR, the exercise is much more complicated. Were Smith, in the position of his juniors, reporting directly to a senior legal official responsible for grain transportation matters, as opposed to his reporting to a Vice-President of Legal, I could more readily accept CPR's concern and assertion that Smith had the type of knowledge of which they complain and that the possession of such knowledge could have the result it asserts. Such would also be the case if Smith were in the position of the Vice-President of all legal affairs for the company or, in another scenario, if he were the senior legal officer of a small legal unit that provided all of the legal services for a company. That, however, is not the reality in this case. There is a distinction between possessing information that is relevant to the matter at issue and having an understanding of the corporate philosophy of a previous employer. This first scenario can bring about a disqualification because of conflict; the second does not."

Arguably, the case stands for no more than the proposition that in-house counsel's role must be carefully scrutinized to determine to what, if any, confidential information, he or she became privy. The law in this respect likely hasn't changed.

What has changed, however, is the role of in-house counsel, especially those in senior positions, and the scope of the inquiry, which must now include the Supreme Court of Canada's articulation of the duty of loyalty, which occurred some four years after the Manitoba Court of Appeal decided Canadian Pacific Railway Company v. Aikins, MacAulay & Thorvaldson.

These days, an investigation of senior in-house counsel's role is much more likely to reveal an integral familiarity with sensitive matters, quite apart from knowledge of prejudicial confidential information. Such a finding, under the McKercher rules, must lead to an assessment of the impact of the risk – be it legal, commercial or strategic – posed by the alleged conflict.

What all this suggests is that in-house counsel are today more significantly exposed to conflict allegations than at any time in the past. From a practical perspective, it means that companies should screen new legal department hires for conflicts and that departing in-house counsel should take proper precautions when they enter private practice.

As legal departments grow and specialize, then, they become more and more akin to law firms. For many, it seems certain that the administrative headaches will keep pace with this growth.

IN HOUSE INSIGHT: THE DUTY OF LOYALTY

Is a duty of confidentiality and loyalty held to all members of the corporate family or just the one that pays your salary?

In-house counsel, especially those in large companies, frequently work in a complex corporate structure, a situation that can give rise to issues regarding the reach of their

ethical responsibilities. Do in-house counsel owe their duties of confidentiality and loyalty only to the corporate entity that pays them or to other members of the corporate family as well?

These are questions that are not unique to in-house counsel: external counsel can also face similar questions regarding the scope of their duties, but the analysis leading to the answers to the questions can vary considerably.

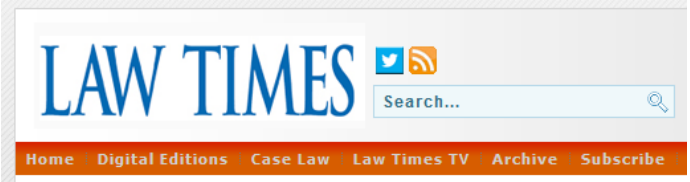
The most recent guidance on the general issue can be found in the Federal Court's April 2014 decision in MediaTube Corp. and Northvu Inc. v. Bell Canada. Although the case engages the duties of Bereskin & Parr LLP, an intellectual property boutique, it does offer meaningful insights on the role of in-house counsel in a conflicts context.

The defendants, Bell Canada and Bell Aliant sought an order removing B&P as solicitors for MediaTube. The Bell companies alleged that the law firm's previous relationship with the defendants led to a conflict of interest.

Bell Canada was a subsidiary of BCE Inc. Bell Mobility, Bell Media, Bell ExpressVu and Bell Aliant Inc., the parent of Bell Aliant, were subsidiaries of Bell Canada. All these companies had one legal department.

MediaTube retained B&P in 2013 when it sued Bell Canada and Bell Aliant, alleging patent infringement. B&P had previously acted for Bell Canada, but not for Bell Aliant. B&P was acting for Bell Media on unrelated matters at the time, but terminated the retainers over Bell's objections.

The key issue on the motion was whether a law firm that acted for one member of a corporate family could be said to have acted for each company in the corporate family. B&P took the position that it never had a general retainer with the Bell family. “The issue is whether Bell Media's status as B&P's current client can result in a duty of loyalty to the whole Bell family of companies — or at least to the applicants,” Justice Catherine Kane wrote. “There are circumstances where a law firm may owe duties to related corporations, but these circumstances do not exist in this case.” Neither the existence of a single legal department nor the casual interchangeable references to “Bell” in correspondence led to the conclusion in this case that B&P was in a conflict of interest to the BCE companies as a group. “It is not realistic to assume that if a law firm is retained by one entity within a large group of companies, then it is retained by the whole and its parts,” Justice Kane concluded.



Social Justice: Time to abolish Ontario's civil jury trials

Alan Shanoff, Law Times, September 22, 2014

"Judicial resources must be husbanded to ensure that the courts function properly and that litigants have access to a justice system that meets the highest possible standards."

That statement comes from the recent Supreme Court of Canada decision in Canada (Attorney General) v. Confédération des syndicats nationaux.

So why is it that we continue to make jury trials available for civil litigation? Surely, allowing a jury to decide complex factual issues and apply their findings to legal issues doesn't meet the test of the "highest possible standards."

