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ASSOCIATION OF JUSTICE COUNSEL
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Press Clippings for the period of November 17 to November 24, 2014
Revue de presse pour la période du 17 au 24 novembre, 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

PSAC wants public servants to have say in cuts

Kathryn May, The Ottawa Citizen, November 20, 2014

The Public Service Alliance of Canada is asking for major contract changes to the way the federal government manages downsizing that would give employees who provide services to Canadians more say in what should be cut.

The giant union presented Treasury Board negotiators with 30 amendments to the highly complicated "workforce adjustment agreement" during collective bargaining this week. The union claims the changes would make downsizing fairer, transparent and reduce employee stress and uncertainty.

"The way in which public services were cut placed a huge stress on our members. We need to learn from our experience to make improvements to the system, by better consulting the people who actually deliver the services and treating them fairly if cuts occur," said PSAC President Robyn Benson.

"The result is severe and long-lasting damage to the overall morale of the federal public service, and there has been a profoundly negative impact on the mental health of thousands of employees."

Sick leave is the big issue in this round of bargaining, but both the government and unions have expressed frustration over the way layoffs were managed in the aftermath of the Conservatives' 2012 austerity budget. The government expected to cut 19,200 positions but closer to 35,000 will disappear by 2017.

PSAC officials argue the process for managing job cuts should be more transparent, should minimize the number of people laid off involuntarily, and be based on input from the workers who deliver the services.

The union is suggesting permanent "consultation" committees in departments where employees can offer their feedback on what works and what doesn't in the programs and services they run. Front-line workers have the insight and first-hand experience into how to save money or how a program can be streamlined or improved, said Liam McCarthy of PSAC's negotiating team.

"We found a big deficiency in the recent cuts is that there wasn't a structure to ensure those conversations took place," he said. "We aren't engaged early enough. We don't want to be engaged when the outcome has been determined; we want to help shape those decisions."

The union is also proposing that departments use seniority when deciding layoffs if there aren't enough employees to leave voluntarily to reach reduction targets. The government uses merit when making its staffing decisions and long resisted any move to seniority.

Benson said seniority, common in the private sector, is easier because "everyone understands the rules," compared to government's "agonizing system which requires employees to compete against each other for their own jobs."

The union is calling for changes to the way voluntary departures are handled. Under the existing system, surplus employees who wanted to stay can swap jobs with employees who wanted to go but unions complained the process never worked properly.

Treasury Board President Tony Clement made little secret of his frustration with the process during the downsizing but wouldn't comment on the proposals.

"We won't comment on the negotiations as they are ongoing," said Clement spokesperson Stephanie Rea. "The minister is always open to hearing what the unions have to say, and will continue to negotiate in a fair and reasonable manner, aiming for agreements that are fair to employees, employers, and the taxpayer."

The existing workforce adjustment agreement, negotiated years ago, is complex and had never been used for such a large downsizing. Some argue that the economy, the nature of work, the way jobs are classified, the move to generic job descriptions, how merit is defined and even the composition of the workforce have changed since the deal was reached.

The agreement is part of the collective agreements of the largest unions. For the other unions, the agreement is a directive that was negotiated by the joint union-management National Joint Council. That agreement comes up for review in January and those unions also want changes to improve the way job cuts are managed.

The Conservative government faced much criticism over the handing of the job cuts, the personal toll on employees and the disruption caused in the workplace. The strain of the job cuts was behind an increase in distress calls to the government's 24-hour helpline and

its employee assistance program. The number of mental health claims, already at record highs, inched higher and several suicides were also said to be linked to the cuts.

Critics complained the government needlessly fanned stress and anxiety in the workplace by issuing thousands of "affected" letters to workers who won't actually end up losing their jobs. They were left in limbo, uncertain as to whether they would keep their job or not, and forced to compete against colleagues for the jobs that remained.

It was also the first downsizing with a new definition of merit — from best qualified to "right fit" — for managers conducting the controversial SERLO competitions (Selection of Employees for Retention or Layoff) to decide who goes and who stays.

Public servants get new offer for sick-leave reform

Kathryn May, Ottawa Citizen, November 19, 2014

The Conservative government has tabled a new contract offer that would give Canada's public servants six paid sick days a year and let them claim some of the unused days they previously accumulated, before it eliminates the $5.2 billion sick-leave bank altogether in 2017.

The Public Service Alliance of Canada and Treasury Board are meeting this week for another round of contract talks in which government negotiators will present the new offer that has been quietly made to other unions over the past month. PSAC is the largest of the 17 unions, representing the majority of public servants in five large bargaining groups.

So far, the two sides are divided over sick leave. Treasury Board President Tony Clement is bent on scrapping the existing sick-leave regime and replacing it with a short-term disability plan by 2017.

For the unions, the new offer is an improvement on the government's opening proposal, which slashed paid sick leave from 15 days a year to five days. It also proposed an unpaid seven-day waiting period before employees can apply for sick benefits under the new short-term disability plan. Also, the bank of unused sick leave that public servants have rolled over year-to-year would be eliminated.

Treasury Board softened the original offer by offering public servants six days – rather than five – of annual paid sick leave.

After using those days, employees would still face a seven-day unpaid waiting period before they can apply for short-term disability benefits. Once on disability, they can collect 100 per cent of salary for five weeks, rather than the original four weeks proposed. After that, benefits are reduced to 70 per cent of salary, under the government's plan.

But the new proposal introduces a formula that will allow employees with accumulated sick leave to convert it into credits that can be used to top up benefits from 70 per cent of salary to 85 per cent.

Under the formula, sick leave is converted from time banked into "top-up credits" at a rate of 15 hours for 15 per cent of income. This means someone off work sick for six weeks (five weeks plus the unpaid seven-day waiting period) can use about two days of banked sick leave to top up benefits from 70 per cent to 85 per cent of salary.

The credits can also be used to bridge the unpaid seven-day waiting period for disability.

These credits, however, are only good for the first year following the plan's implementation. In September 2017, the government plans to abolish the sick-leave bank. Similarly, the banking of sick leave will stop once the new disability plan is up and running in September 2016.

The new proposal, however, will allow public servants who don't use their six days of sick leave to carry over one day a year to a maximum of seven days.

The government's internal studies estimate public servants have socked away about $5.2 billion worth of sick-leave credits. It expects bureaucrats will only use about $1.5 billion of that due to illness – which is the amount booked in the Public Accounts as the liability for sick leave.

Under existing collective agreements, public servants get 15 days a year and any unused days can be rolled over from year to year. Public servants can't cash out their banked sick leave when they leave or retire, so it disappears.

The PSAC wouldn't discuss the offer but has presented its proposals for a "healthy workplace." The union has argued fewer sick days, combined with the unpaid seven-day waiting period, mean people will go to work sick and infect their colleagues rather than stay home and lose pay.

Relations between unions and Clement are fractious and have been deteriorating since the Conservatives began cutting public servants' benefits and weakening bargaining rights.

The negotiations that began last summer have made little progress and, many argue, have departed from the norm. The two sides normally table positions, then the horse-trading begins with counter-proposals.

Treasury Board began this round of negotiating by asking the unions to take part in "consultations" outside the bargaining table about the new short-term disability plan, which they unanimously rejected.

Treasury Board then tabled its first offer but the unions decided not to respond with counter-proposals until the government explained its business case for the new plan and why it was necessary. Without a counter-proposal, some were surprised that Treasury Board came out of the blue with a new, second offer.

"Treasury Board is tabling different positions but has yet to explain why these changes are necessary which really is a requirement of bargaining in good faith. It has to explain why and that is what is missing so far in these talks," said Ron Cochrane, co-chair of the joint union and management National Joint Council.

"He (Clement) is being a dictator. You can't dictate in collective bargaining. You have to negotiate."

But Clement disagrees. "We are bargaining. We are putting forward positions and amending positions. We really want to engage with the unions on how they see sick leave improving," said Clement.

Clement is also clear he will only negotiate details of the new short-term disability plan. He's not open to discussing how to revamp the existing plan.

"Their bargaining position is about tinkering with the current system and that isn't good enough," said Clement. "My position is we actually have to have a modern system but we certainly want to hear from them on how to implement a modern system and make sure it is positive for employees. That is the kind of conversation I want to have."

PSAC demands freeze on cuts to Veterans Affairs

The Public Service Alliance of Canada has tabled a demand for a "moratorium" on program and budget cuts at Veterans Affairs Canada until an independent study can assess whether the department can still meet its mandate.

The clause is proposed for the contract representing 70,000 administrative and program employees PSAC represents, including nearly 1,600 at Veterans Affairs.

PSAC President Robyn Benson said the union made the demand after learning that short-staffed Veterans Affairs offices face backlogs that, it said, are delaying services to veterans for months.

The government shut nine Veterans Affairs offices last year and has eliminated 900 jobs – nearly a quarter of the workforce – since 2010.

CBC news

Public service sick leave expected to dominate negotiations

'What it means is going to work sick... and that is absolutely a non-starter with us,' union rep says

CBC News Ottawa, November 18, 2014

Another round of negotiations start today between the Treasury Board and the biggest federal public service union, with sick days as a major issue.

Government negotiators want to cut the number of paid sick days an employee is entitled to by two-thirds, down to five.

Federal public servants are now entitled to up to 15 paid sick days a year and the Public Service Alliance of Canada doesn't want that to change.

Larry Rousseau, the union's executive vice-president for the National Capital Region, said sick leave is a key sticking point.

"What it means is going to work sick... and that is absolutely a non-starter with us," Rousseau said.

"It is so important because as public sector employees we also are very concerned with public health. And any public health manager anywhere, any person who's working with disease control will tell you, that when you're sick you stay home, you stay away from the workplace, you stay off of public transit, you stay away from the crowds, and this way we have less people who are going around spreading disease."

'I think it does make sense,' business prof says of government's plan

Treasury board president Tony Clement has said he wants to reduce the number of sick leave days a public servant is entitled to each year from 15 to five, as well as get rid of the sick leave bank so employees can't carry over unused sick leave days from year to year.

In exchange, Clement said the government is committed to introducing a short-term disability plan.

Ian Lee, a professor at Carleton University's Sprott School of Business, said he's in favour of the government's model, which would make the federal policy closer to what's found in the private sector.

About 90 to 92 per cent of Canadians have the private sector model, which is about five days of professional leave, short-term disability, and long-term disability, Lee said.

"Politically, I think it does make sense simply because the vast majority of Canadians do not have what employees in the federal government have," Lee said.

"I think it also makes sense financially and even more so for planning purposes."

But Lee said he understands why established public servants don't like the idea.

"I can understand that someone who's been in the government for a very long time... and they've accumulated 100, 200, 300 days, then they're going to be loath to give that up, because they see it as something they've earned," Lee said.

If the government doesn't budge on the issue, Lee said it would be a bad idea for the union to strike, "especially in an election year."

Lee believes the Conservatives would use any strike action to their advantage by telling Canadians the public sector unions are out of touch with ordinary Canadians.

Negotiations start today and further sessions are scheduled until June.

LeDroit

Des mesures pour éviter le stress et la maladie

Paul Gaboury, Le Droit, le 18 novembre 2014

Après une pause de plusieurs semaines, les négociations dans le secteur public fédéral reprennent ce matin à Ottawa.

L'Alliance de la fonction publique du Canada (AFPC), le plus important syndicat du secteur public fédéral, représente plus de 100 000 employés de divers groupes dans ces négociations avec le Conseil du Trésor. Cette ronde doit durer toute la semaine, et les pourparlers devraient reprendre ensuite après la période des Fêtes, selon le calendrier déjà établi.

