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Public service faces throne speech challenges

Kathryn May, Ottawa Citizen, December 5 2015

The throne speech laying out the Liberal government's ambitious policy agenda made no mention of how the work of Canada's public servants to shape and implement those policies could change.

The speech, delivered by Gov. Gen. David Johnston, highlighted many themes outlined in the Liberals' election platform but was silent on specific pledges for the public service, including what will happen at the round of collective bargaining on sick leave that resumes in January under the new government.

Robyn Benson, president of the giant Public Service Alliance of Canada, noted that the throne speech was silent about rebuilding labour relations with the 18 federal unions and about the Liberals' promises to repeal what's viewed as the previous Conservative government's anti-labour legislation.

"As this new Parliament begins its work, PSAC will be holding the Liberal government accountable to act quickly on its commitments to uphold labour rights," she said.

The Conservatives, who took aim at the size and compensation of the public service over almost a decade, often signalled their public management plans in throne speeches by announcing administrative and strategic reviews, freezes on departments' operational budgets, and wage controls.

The Liberals promised a very different approach: "respecting" the public service and seeking its advice and evidence in decision-making.

Despite the speech's silence on the public service, Treasury Board President Scott Brison said the government needs a strong public service to carry out its progressive agenda.

"We will need an engaged and dedicated public service to get it done," he said in a statement. "We are committed to restoring a culture of respect for and within the public service, not only for this reason, but also because it is the right thing to do."

The government has already taken steps, such as letting federal scientists know they can speak publicly, clarifying the role of political staff when dealing with public servants, and reinstating the long-form census.

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Benson said she welcomed several throne speech promises, such as strengthening employment insurance, working with provinces to improve the Canada Pension Plan, reaching a new health accord and an inquiry into missing and murdered indigenous women and girls. But she noted these require major investments in the public service.

“While the speech did not include any specific commitment to restoring federal public services, we will be looking to the government’s first budget to include the necessary resources to allow the public service to implement these commitments,” Benson said.

The speech reiterated an election pledge for “open and transparent government,” which will have a significant impact on public servants, but offered no details on reforming the Access to Information Act.

The Liberals promised during the election to end fees for processing information requests; give the information commissioner the power to order release of documents; and make ministers’ offices subject to the act, among other changes.

Prime Minister Justin Trudeau’s mandate letters to all ministers also emphasized performance and results, with ministers and cabinet committees expected to track and report on the progress of government priorities and their effectiveness.

Public servants are also expected to release more information supporting cabinet decisions, including analyses and backgrounders that used to be secret.

Brison will be overseeing the open government initiatives. He will also be overseeing an updating of communications policies and government advertising, which was mentioned in the throne speech

“Notable are the things the government will not do: it will not use government ads for partisan purposes,” said the speech.

A modern public service has great expectations to meet

Kevin Lynch, Globe and Mail, December 5 2015

Kevin Lynch is vice-chairman of Bank of Montreal and former Clerk of the Privy Council.

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The new government's recognition that an effective, impartial and permanent public service is a vital institution in Canada's system of governance is a welcome change. Restoring respect and trust in our public institutions is one of the primary challenges confronting the new Liberal government.

The government's initial steps are all in the right direction – opening up communications, committing to rebuilding the role played by parliamentary committees, signalling respect for the public service and offering a more inclusive approach to governing.

In our system of governance, the public service plays a core role and, in these complex and changing times, governments should have two messages for their public services: We have great respect for you, and equally great expectations of you.

Whether we always like it or not, today's reality is a world of pervasive globalization, relentless competition, perpetual innovation, and aging demographics. In this "new global normal," government's role and capacities need to evolve to reflect these shifting realities.

Ottawa has signalled its clear intent to let the public service fulfill its intended role. But how does the public service renew itself to meet these expectations? Consider three areas where the greatest scope for public sector reinvention and innovation may lie.

First, a strong analytic policy capacity that is both broad and deep is a basic necessity of effective governing in an increasingly interconnected, complex and uncertain world. We need to be bolder in our policy thinking, by positioning ourselves at the leading edge of disruptive trends so we can thrive, and not merely survive. Consensus building on innovative policy directions requires well-articulated analysis, diverse views and spirited public discourse. In all this, the public service has to be capable of being a strong, impartial and innovative voice in these discussions.

Policy advice cannot be a monopoly of the public service in today's world of social media and a multichannel universe. It should add value to other sources in terms of its impartiality, timeliness, analytic quality, global perspective and long-term focus.

Value-added policy advice eschews short-termism, a problem that bedevils so many aspects of business, politics and journalism today. It offers needed advice based on "big data" and smart analytics, not anecdote.

Second, a risk-management orientation. In a world experiencing a sharp spike in risk and volatility, the smart response by government is proactive – not reactive – risk management. Today's risks are more systemic, more global, more interconnected and more unpredictable

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than ever before. For government as well as the private sector, they include technology risk, geopolitical risk, forecast risk, environmental risk, security risk, social licence risk and policy risk.

