MacKay willing to wait and see with new Trudeau government

Union leader sees cause for 'cautious optimism' in bargaining
Cristin Schmitz, The Lawyers Weekly, November 13 2015

Federal lawyers building a strike fund are "cautiously optimistic" they won't have to walk out or work to rule in order to make contract improvements under the new Liberal government, says the president of the Association of Justice Counsel (AJC).

After nearing an impasse with the Treasury Board earlier this year, the union for 2,600 federal Crowns and Department of Justice lawyers increased its dues last July to build a "job action" fund for financing possible rotating strikes if progress stalls and members deem them necessary.

However, the Oct. 19 majority win of the Liberals — who campaigned on pledges to "bargain in good faith" with public sector unions, and to roll back several Conservative labour laws — is seen as positive from labour's perspective, said union leader Leonard MacKay, a federal Crown from Halifax.

"I think there is some cautious optimism," said MacKay. "The anti-union…animus of the Harper government was well known…so any change in government we thought would be helpful to us.

"We're preparing for the worst, but we're hoping for the best. So as far as time lines go, we will have to give this government some time to develop their mandate."

The AJC's four-year collective agreement expired in May 2014. In eight bargaining sessions with Treasury Board negotiators since early 2014, no progress was made on the issues for AJC members because the Conservative government focused on its desire to replace current public-sector sick leave benefits with a new short-term disability plan, MacKay said.

"They were completely obsessed with sick leave and talked about little else, and so that's the reason why we were approaching an impasse," he said.

The lack of progress on key issues pushed union officials to contemplate job actions, including potential strike action, in 2016. MacKay noted the pay of lawyers working for the provincial

governments of Ontario, British Columbia, Alberta, Saskatchewan and Manitoba outstrips their federal counterparts. For most federal front-line prosecutors (LP2), the top pay is $137,886, he said.

Heavy workload and burnout are also issues for AJC members. For example, staff shortages exist in Alberta, where federal prosecutors have left to earn close to $30,000 more as provincial Crowns.

The prospect of federal lawyers going on strike for the first time increased significantly in 2013 with changes to collective bargaining in the *Public Service Labour Relations Act* (C-4) which took away the right of the AJC and other federal unions to choose binding arbitration following mediation.

It left only conciliation and the possibility of a strike if an impasse ensued. The Liberals have pledged to "revisit" the legislation.

"Until those changes in the Act — if they are going to be changed — come about, we still have to keep job action on the table," MacKay said. "It hasn't gone away."

However, any job action has effectively been postponed because of the new government.

The Treasury Board is not expected to be back to the bargaining table with the AJC before January, at which point MacKay is hoping it has a new mandate "to be more of a partner than an adversary, as [Prime Minister Justin] Trudeau has suggested.

"We kind of have to start fresh with the new government. Ideally we'd have a collective bargaining agreement that we have agreed to by next early summer or late spring, maybe."

The next-best scenario would be if the union's rights to arbitration are fully restored to what they were before C-4, he said.

"I think it's fair to say the worst case would be us being forced to take job action. We have to prepare for that, but it's not something I would want to do."

Strikes, in particular, are likely a last resort, he added.

"It's likely that we would do a work-to-rule type of campaign initially, which means you don't go off the job. You just work strict hours, don't do certain things — like we have a few on-call obligations with phones 24/7; we could decide not to do those."

Before the AJC would be in a legal strike position, there would have to be an impasse with the Treasury Board, conciliation, and a vote by the membership authorizing a strike. If it comes to that, the union would likely follow the approach taken by the Professional Association of Foreign Service Officers, which conducted strategic rotating strikes. For the AJC that might mean lawyers not doing a particular bail court for a week, MacKay said by way of example.

"I think that the extreme examples would be getting entire offices to march off the job for…a week, or even just a couple of days."

MacKay said the AJC is consulting with law societies for guidance on their members' professional obligations in the context of any job actions.