Selon nos informations, l'AFPC a l'intention de déposer cette semaine une proposition incluant diverses mesures pour améliorer le mieux-être au travail, pour contrer les demandes faites jusqu'à maintenant par le gouvernement afin de modifier le régime de congés de maladie des employés fédéraux.

Parmi ces mesures, l'AFPC propose des moyens de «réduire le stress» en s'assurant par exemple que, dans les centres d'appel et les centres de services gouvernementaux, il y ait assez de travailleurs sur place en tout temps et que ceux-ci puissent prendre de courtes pauses au courant de la journée afin d'évacuer le stress.

«Il y a une corrélation à faire entre le stress et la maladie. Quand on a plus de stress, notre système immunitaire est affaibli et on tombe malade plus facilement. Alors on propose diverses mesures reconnues dans la gestion des ressources humaines pour aider les employés à être plus productifs et pour créer un milieu de travail sain», souligne Larry Rousseau, vice-président exécutif de l'AFPC pour la région de la capitale nationale.

Assurance-invalidité

D'ailleurs, l'AFPC n'a pas l'intention de laisser le gouvernement imposer son nouveau régime d'assurance-invalidité à court terme qui réduirait à cinq le nombre de congés de maladie par année, et abolirait les banques de congés de maladie accumulés, tel que proposé.

«Réduire le nombre de congés de maladie des employés n'est pas la solution. Ce n'est pas en revenant au travail malade que l'on va améliorer la situation au travail, surtout que les congés de maladie n'ont pas un coût direct à l'employeur», a insisté le dirigeant syndical.

Selon M. Rousseau, un grand nombre d'employés fédéraux vivent le stress lié aux réductions budgétaires et leur impact sur les services à la population. «Quand les gens appellent au 1-800 pour obtenir des services et qu'ils ne réussissent pas à parler à personne, ils sont souvent très frustrés. Et nos employés doivent de plus en plus faire face à ce stress dans les centres d'appels. L'interaction avec l'ordinateur ne remplace pas le contact avec une personne et c'est très difficile pour beaucoup de gens», explique M. Rousseau.

Les mesures proposées visent également à prévenir le harcèlement, améliorer la santé maternelle, et à garantir le droit des travailleurs de refuser un travail dangereux. Par exemple, en modifiant le Code canadien du travail afin que les employés puissent exercer leur droit de refuser un travail dangereux.

Diverses mesures pour améliorer les conditions de travail des employés à horaires variables, notamment ceux affectés aux services d'incendie, aux groupes de recherche et sauvetage maritime ainsi qu'à la sécurité frontalière font partie des demandes. Elles visent à atténuer les répercussions physiques et psychologiques liées au travail par quart.

Dans le cadre de ces négociations, plus de 27 300 membres de l'AFPC avaient signé lundi la déclaration pour «des lieux de travail sains».

Public servants asked to promote Conservative tax proposal on Twitter

Ottawa Citizen, The Canadian Press, November 21, 2014

OTTAWA — Public servants were asked to use official government Twitter feeds to promote Prime Minister Stephen Harper's recently announced tax measures, using the slogan "Strong Families."

A senior bureaucrat with the Finance department sent out a mass email across government asking organizations to retweet messages about the announcement using the hashtag #StrongFamilies.

"We ask that your organization re-tweet the Department of Finance tweets from @financecanada on the announcement over the following 72 hours," wrote Jean-Michel Catta, an assistant deputy minister.

"Most of our tweets will contain the hashtags #StrongFamilies ou #Famillesfortes."

The proposal, which includes income splitting for families with children under 18 and extending the monthly Universal Child Care Benefit to more taxpayers, has not yet received parliamentary approval.

Both the NDP and the Liberals have been sharply critical of the income-splitting plan, which they say will benefit only 15 per cent of Canadian families.

Liberal finance critic Scott Brison argues the tweets are partisan, and shouldn't be promoted by public servants. The government is again spending money to advertise the proposal on TV and radio, even before it is voted on, he noted.

"It shows again that the Conservatives don't understand the principle of a professional public service separated from partisan politics," Brison said.

One individual tweeted back at the department, asking, "Since when are you an arm of the CPC advertising group?"

Finance spokesman David Barnabe said the directive was sent to departmental heads of communication "for use with their official social media channels, which is common practice to broaden government messaging."

Harper used the phrase “strong families” during the 2011 election campaign when he first promised the measures, and then again during a partisan speech to Conservatives this summer in Calgary.

Several government departments retweeted the information and hashtag about Harper’s measures, including Aboriginal Affairs, Natural Resources, Health Canada and Agriculture.

Tony Clement orders staff to take harassment-awareness course

KATHRYN MAY, Ottawa Citizen, November 17, 2014

Treasury Board Minister Tony Clement has ordered his office to take harassment awareness training and wants all public servants to do the same.

Clement said he has “zero tolerance” for harassment and he expects public servants to treat co-workers with respect and take advantage of courses the Canada School of the Public Service offers on preventing and dealing with harassment. The course is mandatory in some departments, but not all.

“It may not be mandatory, but the Treasury Board directive (against harassment) is mandatory and the expectations on having a harassment-free workplace is mandatory,” said Clement in an interview.

Clement’s 15-member staff is taking the “Respect in the Workplace” course offered by the Respect Group, an online course aimed at preventing discrimination, harassment and bullying. His office is following the lead of Health Minister Rona Ambrose, whose staff is also taking the training.

Political staffers are “exempt employees” and aren’t covered by the same policies and employment rules as public servants. They are employed directly by MPs.

The spotlight was thrown on harassment in the federal workplace after two Liberal MPs were suspended for allegedly harassing two female NDP MPs. The accusations shone light on the fact that there are no rules or policies to deal with such complaints among MPs and staffers on Parliament Hill.

But harassment has been a longstanding problem in the public service, where there are plenty of policies, laws and redress mechanisms to deal with it.

Treasury Board introduced its latest anti-harassment policy in 2012 to give deputy ministers more "flexibility" to try to prevent and "informally" resolve complaints before they become entangled in lengthy processes.

The triennial public service employee survey has consistently found that nearly 30 per cent of public servants say they have faced some kind of harassment over the previous two years.

The last survey, in 2011, found they felt harassed by – ranked in order – superiors, co-workers, the public, people working for them or people in other departments.

Clement took a jab at federal unions for too often resorting to lengthy grievance and appeal processes in collective agreements to protect the rights of the harassers at the expense of the victims.

He argued unions should be "partners" and try to resolve cases where harassment has been found, without dragging them out in long appeals that end up deterring harassed public servants from coming forward.

"With lengthy appeal processes … there is no quick resolution for the victim," said Clement. "I am hoping the unions will be flexible in this and will see this is not helping victims in every case when dealing with harassment issues."

Experts have warned that high and persistent levels of harassment in the public service can be tied to mental-health concerns, which have accounted for nearly half of the workforce's disability claims for much of the past decade. They argue the combination raises red flags about the culture of the workplace.

Clement said his plan to revamp the existing accumulated sick-leave regime and replace it with a new short-term disability plan is key improving the "wellness" of the workplace and reducing the number of people mental health problems who end up on disability.

He said the existing 45-year-old plan was designed when physical injuries accounted for most disability claims and mental illness wasn't even talked about.

"I am hoping through successful negotiation we can come up with a new system to deal with mental health issues, as well as other sick leave … That's one of my motivations for having dialogue at the table to replace a decades-old system with more modern one that has greater sensitivity to mental health, he said,

The unions, however, have a very different approach to creating a healthy workplace. Treasury Board and the giant Public Service Alliance of Canada are back at the negotiating table today.

PSAC , like the other 16 unions, wants no part of Clement's new short-term disability plan, and wants to fix the existing sick leave scheme.

Winnipeg Free Press
November 20, 2014
NEWS | ARTS & LIFE | BUSINESS | SPORTS | TRAVEL | OPINION

PSAC members ratifiy three-year contract with NAV Canada, total wage hike of 6%

Winnipeg Free Press, The Canadian Press, November 20, 2014

The private company that provides air traffic control and other civil navigation services in Canada says members of the Public Service Alliance of Canada have ratified a new three-year collective agreement with the company.

The 265 members of the union range from clerical, customer service and general labour and trade workers to engineering and scientific support service employees.

The agreement, retroactive to Jan 1, 2014, runs until December 31, 2016 and provides wage increases totalling six per cent over the life of the contract.

The first one per cent increase is retroactive to Jan. 1, 2014, followed by another one per cent increase retroactive to July 1, 2015. The contract calls for a two per cent increase Jan. 1, 2015, and another two per cent increase Jan. 1, 2016.

"Also included in this agreement is the introduction of a new hire pension plan arrangement effective Dec. 1, 2014, plus other measures which, once implemented, would assist in sustaining the legacy pension plan for current employees on a long-term basis," NAV Canada said in a statement Wedensday.

With operations from coast to coast to coast, NAV Canada provides air traffic control, flight information, weather briefings, aeronautical information services, airport advisory services and electronic aids to navigation.

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Ottawa songe à permettre les détecteurs de drogue au volant

Hugo de Granpré, La Presse, le 24 novembre 2014

Le gouvernement fédéral pourrait permettre sous peu l'utilisation d'appareils pour détecter l'usage de drogues dans la salive des conducteurs, a appris La Presse. Ces appareils, comme le DrugWipe de l'entreprise allemande Securetec, sont déjà utilisés dans d'autres pays, dont la France et l'Australie. Cinq questions pour mieux connaître le gadget qui pourrait bientôt faire la loi sur les routes canadiennes.

C'est quoi?

On trouve quelques-uns de ces détecteurs sur le marché, dont le DrugWipe ou le DrugTest 5000 de l'entreprise Dräger. En prélevant un échantillon de salive, ils permettent de détecter plusieurs types de drogues en quelques minutes, dont le cannabis, la cocaïne, des amphétamines ou l'héroïne. Leur poids et leur taille (le DrugWipe est à peine plus gros qu'un crayon) permettent aux policiers de mener un test préliminaire sur le bord de la route. Un résultat positif justifie ensuite d'emmener un automobiliste au poste pour procéder à une évaluation plus poussée.

Quelles sont les règles actuelles?

À l'heure actuelle, pour détecter si un conducteur a les facultés affaiblies par l'alcool et s'il être doit emmené au poste, un policier lui fait passer une série de tests dits de «sobriété normalisés». Ces tests incluent les fameuses épreuves «doigt-nez» et la marche le long d'une ligne droite. Mais ils ne sont pas nécessairement les plus efficaces, si l'on se fie aux données de Statistique Canada: seulement 2% de l'ensemble des incidents de conduite avec facultés affaiblies déclarés par la police en 2011 impliquaient des drogues.

Quand surviendraient les changements?

Ainsi, des changements au Code criminel pourraient être proposés bientôt. Des groupes comme MADD Canada ont entrepris un lobbyisme intense à Ottawa et dans les provinces pour les convaincre de donner ce nouvel outil aux policiers. «Je suis convaincu [...] que de nouvelles mesures législatives en matière de conduite avec facultés affaiblies seront présentées dans la nouvelle année», a confié à La Presse le chef de la direction de MADD Canada, Andrew Murie. Au gouvernement, une source bien au fait du dossier s'est limitée à dire qu'«il s'agit d'un outil qui pourrait être considéré». Reste à savoir quand les changements entreraient en vigueur: l'ordre du jour législatif est chargé et il reste peu de temps avant les prochaines élections, à l'automne.

Ces appareils sont-ils fiables?