For any institution in a period of change and challenge, short-term risk-aversion paradoxically amplifies risk and long-term pain rather than minimizing it. Effective risk management is a strategy for long-term gain that accepts risk and innovation are correlated. In part, this necessitates attacking the ever-expanding compliance regimes which drown governments in a web of rules, and replacing them with best-practice risk management tools.

While challenging in practice, particularly in government, risk management lies at the heart of innovation, which is so central to making government more productive, more connected and more relevant.

Third, an innovation focus. In a world where technological innovation is at an inflexion point, disrupting how business is done in sector after sector, government should be at the leading edge of innovation adaptation. It is not.

An interesting parallel is the financial world, where financial tech, or fintech, has captured the imagination with its potential to better manage the allocation of capital, reduce payment costs, transform the collection and analysis of data for decision making and broaden accessibility.

The tools of the fintech trade are new platform technologies, huge scalability, big data, cloud computing, and customer-centric business models – all applicable to government operations.

So why not “govtech”? Many of the core functions of government are equally amenable to such innovations, and offer improvements in costs, productivity, service and the public’s experience of dealing with government.

An added benefit of being a leader in govtech would be the enormous export potential for these Canadian firms to market their innovative applications to governments around the world.

A re-empowered public service can be a magnet for talent and contribute significantly to Canada’s long-term success as a strong economy and vibrant society. It now has great expectations to meet.

Report calls for a 'humanized' public service

Kathryn May, Ottawa Citizen, December 2 2015

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The management of Canada's public service needs to be "humanized," with bosses showing more compassion for people rather than simply focusing on what they produce, says a task force's first report on the mental health in the federal workplace.

The joint union-management task force — struck by former Treasury Board president Tony Clement and the Public Service Alliance of Canada — made 11 recommendations that lay the groundwork to create a culture that enshrines "psychological health, safety and well-being" across the federal workplace.

The report, which recommends implementing the Mental Health Commission's national psychological standard across government, concludes that the way the public service is managed must shift from an "output-focused environment to one that is more people-focused."

The recommendations revolve around fixes in key areas: leadership, engagement, education on mental health, training and workplace practices, communication, and promotion and accountability.

"We must humanize the workplace ... A more people-focused environment contributes to a high-quality federal public service (and) compassion is fundamental to this shift," said the report.

Treasury Board President Scott Brison said the report shows the government and unions have "common ground" where they can work together.

"Humanizing is consistent with our government agenda to create a culture of respect for the public service," said Brison.

"Mental health is part of that, ensuring public servants have a healthy workplace," he said. "It is the right thing and healthy workplaces are more productive."

The task force grew out of the bargaining demand PSAC tabled nearly a year ago. It asked the government to adopt the Mental Health Commission's national psychological standard across government and enshrine it in all collective agreements.

Clement took the extraordinary step of taking the proposal off the table, and setting up a task force to examine the standard and identify the toxic factors in the workplace that are making workers sick.

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“The unions deserve credit ... and I give full marks to Tony Clement for having helped to initiate this,” said Brison. “I told the unions that it this is just the beginning.”

Brison stressed the committee’s work won’t be used as a bargaining chip in “any way, shape or form” when Treasury Board negotiators and the 18 unions resume collective bargaining on sick leave in January.

The cost of mental illness, from absenteeism to productivity, has been on the government’s radar for the past decade, with mental health claims accounting for 47 per cent of all disability claims.

The 2014 public service survey found employees’ engagement was falling and one in five said they were harassed, mostly by co-workers or bosses. Studies of executives and their health showed similar trends.

Last year, 40 per cent of all calls to the hotline for the Employee Assistance Program were about mental health.

PSAC President Robyn Benson called the report a critical first step to build a “new way of life” for public service.

“The federal public service unions look forward to following through on the recommendations of the task force on an equal footing with the government,” she said.

“Our members have high expectations and will be watching the process closely.”

Bob Kingston, president of the Agriculture Union who co-chaired the committee, said recommendations dealing with training, workplace assessments, changing performance standards and holding people to account are key to driving the culture change.

The report calls for the appointment of a senior bureaucrat to become the psychological health and safety champion. Kingston said unions will have input into that appointment which will set the tone.

Kingston said the 15-member committee will now develop a work plan that will “put flesh on the bones” of the broad recommendations.



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Besoin d'«humanité» dans la fonction publique fédérale

Paul Gaboury, Le Droit, le 2 décembre 2015

Pour améliorer la santé et la sécurité psychologique des employés dans la fonction publique fédérale, il faut humaniser le milieu de travail et créer une culture basée sur «la collaboration, l'inclusivité et le respect».

Cette vision est celle du Groupe de travail patronal-syndical sur la santé mentale, dont le rapport a été déposé mercredi par le président du Conseil du Trésor, Scott Brison.