Government lawyers in Canada rarely go on strike, although provincial Crowns in Quebec and Nova Scotia have done so in the past in order to protest wages and working conditions. The AJC's membership (20 per cent prosecutors and 80 per cent lawyers for the DOJ and agencies, tribunals and courts) is not marching down that road yet, said MacKay. "We are a little more optimistic," he said.

The AJC has also joined other public-sector unions in constitutional challenges to some Harper-era labour laws. The Liberals have promised to "immediately repeal" Bill C-377, which mandates extensive public financial disclosure by unions, and Bill C-525, which makes it more difficult to certify (and easier to decertify) unions.

The Liberals have also committed to repealing a measure in the most recent omnibus budget bill (C-59) which enables the Treasury Board to unilaterally change sick leave provisions in collective agreements.

Mandate letters send Liberals into uncharted waters

Don Lenihan, National Newswatch, November 17 2015

Liberals have always believed that government can be a force for good in our society. And, as fate would have it, this government comes to power at a time when openness to some kind of government activism is back in fashion. But what kind of activism?

The clue lies in the past. Following the near collapse of the financial system in 2008, then-Federal Reserve Chairman Alan Greenspan was forced to admit that the invisible hand of the market had failed to prevent the crisis. It was a watershed moment in recent economic history. In the decade since, free market enthusiasts have come under heavy fire. Several important books—I'd include those by John Plender and Thomas Piketty—have wrestled convincingly with the assumptions of market capitalism and found them wanting.

Not that the critics want to revive the old dream of a planned economy. There is lots of agreement that markets must be allowed to work and governments should be careful not to get in the way. Rather, the search is on for a better balance between *laissez faire* capitalism and old-style intervention. If concerns over the inequality of income are one part of this discussion, the need for what we can call a *collaborative approach* to competitiveness is another.

Last week's mandate letters landed smack in the middle of this trend. They commit every federal minister to helping the government rebuild prosperity in the middle class, on one hand, and building public trust in government through openness and collaboration, on the other. The challenge now is to put the ideas to work.

A very promising approach recently surfaced in an unlikely place: the Forum on Canada's Agri-Food Future (CAFF15). Indeed, the seeds of something new and different may have been sown in this soil.

The Canadian Agri-Food Policy Institute and Canada 2020 convened some three hundred delegates to discuss ways to improve competitiveness in the agri-food sector. Much of the discussion revolved around a novel distinction between what delegates called "competitive" and "precompetitive" spheres in the food system.

While the former includes ways that individual businesses compete for market share, the latter is about how openness and collaboration can strengthen Canada's competitive advantage. This challenges conventional thinking, which holds that the way to improve competitiveness is to free up markets, say, through deregulation. Supply and demand then forces businesses to compete for market share, which keeps them lean and innovative.

The delegates at CAPP15 took a very different tack. Consumers, they noted, are increasingly concerned about a growing list of issues around health, food safety and the environment. A failure to meet their expectations can alienate customers and/or weaken supply chains. Delegates went on to discuss whether stakeholders would be willing to collaborate to make Canada's agri-food system the most trusted food system in the world; and, if so, what this would take.

At bottom, they agreed, such a project requires government and stakeholders to work together to deepen the food system's commitment to core values like transparency, openness and authenticity, in order to gain consumers' trust.

Branding our food system this ways would allow Canadian businesses to meet and even exceed consumer expectations anywhere in the world. This, in turn, would distinguish them from other food producers and give Canadians an edge in all kinds of key markets, such as the highly informed consumers in the Japanese beef market.

The collaborative approach thus provides a novel way to enhance competitiveness, and thereby increase prosperity. It also takes government and stakeholders into uncharted waters. And that leaves me wondering how ministers will respond to the commitments in their mandate letters. Here are four points they may want to consider.

First, agri-food is not the only sector where this type of collaboration is an option. Concerns over sustainability, fair trade, health and human rights are raising new kinds of consumer expectations in a wide range of industries, from energy to financial services. Ministers could search their own portfolios for interesting ways to work with stakeholders to make these industries more competitive through openness, transparency, authenticity, and so on.