La fiabilité de trois appareils, dont le DrugWipe et le DrugTest 5000, est actuellement évaluée par un comité de la Canadian Society of Forensic Science. L'étude est financée par la GRC, entre autres, et elle doit être présentée au ministère de la Justice vers le mois de mai. Selon le chercheur responsable, D'Arcy Smith, le rapport établirait des critères pour les appareils qui pourraient être achetés par les corps policiers. Des études menées en Europe ont conclu à une fiabilité relativement bonne, mais pas parfaite, de certains des détecteurs qui sont examinés. Jean-Sébastien Fallu, un professeur de l'Université de Montréal spécialisé en toxicomanies, estime que le législateur devra aussi tenir compte de facteurs comme le coût social et les risques d'abus que posent ces nouvelles mesures.

Pourquoi maintenant?

Cette possibilité de changements législatifs survient à quelques mois de la prochaine campagne électorale, où les règles entourant la possession de cannabis pourraient devenir un enjeu important. Le Parti libéral propose la légalisation, le NPD mise sur la décriminalisation et le gouvernement Harper examine une demande de l'Association des chefs de police d'amender le Code criminel pour permettre d'imposer de simples contraventions pour la possession de petites quantités. «Ce sont de belles conversations à avoir [...], mais avant toute chose, on doit établir l'encadrement de la conduite avec les facultés affaiblies par les drogues», a tranché Andrew Murie, dont l'organisme MADD jouit d'une certaine influence auprès du gouvernement Harper.

35 $: C'est le prix auquel se détaille le DrugWipe de l'entreprise allemande Securetec. Il est distribué au Canada par Alcohol Countermeasure Systems Corp. basée à Toronto.

CBC news

Ottawa police, Supreme Court websites shut down after possible hack

Aerith, group that hacked City of Ottawa website Friday, claims responsibility

CBC News Ottawa, November 22, 2014

A hacker group claimed responsibility after the websites of the Ottawa police department and the Supreme Court of Canada flashed offline Saturday evening, one day after the same group allegedly shut down the City of Ottawa's website.

The Ottawa Police Service's website stopped responding around 6:30 p.m., with visitors attempting to reach the site greeted by a blank page with an error message. The Supreme Court of Canada's website shut down the same way shortly after.

A Twitter account under the name Aerith claimed responsibility for the website malfunctions.

"We'll start by taking OttawaPolice.ca offline, just to annoy them," it tweeted just after 6 p.m.

Ottawa police could not immediately confirm whether its website was hacked but told CBC News they are currently investigating.

"This is just the start," Aerith said in a message posted to an online forum. "We will not rest, we have already hacked Ottawa police's mail server, stolen all email logs incoming and outgoing."

CBC News could not immediately confirm who authored the message or its authenticity.

Aerith said Friday it hacked the City of Ottawa website. For about an hour, the site displayed the name of an Ottawa police officer involved in the investigation of an area teen who allegedly called in fake emergencies across North America, prompting police departments to deploy SWAT teams. The practice is often called "swatting."

Const. Joel Demore's name was shown alongside a dancing banana and the message: "Joel Demore: You laugh at us, you are scared of us, does this help your laughing?" the hacked website read. "We can destroy everything, this is a flex of our power. Please, test us. You know what we want."

The officer's email address was also published.

"You want to know our motive? Ask Joel Demore of the Ottawa Police Services," read the group's online message Saturday.

The City of Ottawa, Ottawa police and Supreme Court websites were each restored as of Sunday morning.

Passing judgment: Supreme Court appointments now shrouded in secrecy, experts say

Ian MacLeod, Ottawa Citizen, November 21, 2014

Four days after taking office in 2006, Prime Minister Stephen Harper named Marshall Rothstein to the nine-member Supreme Court of Canada.

The federal court jurist was one of three candidates on a shortlist drawn up by a new advisory committee of MPs, legal experts and prominent Canadians that had been created by the previous Liberal government.

Ten days later, the new prime minister introduced his own historic reform to the occult practice of selecting justices for the country's highest court. As a condition of employment, Rothstein had to appear before a nationally televised ad hoc, all-party committee of MPs and legal experts – the first Supreme Court nominee ever to do so. Three hours of genteel questioning followed.

Harper hailed the arrival of "more openness and accountability to the process of appointing people to our nation's highest court. I believe the public deserves to know more about the individuals appointed to serve there, and the method by which they are appointed," he said.

Eight years on, Harper faces his seventh and possibly last Supreme Court appointment (depending on the results of the 2015 election). Justice Louis LeBel turns 75 on Nov. 30, the mandatory retirement age. He gave his six-months' notice on May 23.

But the selection process is, once again, shrouded in mystery.

The government slammed the door on parliamentary and public involvement in May, after a Globe and Mail story revealed explosive insider details about the government's disastrous handling of the 2013 Marc Nadon appointment to replace another retiring justice. Justice Minister Peter MacKay later said the appointment process is "under reconsideration," and it "remains to be determined" how the government will proceed.

With that, a decade of public and parliamentary access to the decision-making, however limited, collapsed.

The government had little more to say this week. “These appointments have always been a matter for the executive and will continue to be,” said Clarissa Lamb, spokeswomen for MacKay. She suggested consultations with prominent members of the legal community are underway to fill the looming LeBel vacancy.

Today, the exercise of selecting nine of the most important people in the country has regressed to a not-so-distant past when “more was known about the process for electing a new Pope than about the process for selecting a new Supreme Court Justice,” writes Adam Dodek, a Supreme Court scholar and law professor at the University of Ottawa. (His new study of the appointment process is to be published in the Supreme Court Law Review.)

The former Liberal government of Paul Martin and justice minister Irwin Cotler introduced several reforms beginning in 2004. They included publishing the job criteria and protocol for the process; inviting the public to suggest potential candidates; and creating an advisory committee to vet the longlist of potential candidates.

Once an appointee was named by the prime minister and cabinet, the justice minister was required publicly to defend the choice before a committee of parliamentarians and judicial and law society reps.

“We don’t know who they’ve consulted,” Cotler said of whatever process is currently underway to replace Justice LeBel. “We don’t what criteria they’re using. We have no advisory selection panel to assist. We have no parliamentary input. We have no public engagement. We’re just going to get an announcement.

“Appointing judges is one of the government’s most important responsibilities and it is important that Canadians understand and trust the appointment.

“It diminishes the court when you do this in secret.”

The utility of placing appointees under the spotlight at public hearings is widely debated. For starters, since 2006 the public hearing committees have been dominated by (Conservative) politicians. The government scrapped the judicial and law society seats on the committee after the Rothstein hearing.

What’s more, the potential ideological bent of lower-court judges under consideration is more readily available by reviewing their past reasons for judgment than from polite questioning by MPs.“These people have rendered a lot of decisions,” said Sébastien Grammond, a University of Ottawa, civil law expert. “It’s much more precise than anything that the judges will say at these hearings.

“What the media said the day after (the Rothstein public hearing) was that he had a good sense of humour — which is good — but says nothing about the qualities to be a good judge.”

And the final decision, as always, remains with the prime minister.

The trend in other countries is to reduce the power of politicians in the appointment process, Grammond said. The United Kingdom has an independent committee of non-politicians that proposes a single candidate. The justice minister has very limited discretion to reject the nominee.

Dodek found that attempts to reform the process, by both Liberal and Conservative governments, have largely failed to deliver on transparency and accountability.

Still, the transparency of the recent (if temporary) reforms – especially the public hearing before a committee of Parliament – resulted in significant public education about the role of the court and its judges, he concluded.

Since the 2006 Rothstein appointment, the Conservatives have named six other Supreme Court justices. (That includes the failed appointment of Nadon and the naming of his successor as one appointment.)

Four of the six underwent much the same process as Rothstein: vetted and shortlisted by an advisory committee of MPs; final selection by the prime minister and cabinet; then an appearance before an ad hoc committee of MPs.

Politics and expediency derailed the process for two others: Justices Thomas Cromwell and Clement Gascon.

The Cromwell appointment was swamped by the 2008 federal election call, then by the prorogation of Parliament. Gascon was the government's replacement in June when the Supreme Court ruled Nadon was ineligible for the job because he wasn't a member of Quebec's judiciary. Both skipped questioning by a parliamentary committee and headed straight to the big bench.

With the coming LeBel vacancy, there's "actually less information about the plan than there was about the appointment of Justice Gascon," said Dodek.

Early in its tenure, the Conservative government "made positive steps. But as the whole Nadon fiasco showed, there is still too much of a secret nature of the process and lack of accountability."

Justices appointed by Stephen Harper:

Justice Marshall Rothstein was elevated from the Federal Court of Appeal to the Supreme Court March 1, 2006. After Justice Louis LeBel, who turns 75 next week, Rothstein will be the next Supreme Court judge to hit mandatory retirement age, on Dec. 25, 2015.

Justice Thomas Cromwell was appointed to the Supreme Court Dec. 22, 2008. He had previously been on the Nova Scotia Court of Appeal.

Justice Michael Moldaver was elevated from the Court of Appeal for Ontario to the Supreme Court of Canada Oct. 21, 2011.

Justice Andromache Karakatsanis was appointed to the Supreme Court in October 2011. She had been a judge of the Court of Appeal for Ontario.

Justice Richard Wagner was appointed to the Supreme Court Oct. 5, 2012 from the Quebec Court of Appeal.

Justice Clément Gascon was appointed to the to the Supreme Court June 9, 2014 from the Quebec Court of Appeal.

Justices not appointed by Stephen Harper:

Chief Justice Beverley McLachlin, a former chief justice of the Supreme Court of British Colombia, was appointed to the Supreme Court in 1989 under the Brian Mulroney Progressive Conservative government. She was appointed chief justice in 2000, under the Jean Chretien Liberal government.

Justice Rosalie Silberman Abella was appointed to the Ontario Court of Appeal in 1992, then to the Supreme Court in 2004 under the federal Liberal government.

Justice Louis LeBel was appointed to the Quebec Court of Appeal on June 28, 1984 and to the Supreme Court of Canada on Jan. 7, 2000, under the federal Liberal government. He retires this month.

Supreme Court judgments that riled and rocked the Conservative government

Prime Minister Stephen Harper has appointed the majority of the justices on the current Supreme Court, but that doesn't mean it has been friendly to his government. Here are a few examples:

– In June, for the first time in the country's history, the court granted aboriginal title to a British Columbia native group over a vast piece of the province. The judgment could have profound implications on the Northern Gateway oilsands pipeline proposal, which the federal government backs, and has been described as a "game-changer" in the power dynamic between aboriginal Canadians and the Crown.

– Also in June, in a landmark ruling affirming Canadians' right to online privacy, the court ruled that police need a search warrant to get information from Internet service providers about their subscribers' identities during investigations. The ruling has political implications for the federal government's current cyber-bullying bill, C-13.

– In April, the court declared that the federal government cannot make major changes to the Senate – such as indirect elections and term limits for senators – unilaterally, without any provincial consent. It was a major blow for the Conservatives, who had firmly argued they could enact some reforms without provincial signoff.

– In March, the court rejected the prime minister's latest nominee to fill a vacancy on its bench. The landmark judgment nullified the government's appointment October 2013 of

Federal Court of Appeals Judge Marc Nadon on the grounds that he didn't meet the eligibility criteria laid out in the Supreme Court Act.

– In December, 2013, the court struck down Canada's prostitution laws as unconstitutional and gave Parliament a year to make them Charter-compliant. The unanimous ruling found that bawdy-house laws that make it a crime to be caught unlawfully in what is essentially a brothel are "grossly disproportionate" to the intent of the law, which is to prevent community nuisance. As a result, the government was forced to draft new prostitution laws, which come into force Dec. 6.