En 2013-2014, les résultats du Sondage auprès des fonctionnaires fédéraux avaient permis de constater que la mobilisation des employés fédéraux avait diminué au fil du temps et 19% ont déclaré avoir été victimes de harcèlement.

Pendant cette période, 40% de tous les services fournis par le Programme d'aide aux employés étaient liés à la santé psychologique.

Chez les cadres, un rapport de 2012 indiquait qu'ils souffraient de taux de stress plus élevés et que 25% déclaraient des symptômes d'épuisement professionnel.

Afin de concrétiser cette nouvelle vision et réduire les problèmes liés à la santé mentale, le Comité a cerné des domaines clés sur lesquels se concentrer, tout en répondant au besoin général de créer «une nouvelle culture d'humanité, de compassion et de justice».

Une norme nationale

Le Comité croit que cette vision peut être réalisée par la mise en oeuvre de la Norme nationale du Canada sur la santé et la sécurité psychologique en milieu de travail.

Lancée en 2013, la Norme nationale n'a jamais été mise en oeuvre intégralement par le gouvernement Harper. Toutefois, dans le cadre des présentes négociations, en mars 2015, il avait accepté de créer un groupe de travail mixte, avec l'Alliance de la fonction publique du Canada, pour s'occuper de la santé mentale en milieu de travail, un problème de plus en plus préoccupant chez les employés fédéraux.

Pendant la campagne électorale, les libéraux ont promis d'accélérer la mise en oeuvre de cette Norme nationale.

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Mardi, le président du Conseil du Trésor a félicité le travail des dirigeants syndicaux pour cette initiative et s'est engagé à répondre aux recommandations du rapport.

«Le gouvernement s'engage à rétablir une culture de respect pour et dans l'ensemble de la fonction publique», a indiqué le ministre.

La présidente nationale de l'AFPC, Robyn Benson, se réjouit des recommandations pour revigorer le leadership, l'engagement et les initiatives de sensibilisation en santé mentale.

«Nous sommes très heureux des progrès accomplis par le groupe de travail. Les syndicats de la fonction publique sont impatients de donner suite aux recommandations du groupe de travail. Nos membres ont beaucoup d'attentes et surveilleront de près le processus» a indiqué la présidente Benson.

Opinion: Public sector needs transformation, not return to "good old days"

Dylan Jones, Edmonton Journal, November 30 2015

Many Canadians are optimistic the new federal administration will liven up our democracy. But what we need is a transformation of our public institutions, not merely a restoration.

Shifting power from political staffers to elected cabinet ministers and re-engaging with the expertise of the public service will not be enough. Nor will a cabinet of manageable size, where real conversation can happen; the election of parliamentary committee chairs by secret ballot; and civility and real debate within Parliament.

We need a public sector that shifts from a mode of elite expertise to one that actively seeks the talents of the many — a government that is more nimble, more humble and more engaged with Canadians. Something as basic as crowdsourcing — inviting Canadians to provide data and ideas relevant to the issues of the day — is rich, untapped territory for a reimagined public sector.

The Public Policy Forum recently gathered five eminent Canadians, led by Jim Dinning, to examine public-sector governance. Their report, *Time for a Reboot: 9 Ways to Restore Trust in Canada's Public Institutions*, is worth reading.

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They lay out four core strategies: strengthening parliamentary committees, restoring cabinet government, letting the public service fulfil its role and making political staffers more accountable. The new government has committed to key actions supporting all of these pillars.

Essentially, this is a call for a “back-to-basics” approach. No doubt such a restorative approach would be an improvement over the trend in Canada for the public sector to respond to modernity by centralizing communications and seeking desperately to control its brand and message.

We now live in a world where “gotcha politics” — focusing on mistakes — is king. Taking words out of context is pretty much all we do since no one seems to have time for complexity. Greater transparency and problem-sharing by government require a willingness on the part of the opposition, the media and citizens to trust and be fair-minded with government actors. It’s certainly not easy.

The strategy of returning our institutions to their original design makes some sense when faced with this challenge. In particular, exposing more of the rich policy debate and evidence may well incline Canadians to be more patient and understanding of the difficulties faced by government. As well, such a process is more likely to produce good public policy. After all, policy created in secrecy is far more likely to be based on incorrect or limited information.

At the same time, it would be a mistake to try to recreate the old regime of strong ministers advised by elite experts. In the “good old days,” this model also encouraged siloed thinking, public-sector arrogance and mistakes. We can do much better by considering how to involve more people in the process.

For example, Canadians do not want just to end climate change or just to restore our flagging economy. They want both. This involves diverse expertise, including perspectives not available within the ranks of the existing public service. We increasingly need public actors who engage across and beyond ministry boundaries.

This kind of modern public service will only happen with both support and challenge from politicians. A government that “gets out more” will need more money for travel. Yes, much can be done with modern technologies but since this whole conversation is fundamentally about trust, personal relationships still matter.

