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Press Clippings for the period of November 27th to December 1st 2014
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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

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Ottawa nomme l'avocate Suzanne Côté à la Cour suprême du Canada

Hugo de Granpré, La Presse, le 27 novembre 2014

(Ottawa) Le gouvernement fédéral est allé piger dans les rangs du Barreau pour nommer la troisième juge du Québec à la Cour suprême. Suzanne Côté, une avocate du cabinet Osler, Hoskin & Harcourt à Montréal, succédera au juge Louis LeBel sur le banc de la prestigieuse cour, a annoncé le premier ministre Stephen Harper jeudi matin.

« Le gouvernement du Québec a été consulté dans un esprit de collaboration et dans le respect des compétences de chacun. Les deux gouvernements reconnaissent que Mme Côté est hautement qualifiée pour cette position », a précisé le bureau du premier ministre par voie de communiqué.

Originaire de la Gaspésie, Me Côté est diplômée de l'Université Laval. Elle se spécialise dans le domaine du litige commercial. Elle a pratiqué à Gaspé avant de se joindre et de diriger les départements de litige des firmes Stikeman Elliott et Osler, Hoskin & Harcourt, à Montréal.

C'est la première fois dans l'histoire canadienne que le gouvernement fait son choix parmi les avocates qui pratiquent au pays. Le seul cas féminin semblable est celui de Louise Arbour, nommée en 1999. Mais elle agissait alors comme procureure en chef du Tribunal pénal international pour le Rwanda et pour l'ex-Yougoslavie et elle avait siégé auparavant à la Cour d'appel de l'Ontario.

Un avocat de la métropole qui a été consulté par le gouvernement dans le cadre du processus de sélection a qualifié l'annonce d'« excellente nomination ». « C'est sans doute l'une des avocates les plus renommées au Québec. Elle a plaidé plusieurs fois à la Cour

suprême et elle a fait à peu près tous les plus gros litiges commerciaux à Montréal au cours des dernières années », a souligné ce juriste qui a requis l'anonymat.

Le grand public a pu la voir à l'oeuvre lors de la commission Bastarache sur le processus de sélection des juges du Québec, où elle représentait le gouvernement québécois de Jean Charest. Elle était chargée entre autres de contre-interroger l'ancien ministre de la Justice Marc Bellemarre.

Me Côté est d'ailleurs la deuxième juge à être choisie sans passer par le processus fédéral habituel pour siéger au plus haut tribunal du pays. Ce mécanisme créé en 2005 et qui se basait sur un examen des candidatures par des députés se réunissant à huis clos et en public, a été écarté dans la foulée de la nomination avortée de Marc Nadon.

Clément Gascon, un autre juge du Québec, a lui aussi été choisi en juin au terme ce processus de consultations informelles. « La décision du gouvernement a été prise au terme de consultations menées notamment auprès du gouvernement du Québec, de la juge en chef du Canada, du juge en chef du Québec, du juge en chef de la Cour supérieure du Québec, de l'Association du Barreau canadien et du Barreau du Québec », a précisé le bureau du premier ministre Harper.

Suzanne Côté est la conjointe de l'ancien bâtonnier Gérald R. Tremblay, lui aussi un avocat réputé au sein du cabinet McCarthy Tétrault à Montréal.

Sa nomination entrera en vigueur lundi. Le juge LeBel, qu'elle remplace, prendra sa retraite officiellement dimanche, jour de son 75e anniversaire et au terme d'un mandat de 15 ans à la Cour.

La nomination d'une femme fera sans doute pousser un soupir de soulagement à plusieurs observateurs et aux partis de l'opposition, qui ont fait pression sur le gouvernement depuis le départ de la juge Marie Deschamps, remplacée par Richard Wagner. L'autre juge du Québec, Clément Gascon, a succédé à Morris Fish.

Trois des neuf juges de la plus haute cour du pays doivent provenir de la province francophone.

PM picks Quebec lawyer Suzanne Côté for Supreme Court seat

SEAN FINE, The Globe and Mail, November 27, 2014

Prime Minister Stephen Harper named Suzanne Côté of Montreal to the Supreme Court of Canada today, raising the complement of women back to its high-water mark of four on the nine-member court.

Ms. Côté, Mr. Harper's seventh appointment on the nine-member court, is the first woman in the court's 139-year history to be appointed directly from the practice of law. Male litigators appointed to the Supreme Court include Ian Binnie and John Sopinka. Ms. Côté replaces Justice Louis LeBel, a liberal-minded judge appointed by prime minister Jean Chrétien who reaches the mandatory retirement age of 75 on Nov. 30.

Ms. Côté is a partner and head of the Montreal litigation practice at Osler, Hoskin & Harcourt LLP specializing in civil and commercial law.

Simon Potter, a Montreal lawyer and a former president of the Canadian Bar Association, said she will be a "strong and independent-minded judge. A battler with a mind and a will, with a strong sense of individual justice."

McGill University law professor Robert Leckey said Ms. Côté is known as an extremely aggressive advocate.

"Some people perceived her as needlessly pugnacious during the Bastarache Commission in 2010 [on judicial appointments in Quebec] when she was lawyer for the Charest government," Prof. Leckey said. "You probably need to take such comments with a grain of salt – some people would suggest that women are judged differently than men, starting from an assumption that women will be nicer or gentler than men. So one might at least ask whether a man acting as she did would be so quickly characterized as aggressive. Still, that would clearly be the description of her on the street, I think."

For the second Supreme Court appointment in the past five months, Prime Minister Harper allowed for no parliamentary input in the selection. The justice department, in documents tabled in the Commons this week, said the government is rethinking the process because of a breach of confidentiality in a previous appointment. That was a reference to a Globe and Mail story last May revealing that four of six candidates on a government list for a Supreme Court vacancy last fall were from an ineligible court.

While the Conservative government has criticized judges for not deferring to Parliament on social-policy issues, and Mr. Harper has expressed a wish for law-and-order judges, Ms. Côté's judicial philosophy is untested.

"It is striking that this is another nomination without even the somewhat perfunctory passage via the parliamentary committee," Prof. Leckey said.

From 2004 until last fall, a parliamentary committee had winnowed the government's list of candidates down to a short list of three, for the Prime Minister to choose from. And Mr. Harper was the first Prime Minister to put his nominees before a separate committee for a televised question-and-answer session in Parliament. That hearing, too, seems to be a dead letter, based on the justice department documents tabled this week in response to questions from Liberal MP Irwin Cotler.

The appointment of Ms. Côté, after three previous appointments from Quebec of men, may help Mr. Harper avoid controversy in Quebec City in an election year, although it departs from a tradition that one of the three Quebec judges on the Supreme Court come from Quebec City. The appointment puts to rest the notion that Mr. Harper would appoint Justice Robert Mainville, which could have led to a challenge at the Supreme Court much like the one last year in which Mr. Harper's choice, Justice Marc Nadon of the Federal Court of Appeal, was ruled ineligible by the Supreme Court in a 6-1 vote.

The court went 10 months with just eight judges until Mr. Harper named Clément Gascon as his replacement. Justice Mainville was, like Justice Nadon, on the Federal Court of Appeal, but the government attempted to move him to the Quebec Court of Appeal last spring. Toronto lawyer Rocco Galati, who challenged the Nadon appointment, also filed a lawsuit against the Mainville appointment, and a hearing at the Quebec Court of Appeal on its legality is to be held in December.

Key questions in light of Supreme Court Justice Côté's appointment

SEAN FINE, The Globe and Mail, November 28, 2014

Eight years ago, Prime Minister Stephen Harper created the first U.S.-style parliamentary hearing in which legislators could ask questions of the newest judge on the Supreme Court of Canada.

Today, those hearings appear to be a relic of the past. This week, Mr. Harper appointed Montreal lawyer Suzanne Côté, 56, to the court, but will not hold a hearing for her.

It was the second appointment in six months with no hearing – and the government blames The Globe and Mail.

Why did Mr. Harper create the parliamentary hearing for Supreme Court nominees in the first place?

He said he wished to make the appointment process more open.

"This hearing marks an unprecedented step towards the more open and accountable approach to nominations that Canadians deserve," he said just before the first hearing in 2006, with Justice Marshall Rothstein of Manitoba.

What was the government's stated reason for cancelling the hearings?

A document signed by Justice Minister Peter MacKay and tabled in the House of Commons in September said a Globe article in May "purported" to reveal the names of candidates considered for a previous Supreme Court vacancy. (The article showed that four of the government's six candidates for a Supreme Court job were ineligible.) "As a result of this," Mr. MacKay said, "the government chose not to constitute a Selection Panel, nor to arrange for an ad hoc parliamentary committee" for the appointment of Justice Clément Gascon in June.

Is there another possible explanation?

Revealing the names on a government short list has nothing directly to do with a parliamentary hearing at which a new judge is asked questions. According to a senior judicial source, the government is worried about tough questions being asked in public of its choice for the court. When there was a parliamentary selection committee, the opposition parties participated and had a stake in the Prime Minister's ultimate choice. Now that they are no longer involved in the selection process, the opposition would have more reason to ask critical questions.

What is the legal community's response?

"We're moving in the wrong direction in terms of making that process more transparent and understandable, a process that would build confidence in the system," said Michele Hollins, president of the Canadian Bar Association, representing 37,000 lawyers.

What were the politics behind the Prime Minister's choice of Ms. Côté?

There was pressure to appoint a woman – until now, just one in seven of his Supreme Court appointments (including the failed appointment of Marc Nadon) was a woman. It's an election year, and the government hopes to make some gains in the Quebec City area. Plus, there's a tradition that one of the three Quebec judges on the Supreme Court is from Quebec City. But that city's two full-time female judges on the Court of Appeal, Justice Julie Dutil and Justice Dominique Bélanger, both with excellent reputations, are perceived as small-l liberal. Mr. Harper didn't think much of the province's legal community when he put four judges from the Federal Court in Ottawa on his list of six candidates a year ago. Ms. Côté, who practises business law and is widely respected in the legal community, was a low-risk option.

What should people expect of Ms. Côté as a judge?

Where she stands on government attempts to limit judicial discretion in sentencing, or on the role of judges in defending Charter rights, isn't known. She is said to be independent and extremely curious – not someone who takes the well-trodden path. Whether she will be the conservative dissenter Mr. Harper has been looking for (Justice Nadon was described as a "vocal arch-conservative" in a book by a judicial colleague's wife) remains to be seen.