– In 2011, the court ruled that a controversial Vancouver supervised drug-injection clinic could stay open, calling the federal government's move to shut it down a violation of the Charter of Rights and Freedoms. The ruling paved the way for a similar facility set to open in Montreal.

Harper government criticized for politicizing federal judges

Metro, Torstar News Service, November 15, 2014

The federal government's delay filling several vacancies for full-time judges on the Federal Court of Appeal highlights inherent flaws in an overtly politicized appointment process, say lawyers who argue cases before the appellate body.

This week Toronto lawyer Rocco Galati sent a letter to Prime Minister Stephen Harper and the Attorney General of Canada threatening to launch a constitutional challenge if five vacancies on the appeal court aren't filled in 45 days.

The law calls for a chief justice and 12 full-time judges to sit on the court, Galati notes. Currently, there's Chief Justice Marc Noel, seven full-time judges, and three supernumeraries, who don't count as full-timers.

Galati, known for helping earlier this year to block Justice Marc Nadon's appointment to the Supreme Court, says the Federal Court of Appeal vacancies are leading to delays of up to nine months for cases to be heard.

The vacancies breach the underlying constitutional right to a fair and independent judiciary, Galati argues.

Several prominent lawyers who've appeared before the appellate court say the delays are due to political considerations; they argue that because Federal and Supreme Court appointments are made by the prime minister and cabinet, the selections often centre around loyalty and social values that fall in line with the Conservative party.

Lorne Waldman a Toronto lawyer specializing in immigration and refugee law, sees a "huge problem" with the appointment process in general.

"Canada as a democracy has a completely, in my view, unacceptable process for appointing judges, which is far too political," he says, adding he has not seen as many vacancies on the Federal Court of Appeal as now exists.

"There have been vacancies before, but not this many for so long,'' says Waldman. He notes, however, that he's not sure about Galati's contention that a constitutional issue arises as a result of the unfilled positions.

When queried about the vacancies this week, Clarissa Lamb, press secretary in the office of Peter MacKay, Minister of Justice and Attorney General of Canada, said in a statement to the Star: "these appointments have always been a matter for the executive and will continue to be.

"The appointment process includes broad consultations with prominent members of the legal community. We will respect the confidentiality of the consultation process and will not comment on specific recommendations.''

When later asked about the accusations that the delay in filling the vacancies is a result of political considerations, Lamb said the government's reply "stands as is.''

One of the lesser-known courts, the Federal Court of Appeal, deals with the most serious jurisdictional, legal, and interpretational cases emanating from the Federal Court, issues as varied as immigration, aboriginal and maritime law.

The appellate court also hears appeals from judgments of the Tax Court of Canada, and has authority over judicial reviews and appeals from federal tribunals, and bodies such as the National Energy Board and the Canadian Radio-television and Telecommunications Commission (CRTC).

Like the Federal Court, it's a travelling court where cases are heard in cities across the country.

In a report released in 2011 that examined several Canadian institutions, the non-profit group Global Integrity gave Canada a failing grade for the way it appoints judges. The organization, which monitors accountability and openness around the world, concluded that Canada does a poor job when it comes to transparency around judicial appointments.

"In law there is no established public process for federal judicial appointments (nor are there, in law, public processes for the appointment of the heads or members of the many quasi-judicial, administrative tribunals, agencies, boards and commissions that enforce various specialized federal Canadian laws),'' the report says.

Raoul Boulakia, a Toronto refugee lawyer, prefers the selection process in Ontario where names of potential provincial court judges are vetted by a committee, and only the names the committee approves go forward to the premier and provincial attorney general.

“It’s not a situation where the government says here’s 10 people, rank them,’’ Boulakia says, referring to the federal appointment process.

For Boulakia, the Federal Court of Appeal vacancies harken back to 2006, when Prime Minister Stephen Harper was elected and there were 34 vacancies on the Immigration and Refugee Board, to which the federal government appoints individuals.

Most IRB members appointed under the previous Liberal regime weren’t renewed as their terms expired.

At the time the 34 vacancies prompted concerns from IRB members themselves that delays in hearing immigration cases were occurring as a result.

Lawyer Mario Bellissimo, an immigration and citizenship specialist, suggests that perhaps the rigours of sitting on a travelling court may provide a few challenges when it comes to finding candidates for the appellate court.

“That’s a tremendous consideration for the average lawyer, especially if you have a young family,’’ he said.

But several lawyers suggested the Conservatives may simply be a bit twitchy after getting burned on the Marc Nadon appointment fiasco.

“I think it’s a political calculation about timing, and do they want it to be an election issue,” says Boulakia, referring to the appeal court vacancies

Galati launched a court challenge last year that helped block the federal government’s appointment of Justice Marc Nadon to fill a vacant Quebec seat on the Supreme Court of Canada.

The high court ruled this year that Harper-appointed Nadon isn’t eligible to sit on the Supreme Court because he serves on the Federal Court of Appeal – and was not a Quebec bar association member at the time of his appointment.

The Supreme Court ruled the three high court seats set aside by law for Quebec are restricted to Quebec superior court trial or appellate level judges, or current members of the Quebec bar — not members of the Ottawa-based Federal Court, or Federal Court of Appeal.

B.C. may revoke consent for Christian law school

ANDREA WOO, The Globe and Mail, November 19, 2014

British Columbia's Minister of Advanced Education is considering revoking his consent for the proposed law school at Trinity Western University – a move that would strip the Christian school of its authority to offer law degree programs or grant law degrees in the province.

In a letter sent to TWU president Bob Kuhn this week and obtained by The Globe and Mail, Amrik Virk noted that the university has launched legal challenges against the law societies in Ontario and Nova Scotia and intends to launch one against the benchers of the Law Society of B.C. The lawsuits are part of the battle between the school and lawyers who argue TWU's community covenant discriminates against gay students.

Mr. Virk wrote that it is unlikely the court actions over the societies' decisions to deny accreditation to the school's graduates will be completed before the expiry date of the conditional consent he granted on Dec. 18.

"As you are aware under the terms and conditions of consent TWU must enroll students within three years from the date of consent," Mr. Virk wrote in his letter. "As a result, I am considering revoking my consent for TWU's proposed law program."

The law society votes in Ontario and Nova Scotia would prevent TWU law graduates from practising there. The Law Society of B.C. voted in the spring to accredit the school, but reversed its decision after an outcry.

The controversy stems from a line in the university's covenant that requires all students, administrators and faculty to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."

Earlier this year, the school's accreditation appeared assured because it had received the approval it required from three bodies: the ministry, the Federation of Canadian Law Societies and the B.C. law society.

A legal challenge launched against the minister and TWU by two Canadian law firms says Mr. Virk "created a two-tiered system of legal education" when he granted consent .

Clayton Ruby, the lawyer leading the challenge, said an openly gay student would be "treated like a second-class citizen." The case is to be argued on Dec. 1, and Mr. Ruby

said on Tuesday he believes the minister is backing down because he recognizes that it is "impossible" for the province to win it.

Mr. Ruby said the ministry should have foreseen such a scenario and wondered why it did not act sooner. After Law Society of B.C. benchers voted to accredit the school in April, members in June convened a special general meeting and voted to direct the benchers to reverse the decision. In July, Mr. Virk wrote to Mr. Kuhn saying that should benchers do so, "that would constitute a substantive change to the program that may require further consideration of the consent granted under the Degree Authorization Act."

"Why did it take them so long?" Mr. Ruby said. "Granted, you're up against the deadline of our lawsuit, but why wait for that deadline? Why not act like a competent minister?"

Mr. Virk was not available for an interview on Tuesday.

Mr. Kuhn said the letter came as a surprise and the school will consider its next steps as it proceeds with legal challenges. When asked if the university would consider removing the offending line from the covenant, he said it will fight to maintain its traditional Christian beliefs.

"If society is going to remove the ability to maintain traditional religious belief, it needs to have better grounds than just, 'Times have changed,'" he said. "This is not a matter of six words; this is a matter of religious freedoms being exercised by a university whose purpose is to be a Christian University."

The university has until Nov. 28 to give Mr. Virk written submissions on the matter. If consent is revoked, the school can reapply after the legal challenges are resolved.

Our Blog

ACEP Association canadienne des employés professionnels CAPE Canadian Association of Professional Employees

Bill C-377: New Information on "The Bill That Nobody Wants"

CAPE Guest Blog By Dr. Fiona McQuarrie, November 2014

Fiona McQuarrie has been researching and writing about work and organizations for more than 20 years. Her areas of interest include industrial relations, organizational theory, workplace diversity, management history, and the interaction between work and leisure. Dr. McQuarrie is Associate Professor in the School of Business at the University of the Fraser Valley (UFV). She holds a Ph.D. in organizational analysis from the University of Alberta; a Bachelor of Business Administration (with majors in business

and English), an MBA, and a Certificate in Liberal Arts from Simon Fraser University; and a Certificate in General Studies from Thompson Rivers University.

Two researchers have uncovered some new and very troubling information about Bill C-377, the proposed Canadian law that would impose exceptionally rigorous financial reporting requirements on unions. "The bill that nobody wants", as it was called in the researchers' lecture last week, is now the center of an even more appalling story of misinformation and deception – a story that should concern not only anyone who cares about Canadian unions and workers, but also anyone who cares about the integrity of Canada's democratic legislative process.

The first version of this bill was introduced in the House of Commons in 2011 as Bill C-317, and the Speaker of the House dismissed it as being out of order. The bill was then re-introduced in the House as Bill C-377 – a private member's bill sponsored by Member of Parliament Russ Hiebert. It was approved in the House of Commons and sent to the Senate. The Senate refused to vote on it, and returned a heavily amended version of the bill to the House in mid-2013. The House returned the original, unamended bill to the Senate, where it is currently being debated again. It's extremely unusual for private members' bills to make it this far in the federal legislative process, or to be on Parliament's agenda for so long. So what's really going on here?

Many of the proponents of Bill C-377, in both the House of Commons and the Senate, have stated that 83 per cent of Canadians want financial transparency for both public and private sector unions. But Andrew Stevens and Sean Tucker, two professors in the Faculty of Business Administration at the University of Regina, have assembled information – from interviews, responses to Freedom of Information requests, and online documentation – that indicates the 83% number is questionable, and that the polls that produced that number are even more questionable. (You can see the Powerpoint of their lecture about the bill, and listen to the audio of the lecture, here.)

Stevens and Tucker have been investigating Bill C-377 since 2011, but before I describe what happened then, I'll quickly review some of their findings about the progress of the bill before that time. The primary organizations to publicly express support for Bill C-377 were five notoriously anti-union associations: Merit Canada (a group of non-union construction organizations), the Canadian Federation of Independent Business, the Independent Contractors and Businesses Association of British Columbia, and the Canadian LabourWatch Association (also known as LabourWatch). In contrast, the bill was opposed by the Canadian Labour Congress and its provincial affiliates; the Canadian Bar Association (the national professional association for Canadian lawyers); Canada's federal privacy commissioner; some provincial governments; and a number of pension fund managers. And, according to Stevens and Tucker's sources, two federal cabinet ministers also expressed negative opinions about the bill.

So although Bill C-377's proponents claimed that "83% of Canadians" favoured the proposed legislation, there were very serious concerns about the reasons for and effects of the bill – e.g. the privacy implications of forcing unions to publish contact information for all participants in their financial transactions worth $5,000 or more. Concerns were expressed by a wide range of organizations and individuals, including ministers in Prime Minister Harper's cabinet. Yet the bill was passed in the House of Commons – with an

unusually high number of Members of Parliament present for the vote, compared to the number that usually show up for votes on private members' bills – and was sent to the Senate for further debate.