The key will be blending leadership with vulnerability. Leadership is how governments can survive tough files — like decisions about pipelines, for example — because taking a stand can at least mobilize support, rather than leaving everyone hating you. Vulnerability, on the other

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hand, is how a modern government can ask for help, ask citizens to acknowledge complexity and build trust.

Much can be learned from reflecting on how our institutions were designed in the first place, such as was done so well in the recent Public Policy Forum report. Yet reflecting on the weaknesses of the old structures is also valuable because ultimately, transforming government will be as much about humility as it will be about hope.

Dylan Jones is president and CEO of the Canada West Foundation, a think-tank devoted to issues of particular concern to Western Canada.

Employers can't decide what constitutes PS workplace violence, court rules

Don Butler, Ottawa Citizen, December 2 2015

In a decision hailed as “groundbreaking” for federal public servants, the [Federal Court of Appeal](#) has confirmed a broad definition of workplace violence and underlined that federal employers don’t have the right to arbitrarily determine what constitutes violent abuse.

In its Nov. 30 [decision](#), the court dismissed a government appeal of a federal court decision that overturned a tribunal’s finding that the Canadian Food Inspection Agency acted appropriately when it dismissed a workplace violence complaint by Abel Akon, a CFIA poultry inspector in Saskatoon.

Akon, a native of Sudan, filed the complaint in 2011, alleging that he was harassed, belittled, humiliated and treated with disrespect by his supervisor.

According to the court, Akon alleged that the conduct included “dismissive hand gestures, eye-rolling, verbally demeaning behaviour, disregarding complaints regarding other employees, yelling at him in front of plant personnel, lack of transparency and unfair marking of a certification exam.”

After receiving the complaint, CFIA appointed Ken Schmidt, one of its regional directors, to conduct a “fact-finding process” to review Akon’s concerns. Schmidt concluded that Akon’s complaint didn’t warrant an investigation.

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By conducting its own investigation instead of assigning that task to an impartial person, Akon and his union, the Public Service Alliance of Canada, complained that CFIA management had violated a regulation of the Canada Labour Code.

The matter landed in the federal court after an appeals officer of the Occupational Health and Safety Tribunal of Canada endorsed the CFIA's handling of the complaint.

The officer found that Akon's allegations didn't amount to workplace violence because his superiors' conduct could not reasonably be expected to cause harm, injury or illness. As a result, there was no obligation on the employer to appoint a "competent person" to investigate, he concluded.

The PSAC filed an application for judicial review, and in November 2014, the federal court ruled that the appeals officer's conclusion was unreasonable, saying harassment of the kind alleged by Akon could constitute workplace violence. "Psychological bullying can be one of the worst forms of harm that can be inflicted on a person over time," Judge Michael Manson observed.

Though the government's lawyer argued that workplace violence covers only physical force, the Federal Court of Appeal endorsed Manson's reasoning in its decision this week.

Allowing employers to conduct their own investigations into allegations of workplace violence and determine whether they deserve to be independently investigated "would make a mockery of the regulatory scheme and effectively nullify the employees' right to an impartial investigation of their complaints," the court said.

Management has a duty to appoint an independent investigator unless it is "plain and obvious" that the allegations don't relate to workplace violence, it said, adding: "The employer has very little discretion in this respect."

Bob Kingston, president of the PSAC affiliate Agriculture Union, called the decision "groundbreaking for the federal public service and all federally regulated workers."

"It establishes that psychological harassment can amount to workplace violence and is one of the worst forms of harm that can be inflicted over time."

Robyn Benson, PSAC's national president, said the decision was timely in light of a recent public service employee survey in which one in five workers reported being harassed. "Employees alleging workplace violence deserve to have their concerns treated fairly and respectfully," she said.

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New code of conduct introduced for political aides

Kathryn May, Ottawa Citizen, November 30 2015

Prime Minister Justin Trudeau is introducing the first code of conduct on political staff working for cabinet ministers, aimed at drawing a “line in the sand” between politics and public service neutrality for ministerial aides.

The code is part of the Open and Accountable Government guide, released last week, on the roles, responsibilities and standard of conduct Trudeau expects from his cabinet. The guide is an updated version of one that the Privy Council Office prepared for former prime minister Stephen Harper in 2011.

The line between politics and the public service has been blurring for decades, with experts calling for a code to govern the behaviour of ministerial staffers — the “political warriors” or “kids in short pants” who roam Ottawa’s corridors of power with little accountability.

The code says ministerial aides can’t meddle in the work of the public service, can’t give public servants orders, and that ministers are responsible for their staff’s actions.

The guide also changes the rules on the personal and partisan use of social media.

Ministers’ staff, who are hired under the Public Service Employment Act, are exempt from the hiring rules for public servants. Their job is to provide political advice to ministers while bureaucrats offer non-partisan advice.

Karl Salgo, formerly of the Privy Council Office and now executive director of public governance at the Institute on Governance, said the guide doesn’t break new ground, but is the first attempt to pull together the rules — written and unwritten — in a single code that will be enforced as a condition of employment. Treasury Board, for example, has long had policies on communications and ministers’ offices.