The Prime Minister has appointed a majority of the Supreme Court judges. How has that worked out for him?

Not well. The Conservative government is coming off an annus horribilis at the Supreme Court. A conservative thinktank just reported that the year had more big decisions than any year in recent memory – and of the 10 biggest, the government was a clear winner in just one. He has chosen conservative-leaning judges such as Justice Richard Wagner of Quebec, whose late father Claude was once a Progressive Conservative leadership candidate, and Justice Michael Moldaver of Ontario, who in a speech once blasted defence lawyers, saying they were trivializing the Charter of Rights. But most big decisions from the Supreme Court, including on criminal law, have gone unanimously against the government.

New appointee to Supreme Court won't face questioning from MPs

Ian MacLeod, The Ottawa Citizen, November 27, 2014

The government says its new Supreme Court appointee will head directly to the bench without appearing before a parliamentary committee first for questioning.

Prime Minister Stephen Harper Thursday appointed highly respected Montreal civil trial lawyer Suzanne Côté to fill a Quebec vacancy on the court created by the departure of Justice Louis LeBel, who hits the mandatory retirement age of 75 on Sunday. Côté is Harper's seventh Supreme Court appointment since taking office in 2006.

She also is the second female justice appointed by Harper and the ninth since the court's first female jurist, Bertha Wilson, took her seat in 1982. Côté's selection brings the institution back to its historic high of four women on the nine-member panel.

She's the first woman appointed to the court directly from private practice.

Côté is described as one of the most experienced litigators in the country, with extensive expertise in civil and commercial litigation over a 34-year career. She most recently headed the Montreal litigation group at Osler, Hoskin & Harcourt LLP. The legal community and Supreme Court observers praised her appointment.

Still, why has Harper chosen her? The country may never know.

The Conservative government won't invoke its onetime practice of having Supreme Court appointees go before a televised parliamentary review committee and introduce themselves to the nation.

That review, though toothless, was the final bit of openness remaining in the secret process of selecting nine of the most important people in the country. The Conservative government in 2006 abandoned a series of transparency reforms introduced by the previous Liberal government.

Until recently, it retained the reform of requiring nominees to appear before an ad hoc committee of MPs to answer questions about their backgrounds, values and beliefs. But the government appeared to scrap that practice, too, after the Supreme Court selection fiasco that ended with the June appointment of Justice Clement Gascon.

"This doesn't change anything; the process, regrettably, remains at this point much less transparent than what it had been," said Liberal MP and former justice minister Irwin Cotler, who spearheaded the Liberal reforms.

The secrecy in the Côté appointment is compounded by her not being elevated from a superior or appellate court. She has authored no lengthy legal judgments that might offer insights about her philosophy and outlook on the world or the perplexing issues she will face on the top court.

On the other hand, her private-practice background may be an asset. Her fresh and extensive experience as an in-the-trenches practitioner should be a welcome addition to a bench populated by career and long-time magistrates. The last Supreme Court justices to come directly from private practice were justices John Sopinka and Ian Binnie. Both became highly influential forces.

"Clearly, she is very, very well qualified," said Benjamin Perrin, a former legal adviser to the prime minister and now a University of British Columbia law professor.

"Most of the Supreme Court of Canada judges who practised law did so in a very different era and things have changed remarkably at the trial level in courts across the country. It's good to have a Supreme Court judge who can bring that perspective. "

Still, "it's a bit of risk for them, to take a chance on someone like this. You don't know how they will perform as a judge, it's a new job, there's a big learning curve."

The government wanted to avoid a repeat of the disastrous handling of the 2013 appointment of Marc Nadon. The Supreme Court Act stipulates a Quebec lawyer, or Quebec superior or appeals court judge with a knowledge of Quebec's civil code, is eligible to fill the court's three Quebec seats. But Nadon was a Federal Court of Appeal judge from Quebec. The Supreme Court, in a 6-1 decision, found Nadon's appointment contrary to the act and barred him.

The government also was pressured to appoint a woman. Combined with the act's limits on eligible candidates, that meant a considerably reduced pool of potential candidates,

even before any possible political or ideological considerations might be applied by Harper.

However, the government says it did seek a variety of views. That included consultations with Quebec; Chief Justice Beverley McLachlin; the Chief Justice of Quebec; the Chief Justice of the Quebec Superior Court; the Canadian Bar Association and the Barreau du Québec.

Suzanne Côté: At a Glance

– Originally from the Gaspésie, Côté has a law degree from the Université Laval and has lectured at the Université du Québec à Rimouski and the Université de Montréal.

– Côté has headed the Montreal litigation group at Osler, Hoskin & Harcourt LLP. She is described as one of the most experienced litigators in the country, with extensive expertise in civil and commercial litigation.

– Her commercial litigation practice includes: breach of commercial contracts, representation of banks, bankruptcy and insolvency, shareholder disputes, the Competition Act, and various real estate matters including commercial leasing, manufacturer's liability and class actions.

– She also litigates in civil and administrative matters, such as judicial reviews before the federal courts and the investigation conducted by the Québec Court of Appeal regarding the removal from office of a judge of an inferior tribunal. She has also appeared before the Supreme Court of Canada.

– Côté represented the government of Quebec at the Bastarache commission inquiry into allegations of influence-peddling in the nomination of municipal and provincial court judges in Quebec.

– She successfully represented Jean Pelletier, former chief of staff to prime minister Jean Chrétien, who sued Via Rail in 2007 for his "cavalier" firing as chairman of the railway. A Quebec judge ruled that the government and Via Rail must repay Pelletier $235,161.74 in lost income, plus interest, in addition to $100,000 in moral damages to be paid by the government.

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thestar.com

Harper government tosses aside openness at Supreme Court: Editorial

In naming Suzanne Côté to the Supreme Court, Prime Minister Stephen Harper tossed aside a decade of attempts to open up the process of naming top judges.

Toronto Star Editorial, December 1st, 2014

On the face of it, Prime Minister Stephen Harper's latest appointment to the Supreme Court of Canada looks just fine. Suzanne Côté is said to be one of the top trial lawyers in Quebec – tough-minded, independent and vastly experienced. As a woman, her appointment also restores the top court's gender balance.

But in naming Côté, Harper unilaterally tossed aside a decade of attempts by all parties, and both Liberal and Conservative governments, to bring more openness and accountability to the important process of choosing the country's most senior judges.

Instead, Harper reverted to the old practice of making Supreme Court appointments the sole prerogative of the prime minister – with any consultations done in secret and no opportunity for members of Parliament to review or question his choice. This is the second time Harper has handled a court appointment this way: he did the same thing last spring when he named Clément Gascon to the high court.

Harper and his justice minister, Peter MacKay, appear to be doing this for the worst of reasons. Essentially, they're in a snit because they bungled the appointment of Marc Nadon so badly last year, and that was followed by an ugly spat with Chief Justice Beverley McLachlin and embarrassing leaks about their short list of Supreme Court candidates.

Their solution is to ditch long-standing promises to consult more formally and more widely on appointments, and to give MPs a chance to question nominees. That was done successfully with at least two previous appointments. In fact, it's been 10 years since efforts began under the Paul Martin government, with agreement from all parties at the time, to bring more accountability to the process of naming new members of the Supreme Court.

Now, says Liberal MP and former justice minister Irwin Cotler, it's back to the old ways. "Under the Conservatives," he says, "we've had a serious regression to a process that is secret, unaccountable and unrepresentative."

This is particularly unfortunate at a time when the Supreme Court has never been more influential in our public life. A conservative think tank, the Macdonald-Laurier Institute, even named it last week as "policy-maker of the year" for important decisions on issues ranging from aboriginal rights to the government's attempt to create an elected Senate.

A more open process for naming judges would increase public confidence in this vital institution. The Conservatives once agreed with that and even worked towards it. Now, though, the Harper government has turned back the clock. That doesn't serve the public interest – or the court.

Chief Justice McLachlin wanted another woman on the court

'Gender politics don't play a role once you get beyond a certain number,' chief justice says

John Geddes, MacLean's, November 27, 2014

Prime Minister Stephen Harper's announcement this morning naming a woman—Montreal trial lawyer Suzanne Côté—as his choice to fill the latest Quebec vacancy on the Supreme Court of Canada will come as welcome news to the country's top judge.

Just four days ago, in a rather informal speech to a business audience after a breakfast at Ottawa's City Hall, Supreme Court Chief Justice Beverley McLachlin spoke candidly about her personal preference for more women on the court, offering a nostalgic anecdote—told with a touch of a passable Scottish brogue—about the late Bertha Wilson, the first woman to sit on Canada's highest bench.

McLachlin, who is the first woman and longest-serving chief justice in the Supreme Court's history, was appointed to the court in 1989. At the time, that made her the third woman on the court. Here's what she had to say on Monday morning about that moment, and more generally about why she likes the idea of more women on the court over which she has presided as chief justice since 2000:

"Of nine justices, presently three are women, and six are men. We haven't made quite as much progress as I'd hoped. When I was sworn in, I became the third woman on the court, and Bertha Wilson—some of you will remember her, wonderful, feisty lady with a

Scottish accent—she leaned over to me at the ceremony, she says, 'Three down, six to go.' "

McLachlin got a big laugh by switching to an r-rolling Scottish accent when recounting Wilson's remark. She went on to explain more seriously how she sees the male-female dynamic on the court actually fading as it gets closer to gender balance:

"That may have scandalized some of the men. But we're still at three. We got up to four for a while. We'll have a new appointment coming soon. So, who knows, we may get back up to four, we may not.

"But I, as a woman, find the presence of at least a third of the court being women to be a very good thing. It changes the atmosphere. Gender politics don't play a role once you get beyond a certain number, and we're just colleagues deliberating on difficult issues that are brought before us."

And now we know the roster of women on the court will indeed be, as McLachlin hoped, back to four. Harper's nominee to replace the retiring Justice Louis LeBel, Suzanne Côté, currently heads of the litigation group in Montreal at the prominent law firm Osler, Hoskin & Harcourt LLP. She will be the first woman from private practice to be directly appointed to the Supreme Court of Canada.

Suzanne Côté: 5 things about Canada's newest Supreme Court justice

Canada's new top judge defended big tobacco and became a boss in a law firm while she was still an articling student

Peter Edwards, Toronto Star Reporter, November 27, 2014

Meet Suzanne Côté, who will fill the seat on the Supreme Court that will open up with Sunday's retirement of Justice Louis LeBel.