According to statistics cited in the 2007 civil justice reform project, about 20 per cent of Ontario's civil trials take place in front of juries and the "vast majority" of them involve litigation arising from motor vehicle accidents.

If you wonder what it is about motor vehicle litigation that creates a specific demand for jury trials, you need look no further than the observation of former Ontario associate chief justice Coulter Osborne, author of the civil justice reform project report, when he noted: "I recognize the unfortunate reality that insurers in most negligence actions require their counsel to deliver a jury notice."

Personal injury litigation is often highly complex with technical evidence on various issues including accident reconstruction, future costs of care, losses of income, and causes of and the extent of the plaintiff's injuries and disabilities. Engineers, economists, actuaries, appraisers, physicians, psychiatrists, psychologists, various therapists, and other experts often testify at personal injury trials.

Most judges are familiar with such evidence. Most jurors are likely unable to fully comprehend and assess such evidence, certainly not as well as the judges. Jury decisions, in terms of both liability and quantum, are more unpredictable than those of judges. Judges must follow precedents and provide adequate reasons to support their decisions. Juries provide no reasons.

One would think insurance companies would do everything in their power to avoid jury trials. Surely, they'd want to have more predictability and consistent results. But insurers know there are tactical advantages to electing jury trials.

The tactical advantages flow from the uncertainty and potential for longer, more expensive trials. Plaintiffs faced with the prospect of jury trials and their inherent uncertainty and exposure to increased costs are more likely to settle.

According to a 1996 paper by Prof. John McCamus on civil justice reform, civil jury trials "settle more frequently and more quickly than non-jury trials."

According to Osborne, serving a jury notice is part of a strategy "to increase the risk to which the plaintiff is exposed, manifestly on the basis that the insurer can absorb the risk better than almost all plaintiffs."

If the chief reason for a civil jury trial is the provision of a tactical advantage to insurers or to force plaintiffs to roll the dice, are we really providing a civil justice system that meets the highest possible standards? Surely, a civil justice system that meets the highest possible standards wouldn't allow parties to use juries to obtain tactical advantages. Surely, such a system would require judicial decisions to include adequate reasons, something only a judge can provide.

Cost is an important factor in access to justice. Civil jury trials that don't settle are likely to take up more court time than cases heard by a judge alone. That's the conclusion reached by both Osborne and McCamus.

That's not surprising as jury trials require jury selection, the judge's charge, voir dire proceedings to determine the admissibility of evidence, and other time-consuming elements. There's also the prospect of costly motions to strike jury notices.

Quebec and the Federal Court of Canada have abolished civil jury trials. England has long since barred the use of juries for personal injury cases. Some states and territories in Australia no longer allow civil jury trials, while others provide for them but not for motor vehicle litigation.

There was once a solid historical basis for the use of juries in civil trials. That historical basis no longer applies and there's no justification for the continued use of juries in personal injury cases or indeed any civil litigation.

It's time we eliminated jury trials for civil lawsuits in Ontario.

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OTTAWA CITIZEN

Angry judge demands interpreter for deaf man

ROBERT BOSTELAAR, The Ottawa Citizen, September 23, 2014

For a month now, Adam George-Ouellet has travelled from jail cell to courtroom to jail cell to courtroom, never once hearing — let alone understanding — the many things that police and lawyers and other officials say to him and about him.

On Monday, an Ottawa judge was vocal in expressing anger over the "outrageous" failure of court staff to find sign-language interpreters for the 28-year-old deaf and mentally disabled man.

"This is the biggest comedy of errors I have seen in the last five years," Justice Robert Fournier declared after being told again that no interpreter was available for George-Ouellet, who was arrested for allegedly causing damage at his group home and then waving a knife and making threats — by sign language — to staff.

Hampering the efforts of court officials is a need for both an interpreter who can communicate in LSF (langue des signes française) and a DI, or deaf interpreter, who can put what's said into context for George-Ouellet, who reportedly has the intellectual capacity of an eight-year-old.

As well, court heard that two interpreters of each type could be required because the rigorous demands of translation can limit how long they can carry out their roles in one sitting.

That didn't satisfy Judge Fournier. "I don't want an explanation. I want action," he lectured Crown prosector Andrea Levans, questioning why one interpreter couldn't be found who could relay proceedings to the accused.

"Surely they have someone who is bilingual — in this country that's not unusual — and who can sign in French."

Defence lawyer Michel Bisson said in an interview he is frustrated because his client appears to be a low priority to the limited number of interpreters available to the court.

"What could be more important than this?" he added. "His liberty is at stake."

Bisson is seeking to have the charges dropped because of the delays, but even that application is stalled because of the lack of a translator.

Mark Moors, acting deputy Crown attorney, said he was limited in commenting because the case is before the courts but stressed that staff have been working long hours trying to arrange the specific services needed.

"This is a genuine issue," Moors said. "People want to do the right thing."

George-Ouellet next appears in court on Wednesday.

Fournier said he wished he could apologize to the small man with a full head of dark curls who sat quietly in the prisoner's dock. Keeping him in jail without communications, the judge said, "is not borderline outrageous. It is outrageous."

In a written response to a comment, Ontario's Ministry of the Attorney General, responsible for the province's court services, said it "will continue to make every effort to secure the services required for this matter."