“This is not a change in rules but rather a codification of established principles that has not previously been brought together as comprehensively nor as authoritatively,” he said.

Salgo said the code is now the most “authoritative” statement on the boundaries around the relationship between political aides and public servants, and puts the onus on staffers to know and live by those rules. He argued more structure should improve compliance.

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For the public service, the new code is a concrete step towards the Liberals' election promise to restore and rebuild respect for the public service.

"This is good for the public service because it clarifies the lines of accountability and draws that line in the sand," said Salgo.

"The guide lays out the parameters, and people can't claim to be unclear about them because it is a term and condition of employment. This is a good innovation for building a healthy relationship (between ministerial staff and public servants)."

A code of conduct for political staffers was a key recommendation, which the Conservatives never implemented, of the Gomery Inquiry into the sponsorship scandal.

Conservative ministers' relationship with public servants was an uneasy one.

They often bypassed the deputy ministers' office, gave public servants orders and were so involved in the running of departments that a recent Public Policy Forum report called political aides a new "political service" that was more influential and less accountable than the public service.

The study also found the number of aides soared to 600 — 10 times more than the 60 political advisors on payroll for the much-larger U.K. government.

With the new code, ministerial staff must act with integrity and honesty, support the minister's duties, be diligent and loyal to the minister, and work with the public service to support the minister. When working with bureaucrats, they must:

- be aware of the ethical standards, guidelines and codes of conduct that public servants must comply with;
- stay out of departmental operations, including how money should be spent;
- not engage public servants in activity that breaches their ethical and legal obligations as non-partisan public servants;
- not direct or issue orders to public servants;
- not undermine or circumvent the authority of deputy ministers; and
- not suppress or alter advice that public servants prepare for ministers.

The code also calls for a separation between ministers' social media accounts and those of the government. That's long been the policy but the Conservatives were repeatedly called out for using the government's communications machinery to promote partisan interests.

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They made public servants refer to the Government of Canada as the Harper Government on all news releases and backgrounders.

In another case, departments were asked to send retweets promoting a family-tax measure not yet passed by Parliament, including a hashtag with the Conservative slogan #StrongFamilies. Employment Minister Pierre Poilievre had public servants work overtime to create promotional videos about child benefits, which featured him.

The government has two types of social media accounts – departmental and thematic accounts — which are targeted at specific topics or audiences. They are used to promote or advertise federal programs but can't have identifying "party symbols" or partisan content.

The code allows ministers and parliamentary secretaries to have their own social media accounts, but won't allow government resources to manage or create content for them.

Departments can't tweet, retweet or link to the personal or political accounts of ministers. Ministers, however, can link or tweet content from Government of Canada websites.

Niqab ban legal battle cost federal government more than \$420K

Alison Crawford, CBC News, November 30 2015

The final tally of the federal government's legal bill for its fight to prevent women from wearing a face veil at citizenship ceremonies is \$421,840.

The figure is included in a document obtained in an access to information request filed by CBC News.

The former Conservative government lost in Federal Court and again at the Federal Court of Appeal before going all the way to the Supreme Court of Canada to try to reinstate its ban on women wearing a niqab while taking the citizenship oath.

The case had a huge impact on last month's federal election campaign.

It all started with a lawsuit from Zunera Ishaq, a devout Muslim woman from Mississauga, Ont. She moved to Canada from Pakistan in 2008 to join her husband. Ishaq agreed to remove her niqab for an official before writing and passing her citizenship test in 2013, but she objected to unveiling in public for the official oath-taking ceremony.

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Earlier this year Federal Court Justice Keith Boswell said the government policy, introduced in 2011 on the direction of former citizenship minister Jason Kenney, was unlawful.

Citizenship judges must allow the greatest possible religious freedom while administering the oath. Boswell asked how that would be possible, "if the policy requires candidates to violate or renounce a basic tenet of their religion."

The government then asked for another hearing at the Federal Court of Appeal. At the time Kenney said, "today's ruling not only goes against the democratic will of Canadians but against long-held Canadian values of openness and the equality of women and men."

The Federal Court of Appeal heard the case on Sept. 15, 2015. In a rare move, the panel of three judges immediately [ruled from the bench](#) and agreed that the niqab ban was unlawful.

The government appealed to the Supreme Court of Canada and the Conservatives turned their niqab ban into a wedge issue during the campaign that, in the end, did nothing to help the party.

The new Liberal Minister of Justice Jody Wilson-Raybould [formally withdrew](#) the leave to appeal two weeks ago, a move that put a stop to spending thousands more on what was seen to be a doomed legal campaign.