Here are five things about our newest top judge:

1. Started Young

She has been quoted as saying she wanted to be a lawyer since around age 11, when she liked to read tabloid accounts of high-profile trials while growing up in eastern Quebec's Gaspé Peninsula. Her mother wanted her to be a teacher.

She bought half of her employer's law firm while an articling student from Université Laval. It was just a tiny firm in Gaspé but it was an early lesson in management and the law.

2. Veteran of high-stakes cases

She is a partner and head of the Montreal litigation group at Osler, Hoskin & Harcourt LLP. Before that, she was section head of the litigation team at Stikeman Elliott LLP in Montreal for nine years.

She defended Imperial Tobacco during a class-action lawsuit in 2012, when she argued that the public has been aware of the dangers of smoking since the 1960s and that the federal government "is directly implicated in all aspects of the industry, from cultivation to production to marketing."

Côté served as independent counsel in the Canadian Judicial Council inquiry into the Lori Douglas affair. Douglas, then Associate Chief Justice of the Court of Queen's Bench of Manitoba, was embarrassed when her lawyer/ husband admitted posting nude photos of Douglas on a website and trying to lure a client to have sex with her.

Côté also represented the government of Quebec in the 2010 Bastarache Commission inquiry into judicial nomination in the province.

3. Will make nice salary, but not Bieber bucks

Côté stands to make $358,000 plus benefits when she takes the post on Monday.

4. Highly rated

Côté was named as a "2011 Client All-Star" by BTI Consulting, Inc. Very few Canadian lawyers achieve "all-star" status from the American rating firm.

5. Balked at Politics

Côté has been quoted as saying she was pushed to go into politics while a young lawyer, but declined. She didn't say who was pushing. She did represent Jean Pelletier, former chief of staff to Prime Minister Jean Chretien, after he was fired as Via Rail Chairman.

Supreme Court named 'policymaker of the year'

IAN MACLEOD, OTTAWA CITIZEN, NOVEMBER 27, 2014

A string of landmark legal decisions has distinguished the Supreme Court of Canada as the nation's "Policy Maker of the Year," the Macdonald-Laurier Institute says.

Over the past 12 months, the court has made 10 major rulings with significant implications for law and policy, the Ottawa public policy think-tank says in a report analyzing the court's performance over the past year. These include: aboriginal title and treaty rights; prostitution laws; the appointment of justices to the court from Quebec; security certificates and protection of spy service informants; Internet privacy; undercover police operations; and sentencing.

The court has also inoculated itself and the Senate from any institutional changes without unanimous parliamentary and provincial approval.

The decisions "fundamentally affect the way that Canadian democracy functions, the relationship between the Crown and First Nations, including involving resource development, limits on police investigative tactics and decisions on controversial criminal law issues," the institute concludes.

"One would be hard-pressed to find another actor in Canada who has had a greater impact on such a wide range of issues than the Court has in the last year."

What's more, eight of the 10 cases were decided unanimously and dissenting opinions were rare, revealing "a remarkably united institution with consensus decisions on these significant cases being the norm."

The cases also contradict any notion that Prime Minister Stephen Harper's appointments of six Supreme Court justices since 2006 has "stacked" the court in the government's favour.

Authored by Benjamin Perrin, a former legal adviser to Harper and one-time Supreme Court clerk, the report notes that of the 10 major cases, the Conservative government, and by extension parts of its crime agenda, has an "abysmal record" with just one clear win: the July decision in Grassy Narrows First Nation v. Ontario, which dealt with commercial logging. (The judgment ruled the Ontario government has wide, but not unconditional, jurisdiction over natural resources. The court also sided with the federal government's position.)

The consequences of the government's losing streak "will likely be of enduring significance," says Perrin.

"If the norm becomes a united court handing down losses to the federal government, there is a risk of increasing tensions and frustrations by the federal government where the Supreme Court of Canada is viewed as an impediment to legal and policy reforms – this would not be healthy for our democracy or the proper functioning of either body," writes the University of British Columbia law professor and senior fellow at the institute.

With more high-profile, controversial issues such as euthanasia, polygamy, the right to strike, the fate of long-gun registry data from Quebec and the constitutionality of a raft of new justice and immigration laws destined for decision by the court in the coming months and years, "time will tell whether Canada has entered a 'legal cold war' or if this has merely been a long, cold winter for the federal government."

Perrin singled out the leadership of Chief Justice Beverley McLachlin. In all of the 10 major decisions, she wrote for either a unanimous court or a majority of the judges.

Q and A: Benjamin Perrin on the influence of Canada's top court

BY IAN MACLEOD, OTTAWA CITIZEN NOVEMBER 27, 2014

The Supreme Court of Canada has been named "Policy Maker of the Year" by the Macdonald-Laurier Institute. Benjamin Perrin, associate professor of law at the University of British Columbia, tells the Citizen's Ian MacLeod why.

Q: Is there a fundamental shift in values between the court and the federal government?

A: That remains to be seen. The court has definitely demonstrated a willingness to entertain cases before it that it has previously decided differently. The court had previously decided that our prostitution laws (were), in fact, constitutional. The litigants (now) come forward with a different angle on it, they argue some different charter rights and bring in some new evidence, and the court is willing to change its mind.

Will it do the same thing on something like assisted suicide (the constitutionality of which the court is currently deliberating)? It's already decided that issue previously, too.

It shows that the lifetime in which we live, we will likely see major changes in the court in terms of its decisions.

Q: Was there a runner-up for Policy Maker of the Year?

A: We looked at how many pieces of government legislation have passed within the last year that are of broad significance, and (Parliament) came close, but many bills have been introduced but very few of them have been passed yet. And so, ultimately, the court emerged as the preferred candidate.

The impact of their decisions on policy is undeniable and it's important to recognize the significance at this stage in our history that the court is playing and likely will play because of such a huge number of additional, high-profile cases.

Q: In the next 12 months, is there a particular case that has the potential to be the blockbuster decision of next year?

A: The mandatory-minimum (sentencing) challenge that the court recently heard, this is going to be big test for the federal government. (Editors's note: The government's Truth in Sentencing Act attempted to curb the practice of giving offenders extra credit for time spent in pre-sentence custody by allowing it only in "exceptional" circumstances.)

Historically, the court has been very mindful of mandatory-minimum penalties for serious and violent crime and has affirmed them.

It will be interesting to see whether it will insist on higher levels of judicial discretion in sentencing, which could have much more broader impact on the government's criminal justice agenda.

Q: What does this string of losses say about the government's ability to argue successfully before the court?

A: This is a very troubling report for the federal government, for the justice department, the director of public prosecutions and the ministers who were instructing these cases. Are they getting bad advice, or are they getting advice that's good and are simply not following it?

There's a strong argument that the federal government should be intervening in important cases with respect to the government's agenda, at earlier (trial) stages and doing other proactive things, too.

If the government is serious about the legacy of its agenda being sustained for some time, it needs to pay more attention to the role of the courts (especially lower courts) in either supporting or striking down its agenda and understanding more clearly what are the legal risks of these new laws.

– This interview has been edited for length and clarity.

Court case anonymity: A noble idea whose time has passed

DENISE BALKISSOON, Contribution to The Globe and Mail, November 27, 2014

Denise Balkissoon is a Toronto writer and editor-in-chief of The Ethnic Aisle. She is on Twitter @Balkissoon.

On Monday, the second of three young men accused of distributing child pornography began his trial in a Halifax court. It's a huge case, involving photos taken of the gang rape of a teenaged girl, who was later harassed incessantly by her peers and eventually took her own life. Despite the photos, no one was ever charged with her assault. The fate of these boys, also teens when the attack occurred, is the only opportunity for any justice.

Last year, widespread outrage at insensitive police handling of the case meant the girl's name was all over the Internet, on both news sites and social media. Once charges were finally laid, the Criminal Code kicked in. To protect her identity and the identities of the accused, publishing the 17-year-old girl's name is now illegal. Even if it's seared in our minds, we're supposed to separate what we knew then from what's happening right now.

This has made coverage of the trials confusing and incomplete. The girl's parents have been using her name all over Twitter and Facebook, their supporters wearing t-shirts emblazoned with it to court. That can't be accurately reported without breaking the publication ban and risking legal sanction. American media, including Slate and the Huffington Post, is doing it anyway, giving outside journalists the chance to tell the story with more nuance than in Canada.

On Monday evening, the Halifax Chronicle-Herald put a story up online using the girl's name and citing this frustration as the reason. "It is difficult for readers to follow a news story when the name associated with it is omitted, and we want to inform Nova Scotians…." read the editor's note, which promised future rape victims would be anonymous.

Meanwhile, in Winnipeg, the parents of 16-year-old Rinelle Harper decided to release her name after their daughter was beaten, raped and left for dead in early November. Their decision seems to have helped police arrest two men for the crime, as well as connect them to another victim. Justin James Hudson, 20, is one of the alleged attackers; the other is a teenager, and so must go unnamed. Again, legacy media has followed the rules while Facebook users haven't. It took me less than ten minutes to find the youth's name in legions of posts showering both of the accused with hatred.

Anonymity isn't the end game. It's a legal tactic meant to prevent one incident from overshadowing the entirety of someone's life. There are three main reasons for publication bans in Canadian trials. The first is to keep eventual jury members unbiased. In adult cases, this type of ban usually covers only pre-trials, not trials, and so doesn't especially affect the right of the public to know how justice is served.

The second reason is to protect sexual assault victims from having their histories and violations dissected in public. It's a provision that victims' rights organizations fought long and hard for, since sexual crimes have often shamed the victim even more than the accused. But lately, in the wake of accusations against Jian Ghomeshi and Bill Cosby, scores of assault survivors across North America have decided it's time to be named.

A deluge of women refusing to wear the stigma of victimhood seems to be forcing results. A number of universities in Canada and the United States have publicly declared an intent to address the disease of sexual violence on their campuses, even standing up to the overwhelming financial and alumni power of fraternities. Here, too, it's the reaction to a breach of anonymity, rather than the breach itself, that matters.