In 2012, Stevens and Tucker discovered that "State of the Unions", a 2011 poll conducted by Nanos Research for LabourWatch – and the source of the 83% figure – contained a question with a biased and misleading introduction that could have influenced the direction of the responses to that question. They also found that the results of another question were suppressed. The original report on the poll stated that "Canadians were divided on whether the Canadian public or just union members/unionized employees should have access to unions' financial information". This statement not only seemed to contradict the claim of 83% of Canadians being in favour of such disclosure, but also had no relation to any of the survey results mentioned in the report.

According to Tucker, in October 2011 the version of the report on the poll that was posted on Nanos Research's website was amended to include an appendix. The appendix stated that a question in the survey "was considered, in retrospect, to be inadequate from a research perspective" because the potential responses to the question were not mutually exclusive, and because one of the words in the question ("access") could be interpreted in different ways by respondents. Thus, the appendix stated, the results of the question had been removed from the survey outcomes.

The Canadian Labour Congress (CLC) used those findings as the basis for a complaint about the poll's methodology to the Marketing Research and Intelligence Association (MRIA), an industry group for the Canadian polling industry. Among other services to the industry, MRIA maintains a code of ethical conduct for its members. MRIA convened a panel to hear the complaint, and announced in September 2013 that the reporting of the results of two questions "allowed potentially biased information to be reported by LabourWatch"; it also stated that MRIA's ethical code had not been violated.

- '*This bill before us, whatever may have been its laudable transparency goals, is really – through drafting sins of omission and commission – an expression of statutory contempt for the working men and women in our trade unions and for the trade unions themselves and their right under federal and provincial law to organize. It is divisive and unproductive.* ***Senator Hugh Segal's comments on Bill C-377, during its 2013 debate in Canada's Senate.'***

But Tucker and Stevens were informed by a source that the MRIA panel actually ruled that the code had been violated. The panel also set four recommendations that Nanos Research would have to fulfill to avoid being censured by MRIA.

- Nanos should inform LabourWatch, and copy the CLC and MRIA, that Question 20 [the question with the misleading preamble] must only be reported within the complete context of the question including the preamble.
- The complete preamble for Question 20 must be used whenever Nanos refers to the question or the figure of 83% of respondents answering "yes" to the question, and Nanos should acknowledge to the CLC in writing the importance of including the preamble when talking about the results of the question.

- Nanos should also inform LabourWatch that the full questionnaire, including Question 18 [the question whose results were removed], needs to replace the version of the questionnaire that was posted on the LabourWatch website.
- Nanos should also seek permission from LabourWatch to release the results of Question 18. These results should be communicated to the CLC by letter (with a copy to MRIA).

The difficulty for Nanos in carrying out these recommendations, according to Stevens and Tucker's sources, was that LabourWatch owns the data and the results of the poll. And to say that LabourWatch responded with disdain to these recommendations would be an understatement. Stevens and Tucker's sources stated that LabourWatch refused to comply with Nanos' requests, and this can be verified by looking at the two versions of the 2011 questionnaire that are available online. One is posted on Nanos Research's website, and one is posted on LabourWatch's website. Specifically, the Nanos Research version includes the question related to the suppressed result (question 18 on page 35 of the report) while LabourWatch's version omits that question (page 5 of their version of the questionnaire).

And, as I've written before, the poll also produced results – such as a majority of respondents agreeing that unions had positive workplace effects such as job security for employees, and a majority of unionized respondents feeling that their union dues were well spent – that were not mentioned in LabourWatch's press release about the poll.

Then, while MRIA was still investigating the complaints about the 2011 poll, LabourWatch contracted the polling organization Leger to conduct a 2013 version of the "State of the Unions" poll. The 2013 poll included two versions of the 2011 poll question with the controversial preamble – one version with the preamble, and one without. Equal numbers of respondents were given one of the two versions of the question, and the reported responses were almost identical. 83% of the respondents who heard the question with the preamble said they "completely" or "somewhat" supported unions being required to "publicly disclose detailed financial information on a regular basis". 85% of respondents who heard the question without the preamble gave the same responses.

The wording of Leger's report on the 2013 poll, as posted in the LabourWatch website, notes that the preamble had no effects on the responses to the question. However, Richard Johnston of the University of British Columbia – who holds the Canada Research Chair in Public Opinion, Elections, and Representation – told Tucker and Stevens that it isn't too much of a stretch to get anyone to endorse financial openness for any kind of organization, and that a question asking about financial openness for corporations would likely also get support from a majority of respondents.

Tucker and Stevens have also uncovered some information about Nanos Research that is worth mentioning in the context of Bill C-377. In 2012, Nik Nanos, the head of the company that conducted the 2011 LabourWatch poll, participated in a panel discussion at the 7th International Open Shop conference in Ottawa. The conference was sponsored by Merit Canada; Merit Canada's Alberta affiliate was one of the organizations that co-founded LabourWatch in 2000. According to media coverage of the panel discussion, Nanos stated during the discussion that "unions have a significant problem in terms of transparency"; that getting support for accountability and transparency was a "no-

brainer"; and that the poll results were a "slam dunk" for the cause of union disclosure. Two of Tucker and Stevens' interviewees expressed the opinion that these comments were not neutral, and could be interpreted as advocacy for Bill C-377. Nanos' participation in the Open Shop conference does not appear on his list of speaking engagements on the Nanos Research website.

Despite the controversy over the results of the 2011 poll, the results of both the 2011 and 2013 polls continue to be used to support Bill C-377. In September of last year, when the bill was again debated in the Senate, Senator Bob Runciman referenced the poll results in alleging that "union bosses…fiercely want to hide their spending". Kevin Sorensen, the Minister of State for Finance, took things even further by stating in the House of Commons that the provisions of the bill were something that "all Canadians are asking for" [emphasis mine], which is an assertion that even the flawed poll results don't come remotely close to supporting. And in November, Russ Hiebert, the MP who sponsored Bill C-377, issued a press release saying that the 2013 poll results showed "a broad public consensus" for the bill's "financial transparency" proposals. (Hiebert also called LabourWatch a "non-partisan" organization, which any quick review of its activities and information will show is clearly untrue.) To this day, the Bill C-377 FAQ on Hiebert's website repeats the 83% claim without including the contextual information that the MRIA requested.

It's embarrassing that Bill C-377 is still on the agenda of Canada's Parliament after nearly three years of criticism of and resistance against it. The only serious support for the bill is from a few organizations that clearly have an anti-union agenda, and which have not provided any practical reasons why the bill is necessary, or what problem it is addressing. And, hypocritically, several of these organizations are anything but transparent about their own financial affairs.

Stevens and Tucker describe the progress of the bill as a case of "ideology over public policy". With such limited support for the bill – and with much of that support based on the results of spurious research – it's deeply troubling that so many Canadian Members of Parliament did not, or would not, look more critically at Bill C-377 and its implications before voting on it. (Here's the list of the MPs that voted for and against the bill.) And for all the criticism that gets directed at Canada's Senate, the debate over Bill C-377 is one instance where the Senate responsibly fulfilled its role as the "chamber of sober second thought" – by recognizing the numerous flaws of this bill, and refusing to pass it in the form in which it was presented.

Perhaps the information that Stevens and Tucker have uncovered will be enough to finally stop the bill from going any further. Not only is Bill C-377 a bad piece of legislation, but the process by which it has been pushed through Parliament reflects very badly on the Conservative government's respect for honest, factual debate and for the democratic process. "The bill that nobody wants" is a bill that should never be passed.

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Projet de loi C-377 : Nouveaux renseignements sur « le projet de loi dont personne ne veut »

Blogue de l'ACEP, Contribution de Fiona McQuarrie, Ph.D., Novembre 2014

(Fiona McQuarrie has been researching and writing about work and organizations for more than 20 years. Her areas of interest include industrial relations, organizational theory, workplace diversity, management history, and the interaction between work and leisure. Dr. McQuarrie is Associate Professor in the School of Business at the University of the Fraser Valley (UFV). She holds a Ph.D. in organizational analysis from the University of Alberta; a Bachelor of Business Administration (with majors in business and English), an MBA, and a Certificate in Liberal Arts from Simon Fraser University; and a Certificate in General Studies from Thompson Rivers University.)

Deux chercheurs ont mis au jour des renseignements nouveaux et très inquiétants au sujet du projet de loi C-377, qui a été proposé pour frapper les syndicats d'exigences exceptionnellement rigoureuses en matière de rapports financiers. « Le projet de loi dont personne ne veut », comme les chercheurs l'appelaient au cours de leur présentation de la semaine dernière, se trouve maintenant au centre d'une histoire encore plus consternante de désinformation et de tromperie – une histoire qui devrait intéresser non seulement tous ceux qui se préoccupent des syndicats et des travailleurs canadiens, mais également tous ceux qui ont à cœur de préserver l'intégrité du processus législatif démocratique du Canada.

Ce projet de loi, sa première version en fait, a été présenté à la Chambre des communes en 2011 comme projet de loi C-317, et le président de la Chambre l'a rejeté parce qu'il l'a jugé contre le règlement. Le projet de loi a été soumis à nouveau à la Chambre en tant que Projet de loi C-377 – un projet de loi émanant d'un député, parrainé par le député Russ Hiebert. La Chambre des communes l'a approuvé et acheminé au Sénat. Le Sénat a refusé de se prononcer et a retourné une version fortement modifiée du projet de loi à la Chambre des communes au milieu de 2013. La Chambre a renvoyé le projet de loi original non modifié au Sénat, où il fait actuellement l'objet d'un nouveau débat. Il est extrêmement inhabituel qu'un projet de loi émanant d'un député se rende aussi loin dans le processus législatif ou qu'il soit à l'ordre du jour du Parlement aussi longtemps. Alors, qu'est-ce qui se passe ici réellement?

De nombreux défenseurs du projet de loi C-377, à la Chambre des communes et au Sénat, ont affirmé que 83 pour cent des Canadiens veulent que les syndicats des secteurs aussi bien public que privé fassent preuve de transparence financière. Par contre, Andrew Stevens et Sean Tucker, deux professeurs de la faculté d'Administration des affaires de l'Université de Regina, ont réuni de l'information – à partir d'entrevues, de réponses aux demandes d'accès à l'information et de documents sur la toile – selon laquelle le

pourcentage de 83 pour cent est douteux et que les sondages utilisés pour l'obtenir le sont encore plus. (Vous pouvez regarder la présentation PowerPoint de leur exposé sur le projet de loi et écouter l'exposé ici [en anglais].)

Stevens et Tucker enquêtent sur le projet de loi C-377 depuis 2011, mais avant de décrire ce qui est arrivé alors, je vais faire un bref tour d'horizon de certaines de leurs découvertes sur le cheminement du projet de loi avant ce temps. Les principaux organismes à exprimer publiquement leur appui au projet de loi C-377 étaient cinq associations antisyndicales reconnues : Merit Canada (un groupe d'organismes de construction non syndiqués), la Fédération canadienne de l'entreprise indépendante, l'Independent Contractors and Businesses Association of British Columbia et l'Association LabourWatch du Canada (alias LabourWatch). Au contraire, les organismes suivants se sont opposés au projet de loi : le Congrès du travail du Canada et ses partenaires provinciaux; l'Association du barreau canadien (l'ordre professionnel national des avocats du Canada); le Commissariat à la protection de la vie privée du Canada; certains gouvernements provinciaux; un certain nombre de gestionnaires de caisses de retraite. Selon certaines sources de Stevens et Tucker, deux ministres du cabinet fédéral ont eux aussi exprimé une opinion négative à l'endroit du projet de loi.