Supreme Court Of Canada Affirms Principle Of Technological Neutrality In Canadian Copyright Law

Daniel Anthony, Smart & Biggar/Fetherstonhaugh December 1 2015

On November 26, 2015, the Supreme Court of Canada issued a 7-2 split decision affirming that even incidental copies of a work made to facilitate broadcasting will engage the reproduction right and require a license. In reaching its decision, the Supreme Court highlighted the central role that the principle of technological neutrality plays in Canadian copyright law. The principle of technological neutrality recognizes that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted or applied to favour or discriminate against any particular form of technology. The goal of technological neutrality is to preserve the traditional balance between authors and users in the digital environment.

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The decision under appeal. In *CBC v SODRAC*, [2015 SCC 57](#), the Canadian Broadcasting Corporation (CBC) disputed the finding of the Copyright Board and Federal Court of Appeal that the *Copyright Act* required a separate license for incidental copies of works made to facilitate broadcasting, and also disputed the valuation of the license fee.

The parties' positions. CBC is Canada's public television broadcaster. The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) is a collective management society that grants licenses to reproduce, or make copies of, copyrighted musical and artistic works. SODRAC does not grant licenses for broadcasting, since broadcasting rights are managed by a separate collective society.

The parties agreed that a license is required during production when copyrighted musical works are synchronized with video to produce finished television programs and movies, called "master copies". In order to broadcast a master copy, CBC loads the master copy into its digital system and makes temporary copies for various purposes, such as for reformatting to meet technical requirements, editing for language or timing, and pre-screening. These copies are referred to as "broadcast-incidental" copies. The dispute involved SODRAC's claim that a separate license is required for the broadcast-incidental copies.

To support its claim for a license over broadcast-incidental copies, SODRAC relied upon a previous decision of the Supreme Court (*Bishop v Stevens*, [1990] [2 SCR 467](#)), which held that temporary musical recordings made to facilitate a later broadcast are considered reproductions under the *Copyright Act*. In response, CBC argued that subsequent rulings by the Supreme Court favoured a finding that broadcast-incidental copies do not engage the reproduction right. Specifically, CBC relied upon the requirement to balance user and right-holder interests discussed in *Théberge v Galerie d'Art du Petit Champlain inc*, [2002 SCC 34](#), and the principle of technological neutrality discussed in *Entertainment Software Association v SOCAN*, [2012 SCC 34](#) (*ESA*).

The majority. In its ruling, the majority held that the principles of balance and technological neutrality inform the interpretation and application of the *Copyright Act*, but cannot override its express wording. The majority determined that both the ordinary meaning of the text and the evidence of legislative intent support a conclusion that broadcast-incidental copies trigger the reproduction right set out in section 3(1)(d) of the *Copyright Act*.

Having affirmed the need for a license, the majority then held that the license fee was inappropriate since the Copyright Board failed to consider the principles of technological



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neutrality and balance between users and right-holders interests. The majority commented that relevant factors in setting the valuation of the license will include, but are not limited to, the risks taken by the user, the extent of the investment the user made in the new technology, and the nature of the copyright protected work's use in the new technology. Since CBC took the risks of investing in and implementing the new technology and CBC's use of the reproductions was incidental, the majority noted the license fees should be low.

The minority. A strong minority decision would have held that in order to properly give effect to the principle of technological neutrality, broadcast-incidental copies should not be found to engage the reproduction right in the *Copyright Act*. The minority concluded that SODRAC was attempting to claim royalties for a particular method of broadcasting musical works as part of television programs and movies, despite never before receiving royalties for broadcasting. The minority agreed with CBC's characterization that SODRAC was attempting to subvert the *Copyright Act* to generate economic gain through a layered licensing scheme.

The importance of technological neutrality. While reaching different conclusions on the statutory interpretation of section 3(1)(d) of the *Copyright Act* as applied to broadcast-incidental copies, both the majority and minority emphasized the essential role of technological neutrality in interpreting and applying Canadian copyright law. It is clear that Canadian courts have an important role in future cases to ensure that the *Copyright Act* does not unfairly benefit or prejudice new and emerging technologies.

For further information regarding this topic, please contact a member of [our firm's Copyright & Media group](#).

The preceding is intended as a timely update on Canadian intellectual property and technology law. The content is informational only and does not constitute legal or professional advice. To obtain such advice, please communicate with our offices directly.

Federal right-to-die laws will draw 'inspiration' from Quebec, PM's spokesman says

Liberal government considering a request to Supreme Court for extension to write new laws
Kathleen Harris, CBC News, December 2 2015

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The federal government will draw "inspiration" from Quebec's legislation on doctor-assisted death as it drafts new federal laws around the emotionally charged issue, says a spokesman for the prime minister.

Olivier Duchesneau said Prime Minister Justin Trudeau appreciates the "incredible work" done by Quebec's National Assembly on the sensitive issue, and praised Quebec parliamentarians for putting partisanship aside to reach consensus.

"We have always been clear that Canada should take inspiration from Quebec on how it studied the issue and that is what we intend to do. We'll be announcing more details in the coming days, but rest assured that the leadership taken by Quebec will be recognized for its true value," Duchesneau said.