The last goal of legal anonymity, as set out in the Youth Criminal Justice Act, is to give young people a chance to escape the shadow of early mistakes. It's a noble idea – the Canadian Paediatric Society says under-18s don't have the moral, ethical or cognitive ability to conceive of crime the way adults do – and it's rarely worked well in real life. Facebook is only the newest face of the public commons. Accused and accuser have always been hurt the most by whispers and shouts in their own community, and that rapid-fire gossip existed centuries before the Internet.

Perhaps recognizing the grey – and less Googleable – area between official news stories and social media innuendo, Halifax police announced in mid-November that they wouldn't be laying charges in seven mystery "files" that breached the publication ban in the child pornography trials. There's been no statement yet on whether the Chronicle Herald will face charges for its purposeful breach.

The young alleged criminals in Halifax and Winnipeg may never escape the judgment of friends and enemies, but they could appear fresh to future employers if they move out of their hometowns. As for the victim, she's gone forever. Her case will set a legal precedent in the digital age of just how heinous it is to pass around photos of someone else's humiliation, and let us know just what her life meant to the country at large. Let's never forget her name.

Update: New Sick Leave Offer Proposed

The Public Servant website, November 24, 2014

Last week, discussions resumed between the government and union leaders on the topic of public servants' sick leave.

The original offer that was proposed:

- end the accumulated sick leave bank, as currently, public servants can carry over unused sick days to the next year. Unused days would now disappear at the end of every year;
- reduce annual paid sick leave from 15 days to 5 days, or 37.5 hours that could not be carried over; and
- introduce an unpaid 7 day waiting period before qualifying for new short-term disability benefits.

In the United States, public servants working for the federal government get 13 days/104 hours that can be carried over.

(Click here to see the sick leave benefits for public servants in the USA).

By Wednesday night, the media was already reporting on a new, second proposed offer. On Friday, the official "Short Term Disability Plan" document was posted on the Public Service Alliance of Canada's website. The second proposal would start on September 1, 2016 and now consists of:

- still ending the accumulated sick leave bank but introducing a new formula that will allow employees with accumulated sick leave to convert it into credits that can be used to top up benefits from 70% of salary to 85%; then in September 1, 2018, "top up credits" banked would be eliminated and any reference to "top up credits" and its usage would be eliminated from the collective agreement;
- reduce annual paid sick leave from 15 days to 6 days, or 45 hours which employees would get at the start of every fiscal; employees who don't use their 6 days of sick leave could carry them over 1 day a year to a maximum of 7 days; and
- the "top up credits" could be used to top-up short-term disability benefits (or bridge the unpaid 7 day waiting period for disability).

NATIONAL NEWSWATCH

‘Death by a Thousand Cuts:’ Memo to PM questions across-the-board budget cuts

National Newswatch, Bruce Cheadle, Canadian Press, November 26, 2014

OTTAWA - Prime Minister Stephen Harper was briefed earlier this year on how across-the-board budget cuts hurt public service morale, productivity and citizen satisfaction.

The memorandum — headlined "Death by a Thousand Cuts: How governments undermine their own productivity" — laid out arguments from an Australian, union-funded study that suggests poorly executed austerity undermines trust and confidence in public institutions.

The Conservative government is on track for a budgetary surplus in 2015 after years of belt-tightening.

Billed as "back office" or administrative cuts by Conservatives, the ongoing austerity measures are supposed to shrink departmental budgets without affecting programs or services — a promise the independent parliamentary budget office has been unable to verify even after taking the government to court in a fruitless effort to get a full public accounting.

But the cumulative impact of all the cuts has begun attracting wider notice.

Military veterans are incensed over the closure of Veterans Affairs offices and lapsed funding, First Nations have learned that funding for critically needed infrastructure has been diverted, transportation safety budgets have been slashed, Coast Guard stations have been closed and services across government — from national parks to access to information — are being squeezed.

In a Jan. 27 memorandum to the prime minister, obtained under the Access to Information Act, the Clerk of the Privy Council briefed Stephen Harper on how austerity measures were being assessed in Australia.

"The authors found that prolonged cuts of this nature result in a loss of workforce capability, public sector productivity and innovation, and trust and confidence in public sector institutions," states the memo.

The memo details how public trust is undermined "as programs become less efficient and effective in the wake of across-the-board cuts, and as mistakes and oversights occur."

The study recommends that a better way to trim costs is by using efficiency audits of departments and by engaging staff to find effective and efficient new ways of delivering programs and services.

As the memo summarizes the Australian study, "skills shortages are having a significant impact on government operations, resulting in higher costs for recruitment and training over time, the appointment of more expensive private sector contractors for information technology, and diminished procurement expertise."

Large portions of the four-page memo are blacked out.

The Prime Minister's Office says it receives many memos and would not comment on the views in the Australian study.

"I will say that our government is proud of the steps we have taken to trim the size of government bureaucracy and ensure that tax dollars are being spent on programs and services that benefit Canadians," spokesman Jason MacDonald said in an email.

The full, 29-page Australian report was attached to the memo. It is rather more unsparing than the overview provided by the Privy Council.

"Increasingly, governments are choosing to take an irresponsible, and ultimately self-defeating, approach to budget savings," says the opening paragraph of the report, prepared by the Centre for Policy Development, a self-described progressive think tank.

"Rather than identifying ineffective programs and undertaking the political hard work of persuading the public of the advisability of cancelling the service, many politicians and parties institute across-the-board cuts .... This allows them to claim credit for budget savings without taking responsibility for service cuts."

The study, based on austerity measures taken by national and regional governments in Australia, notes that politicians habitually claim cuts will be efficient and painless.

"In practice, however, claims that administrative budgets can be cut without affecting services are likely to be made only by politicians who have evaded explicit and responsible government decision-making, or want to evade it, or who are prepared to re-define services in order to evade it."

Emmanuelle Tremblay est élue présidente de l'ACEP

Paul Gaboury, Le Droit, le 25 novembre 2014

Les trois principaux syndicats du secteur public fédéral seront désormais présidés par des femmes.

Les membres de l'Association canadienne des employés professionnels ont élu Emmanuelle Tremblay comme leur nouvelle présidente, pour un mandat de trois ans. Le scrutin électronique a eu lieu entre le 3 et le 21 novembre.

Mme Tremblay est analyste principale à Affaires étrangères, Commerce et Développement Canada.

Après Robyn Benson, présidente de l'Alliance de la fonction publique du Canada, et Debi Daviau, présidente de l'Institut professionnel de la fonction publique du Canada, elle devient ainsi la troisième femme élue pour diriger un des trois plus importants syndicats du secteur public fédéral.

L'ACEP représente 12 500 économistes, employés en sciences sociales, traducteurs,interprètes et analystes.

Budget watchdog open to legal action against revenue agency

Kathryn May, The Ottawa Citizen, November 25, 2014

Canada's budget watchdog suggests that going to court may be his next step if the federal tax agency doesn't turn over by the end of the week the information he wants to help determine federal revenue lost through tax evasion.

Jean-Denis Frechette took up the battle for information from the Canada Revenue Agency when he became the country's second parliamentary budget officer a year ago. He adopted a strategy to be more "collaborative" than his aggressive predecessor, Kevin Page, in finding solutions to the intractable problem of getting information out of departments.

But this week, Liberal Sen. Percy Downe, fed up with the delays and obstacles in getting the data, challenged Frechette to exercise his "full authority" under the law and take CRA to court to get the information.

In a letter, Frechette cautiously signalled that legal action is an option. He said he was waiting for a response from CRA about changes his office made to a data-sharing agreement proposed by the tax agency. If he doesn't get a "satisfactory" response by the end of the week, Frechette said he will be "happy" to consider Downe's advice.

"Should I not receive a response or should the response not prove satisfactory, I will be happy to discuss the terms of your letter, including timelines, strategies and the finding required to advance this issue at your earliest convenience," Frechette wrote.

Two years ago, Downe asked the PBO to calculate the economic impact of tax evasion after leaked client lists of banks in Liechtenstein and Switzerland showed Canadians had millions in offshore accounts. That request has evolved into an inquiry to calculate Canada's tax gap: the difference between what's owed and what's collected.

Many tax agencies in other OECD countries use the tax gap as a way of measuring performance and to get a handle on how many people aren't paying their fair share of taxes. The CRA, however, has insisted it doesn't calculate the tax gap because it would be inaccurate and "of limited utility." The PBO has since been trying to get the data to do an estimate of its own of the tax gap.

Downe's request turned up the pressure on Frechette, who has made "defending and clarifying the legislative right" of the PBO to information one of his top strategic priorities, even while pursuing a more co-operative approach than Page, who became a thorn in the government's side. Some argue the office's reputation and quality of analysis is at stake, particularly when so much time and effort is spent fighting for information.

Page took the government to court after the Conservatives accused him of overstepping his mandate when he couldn't get information on the nature of 2012 budget cuts. That ruling set the stage for the PBO to go back to court after it has exhausted all "parliamentary remedies" to get the information it needs to help parliamentarians hold the government to account.

Since then, Frechette has been working on those remedies, which have included meetings with the parliamentary librarian, the Speakers of the Senate and House of Commons, and parliamentary committees, but with little success.

Downe said Frechette's approach isn't working and it's time to take legal action if he doesn't get the information he needs.

"Indeed if he doesn't receive a positive reply on Friday, the next thing I want to hear from him is that he launched his court action," the senator said.

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Projet de loi omnibus C-43: le NPD craint un excès de pouvoir des ports

Annie Mathieu, Le Soleil, le 25 novembre 2014

(Québec) Le Nouveau Parti démocratique (NPD) s'inquiète des changements à la Loi maritime du Canada inclus dans le projet de loi omnibus C-43, changements qui auraient pour effet d'augmenter les pouvoirs des administrations portuaires.

Si la division 16 de ce mégaprojet de loi déposé en février semble avoir été rédigée pour faciliter la réalisation de projets gaziers en Colombie-Britannique, comme s'en sont réjouis des observateurs, l'opposition officielle craint qu'elle ne renforce l'autonomie déjà grande des ports de tout le pays, incluant Québec.

Un ajout à l'article 46 de la Loi maritime permettrait ainsi aux ports de procéder plus facilement à l'acquisition d'immeubles fédéraux et à la location d'espaces, dans la limite du respect de leurs lettres patentes.

Raymond Côté, député fédéral de Beauport-Limoilou, croit que cela pourrait permettre à des ports d'en acquérir d'autres et de les gérer désormais. Le politicien donne l'exemple du port de Québec, qui pourrait être tenté de mettre la main sur celui de Gros-Cacouna, selon son évaluation.