Second, there was lots of agreement at CAFF15 on what falls inside the precompetitive sphere. Dividing activities this way seemed to help clarify what kinds of tasks require collaboration. This, in turn, makes it much easier for governments to engage in productive discussions with industry and/or public-interest organizations and arrive at a real plan for action.

Third, ministers (and their officials) should not confuse such talks with traditional consultations on government regulation of the sector. Government may or may not have a regulatory role to play in the final plan. Every case is different. Based on the discussions at CAFF15, much of the heavy lifting in agri-food's precompetitive space belongs to industry, such as taking steps to align supply chains or provide greater transparency on animal welfare.

Finally, because these talks call on stakeholders to do some heavy lifting for the collective good, ministers (and their officials) can't manage the process from the top down. Stakeholders must be engaged as full-fledged partners in the initiative. Openness, transparency and collaboration apply as much to government's relationships with them, as to the system they are working together to improve.

In sum, the big idea here is that governments and stakeholders can work together to enhance industry competitiveness by promoting values such as openness, transparency and authenticity, which, in turn, earn consumers' trust.

Far from conflicting with traditional market imperatives, this kind of collaboration creates a business environment where fair competition can flourish. In the end, the competitive and precompetitive spheres are two sides of the same coin.
Collaboration, it turns out, can enhance competition.

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Indigenous Affairs Minister begins 'pre-inquiry engagements' with families of MMIW

Tiar Wilson, CBC News, November 18 2015

Indigenous Affairs Minister Carolyn Bennett has started inquiry consultations with families of missing and murdered indigenous women and girls**.**

"The more I listen to families, the more I understand they have many instincts and much knowledge about the way we go forward in order to get this right," Bennett said from a First Nations education conference in Thunder Bay yesterday.

Many families are determined to be at the forefront of an inquiry and have been vocal on social media through campaigns like #ourinquiry, directed at Prime Minister Justin Trudeau.

That family driven initiative caught Bennett's attention. So far she's begun "pre-inquiry engagements" with families, provincial and territorial governments, aboriginal organizations, and civil society groups.

"[These are] people who are actually dealing with this [issue] every day," said Bennett.

She said she intends to "make sure that they feel they've had the input on things like the scope, the terms of reference, the length, who should be commissioners and whether there should be one or three."

Cultural components within the actual inquiry are also being considered, said Bennett.

"The importance of ceremony and how we can build a commission that may look [different] than anything that anybody has ever seen before, but will also have the creativity and the responsiveness to the needs that starts with the families."

The Liberals have committed to spending $40 million over two years on the examination of missing and murdered indigenous women and girls. So far no one, including Bennett, has mentioned what the scope of the inquiry will be.

However, when asked about the possibility of including missing and murdered indigenous men and boys, Bennett didn't rule it out.

"When you look at the systemic problems and the effects of colonization, the effects of residential school, there is no question that men and boys have also been victims of this system," she said.

"I think that it would be impossible to separate out the needs of the men and boys as well, as we begin to address the systemic problems."

In an interview with CBC's Chris Hall last week, Bennett said she will be working closely with the Minister of State for the Status of Women Patty Hajdu,as well as Justice Minister Jody Wilson-Raybould.

"What's exciting for me is to have a partner in the minister of justice who is very knowledgeable about these things and we get to do these things together."

Federal government formally drops niqab appeal

Adam Fisk, Global News, November 16 2015

The Liberal government has officially dropped an appeal of a court's decision allowing women to wear niqabs during citizenship ceremonies.

Immigration Minister John McCallum and Justice Minister Jody Wilson-Raybould formally noticed the Supreme Court of Canada of the decision to drop the appeal on Monday.

"The Federal Court of Canada found that the policy requiring women who wear the niqab to unveil themselves to take the Oath of Citizenship is unlawful on administrative law grounds, and the Federal Court of Appeal upheld this ruling. The government respects the decision of both courts and will not seek further appeal to the Supreme Court of Canada," the ministers said in a joint statement.