On Tuesday, Quebec Superior Court Justice Michel Pinsonnault ruled that Quebec's law allowing some terminally ill patients to end their lives with medical assistance contradicts Criminal Code provisions that remain in place until Feb. 6, 2016.

The Quebec government announced it would appeal the Superior Court decision. The province's end-of-life law was set to take effect Dec. 10.

In February, the Supreme Court of Canada ruled that Canadians with unbearable suffering should be allowed to end their lives with the aid of a physician, and gave Parliament one year to enact new laws. The new Liberal government has not yet confirmed if it will ask the top court for an extension.

Federal Justice Minister Jody Wilson-Raybould said that option remains under "serious consideration" and that she will have more news in "coming days."

Federal lawyers intervened

Wilson-Raybould promised to work co-operatively with her provincial counterparts, consult widely and rely on the four-plus years of work Quebec has already done. She said Wednesday the fact federal lawyers intervened in the case against Quebec's legislation does not reflect a lack of collaboration.

"It's not anything confrontational. It's just ensuring we proceed in the most appropriate way," she said.



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Government House leader Dominic LeBlanc has said drafting new laws will be a top priority for the government and that a committee of MPs and senators will be struck to craft "quick and expedited" legislation to fill the void.

Aide médicale à mourir : Ottawa nie toute confrontation avec Québec

La Presse Canadienne, le 2 décembre 2015

La ministre fédérale de la Justice, Jody Wilson-Raybould, trouve « malheureux » que l'on puisse penser qu'Ottawa est dans une dynamique de confrontation par rapport au Québec dans le dossier de l'aide médicale à mourir.

« Cela n'a rien à voir avec la confrontation. Nous voulons simplement nous assurer que nous procédons de la manière la plus appropriée qui soit. » — *La ministre fédérale de la Justice, Jody Wilson-Raybould*

« Je trouve cela malheureux que cette perception existe », a laissé tomber Mme Wilson-Raybould, en mêlée de presse à la sortie du caucus de son parti, mercredi. Elle a ajouté ne pas vouloir « projeter cette image », mais plutôt « apprendre de l'expérience » du Québec, dont elle a salué le leadership.

La ministre n'a pas répondu directement aux questions entourant la décision du fédéral d'intervenir dans les démarches judiciaires ayant mené à la suspension de l'application de certains articles de la loi concernant les soins de fin de vie, qui devait entrer en vigueur le 10 décembre.

Le fédéral a argué devant la Cour supérieure qu'« affubler le qualificatif de soin à l'euthanasie d'un être humain ne convertit pas celle-ci d'un acte criminel en un soin de santé », est-il écrit dans le jugement rendu mardi.

Il devrait ainsi revenir à Ottawa de « légiférer en matière de l'euthanasie d'un être humain et du suicide assisté, lesquels relèvent tous deux de sa juridiction exclusive en matière criminelle », a plaidé l'avocate de la Procureure générale du Canada.

Quelques heures après le jugement, le gouvernement québécois a annoncé qu'il le porterait en appel, et les députés de l'Assemblée nationale ont adopté mercredi une motion unanime exigeant d'Ottawa « qu'il reconnaisse la validité de la loi québécoise ».



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La ministre Wilson-Raybould n'a pas précisé si le gouvernement libéral s'impliquera dans l'appel de la décision qui est tombée la veille ni si la loi québécoise était selon elle valide.

Une « erreur monumentale » des libéraux, selon Mulcair

Pour le chef du Nouveau Parti démocratique (NPD) Thomas Mulcair, les libéraux ont commis une « erreur monumentale » en « s'attaquant au modèle québécois » devant les tribunaux.

Il a rappelé que le premier ministre Justin Trudeau louangeait ce même modèle québécois en campagne électorale.

« Et voilà qu'à peine quelques semaines après l'élection, il a envoyé les avocats du gouvernement fédéral battre en brèche la loi québécoise », a ironisé le chef néo-démocrate en point de presse dans le foyer de la Chambre des communes.

De son côté, le chef adjoint du Parti conservateur a fait preuve de davantage de réserve. Lorsqu'on lui a mentionné que le gouvernement dont il faisait partie s'était traîné les pieds dans ce dossier, Denis Lebel a répliqué « que tout va être de notre faute encore pour plusieurs mois ».

Les conservateurs avaient mis cinq mois avant de mettre sur pied le comité consultatif qui doit déposer un rapport à la mi-décembre.

Le comité, dont fait partie l'ancien ministre québécois Benoît Pelletier, a vu son mandat changer en cours de route. Il n'a plus la responsabilité de proposer des options législatives au gouvernement, seulement de rendre compte des résultats de ses travaux.

En attendant la réponse du gouvernement fédéral

Ottawa doit annoncer sous peu quelle sera sa réponse législative au jugement rendu le 6 février dernier par la Cour suprême du Canada dans le dossier de l'aide médicale à mourir.