On sait déjà que les deux organisations explorent des pistes de collaboration, mais il n'a pas été question d'acquisition ou de fusion.

Les autres modifications concernent la possibilité d'ajouter des règlements pour les entreprises situées en territoire portuaire. Le gouvernement veut en effet accorder aux administrations portuaires le pouvoir d'édicter des règles environnementales complémentaires aux siennes ou au régime provincial, voire d'appliquer ce dernier si la province est consentante.

Ce pouvoir viendrait avec les moyens de le faire appliquer, soit la possibilité de mener des inspections et d'imposer des sanctions. Une procédure d'arbitrage des différends serait prévue.

Le député Côté déplore que cet avancement puisse se faire par la voie réglementaire plutôt que législative, laissant au seul gouvernement le loisir de décider des orientations. «Tout va se passer dans les officines ministérielles et on va être mis devant le fait accompli», a-t-il lancé, lundi, craignant les «jeux de coulisses».

«Formaliser des pratiques»

Pour le porte-parole de l'Administration portuaire de Québec (APQ), Anick Métivier, il s'agit plutôt de «formaliser des pratiques qui ont déjà cours dans certains ports», dont celui de Québec.

L'APQ a en effet présenté un premier plan d'action environnemental cette année et prévenu que ses locataires devraient le respecter. M. Métivier parle de «valeurs guides» et de «bonnes pratiques» qui s'ajoutent au cadre réglementaire fédéral.

Véronique Lalande, la résidente de Limoilou derrière le groupe Vigilance Port de Québec, était à Ottawa, lundi, pour s'exprimer sur le projet de loi C-43.

Elle a dénoncé la volonté d'accorder de nouveaux pouvoirs aux administrations portuaires, qui n'ont pas prouvé qu'ils méritaient la confiance du public selon elle. La citoyenne a plutôt plaidé pour un resserrement des contrôles.

Counter-terrorism: Two bills poised to pass

Dylan Robertson, The Ottawa Citizen, November 28, 2014

Two anti-terrorism bills that would give greater investigative powers to Canada's police and spies are being swiftly pushed toward becoming law. The government says the new powers will make the country safer, while critics believe they might be tossed by the courts.

What's being proposed?

Bill C-13 is expected to pass a final Senate vote next week, the last step before it is signed into law. The so-called cyberbullying bill will allow police to obtain surveillance warrants on "reasonable grounds for suspicion" – a lower threshold of evidence than now exists. The bill also shields Internet providers from lawsuits for voluntarily giving police private data without a warrant.

Bill C-44, on the other hand, is a series of amendments to the act governing the spy agency, the Canadian Security Intelligence Service (CSIS). If passed, the bill would grant

CSIS informants near-total anonymity, and confirm that Canadian courts can issue spy warrants that have effect outside Canada.

The bill has had four hours of committee study and faces another two hours Monday before it returns to the House for a third reading. Then the Bill will be voted and move on to the Senate.

Why the rush on Bill C-44?

Both bills were drafted before the deadly attack on Parliament Hill in October. Since then, Prime Minister Stephen Harper has stressed his belief that security agencies need more power of "surveillance, detention, and arrest," and has said legislation would be "expedited."

Liberal critic Wayne Easter says C-44 requires more scrutiny. "CSIS is already doing these things; there's no rush," he argues.

Are the bills constitutional?

Public Safety Minister Steven Blaney called C-44 "the most constitutional piece of legislation that we have ever brought in."

Official Opposition critic Randall Garrison says he's worried a court could later toss out the law. "If you're going to do this, you can't make mistakes that will inadvertently make it harder to use CSIS information in prosecutions of people actually guilty of terrorist acts," he says.

As for Bill C-13, critics say a Supreme Court ruling in June suggests courts will discard information police collect from Internet providers without sufficient cause.

Has everyone been heard?

In an unusual move, the government denied Privacy Commissioner Daniel Therrien's request to appear at the committee discussing Bill C-44 last week.

A Conservative MP even quashed an NDP proposal that would have Therrien appear if some other witnesses was absent.

Therrien thus wrote a letter detailing his concerns. He says C-44 doesn't include enough safeguards to ensure Canadians being spied on abroad by other governments aren't, as a result, abused or tortured by them.

"Clear statutory rules should be enacted to prevent information sharing by CSIS from resulting in a violation of Canada's international obligations," he wrote.

A similar letter he co-wrote a letter last month with the information commissioner said the government hasn't clearly established why authorities need any new counter-terrorism powers at all.

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thestar.com

Marie Henein is the lawyer Jian Ghomeshi needs, say justice system observers

In just a few days for top criminal lawyer Marie Henein, Jian Ghomeshi has gone from punchline to client. But given her track record for winning, he probably doesn't mind.

By Alyshah Hasham, Toronto Star Reporter, November 2014

In just a few days for top criminal lawyer Marie Henein, Jian Ghomeshi has gone from punchline to client.

"As criminal lawyers we represent people who have committed heinous acts. Acts of violence. Acts of depravity. Acts of cruelty. Or as Jian Ghomeshi likes to call it, foreplay," Henein said at a gala on Oct. 29 to big laughs from the crowd of about 450 lawyers, including judges of both the provincial and superior court where his case might be heard if charges are laid.

But her latest client — under investigation by police for serious allegations of physical and sexual assault — is unlikely to mind given her reputation for winning.

Henein is the lawyer Ghomeshi needs, observers of the criminal justice system say.

Ruthless, smart, hardworking, an exceptional strategist and known for eviscerating cross-examinations, she is a go-to criminal lawyer in high-profile cases — and is high on the list of barristers whom lawyers themselves would call, if they got into trouble.

In 2010, she got all charges dropped against Michael Bryant, including criminal negligence causing death, after bike courier Darcy Allan Sheppard died. In his book, the former attorney-general of Ontario heaped praise on the "finest barrister I ever met."

She "seemed to channel Hannibal Lecter," Bryant wrote in his 2012 book, 28 Seconds . "So able was she to find a person's deepest frailties and exploit them."

Other former clients include junior hockey coach David Frost, acquitted of sexually exploiting his players in 2008, and Gerald Regan, the former premier of Nova Scotia, acquitted of a string of historic sexual assaults.

Perhaps unexpectedly, another former client and ardent fan, is Jane Doe — the well-known activist and head of a coalition of groups focused on violence against women. Henein represented the Feminist Coalition pro bono in the Bedford case at the Supreme Court, which led to the high court striking down prostitution laws.

“She is a brilliant feminist and did outstanding work for our coalition,” Doe said Wednesday. And despite emotions running high in light of the shocking allegations by nine women against the fired CBC radio host “I do feel strongly that everyone is entitled to the fullest and best representation — and she’s the one.”

Henein will defend Ghomeshi alongside former Crown attorney Scott Hutchison and Danielle Robitaille, both partners at Henein Hutchison LLP.

Henein was previously a partner at famed criminal lawyer Eddie Greenspan’s firm and served a term as co-chair of the Masters of Law program at her alma mater Osgoode Hall, and 14 years as an adjunct professor at the school.

In 2013, Henein was the recipient of the Laura Legge award, which recognizes female lawyers in Ontario who have demonstrated exemplary leadership. She was also the first female defence lawyer to as president of the Advocates' Society.

“Marie is well-respected by every participant in criminal justice system,” said lawyer Jonathan Rosenthal, who has known Henein for 20 years.

“She is a very smart woman. Personally, I certainly wouldn’t want to be cross-examined by her.”

He also noted her “ballsy” sense of humour — showcased by her Ghomeshi jokes while emceeing at the Criminal Lawyer’s Association gala last week.

“Will be completely appropriate,” she promised on Twitter before the gala where she noted that she and Eddie Greenspan have worked together for many years: “Some criminal. Some regulatory. Some light BDSM.”

Both jokes drew huge laughs from the crowd at the Ritz Carlton.

With Henein representing him, the case against Ghomeshi, if or when charges are laid, is far from a “slam-dunk,” observed one source in the legal community.

But since Ghomeshi has been “hung, drawn and quartered” in the media and on social media, he needed a good lawyer to make sure he has a chance at a fair trial.

“She is as good as it gets,” the source said. “It’s like ‘who you gonna call?’ She’s the Ghostbuster.”

Henein recently deleted her Twitter account, but not all of her online presence has been scrubbed. A Law Society of Upper Canada video from 1998 shows Henein explaining defence strategies around getting a sexual assault complainant’s sexual history to be introduced at trial.

Suggesting one final tactic she said: “Sometimes you bring the application, especially in front of a judge-alone trial to introduce all this otherwise inadmissible evidence and if it’s excluded, well, oh, well, the judge has heard it.”

After slightly shocked laughter from the audience, she continued: “No, no, I’m absolutely confident that the judge will be able to disabuse his or her mind of the fact that she has a very extensive and lewd prior sexual history.”

Another respected Toronto lawyer — who happened to graduate from Osgoode Hall the same year as Henein — has been hired to investigate allegations about Ghomeshi within the CBC.

Janice Rubin, an employment lawyer with a reputation for being a thorough and balanced workplace investigator, has co-written a book on the subject and has been called into high-profile situations before.

Rubin, who 11 years ago co-founded law firm Rubin Thomlinson LLP, conducted the probe into allegations of sexual harassment by a trustee at the TDSB earlier this year. A frequent media commentator, she has also appeared on CBC shows, both radio and TV.

A CBC spokesperson said management was aware of Rubin’s prior history with the CBC when they made their decision to hire her for the investigation.

Rubin will deliver two reports, one into the complaints, and one into changes CBC can make to prevent “similar issues from arising in our organization in the future,” said CBC’s executive vice-president for English services, Heather Conway, in a staff memo.

Complaints not involving the Ghomeshi investigation are to go to human resources, CBC has said.

CBCnews

Meet Marie Henein, the 'fearless and brilliant' lawyer defending Jian Ghomeshi

'As fine a criminal lawyer as this country has' will represent Ghomeshi

By Mark Gollom, CBC News, November 27, 2014

Marie Henein has been described by her legal colleagues as" fearless and brilliant" and "as fine a criminal lawyer as this country has." The Toronto lawyer is a key go-to barrister for high-profile accused.