"Canada's diversity is among its greatest strengths, and today we have ensured that successful citizenship candidates continue to be included in the Canadian family. We are a strong and united country because of, not in spite of, our differences."

The Conservative government expressed its intention to appeal the Supreme Court's decision about a month before the election.

Justin Trudeau made it clear at the time that his government would not appeal to the ruling.

Stephen Harper's government argued it was important for new citizens to show their face at the moment they become Canadian.

The Liberals accused the Conservatives of using the niqab, which is worn by only a small number of women, as a distraction and a wedge issue during the recent federal election campaign.

Groups want broad public consultations on anti-terror law

Ian MacLeod, Ottawa Citizen, November 20 2015

A coalition of about a dozen civil liberty and privacy protection organizations is calling on Prime Minister Justin Trudeau to launch broad public consultations on planned reforms to the controversial Anti-terrorism Act of 2015.

In a letter to Trudeau to be released Friday, organizers write "it is only through meaningful engagement with stakeholders that the government can hope to address security in a manner that appropriately respects civil liberties.

"In light of the sweeping and fundamental nature of the changes imposed by Bill C-51, such consultation must occur before the parliamentary reform stage begins."

The Liberal government has promised to hold public consultations on its plan to repeal parts of the law, reform others and create a committee of parliamentarians to monitor the operations of federal agencies responsible for national security.

The coalition, led by the Internet advocacy group OpenMedia, wants the government to go further by issuing a position statement to "clearly demonstrate how Canada's pre-Bill C-51 security apparatus was inadequate, and justify any changes introduced by Bill C-51 that the government seeks to retain. It should also outline any anticipated impacts on civil liberties and explain why these are justified."

It also calls on the government to conduct online consultations with Canadians and hold hearings with various experts – all before the promised legislation is tabled in Parliament.

"To rebuild public trust after Bill C-51 we need to restore a democratic dialogue that is more collaborative and generates results that are constitutional and consistent with Canadian values," the letter concludes.

"We urge you to set the proper tone for a truly participatory democracy by committing to an open public debate on Bill C-51 as a precondition to the tabling of any legislative changes."

Suicide assisté: du temps additionnel pour modifier les lois

Droit-Inc, Le 17 Novembre 2015

Dans un jugement rendu le 6 février dernier, le plus haut tribunal du pays a déterminé que l'interdiction d'offrir l'aide médicale à mourir à une personne consentante était inconstitutionnelle.

Le tribunal avait suspendu l'invalidité des textes de loi interdisant le suicide assisté, et avait donné un an à Ottawa pour réécrire la législation en la matière afin de permettre à des personnes atteintes de problèmes de santé graves et irrémédiables d'avoir recours à l'aide médicale pour mettre fin à leurs jours.

Le premier ministre du Canada, **Justin Trudeau**, a demandé à la ministre de la Justice, **Jody Wilson-Raybould**, de diriger un processus avec le ministère de la Santé visant à collaborer avec les provinces et les territoires dans le but de donner suite à la décision de la Cour suprême du Canada au sujet de l'aide médicale à mourir.

Lundi, la ministre de la Justice, Jody Wilson-Raybould, a reconnu que le temps presse alors qu'il ne reste que moins de trois mois avant l'échéancier du 6 février 2016.

« Sans contredit, le délai est court », a résumé la ministre, précisant qu'elle a des discussions

avec sa collègue de la Santé sur un possible report de l'échéance, et que le conseil des ministres se penchera sur la question.

Samedi, Ottawa a annoncé qu'il accordait un mois additionnel au comité qui a été chargé de mener des consultations auprès d'experts sur le suicide assisté pour terminer son rapport.

Le comité a donc jusqu'au 15 décembre pour livrer son document résumant les résultats et les principales conclusions de ses consultations. Le gouvernement Trudeau a d'ailleurs retiré des responsabilités du comité la présentation de recommandations législatives.