Ainsi, bien que les défenseurs du projet de loi C-377 aient prétendu que « 83 pour cent des Canadiens » étaient pour la loi éventuelle, les motifs et les effets du projet de loi soulevaient de graves préoccupations – p. ex., les répercussions sur la vie privée de l'obligation pour les syndicats de publier les coordonnées de tous les participants relativement à leurs opérations financières d'une valeur égale ou supérieure à 5 000 $. Un vaste éventail de personnes et d'organismes ont exprimé leurs inquiétudes, y compris des ministres du cabinet du Premier ministre Harper. Pourtant, le projet de loi a été adopté par la Chambre des communes – où un nombre inhabituellement élevé de députés étaient présents par rapport au nombre habituel de députés qui se présentent pour voter sur les projets de loi émanant de députés – et acheminé au Sénat pour être débattu plus avant.

En 2012, Stevens et Tucker ont découvert que l'« État des syndicats » – un sondage mené en 2011 par Recherche Nanos pour le compte de LabourWatch – à l'origine du chiffre de 83 pour cent – comprenait une question dont l'introduction biaisée et trompeuse pouvait avoir influé sur le sens des réponses à cette question. Ils ont également découvert que les résultats d'une autre question avaient été retranchés. Dans le rapport original sur le sondage, on lisait : [traduction] « Les Canadiens sont divisés sur la question de savoir s'il convient que le public canadien en entier ou seuls les employés syndiqués aient accès aux données financières des syndicats ». Non seulement cette affirmation semblait contredire la prétention selon laquelle 83 pour cent des Canadiens sont pour une telle divulgation, mais elle n'avait aucun lien avec les autres résultats du sondage mentionnés dans le rapport.

Selon Tucker, en octobre 2011, la version du rapport sur le sondage qui a été publiée sur le site Web de Recherche Nanos a été modifiée par l'ajout d'une annexe. Celle-ci mentionne qu'une question du sondage [traduction] « a été considérée rétrospectivement comme inappropriée du point de vue de la recherche » parce que les réponses possibles à la question ne s'excluaient pas mutuellement et que l'un des termes de la question (« accès ») pouvait être interprété de façons différentes par les répondants. Voilà pourquoi, selon l'annexe, les résultats de la question ont été retranchés des résultats du sondage.

Le Congrès du travail du Canada (CTC) s'est servi de ses constatations comme fondement d'une plainte sur la méthodologie du sondage auprès de L'association de la recherche et de l'intelligence marketing (ARIM), un groupe d'industries à l'usage du secteur canadien du sondage. Parmi les services qu'elle offre à l'industrie, l'ARIM maintient un code de déontologie des membres. L'ARIM a réuni un groupe de spécialistes pour entendre la plainte et a annoncé en septembre 2013 que la divulgation des résultats aux deux questions : [traduction] « permettait à LabourWatch de faire rapport de renseignements possiblement biaisés »; elle a également déclaré que le code de déontologie de l'ARIM n'avait pas été violé.

- *« Ce projet de loi, quels que soient ses louables objectifs de transparence, est en fait — par suite de défauts de rédaction — une expression de mépris législatif pour les travailleurs et les travailleuses de nos syndicats ainsi que pour les syndicats eux-mêmes et leur droit de s'organiser en vertu des lois fédérales et provinciales. Il divise et est improductif. »* ***Commentaires du sénateur Hugh Segal sur le projet de loi C‑377 au cours du débat de 2013 au Sénat du Canada.***

Cependant, Tucker et Stevens ont été informés par une source que le groupe de spécialistes de l'ARIM avait en réalité déterminé que le code avait été violé. Le groupe a également effectué quatre recommandations que Recherche Nanos devait suivre pour éviter la censure de l'ARIM.

- Nanos devrait informer LabourWatch, et en envoyer copie au CTC et à l'ARIM, que la Question 20 [la question comprenant le préambule trompeur] ne doit être incluse dans le rapport que dans le contexte complet de la question et de son préambule.
- Le préambule complet de la question 20 doit apparaître chaque fois que Nanos fait référence à cette question ou au pourcentage de 83 pour cent des répondants qui répondent « oui » à la question, et Nanos devrait admettre par écrit au CTC l'importance d'inclure le préambule lorsqu'elle parle des résultats de la question.
- Nanos devrait également informer LabourWatch qu'il s'avère nécessaire que le questionnaire complet, comprenant la question 18 [la question dont les résultats ont été supprimés], remplace la version du questionnaire qui a été diffusée sur le site Web de LabourWatch.
- Nanos devrait également demander la permission de LabourWatch pour divulguer les résultats de la question 18. Ces résultats devraient être communiqués au CTC par lettre (copie à l'ARIM).

Pour Nanos, la difficulté de suivre ces recommandations vient du fait que, selon les sources de Stevens et Tucker, les données et les résultats du sondage appartiennent à LabourWatch. Or, dire que LabourWatch a répondu avec dédain à ces recommandations serait un euphémisme. Selon les sources de Stevens et Tucker, LabourWatch a refusé de se plier aux demandes de Nanos, ce qui peut se vérifier en examinant les deux versions du questionnaire de 2011 qui sont disponibles en ligne. L'une est publiée sur le site Web de Recherche Nanos et l'autre est publiée sur le site Web d'InfoTravail. En d'autres termes, la version de Recherche Nanos comprend la question liée au résultat supprimé (question 18, page 35 du rapport), tandis que la version de LabourWatch omet la question (page 5 de sa version du questionnaire).

Comme je l'ai déjà écrit, le sondage a également des résultats – notamment qu'une majorité de répondants convient que les syndicats ont des effets positifs sur les lieux de travail comme la sécurité d'emploi des employés et qu'une majorité de répondants syndiqués ont l'impression que leurs cotisations syndicales ont été bien dépensées – qui n'ont pas été mentionnées dans le communiqué de LabourWatch sur le sondage.

Ensuite, alors que l'ARIM enquêtait toujours sur les plaintes au sujet du sondage de 2011, LabourWatch a engagé la firme de sondage Léger et Léger pour produire la version 2013 du sondage de l'« État des syndicats ». Le sondage de 2013 comprenait deux versions de la question du sondage de 2011 au préambule controversé – l'une comprenait le préambule, l'autre non. Des répondants en nombres égaux ont reçu l'une ou l'autre des deux versions de la question, et les réponses données étaient presque identiques. Quatre-vingt-trois pour cent des répondants qui ont entendu la question avec son préambule ont dit qu'ils étaient « complètement en accord » ou « plutôt en accord » qu'il devrait être obligatoire pour les syndicats de « divulguer publiquement et sur une base régulière leurs informations financières détaillées ». Quatre-vingt-cinq pour cent des répondants qui ont entendu la question sans le préambule ont donné les mêmes réponses.

Le rapport Léger sur le sondage de 2013, tel qu'il paraît sur le site Web d'InfoTravail, signale que le préambule n'a eu aucun effet sur les réponses à la question. Par contre, Richard Johnston, de l'Université de la Colombie-Britannique – qui détient la Chaire de recherche du Canada sur l'opinion publique, les élections et la représentation – a informé Tucker et Stevens qu'il n'est pas très difficile de faire en sorte que chacun appuie la transparence financière, peu importe le type d'organisme visé, et que toute question posée à l'endroit de la transparence financière des sociétés incorporées recueillerait vraisemblablement l'appui de la majorité des répondants.

Tucker et Stevens ont également révélé certaines informations au sujet de Recherche Nanos qui méritent d'être mentionnées dans le contexte du projet de loi C‑377. En 2012, Nik Nanos, le président de l'entreprise qui a mené le sondage 2011 d'InfoTravail, a participé à une discussion de spécialistes lors de la 7th International Open Shop Conference (Septième conférence internationale sur les ateliers ouverts), à Ottawa. Merit Canada commanditait la conférence; l'organisme affilié Merit Canada de l'Alberta a été l'un des cofondateurs de LabourWatch en 2000. Selon les médias qui ont couvert la discussion de spécialistes, Nanos a déclaré au cours de la discussion que : [traduction] « les syndicats ont de graves problèmes de transparence; obtenir l'appui pour la responsabilisation et la transparence était une "affaire de rien"; enfin, les résultats du sondage étaient du "tout cuit" pour la cause de la divulgation syndicale. » Deux des personnes interviewées par Tucker et Stevens ont exprimé l'opinion que ces commentaires n'étaient pas neutres et pourraient être interprétés comme venant à la défense du projet de loi C‑377. La participation de Nanos à la conférence sur les ateliers ouverts ne se trouve pas sur sa liste des discours publiée sur le site Web de Recherche Nanos.

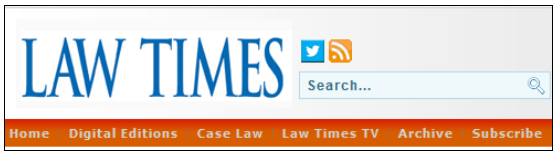
En septembre de l'an dernier, lorsque le projet de loi était toujours débattu au Sénat, le sénateur Bob Runciman a fait référence aux résultats des sondages en alléguant que « les chefs syndicaux… férocement… cherchent à soustraire leurs dépenses au regard… » Kevin Sorenson, le ministre d'État aux Finances, a poussé la chose encore plus loin en déclarant à la Chambre des communes que les dispositions du projet de loi sont quelque

chose que [traduction] « … tous les Canadiens demandent… » (l'italique est de moi), une affirmation que même les résultats fautifs des sondages ne viennent pas près d'appuyer. En novembre, Russ Hiebert, le député qui a parrainé le projet de loi C-377, a publié un communiqué disant que les résultats montrent « un vaste consensus public » au sujet des propositions relatives à la « transparence financière » [en anglais] (Hiebert a également appelé le LabourWatch un organisme « non partisan », ce qu'un simple examen rapide de ses activités et de l'information le concernant démontrera comme clairement erroné.) À ce jour, la partie de la FAQ visant le projet de loi C‑377 sur le site Web de Hiebert répète le chiffre de 83 pour cent sans inclure le contexte que l'ARIM demande.

Il est gênant que le projet de loi C-377 se trouve toujours au feuilleton du Parlement du Canada après presque trois années de critiques et de résistance contre lui. Le seul appui sérieux dont il jouisse provient de quelques organismes qui ont nettement des vues antisyndicales et qui n'ont fourni aucune raison concrète pour justifier la nécessité du projet de loi ou pour montrer quel problème il vise à régler. Hypocritement, plusieurs de ces organismes ne sont rien moins que transparents au sujet de leurs propres affaires financières.

Stevens et Tucker décrivent le cheminement du projet de loi comme un cas où l'« idéologie l'emporte sur la politique gouvernementale ». Compte tenu du faible soutien apporté au projet de loi – dont une grande partie est fondée sur des résultats de recherche fallacieux –, il est fort inquiétant que tant de députés canadiens n'aient pas voulu examiner le projet de loi C-377 et ses répercussions de façon critique avant de voter sur lui. (Voici la liste des députés qui ont voté pour et contre le projet de loi.) Par ailleurs, malgré toutes les critiques qui sont adressées au Sénat du Canada, le débat concernant le projet de loi C‑377 est un cas où le Sénat a joué son rôle de « chambre de réflexion » de façon responsable – en reconnaissant les nombreux défauts de ce projet de loi et en refusant de l'adopter dans la forme où il a été présenté.