And in terms of current Canadian clients, no one has as high a profile as former CBC Radio host Jian Ghomeshi, charged with four counts of sexual assault and one count of overcoming resistance by choking.

Henein is no stranger to cases involving sexual assault allegations. She was part of the legal team responsible for getting former Nova Scotia premier Gerald Regan acquitted in 1998 of sexual assault related charges. And she successfully defended junior hockey coach David Frost, who was found not guilty in 2008 on all four counts of sexual exploitation against two former players.

What her legal strategy will be when it comes to defending Ghomeshi is anyone's guess. Henein said very little Wednesday at the Toronto courthouse, where, minutes earlier, her client had been released on $100,000 bail. Standing beside Ghomeshi, and surrounded by a crush of reporters and cameras, she indicated she would do all of her talking in the courtroom.

But in a lecture at the University of Windsor law school back in 2010, Henein spoke about the anatomy of the defence narrative. She said that "the importance of developing your narrative starts from the moment the client walks into your office."

"It drives everything that you do, your analysis of the law, your comments to the media, your approach with experts and witnesses. It defines your cross-examination and your examination," she said.

"Each question you ask, you have to advance your theory. Each witness and each exhibit, each conversation you have with the Crown, is about advancing the fabric of the defence narrative."

Henein's colleagues are effusive in their praise of her legal skills and work ethic. That Ghomeshi was able to overlook a joke she made at his expense last month during a gala dinner may speak volumes about her reputation as one of the top criminal lawyers.

"She is as fine a criminal lawyer as this country has," said Toronto lawyer Peter Griffin. "She is smart, creative, dogged and eminently resourceful." She has "terrific judgment," he said, and "trained with the best."

The best being Canadian legal legend Edward Greenspan's law firm, where the Osgoode Hall Law School graduate eventually became a partner. There, she would work on some of the country's highest-profile cases, including the Frost and Regan cases.

Started own law firm

But she would later start her own firm, Henein and Associates and eventually team up with Scott Hutchison, a former Crown attorney whom she had previously battled in court, to form Henein Hutchison.

In 2011, when she made Canadian Lawyer's list of the top 25 most influential lawyers, Henein was described as "a key go-to lawyer for high-profile accused in Toronto."

That reputation was solidified following her defence of former Ontario attorney general Michael Bryant. Bryant had been charged with criminal negligence causing death and dangerous driving causing death in the case of bike courier Darcy Allan Sheppard. But

Henein, whom Bryant described as the best barrister he ever met, was able to get all charges dropped in 2010.

"She's universally well-regarded by every player in the criminal justice system," said Toronto lawyer Jonathan Rosenthal, who is vice-president of the Ontario Criminal Lawyers Association. "She thoroughly investigates every possible avenue of a defence. You need look no further than her representation of Michael Bryant."

'No-nonsense defence lawyer'

In a review of Bryant's book 28 Seconds: A True Story of Addiction, Injustice, and Tragedy, the Ontario law magazine Precedent described Henein as a "top notch no-nonsense defence lawyer who is the "real star" of the book.

Meanwhile, the biography on her firm's website says she has argued at all levels of court, including the Ontario Court of Appeal and the Supreme Court of Canada. She was also past president of the Advocates' Society.

Former CBC Radio host Jian Ghomeshi is escorted by police out of a Toronto court on Wednesday. Ghomeshi was granted bail during an appearance to face four sexual assault charges and a charge of choking. His bail was set at $100,000, and he must live with his mother and stay in Ontario.

Ontario lawyer Peter Cronyn, also a former president of the Advocates' Society, said Henein has a "razor quick mind," describing her as "fearless and brilliant" and very strategic in how she handles her cases.

"She's very strong in terms of cross-examination. She gets to the point quickly. Because she's as smart as she is, she doesn't waste time getting to where she needs to get to."

Cross-examining alleged victims of sexual assault is a tricky endeavour for defence lawyers, but Cronyn said Henein will know "when it's appropriate to be aggressive and when it's appropriate not to be."

However, Rosenthal cautioned that even though Henein is thoroughly gifted, her defence will still be handicapped by Ghomeshi's prior statements on social media.

"She can only play the hand that's been dealt to her. It's not like you just hire Marie Henein and she waves a magic wand and the charges go away."

LEGAL POST Know the Law

Drew Hasselback: Waiting for class actions without borders

Drew Hasselback, National Post's Legal Post, November 26, 2014

We live in a globalized world, and some wrongs transcend borders. So will we eventually see a wave of international class actions?

Lawyers have mixed views. Some say legal systems differ too much for cases to receive identical treatment in multiple jurisdictions. Others say we shouldn't discount the creativity of judges and lawyers who might dream up ways to make global cases work.

"The law is very different as between jurisdictions in the area of class actions," says Randy Sutton of Norton Rose Fulbright Canada LLP. "There's a lot of work that would have to be done before you could see that happen with global class actions."

Michael Eizenga of Bennett Jones LLP acknowledges that jurisdictional differences are a problem. Yet he adds that Canadian courts have figured out how to make national actions work, despite differences in provincial class action legislation.

"We have found ways to do it," Mr. Eizenga says. "What's going to happen is that you'll see counsel in different jurisdictions find ways to cooperate and make sure the case works."

The question of international class actions gained fresh currency in early October when, after much deliberation and debate, France finally implemented a law that will enable consumers in that country to file an "action de groupe" — a procedure that in many ways resembles what North American lawyers would recognize as an "opt-in" class action.

The French procedure is rooted in consumer protection. Actions may be brought by one of 16 recognized consumer protection organizations on behalf of its members. Should the action succeed at trial, affected consumers would have two to six months to join the group.

The French law limits the procedure to consumers who've purchased items for personal use and limits the type of damages that may be sought. These limits are designed to prevent what European critics see as the excesses that result from the aggressive tactics of the plaintiff-side class action bar in the United States.

"There's a lot of resistance, especially in Europe," says Sylvie Rodrigue of Torys LLP. "They really don't want to adopt a class action system that is similar to the one in North America. They are very much opposed to opt-out class actions."

Indeed, most class actions in North America operate on an "opt-out" basis. If a representative plaintiff convinces a judge to certify an action, the resulting judicial order puts everyone who meets the class definition into the class. Those who don't want to participate in the lawsuit must take the positive step of notifying the court that they want out. This system is supposed to provide access to justice by simplifying the process of grouping together a class of plaintiffs who suffered the same loss. Yet there's a harsh flip side. If any plaintiffs who want out of the case miss an opt-out deadline, they lose control over their legal options.

This leads to another problem. The North American opt-out system comes with a benefit to defendants who settle. Judges must approve settlements, and when they do, they issue sweeping "claims bars" that protect defendants from copycat actions filed by others who met the class definition, but who didn't opt out before the court appointed deadline.

The global legal system operates on a principle called "comity" in which judges generally agree to respect court orders issued in foreign jurisdictions. This is problematic with class action cases, because some foreign judges don't understand how the class action claims bar works, Mr. Sutton says. "It's completely foreign for them to see how someone could be bound by litigation in Canada, even though they never had to take a step to opt into the action, they never had to appear in the action, and they never had to do anything in the action."

Yet Mr. Eizenga believes there is room for creativity. Canada has a patchwork of separate provincial class action laws, yet somehow the courts have figured out how to make multi-jurisdictional class actions work within the country. "You could argue that what has happened in Canada is something of a model for what could happen on a broader inter-jurisdictional basis."

Ms. Rodrigue agrees. As co-chair of an International Bar Association committee that is studying multi-jurisdictional class actions, she's aware of the challenges that exist in finding ways for foreign jurisdictions to enforce class action settlements or judgments reached in North American proceedings.

Yet some countries, such as the Netherlands, are starting to do just that. Ms. Rodrigue thinks international class actions will grow, particularly in certain areas, such as anti-trust and securities cases. "There's no doubt in my mind that it's going to become more popular," she says.

The sweetness at the end of the tunnel

Written by Ted Flett, 4Students Blog, Canadian Lawyer, November 24, 2014

Exams ruin Christmas for law students. Even the term “Christmas exams” infuriates me. Such an oxymoron.

As a mature student, I recall a solid decade of holiday seasons replete with parties, shopping, decorating, and connecting with friends. But, no more. Rather than merriment and fun, December features endless hours in the library. Any slice of fun, whether a small gathering or quick trip to the mall, is mired in guilt and angst that my time should be dedicated to pouring over casebooks, writing CANs and rewriting CANs. Bah humbug.

Last December, I arrived at Pearson airport, home to Toronto for Christmas, hours after my last of five exams, exhausted and bewildered after surviving a gauntlet of exams.

I make this complaint with a qualification. While hundreds of other students and I are flung back home depleted of energy with days to get ready for a family Christmas, at least the schedule accommodates our religious or chosen holiday. Those who celebrate Christmas have the convenience of decking the halls exam-free while other religious holidays are not accommodated.

Hanukkah, for example, begins Dec. 16. A quick glance at many Canadian law school exam timetables have exams scheduled right up to Dec. 17, 18, or 19. I sympathize with my fellow law students who observe Hanukkah and are forced to celebrate the first night while preparing for an exam in the morning.

I am not alone in feeling cheated from Christmas at the hands of exams. Erika Anschuetz, my 2L classmate and friend, commiserates.

“Exams impact on my ability to prepare for the holidays in that I have to put off shopping for gifts, decorating, and most of all, getting into the spirit,” she says.

An atheist, Anschuetz celebrates Festivus and normally milks the most out of preparation. She makes her own Halloween costumes. She makes her own hats and scarves. She makes her own cards. A scrapbooker, knitter, and all-around crafting enthusiast, she puts a personal touch on most occasions and exams get in the way.

“It stinks,” she says of the truncated holidays.

But, for Anschuetz, the scheduling of fall exams is also a blessing according to her “light at the end of the tunnel” argument.

“The holidays also help me get through exams,” she says. “Knowing that after exams are finished I get to go home and spend time with my family doing Christmas stuff gives me the motivation to power through.”

A pragmatic, Anschuetz schedules her flight home to Zephyr, Ont., on the day following her final December exam. “I like to get a good sleep and have some time to relax before I jump into craziness of holiday festivities,” she says.

The Ab Initio column one year ago by my predecessor was on this very same topic — it’s one worth repeating given exams dominate a law student’s mindset — though as a 3L,

Rebecca Lockwood had culled two years' worth of law exams to distil into wisdom on how to survive law school exams.