Panel studying doctor-assisted dying gets new mandate, extended timeline

Panel appointed to consult with Canadians, medical authorities, experts and organizations

CBC News, November 16 2015

A group of experts consulting with Canadians on doctor-assisted suicide has a new mandate and more time to complete a report to the federal government.

Rather than providing options on developing legislation, the panel, led by University of Manitoba psychiatry Prof. Harvey Max Chochinov, is now asked to simply focus on the results of the consultations. It has until Dec. 15 to complete its report.

"Physician-assisted dying is a deeply personal and complex matter and [the panel members] have conducted their work with utmost professionalism. Recognizing that this is of interest to all Canadians, we are committed to ensuring a thoughtful, well-informed legislative response," stated a letter released by Justice Minister Jody Wilson-Raybould and Minister of Health Jane Philpott.

"The panel has heard from an impressive number of Canadians and experts. We look forward to receiving their final report and will use it as we continue to develop the government's response to the Supreme Court of Canada's decision in Carter vs. Canada."

The Supreme Court of Canada ruled in February that people with grievous and irremediable medical conditions should have the right to ask a doctor to help them die.

The case was initiated by Kay Carter, 89, who suffered from a degenerative disease and ultimately went to Switzerland to end her life.

The court ruling in February said Canada's law that makes it illegal for anyone to help people end their own lives should be amended to allow doctors to help in specific situations. The court gave Parliament a year to craft a set of laws to govern assisted suicide.

The government then appointed the panel to consult with Canadians, medical authorities, experts and organizations, and formulate legislation options by Nov. 15.

In addition to Chochinov, who is the Canada research chair in palliative care at the U of M, the panel consists of University of Ottawa law professor Benoit Pelletier, a former Quebec cabinet minister and a constitutional expert, and Catherine Frazee, former co-director of Ryerson University's institute for disability research and education.

"Our government is profoundly grateful for the hard work and personal commitment of all three panel members," stated the letter from Wilson-Raybould and Philpott.

"Thousands of individuals, experts and organizations, both within Canada and abroad, have provided their views on this complex and sensitive issue since the panel was established in July. The government recognizes the challenges of this tight timeline and is extending the panel's mandate by one month."

The panel has held 51 meetings in five countries and consulted with 66 experts and 95 representatives from 48 Canadian organizations, government officials said. It has also received more than 300 document submissions from stakeholders and more than 11,000 responses to its online consultation.

Les lois albertaines peuvent être rédigées uniquement en anglais

Kristy Kirkup, La Presse Canadienne, Le 20 novembre 2015

Les lois albertaines n'ont pas à être rédigées en français et en anglais, a tranché la Cour suprême du Canada, dans un jugement partagé - à six juges contre trois - relativement à une affaire qui est devant les tribunaux depuis bon nombre d'années.

Le plus haut tribunal du pays a rejeté, vendredi, l'appel de deux hommes qui plaidaient que les lois de l'Alberta devraient être publiées dans les deux langues officielles du Canada en vertu de la Constitution.

Le motocycliste Pierre Boutet a reçu une contravention routière en 2003 et il jugeait qu'elle était inconstitutionnelle puisque la loi n'était pas formulée dans les deux langues. Gilles Caron, un autre motocycliste qui a reçu une telle contravention unilingue, s'était joint à la cause de M. Boutet.

Au terme d'un procès de 89 jours en 2008, une cour provinciale avait tranché en faveur des deux plaignants, mais il avait été renversé par la Cour du Banc de la Reine, en 2009, et la Cour d'appel de l'Alberta, en 2014.

Or, les juges Cromwell et Karakatsanis, avec l'accord de la juge en chef McLachlin et des juges Rothstein, Moldaver et Gascon, ont statué que la loi constitutive du pays «n'oblige pas l'Alberta à édicter, à imprimer et à publier ses lois et règlements en français et en anglais».

Selon les juges, la thèse des appelants «ne respecte pas le texte, le contexte, ni l'objet des documents qu'ils invoquent», dont la Proclamation royale de 1869 et un décret délivré en 1870, qui marquait la fondation de la plupart des provinces des Prairies.