L'information que Stevens et Tucker ont mise au jour suffira peut-être à empêcher, enfin, que le projet de loi poursuive son chemin. Le projet de loi C‑377 est non seulement une mauvaise mesure législative, mais le processus utilisé pour le faire progresser au parlement donne une très mauvaise impression du respect que le gouvernement Conservateur montre à l'égard des débats honnêtes et fondés sur les faits et du processus démocratique. « Le projet de loi dont personne ne veut » est un projet de loi qui ne devrait jamais être adopté.



Judge finds creative way around mandatory jail time

By Yamri Taddese, Law Times, November 17, 2014

Superior Court Justice Ian Nordheimer came up with an appropriate mandatory minimum sentence in a recent child pornography case, but in a twist that has the criminal bar talking about his creative approach, he decided the defendant wouldn't serve it in jail.

After finding the matter before him was "a real-life example of the problems that are inherent in mandatory minimum sentences," Nordheimer ordered a conditional sentence due to breaches of the Charter of Rights and Freedoms against the defendant whose mental health had deteriorated.

"Mandatory minimum sentences can clash with the core function of sentencing, as it is understood and applied in this country. That clash arises in this case because of the rare and unusual circumstances that are presented," wrote Nordheimer in R. v. Donnelly.

The defendant, 30-year-old Brandon Donnelly, pleaded guilty to editing 74 films that featured naked teenage boys as an employee of a company that sold the videos over the Internet. Donnelly argued he didn't know the films were illegal as his employer always maintained they were lawful.

Although the Crown sought seven years in prison for Donnelly, Nordheimer found "that it is not the appropriate sentence by a wide margin."

The judge found the mitigating factors in the case, including the limited weight put on Donnelly's "naïveté," would bring the appropriate sentence to 21 months in prison, almost double the mandatory minimum of 12 months.

But Nordheimer found Donnelly shouldn't serve the sentence in custody. Due to breaches of his Charter rights, Donnelly spent three days in unnecessary incarceration, according to Nordheimer, who also found Donnelly suffered severe mental deterioration.

The judge also relied on medical reports that suggested Donnelly would likely commit suicide if he went to jail.

"Of more importance, however, is that I have the opinions of three medical professionals (two psychologists and one psychiatrist) who say, in very clear terms, that Mr. Donnelly is at a marked risk for suicide, as a consequence of these events," wrote Nordheimer.

"It is a risk that will be significantly increased if Mr. Donnelly is incarcerated. Indeed, the psychologist who is most familiar with Mr. Donnelly and who has worked with him the longest, is of the opinion that Mr. Donnelly's risk of suicide, if he is sent to jail, is very high. These suicide concerns are reinforced, not only by Mr. Donnelly himself, but also by his family members."

The decision, according to criminal lawyer Howard Rubel, is an example of the dilemma judges face when trying to apply sentencing principles without questioning the constitutionality of mandatory minimum sentences. "Respect for the law isn't just restricted to punishment; it is restricted to a just penalty," he says.

“And that’s the tension that judges have these days because there are a number of mandatory minimum sentences that are now in our law books.”

He adds: “What we are left with is judges caught between two very powerful principles. And frankly, I think this an example of the willingness of our judges to face the dilemma head-on.”

In many U.S. jurisdictions, judges faced with tough cases like this one have simply opted to not take on those matters for fear they couldn’t apply the law, according to Rubel. Although Canadian judges don’t have the ability to reject cases, “our bench has decided not to duck the problem but to face it head-on,” he says.

In the past, judges found other ways to circumvent mandatory fines and sentences, in some cases ordering a levy of $1 where fines were mandatory.

Nordheimer’s decision is another “creative” way around mandatory minimum sentences, says criminal lawyer Edward Prutschi, who notes the judge’s remedy in this case was very specific to the set of facts before him.

“What’s unique about this scenario is because of the psychiatric evidence and because of the factual background for the particular violation and the psychiatric evidence for this particular accused, Justice Nordheimer is finding that reducing the sentence would not be an effective remedy under s. 24(1),” says Prutschi.

“It would be a remedy but not an effective one. The only way to craft an effective one would be to create a remedy that would allow this accused to serve a non-custodial sentence. And to do that, he had to butt right up against the mandatory minimums, which would normally prohibit it.”

Nordheimer reasoned that in this case, incarceration would have had an adverse effect. “It is clear that, in the case of Mr. Donnelly, imposing a term of imprisonment will not advance his rehabilitation. Indeed, the uncontradicted evidence is that imprisonment will have the opposite effect,” he wrote.

“Imprisonment will not only impede rehabilitation, it will place Mr. Donnelly at very serious risk of self-harm and will, most certainly, negatively affect his already fragile mental state and it will do so in a significant way.”

Although unique, Nordheimer’s decision likely has little precedential value, according to Prutschi, because the case is very specific to the facts.

Not all lawyers take kindly to judges who avoid mandatory minimums. Bennett Jones LLP partner Lincoln Caylor, co-author of a report defending mandatory minimum sentences earlier this year, told Law Times judges who creatively circumvent such provisions should perhaps “resign and run for Parliament.”

“If it is constitutional, then it must be upheld and to the extent that you want the law changed, it is for Parliament to do that and it’s not for judges to try and circumvent the law,” said Caylor.

New rule of civil procedure tool to deal with vexatious litigants

By Jennifer Brown, Legal Feeds blog from Canadian Lawyer, November 18, 2014

An Ontario Superior Court judge has drawn upon a new rule of civil procedure to dismiss a motion by a litigant who had "already had his day in court."

In Gao v. Ontario WSIB, Justice Fred Myers directed the registrar to send a notice under Rule 2.1, part of the Superior Court of Justice Rules of Civil Procedure, to Tieguang Gao indicating his motion was dismissed.

In the action, the plaintiff sued the Ontario Workplace Safety and Insurance Board and the Ombudsman. The plaintiff claimed relief as a result of alleged unlawful acts by the WSIB that led to the limiting of the plaintiff's benefits under the Workplace Safety and Insurance Act. The plaintiff also alleged unlawful acts by the Ombudsman with whom the plaintiff filed a complaint concerning the conduct of the Ontario WSIB.

Another judge had already dismissed the action in August. In his decision, Myers stated: "The motion is supported by three volumes of motion record and a factum, none of which is written so as to be readily understandable.

"Mr. Gao has had his day in court and must now move on."

In the decision, Myers addressed the specific issue of frivolous and vexatious proceedings stating: "The amount of wasted judicial time and administrative resources dealing with utterly frivolous matters is substantial," adding that wasted court time and resources is "an issue impacting access to civil justice."

Rule 2.1 was introduced July 1 to bring resolutions to "a particular category of disputes in a proportionate, timely and affordable way." It provides a summary process for a hearing in writing to determine if an individual proceeding or a motion ought to be dismissed where it appears to be "frivolous, vexatious, or an abuse of process. "

"This prevents the hearing of the motion from itself becoming a vehicle for a party who might be inclined to inflict the harms of frivolous proceedings on the opposing parties and the civil justice system," said Myers.

The judge only considered written submissions, which is the big difference from other proceedings that can be time consuming for the court and parties involved.

“It certainly strikes me as the kind of motion that this rule is designed to put a very quick end to,” says Kevin Toyne, a partner with Brauti Thorning Zibarras LLP.

“The proceeding had already been dismissed but the person was trying to have someone noted in default. Justice Myers does a good job of identifying the different indicia that shows it’s a frivolous or vexatious proceeding that should be dismissed with this new summary procedure.”

Toyne says there are two ways for this to be applied. In Gao, it was the court drawing attention to it but there is also a provision for litigants to write in and ask for the process to be triggered. Both sides have an opportunity to make submissions and then it’s up to the court to decide whether the proceeding will be tossed out or allowed to proceed.

“Before this rule came in if you were served with a statement of claim at 100 pages long full of nonsense it was difficult to make it go away quickly and efficiently and in a cost-effective manner.

“Now all I have to do is write a letter to the registrar asking the registrar to trigger this summary procedure and there’s a lot less time used up, far fewer judicial resources, and less cost to the affected litigants,” he adds.

The flipside, however, is that it could also be open to abuse. Instead of the preliminary play by a defendant to strike, now they can write a letter to the registrar asking for the matter to be dismissed.

“In a case like the one before Justice Myers it seems it was pretty clear the motion should be dismissed, but what you may start to see as people become more familiar with the rule is . . . more people writing to the registrar asking for motions or lawsuits to be dismissed,” says Toyne.

The judge’s decision was “quite careful” in observing the track record of the plaintiff says Patricia Virc, of Steinberg Title Hope & Israel LLP.

“It looks to me like Justice Myers was looking at a pleading and saying ‘I can’t make heads or tails of this.’ That is a situation where it should be stopped in its tracks,” says Virc. “He does point out there are situations where you just have an unrepresented person but there is a thread or a notion of an underlying complaint that may be legitimate but the person just doesn’t know how to put it forward.

“Normally the relief a court would give if they just see a litigant having trouble putting something together would be to give leave to amend,” says Virc. “But when a pleading is just incomprehensible then there is no point in allowing an amendment.”

Virc admits there may be cases where a litigant is just having a difficult time getting their point across, but that wasn’t the case in this instance.

"There are situations where something legitimate is just buried in a mountain of nonsense and those are the difficult cases," she says. "In this case what the judge is trying to be avoid is putting a litigant who has already been put through numerous vexatious proceedings to the trouble of bringing their own motion again and give further platform for the litigant to do damage to someone who has already been unjustly victimized."

Bitter battle brewing over coffee cup format

By Jennifer Brown, Canadian Lawyer Magazine, November 17, 2014

In a move some competition lawyers say is "odd," Club Coffee has filed a formal complaint with the Competition Bureau of Canada asking for an investigation of coffee company Keurig Green Mountain alleging it has created a monopoly and driven up prices in the K-cup format of single hot beverages.

Its filing with the Competition Bureau comes a month after Club Coffee filed a $600-million lawsuit against Keurig. Club Coffee, which also manufactures the popular single-serve coffee pods, is suing Keurig saying it uses "anti-competitive measures to maintain a near monopoly and keep single serve coffee prices artificially high."

Club Coffee's CEO John Pigott announced the complaint in a speech to the Economic Club of Canada Nov. 13 in Ottawa.

He noted, "Keurig is trying to please investors at the obvious expense of everyday coffee consumers. Canadians know we deserve an open market with real choice. We deserve innovation. And as Canadians, we have laws that can follow through with action."

The K-cup case engages the issues of product design and interoperability of after-market products of independent third parties into their machine. Keurig has announced plans to launch the new Keurig 2.0 brewer with "lock-out" technology to interact only with Keurig-licensed and approved K-cup packs.

Keurig is said to control 90 per cent of the North American market for the popular single-serve coffee pods. In Europe, Tassimo has the lion's share of the market. In Tassimo's case, the French competition authority found Tassimo was engaging in anti-competitive behaviour when it put locking technology into its machines.

Keurig's strategy has been to lock up all of the major brands of coffee under exclusive licence agreements, says Coffee Club's counsel Robert Russell, national chairman of the competition and foreign investment review group at Borden Ladner Gervais LLP.

The battle has been percolating for the last few years since key Keurig patents expired in 2012 and Club Coffee targeted the high-growth market. Building on its soft-bottom coffee pods for Keurig brewers, Club Coffee is said to be "weeks away" from rolling out a compostable pod designed to meet municipal organic waste standards. In a statement, Pigott noted competition led to cost savings for Canadians who paid an average of 40-per-cent less for each Club Coffee-produced K-cup format pod than for Keurig licensed and produced equivalents.

"The commercial strategy of knowing you have a patent which has a limited lifetime which expired in the U.S. in 2012 is to get your strength while you have your monopoly on those consumables in the U.S. and that's what's happened as is set out in the statement of claim," says Russell.