As a 2L, I confess to being less experienced on the topic though distancing myself from stress, doubt, and angst in the coming weeks seems a sensible route. My former figure skating competitive days remind me that calm confidence reaps more rewards than frantic anxiety.

The stress of law school exams is compounded by the skepticism many of us hold of the seemingly arbitrary evaluation of them. While 1L is about finding a student's legal sea legs, my December exam results were all over the map, making me question the certainty in my strengths and weaknesses. But, evaluation by examination is under attack. Douglas Judson, president of the Law Students Society of Ontario, calls the current system of testing and grading flawed.

"The grading curve is at the heart of many law school contradictions," he says. "There's a push for practical legal education, yet students are given exam-based courses that often boil down to tests of typing speed. The legal community is scratching its head about mental health and wellness, but standing by oppressive evaluation methods.

"We are needlessly separating talented people into meaningless groups of winners and losers, over what can be a narrow range of actual performance," he says. "We are also rewarding certain skill sets and under-valuing others. It's like asking an elephant and monkey to climb a tree and calling the contest a fair race to the top."

There needs to be an institutional culture shift, he says.

"We need a grading regime that rewards collaboration and collegiality — qualities valued in the workplace and by clients. A strict ranking profile cannot accomplish that, and it produces twisted incentives and work norms. Other competitive programs — like MBAs — have more flexible scales, and in my view they foster a stronger community and a healthier work environment. Let's cut the exceptionalism out of legal pedagogy and introduce more relevant incentives."

Judson's arguments note, at the present time exams are a harsh reality.

Back at the University of New Brunswick's law library, Anschuetz reclines deeper into the chair of her second-floor study carrel, settling into a long afternoon of reading civil procedure. She has her eye on a prize. Despite the bland environment, Anschuetz is chasing a merrier carrot.

"Eventually surviving exams makes the satisfaction of cozying up on the sofa with my family and loved ones in front of the fireplace, with a glass of wine in hand, so much sweeter," she says.

Candy cane sweet.

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thestar.com

Judicial vacancies delaying cases in Ontario

Judges and lawyers in Ontario Superior Court are complaining that several vacancies for judges are seriously delaying criminal trials coming forward.

Donovan Vincent, The Toronto Star, November 21, 2014

Judicial vacancies on Ontario's Superior Court of Justice are raising concerns among judges and lawyers, who say the situation is causing "substantial delays'' in trials getting to court in Brampton.

Ontario has 31 vacancies for federally appointed judges — 23 on Superior Court, five on Family Court and three on the Court of Appeal. That's higher than normal, say those in the legal community.

"On a court as large as ours, we will always experience judicial vacancies. In the past, the federal Minister of Justice filled these vacancies in a timely manner. Regrettably, this year is quite different,'' said Chief Justice Heather Smith of the Ontario Superior Court of Justice, referring to the overall number of vacancies in the province.

"The seamless filling of judicial vacancies is critical to meeting our court's obligation to Ontarians — children and families in particular. I urge the minister of justice to act with dispatch to fill our court's outstanding vacancies,'' Smith said recently during the annual Opening of the Courts, adding that family court vacancies are of particular concern.

Vacancies are also causing problems for criminal trials in Superior Court in Brampton.

Toronto criminal lawyer John Struthers, who is also a provincial director for the Criminal Lawyers Association, says he was in court in Brampton earlier this month when Justice Bruce Durno commented that the shortage of three Superior Court judges in the area is causing delays in jury trials coming forward.

One of the vacancies has lasted for over a year and a half, Struthers said.

"As a result they're having a great deal of difficulty getting jury trials on, particularly,'' Struthers told the Star this week, adding the problem is causing "very substantial delays in serious cases.''

The lawyer said the problems are compounded by the fact many of the judges being appointing these days aren't experienced in criminal cases, "so they need time to get up to speed as well so they can figure out how to conduct a jury trial.''

The Star contacted Ontario's Ministry of the Attorney General seeking a copy of Durno's comments. Ministry spokesperson Brendan Crawley referred the Star to Roslyn Levine, executive legal officer in the office of the Chief Justice for Ontario's Superior Court of Justice.

In a statement Levine said she isn't aware of Durno's remarks, but added: "the Superior Court has done everything within the court's own authority to provide litigants with timely next steps in all proceedings. To ensure that cases and trials continue to be scheduled in an orderly and timely way, the court must have its judicial complement at full strength.''

"Our Chief Justice (Smith) has every confidence that the minister of justice understands the importance to the public, the government and the court, of promptly filling all of the Superior Court's current judicial vacancies,'' Levine said in the statement.

A spokesperson for federal Justice Minister Peter MacKay said federal appointments have always been a matter for the executive and will continue to be, and that the appointment process includes broad consultations with prominent members of the legal community.

The consultation process is confidential, the spokesperson added.

The issue of judicial vacancies has been in the news recently since Toronto lawyer Rocco Galati sent a letter earlier this month to Prime Minister Stephen Harper and the Attorney General of Canada threatening to launch a constitutional challenge if five vacancies on the Federal Court of Appeal aren't filled in 45 days.

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

Across the country there are 61 vacancies, and 1,110 federal judges on the bench — 335 of whom sit in Ontario.

CALGARY HERALD

Blatchford: Manitoba judge's resignation calls off ongoing inquiries into alleged personal conduct

Christie Blatchford, Postmedia News, November 24, 2014

Nine years after she got the call from the then-minister of justice that saw her write exuberantly in her gardening diary, "Instant cloud nine," the tattered judicial career of Lori Douglas has entered its final stage.

With the announcement that the former associate chief justice of the Manitoba Court of Queen's Bench will resign next May, the Canadian Judicial Council on Monday agreed to call off its ongoing inquiry into Douglas's conduct.

The proposed agreement was then approved by the CJC inquiry committee — the second one — in Winnipeg later in the day.

If the settlement brings an end to the often acrimonious on-again, off-again proceedings against Douglas, it offers no resolution to the issue of whether any woman, even a judge, can be brought to heal through what's now known as "revenge porn" and blackmail.

After all, at the heart of the allegations against the judge was the bald shakedown of her late husband, Jack King, by a litigious man named Alex Chapman.

And how Chapman chose to go after first King, and then much later his wife, was by using sex pictures of her as a club.

Chapman first alleged that King, who was his divorce lawyer, had sent him some of the explicit pictures and tried to lure him into a sexual encounter with his wife, who was then like him just a lawyer.

But when he made the original allegations in 2003, Chapman levelled no accusation that Douglas, prior to her judicial appointment, knew anything about King's efforts. He was paid $25,000 by King, essentially for his silence and a promise to destroy the pictures.

But seven years later, with Douglas now sitting as a judge, Chapman added her as a party to his complaint of sexual harassment and took the whole shebang to the CJC and to the CBC — turning what had been a contained scandal within the small Manitoba bar into a full-fledged public firestorm.

Ironically, Chapman's complaint wouldn't have been heard at the now-abandoned hearings; it had been dropped earlier by the new committee.

The allegations against Douglas were that she failed to disclose "relevant facts" (the existence of the pictures) when she applied for the bench in 2004, this despite testimony by the former judge who was the chair of the committee which appointed her that he knew about the photographs and told the other members about them; that she was incapable of carrying on simply by virtue of the fact the pictures existed and were online; and that she hadn't fully disclosed some facts (chiefly, that she'd altered an entry in her diary to reflect that a meeting with

Chapman, arranged by her husband, wasn't "nice" but "boring."

The hearings would have marked the second time the CJC heard evidence in public both about the circumstances of Douglas's appointment to the bench and, indirectly, about the sex life she had with King, who died of cancer in April.

Essentially, the judge and the CJC reached a deal, not so very different from the plea bargains so common in the criminal courts.

Douglas and her lawyers are prohibited from commenting by the terms of the deal.

For the CJC, the fairness of whose processes has been much criticized, it means an end to an embarrassing saga that saw Montreal lawyer Guy Pratte, so-called "independent counsel" to the first inquiry committee, resign over his lack of independence, and the members of that committee then quit en masse in a huff.

For Douglas, it means an end to the humiliation of having even more of her peers — the two judges and one lawyer on the second committee — see the notorious pictures King once took of her in the privacy of their bedroom, with her consent, and posted online on a hard-core sex site, without either her consent or knowledge, as she has always maintained and as the evidence heard by the first inquiry supports.

Perhaps most importantly to Douglas, the settlement means the pictures will be returned to her.

The deal also appears to mean that she will be eligible for the annexed, pro-rated annuity that federally appointed judges who take early retirement qualify for if they were on the bench for 10 years and have attained the age of 55.

Douglas was first appointed on May 20, 2005, and was later made associate chief justice, a job that now pays $329,000 a year. Her resignation is effective 10 years and one day after her appointment was announced.

She stopped hearing cases and stepped aside from active service on Sept. 1, 2010, shortly after the allegations against her became public. In the intervening years, assuming an average salary of $300,000, she would have earned about $1.2 million.

But that's small change in what this schmozzle may have cost the taxpayer, who foots the bill for judges' salaries and their legal costs, the legal costs of other parties and two weeks of hearings in the summer of 2012, with all the support services that entailed (from accommodation, travel to transcript preparation and the like).

The CJC estimates that not counting Douglas's salary, it has spent at least $3 million on the process, which saw the parties make countless trips to the Federal Court of Canada and the Federal Court of Appeal.

And those are just the monetary costs: The real lesson of Lori Douglas may be that even those who breathe rarified judicial air aren't immune to the awesome power of sex pictures and the web.

Lori Douglas to quit rather than face inquiry

Dean Pritchard, Winnipeg Sun, November 24, 2014

A judge who had naked pictures of her posted on the Internet has reached an agreement with the Canadian Judicial Council to stay an inquiry examining whether she should be allowed to remain on the bench.

The inquiry panel hearing the case of Associate Chief Justice Lori Douglas will decide if it accepts the agreement Monday afternoon.

Douglas has agreed to retire in May 2015 rather than proceed with the inquiry, her lawyer Sheila Block told the inquiry panel this morning.

"The trauma of the past four years has taken a grave toll on her, on her family and on those who have stood by her," Block said.

"Even though she loved being a judge and considered it an honour and privilege to serve, she is at the point where this is the best choice for her," Block said. "To withstand more weeks of hearings into intensely private matters and risk the viewing of her intimate images by colleagues and others is more than she can bear."