Les provinces ont la responsabilité de choisir si elles publient leurs lois en français et en anglais puisqu'il n'y a aucune garantie du bilinguisme législatif dans la Constitution, ni dans les documents présentés par les appelants, expliquent les six juges.

Les juges dissidents Abella, Wagner et Côté estiment cependant que la province a l'obligation constitutionnelle de traduire ses lois «parce que l'entente historique conclue entre le gouvernement canadien et la population de la Terre de Rupert et du Territoire du Nord-Ouest contenait une promesse de protéger le bilinguisme législatif» - un document qui a été enchâssé dans l'Adresse de 1867 et qui a une valeur constitutionnelle, selon eux.

Cependant, selon les six autres juges, les droits linguistiques, s'il y en avait, ont toujours été garantis de manière explicite et ce n'est pas le cas dans l'Adresse de 1867, qui les incorpore «par un renvoi implicite à des termes génériques».

«Le libellé de l'Adresse de 1867 n'étaye pas la thèse de l'existence d'une garantie constitutionnelle de bilinguisme législatif en Alberta», concluent-ils.

L'avocat Roger Lepage, originaire de la Saskatchewan, qui portait la cause de M. Caron depuis le début, s'est dit déçu de la décision de la cour. Il s'est toutefois quelque peu réjoui que trois juges lui aient donné raison.

«Nous avons été capables de convaincre trois des neuf juges qu'il y avait une promesse solennelle qui avait été faite et que c'était une garantie constitutionnelle. Cela dit, c'est la majorité qui l'emporte. C'est décevant pour nous et pour l'ouest du Canada», a-t-il déclaré.

Me Lepage trouve inacceptable que le Canada protège la minorité anglophone au Québec, mais pas la minorité francophone hors du Québec. Il a d'ailleurs appelé le nouveau gouvernement libéral à agir sur ce front.

«Le gouvernement Trudeau devrait financer les gouvernements de la Saskatchewan et de l'Alberta pour s'assurer que les lois soient maintenant traduites», a-t-il suggéré.

En 1988, la Cour suprême du Canada a déterminé que les lois linguistiques devaient être établies par les gouvernements provincial et fédéral, selon leurs compétences respectives.

La même année, l'Alberta avait adopté sa loi sur les langues, où l'on peut lire que «toutes les lois et les règlements seront promulgués, imprimés et publiés en anglais seulement».

Alberta's English-only laws are constitutional: Supreme Court of Canada

The Canadian Press, November 20 2015

The Supreme Court of Canada says Alberta is not constitutionally required to enact its laws in both English and French.

In a 6-3 split decision, the court ruled that the arguments in favour of bilingual legislation brought forward by two appellants were inconsistent with the historical documents they relied on.

The ruling ends a legal fight that has spanned more than a decade, beginning when Alberta's Gilles Caron received a traffic ticket in 2003.

Caron ended up merging his legal challenge with that of another driver, Pierre Boutet, who was also charged with a traffic offence.

The men argued legislative bilingualism extended to modern Alberta based on an assurance given by Parliament in 1867 and in the 1870 order which gave way to the creation of the province.

They won their case in provincial court, but that ruling was overturned on appeal.

The majority of the Supreme Court found Caron and Boutet's position would require the court to believe the status of legislative bilingualism in Alberta was fundamentally misunderstood by "virtually everyone" involved in the Commons debate when the province was created.

"The legislative history post-1870 cannot support an inference regarding the 1870 order that is helpful to the appellants," the court said. "Furthermore, the provincial judge's legal conclusion based on these arguments is in error.

"There is simply no evidence that this joint administration was part of the implementation of a constitutional guarantee. The evidence is, in fact, entirely to the contrary."

In a 1988 decision, the Supreme Court of Canada found the power to legislate language belongs to both the federal and provincial levels of government, under their respective legislative authority.

The same year, Alberta passed its Languages Act which says "all acts and regulations may be enacted, printed and published in English only."