Davit Akman, a partner with Gowling Lafleur Henderson LLP, suggests the case is "odd" citing the publicity of the initial filing of the $600-million lawsuit Oct. 1, and the speech by Pigott to the Economic Club — both considered "unusual in the competition context."

"Making serious allegations of anti-competitive conduct online, in the press, and in a public speech — that's unusual," says Akman. "There may also be questions about whether statements like that might amount to defamation and whether any protection would be accorded to such public statements."

Russell says it isn't unusual, especially in light of the civil action.

"We were asked if we were involving the Competition Bureau and so for the company to say that's what we're doing isn't that unusual," says Russell, adding Keurig has said disparaging things about Club Coffee's product such as it being stale, and a claim that the club pods would make Keurig machines malfunction is incorrect.

"There are a number of disparagements that are outlined in the statement of claim," he says.

So why has Club Coffee so publicly announced its Competition Bureau complaint?

"If I had to speculate I would say Club Coffee approached the bureau before it issued its claim and the bureau wasn't interested," says Akman. "It then issued the complaint trying to whip up publicity and has now very publicly taken the step of filing a formal complaint in an attempt to force the bureau to pursue this."

Russell confirms Club Coffee had gone to the bureau prior to the formal complaint.

The company ended up using a measure under s. 9 of the Competition Act that allows for the filing of a "six resident" complaint which is one way to compel the commissioner to start an inquiry. It requires six Canadian residents over the age of 18 to sign a document then send it into the bureau.

Under the act, the commissioner "shall" start an inquiry under those circumstances. Competition lawyers say typically a company wouldn't go the route of the six-resident complaint. Instead, it would quietly try and get the commissioner engaged from the inside.

It hits an area where anti-trust law has to be pretty careful about intervening, says Melanie Aitken, former commissioner of the Competition Bureau and co-chairwoman of the competition, antitrust, and foreign investment practice with Bennett Jones LLP in Washington, D.C.

"There could be some scope for a case but the bar for the plaintiffs is pretty high and it's likely to be an extremely fact-intensive inquiry with the real focus probably being on proving the effect is sufficient enough," says Aitken. "It's not problematic unless there is a real substantial lessening of competition."

Akman says it is not unusual for manufacturers, where their products might be used in conjunction with secondary products, to ensure the secondary products are compatible with their products and result in a positive customer experience.

"Consumers make choices all the time about which products they buy based on which other products can be used with them. For example, you might buy one smartphone instead of another because one smartphone gives you access to certain apps while the other does not," he says.

Law-Mart: Pick up a will with your TV at Wal-Mart

JEFF GRAY, The Globe and Mail, November 19, 2014

Walk into one of four Toronto-area Wal-Marts and in addition to the advertised "pre-Black Friday deals" that include discounted toys and flat-screen TVs, shoppers can also pick up a last will and testament drafted by a real, live lawyer.

Recently launched Axess Law has put itself among the most aggressive of a new breed of low-cost law firms by installing a bright-orange branded retail presence inside Toronto Wal-Marts over the past year, offering wills for just $99 and real-estate deals for $1,288, tax and other expenses included. The service is the first of its kind in Canada.

The law firm says the move has been so successful it is expanding the service to seven more Toronto-area Wal-Marts over the next six months, with a plan to move into Wal-

Mart Canada Corp. outlets across the country. The next location, at Toronto's west-end Dufferin Mall, is due to open in weeks.

"It's only a matter of time before you see our bright orange in Alberta and B.C.," Axess Law co-founder Mark Morris, 38, said in an interview.

The concept is not unlike accounting firms and travel agencies that have set up shop in various large retailers. But it is a still revolutionary step in this country's conservative legal circles.

The legal profession has long wrung its hands about how middle and lower-income Canadians are priced out of using traditional law firms, which charge hundreds of dollars an hour, sparking calls for lower-cost, more accessible services.

Meanwhile, some of the country's law societies are taking a serious look at rule changes, similar to those already in place in England and Australia, that would allow private investment from non-lawyers in law firms. Such a move, recently endorsed by the Canadian Bar Association, could see even more new entrants, such as Axess Law emerge and offer cheaper services, industry observers say.

Wal-Mart Stores Inc., fighting with Amazon and other online retailers, has suffered some disappointing quarters recently and just announced that it is laying off 210 employees mostly from its Canadian head office. But Mr. Morris says Axess Law has been exceeding expectations.

His firm offers Wal-Mart Canada shoppers a small range of simple high-volume "commodity" legal services that his eight lawyers and staff of 20 can find new ways to do more efficiently than traditional law firms. More complex matters, such as parking tickets or personal injury cases, are referred to outside lawyers.

Like Wal-Mart, the firm has a "low-price guarantee." On a busy day, Mr. Morris says his sites – open till 8 p.m. on weekdays – do an average of 10 wills or other legal documents a day. More than half of the business comes from real-estate deals, he says, and the firm may soon expand its offerings into other areas such as low-complexity "no contest" divorces.

His co-founder, Lena Koke, 35, compares her law firm to coffee chain Tim Hortons: "The type of law that we do right now are things that we can commoditize, that we know we can do perfectly, again and again. Similar to a Tim Hortons: You go to a Tim Hortons, you know you are going to get the same cup of coffee no matter where you go."

They pitched their retail law idea to Wal-Mart after getting to know the company through conducting legal work with mall developer Smart Centres Inc.

It may be a concept whose time has come. In the United States, Wal-Mart's related bulk-goods retail Sam's Club announced a deal to provide a limited range of legal services to customers in partnership with online legal service provider LegalZoom.com Inc.

Jordan Furlong, an Ottawa-based lawyer and legal industry consultant with Edge International, says Axess and others like it are shaking up a legal business that has operated with higher and higher costs, in contrast to cheap-as-possible Wal-Mart.

“Any law firm that operates inside Wal-Mart … has to offer extremely affordable services,” Mr. Furlong said. “But at the same time, it is going to be held to all the same professional standards as if they were on Bay Street. That’s not an easy combination to pull off.”

The Atlantic

What Makes a Good Employer?

When it comes to satisfaction at work, some Americans say that money isn't everything.

GILLIAN B. WHITE, The Atlantic, November 17, 2014

How do you feel about your employer? Seems like a simple question, but the answer isn't always clear-cut. Satisfaction with your employer can be a more involved concept, one that includes opinions about company culture and policies, feelings about how an organization treats its employees, and maybe even some thoughts on how the work your company does impacts the community or society.

The most recent Allstate/National Journal Heartland Monitor Poll asked Americans to consider this multi-faceted question in order to get a sense of how people really view the organizations that employ them. An overwhelming majority of people had mostly positive things to say about their employers. According to the poll, which surveyed 1,000 adults, 87 percent of respondents would consider their company or organization a good place to work, and would recommend it to others. And, 88 percent of people surveyed said that they believed in the mission and purpose of their company.

For example, Jennifer Cornelius, a data analyst at an insurance company in Alabama, says that she thinks of her employer as a good workplace. Why? Well, the fact that she can work from home helps—a lot. “The flexibility is a huge bonus,” says Cornelius. “I live about 45 or so minutes away from the office, it saved me fifty-odd dollars a week, just in gas.” The ability to work from different locations is also great for peace-of-mind Cornelius says, since workers know that they have more options when it comes to balancing their personal and professional lives.

But it’s not just saved gas money or the ability to work in her pajamas that has endeared Cornelius to her employer. She’s most proud of the health benefits package her company offers. The firm that Cornelius works for was recently sold: It changed hands from

Humana, a large, well-known insurer to a smaller, Chicago-based company. Instead of slashing the more expensive benefits package that was easily provided by Humana, Cornelius says the new owners "bent over backwards" to provide a comparable level of health care coverage. The fact that the new, smaller firm went out of their way to continue providing the same level of health benefits, which was important to workers, really made an impression on Cornelius.

When it comes to employee pride and affinity, size seems to matter. Companies with 100 or fewer employees had higher employer-approval ratings, with about 90 percent of their employees saying that their company was a good place to work compared with less than 80 percent for companies that had over 2,500 employees.

How is support for employers so overwhelming despite long hours and virtually stagnant wages? Even among part-time workers, some of whom openly expressed a desire for more hours, 84 percent of individuals still had positive opinions of their employers. Approval might be so high because some employees, like Cornelius blame the economy, more than their companies, for lackluster salary increases. "Would I like to be paid more? Absolutely. But do I think they can afford to pay me more? Not in the current climate," Cornelius said. "They're doing their best."

And money might not matter as much as you think. When given the choice between a job that paid less, but provided more flexibility, and a more highly-paid job that required more hours, more than two-thirds of respondents said that they would opt for lower pay. That puts the potential for more satisfied workers, even in difficult economic circumstances, in the hands of management, or at least it seems that's how employees feel. While some believe that employers don't have the capability to raise salaries right now, the majority of Americans said that even during these tough times, companies could still institute more flexible work schedules, which would produce happier and more productive employees.

Defence procurement staff struggle with burnout

David Pugliese, The Ottawa Citizen, November 23, 2014

Public servants overseeing billions of dollars of military equipment projects are facing burnout and poor morale and could be prone to error due to overwork, documents obtained by the Citizen reveal.

In addition, some 18 per cent of the civilian workforce in the Department of National Defence's procurement branch is eligible to retire by the spring, without penalty. That potential exodus of skilled employees "creates a significant risk to program execution," the documents note.

There are slightly more than 2,600 DND staff handling military procurements; future projects range from the acquisition of new search-and-rescue aircraft to ships and armoured vehicles.

The Conservative government plans to spend tens of billions of dollars on new gear for the Canadian Forces over the coming years.

But the procurement branch's human resources plan for 2014/2015 outlines the problems the group faces.

"Heavy workloads, long-term high stress levels and waning morale, resulting in increased sick leave usage (and) employee burnout increase error rate and labour relations issues," noted the plan.

A limit on the ability to hire new staff is another problem.

In addition, the procurement branch's business plan points to a lack of funding. For fiscal year 2014-2015, DND's procurement organization needs $3 billion for its purchases. But the plan, prepared by John Turner, assistant deputy minister for matériel, pointed out that it has been allocated only a little more than $2.3 billion.

There is no indication how DND will handle the shortfall in funding.

Both the human resources document and the business plan were leaked to the Citizen.

DND spokesman Daniel LeBouthillier said in an email that the human resources report is a planning document that does not reflect the current state of affairs in the procurement group.

"The plan refers to morale issues as an area of risk for the future state of the group, not as a current situation," his email stated. "Intent of the Plan is to identify steps and actions required to avoid that future state."

LeBouthillier added: "The Department of National Defence and the Canadian Armed Forces is committed to focusing on the importance of creating a productive and supportive work environment through the implementation of developmental programs and learning/training activities."

The department will strengthen the procurement group's existing training and professional development programs and will put in place "succession management programs, ensuring an adequate intake essential to the success of the Materiel Group in the future," he said in his email.

But parts of the human resources plan do reflect the current situation, according to the documents.

The plan points out that there are current shortages in leadership levels in the procurement group. That is mainly due to high attrition rates.

The human resources plan also noted that large numbers of employees in the procurement branch have fewer than 10 years' experience, in addition to "limited leadership skills."

The Conservative government, DND and Public Works and Government Services Canada have been under fire for the past several years for what critics say is the bungling of billions of dollars of military purchases.

DND has countered with a new public relations strategy designed to downplay problems and focus on what the department considers equipment success stories, such as the purchase of new transport aircraft and the refurbishment of the navy's submarine fleet.