Under terms of the proposed agreement, Douglas will be given all pictures in the CJC's possession so she can destroy them, Block said. The pictures will remain with the CJC until she officially retires.

Last week, Douglas's lawyers won a motion in federal court temporarily barring the inquiry panel from viewing the disputed pictures in its possession.

The CJC agreed it would not be in the public interest to pursue the case if Douglas retires, Block said.

Douglas has been facing ouster from the bench after nude pictures of her were posted on the Internet years ago by her late husband, lawyer Jack King.

An inquiry was ordered into Douglas's conduct after one of King's former clients, Alex Chapman, went public in 2010 with revelations that King, seven years earlier, had tried to lure him into a sexual tryst with Douglas, then a lawyer in private practice, and had posted nude pictures of Douglas on the Internet.

Douglas has always maintained she had no knowledge of her husband's actions.

Chapman told King's law firm of his overtures in June 2003 and negotiated a $25,000 agreement to keep quiet. Chapman was later ordered to repay the money after a judge ruled he had violated the nondisclosure agreement.

The inquiry is tasked with determining whether Douglas failed to disclose knowledge of the Internet pictures when she applied to become a judge, whether she changed a personal diary entry after learning she was the subject of an investigation, and whether her continuing presence on the bench undermines the integrity of the justice system.

TIMELINE OF A SCANDAL

AUG. 31, 2010: Alex Chapman accuses lawyer Jack King of harassing him to have sex with his wife, Lori Douglas, an associate chief judge in the Court of Queen's Bench. Chapman alleged King urged him to visit a website devoted to linking white women with black men for sex. Chapman also claims King emailed him numerous nude pictures of Douglas. Chapman was eventually paid $25,000 and signed a confidentiality agreement which included a promise to destroy all correspondence and pictures he received from King. But Chapman didn't destroy the pictures and emails and in July filed a complaint with the Manitoba Law Society and the Canadian Judicial Council.

SEPT. 1, 2010: Chapman files separate multi-million lawsuits against Douglas, King, and the couple's former law firm. On the same day, Douglas asks to be temporarily relieved of her duties as judge. All suits would either be dropped or thrown out in short order.

MARCH 28, 2011: King pleads guilty before a Law Society disciplinary panel to three counts of professional misconduct, which included sexual harassment of a client.

JULY 5, 2011: The Canadian Judicial Council announces it will conduct an inquiry that could end in Douglas' removal from the bench.

JUNE 25, 2012: Hearing begins, then is delayed days later.

AUG. 20, 2012: Federal court begins hearing Attorney General of Canada vs. Lori Douglas.

AUG. 27, 2012: Lead lawyer Guy Pratte resigns as independent counsel for the judicial inquiry.

NOV. 27, 2012: Chapman back in court fighting a court order that he repay $25,000 he received to keep quiet about sex allegations.

MAY 15, 2013: Chapman denied respondent status in federal case.

JUNE 2013: CJC gets intervenor status in federal case; motion for a stay is heard and eventually approved.

AUGUST 2013: New complaint against Douglas, for expense filings.

SEPTEMBER 2013: CJC hearing was supposed to resume, didn't.

NOV. 20, 2013: The inquiry committees resigns, casting further doubt on the inquiry's future.

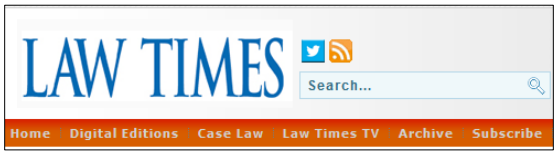
APRIL 28: Jack King dies.

AUG. 12: New dates are announced for when the inquiry will re-start.

NOV. 4: An attempt by Douglas to get the upcoming inquiry quashed is shot down by the CJC.

NOV. 21: A federal court judge agrees to ban the use of explicit photos of Douglas from being used at her disciplinary hearing.

NOV. 24: Douglas and the CJC cut a deal that will see the hearing cancelled in exchange for the judge agreeing to retire.



Editorial: Better justice, incrementally

Law Times Editorial by Glenn Kauth, November 24, 2014

It's somewhat ironic that not long after the province released updated statistics showing the Justice on Target program continues to lag, Attorney General Madeleine Meilleur was announcing a new effort called Better Justice Together last week.

The two strategies are by no means the same. Justice on Target was about setting specific goals for speeding up criminal cases while Better Justice Together is a broader effort to make the overall justice system simpler, faster, and less expensive. It includes familiar themes around making the system easier to navigate, supporting mediation and other court alternatives in family law, and doing more to address mental health in the justice system. A key theme is collaboration across the justice system and introducing more modern technology.

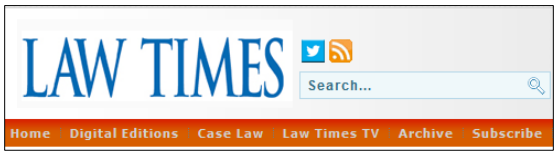
It's all things we've heard before. But in a speech last week, Meilleur suggested things would be different this time. "Despite our best efforts, government hasn't been a leader in harnessing the power of technology," she said. "The reality is we are not where we should be. So you may be asking yourself, 'Why now? What's different this time?'"

The answer she gave was that the government is now focusing on incremental progress. “We are now focusing our efforts on projects that are incremental, targeted, and meet the expectations of court and tribunal users and the public,” she said, citing changes such as the recent introduction through a pilot project of electronic filing options in the Small Claims Court. The government will be rolling it out across the province in early 2015, she noted.

Other changes planned for the coming year include a pilot project for a search warrants tracking system in Toronto that will allow court staff to more easily search for and find warrants. The government is also planning to expand its Crown case management system that allows for electronic disclosure in Toronto to make it available across the province.

The changes are, admittedly, small and fall short of what people have been demanding for years. But even with something like Justice on Target, which has fallen short of its initial ambitious goals and even its revised ones, lawyers say they’re still seeing progress in court with disclosure coming faster and cases proceeding a bit more smoothly. And with the government having allocated significant money for legal aid, things are improving on that front as well.

The government, then, deserves some credit. It’s certainly not fixing the backlog of issues in the justice system it let fester for years but it has at last shown it’s able to move forward in a modest but more comprehensive way.



Cancer decision a shock to lawyers

Is ruling on treatment a throwback or constitutional advancement?

Yamri Taddese, Law Times, 24 November, 2014

An Ontario Court judge’s recent decision to allow an aboriginal girl with cancer to withdraw from chemotherapy and pursue traditional treatment is a throwback to a “prescientific era,” says a Toronto health lawyer.

‘From having worked in a hospital, there is no question that alternative and complementary therapy have a place but cannot and should not be treated in isolation,’ says Alan Belaiche.

‘From having worked in a hospital, there is no question that alternative and complementary therapy have a place but cannot and should not be treated in isolation,’ says Alan Belaiche.

The judge allowed the 11-year-old aboriginal girl, who has lymphoblastic leukemia, to seek alternative treatment at a Florida clinic in accordance with the wishes of her mother, D.H., after she invoked the constitutional rights of aboriginal people to make their own treatment decisions.

But Toronto lawyer Alan Belaiche says the decision was a huge leap backwards and "should definitely be appealed."

"What is glaringly absent from the decision is any meaningful consideration of the child's best interest. And in lieu, the judge appears to have decided that a constitutional principle will trump all other considerations, including, most importantly, the best interest of the child," he says.

"In my view, invoking and then essentially importing a constitutional principle, however laudable and important it may be, into the health-care context — where to my knowledge it's never been judicially recognized in Canada — without considering the subject's best interest is not a decision to be celebrated but a decision that should definitely be appealed."

The court decided the girl, identified only as J.J., isn't a child in need of protection as alleged by McMaster Children's Hospital, the facility that treated her until her withdrawal in August. The court also found a constitutional protection for the right of aboriginal people to pursue traditional treatment as opposed to western medicine. "It is this court's conclusion therefore, that D.H.'s decision to pursue traditional medicine for her daughter J.J. is her aboriginal right," wrote Justice Gethin Edward. "Further, such a right cannot be qualified as a right only if it's proven to work by employing the western medical paradigm. To do so would be to leave open the opportunity to perpetually erode aboriginal rights."

Edward emphasized the mother's deep commitment to her longhouse beliefs and her belief that traditional medicines work.

"This is not an 11th-hour epiphany employed to take her daughter out of the rigours of chemotherapy. Rather, it is a decision made by a mother, on behalf of a daughter she truly loves, steeped in a practice that has been rooted in their culture from its beginnings," wrote Edward.

But according to Belaiche, former general counsel at St. Michael's Hospital, the court had a duty to examine the efficacy of the alternative treatment the child would receive.

"From having worked in a hospital, there is no question that alternative and complementary therapy have a place but cannot and should not be treated in isolation," he says. "It seems to me in the circumstances of this case, when one is dealing with a minor, it is incumbent upon a court to consider the efficacy of such alternative treatments against others."

The judge's reasoning about preserving aboriginal culture "seems to me to be a political agenda that effectively ignores the best interest of the minor and rolls back time to a historic prescientific era," says Belaiche.

According to the ruling, the hospital's position was that initial testing on the child showed she had a 90- to 95-per-cent chance of survival with chemotherapy. The hospital also said it wasn't aware of any survivors of the disease without chemotherapy treatment.

Bioethics lawyer Mark Handelman says the Consent and Capacity Board would have been in a better position to deal with this case.

Handelman, a former vice chairman of the board, says he was "surprised that the case turned on the constitutional right of the girl's mother to make her own treatment decisions."

Handelman doesn't believe the child needed protection because her mother didn't refuse to make a treatment decision but had instead made one the doctors didn't agree with. In this case, it would have been best to leave the issue to the Consent and Capacity Board, he suggests.

Toronto family lawyer Donald Baker calls the decision "extraordinary." He compares the case to jurisprudence that has seen the children of Jehovah's Witness families ordered back into treatment when their parents disagreed. That the girl was of an aboriginal background in this case had "everything" to do with the court's decision, he says.

"These are constitutional issues which really go back to the time of when this country was formed — who has what powers over which people. To basically take this girl from that almost-guaranteed life-saving effort by the doctors and maybe kill her is really extraordinary. It's shocking to me, but I'm not aboriginal and my code rights are not being trampled on," he adds.