Le fédéral disposait d'un an pour réagir au jugement de la Cour suprême. S'il ne bouge pas, les articles du Code criminel qui ont été invalidés cesseront de s'appliquer en février et l'aide médicale à mourir sera permise, sans balise.

Si le gouvernement choisit de légiférer, les parlementaires auraient seulement quelques jours - une dizaine après le dépôt du rapport du comité chargé de mener des consultations, selon le calendrier de la Chambre des communes - pour se pencher sur l'épineuse question.



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Le leader du gouvernement à la Chambre des communes, Dominic LeBlanc, a affirmé mercredi qu'il espérait mettre sur pied un comité composé de députés et de sénateurs pour s'attaquer au dossier.

« C'est une priorité pour nous, a-t-il assuré en mêlée de presse. Et à date, la réaction de mes collègues au Sénat est très positive. »

Le discours du Trône calqué sur les engagements électoraux des libéraux

La Presse Canadienne, le 4 décembre 2015

Chose promise, chose due: le gouvernement libéral avait laissé entendre que le discours du Trône serait fidèle à ses promesses électorales.

Le discours livré vendredi par le gouverneur général au nom du nouveau gouvernement fédéral a donc repris, sans surprise, les principaux engagements électoraux des libéraux.

Diminution d'impôt pour la classe moyenne, enquête sur les femmes autochtones disparues et assassinées, accueil de 25 000 réfugiés syriens d'ici février 2016, négociations avec les provinces pour améliorer les régimes de pension - les grandes promesses électorales se retrouvent toutes dans ce discours.

Le texte, lu par David Johnston au Sénat, rappelle que la «priorité immédiate» du gouvernement de Justin Trudeau est une baisse d'impôt pour la classe moyenne.

«Pour l'économie canadienne, il s'agit d'une mesure équitable et judicieuse», indique le gouvernement dans son discours.

Dès la semaine prochaine, les Communes siégeront le temps d'adopter une motion de voies et moyens qui mettra en vigueur cette baisse d'impôt. Les libéraux ont promis de faire passer de 22 à 20,5 pour cent le taux d'imposition des Canadiens dont le revenu annuel se situe entre 44 701 \$ et 89 401 \$ et de créer une nouvelle tranche d'imposition de 33 pour cent pour ceux dont le salaire annuel dépasse les 200 000 \$.

Le gouvernement poursuit en affirmant que la nouvelle Allocation canadienne aux enfants lui permettra de remplir son engagement «d'accorder une aide directe à ceux qui en ont besoin en donnant moins à ceux pour qui ce n'est pas le cas».



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Il rappelle les investissements «majeurs» qu'il a promis pour les infrastructures - vertes et sociales - de même que les investissements dans les technologies propres qu'il entend faire.

Au plan de l'environnement, le gouvernement réitère son intention de mettre en place de nouveaux processus d'évaluation environnementale et celle d'exercer «un leadership» pour que le Canada mette un prix sur le carbone.

Les troupes de Justin Trudeau rappellent par ailleurs leur intention de réformer le système électoral. «Pour veiller à ce que chaque vote compte, le gouvernement mènera des consultations sur la réforme électorale, puis fera en sorte que l'élection de 2015 aura été la dernière à être menée selon le système électoral majoritaire à un tour», a prononcé M. Johnston.

Reprenant les promesses libérales concernant les peuples autochtones, il a signalé que le «gouvernement rétablira la relation de nation à nation», lancera une «enquête sur les femmes et les filles autochtones disparues et assassinées» et s'assurera que tout enfant des Premières Nations «reçoive une éducation de qualité».

Au plan de la sécurité, sans parler spécifiquement de Loi C-51, le gouvernement promet de «travailler à assurer la sécurité de la population tout en protégeant les droits et libertés que nous chérissons».

Il évoque notamment son intention de légaliser et réglementer la consommation de marijuana tout en limitant l'accès à cette substance.

Il promet également d'amorcer le travail avec les provinces et les territoires pour mettre en place un nouvel accord sur les transferts fédéraux pour la santé.

Lançant quelques pointes indirectes au gouvernement conservateur précédent, le gouvernement évoque aussi ce qu'il «ne fera pas: il n'utilisera pas les publicités du gouvernement à des fins partisans, il n'entravera pas le travail des agents parlementaires, et il n'aura pas recours à des mécanismes tels que la prorogation et les projets de loi omnibus pour éviter les examens minutieux».

Liberal government unveils plan for Senate reform

Selina Chignall, iPolitics.ca, December 3 2015

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The Trudeau government unveiled its plan for reforming the Senate today; an approach aimed at overhauling the appointments process without requiring a Constitutional amendment. Democratic Institutions Minister Maryam Monsef and Government House Leader Dominic LeBlanc announced the formation of a non-partisan, five-member board to advise the prime minister on Senate appointments.

“I believe this new process will immediately begin to restore the confidence of Canadians in an institution that plays a vital role in our democracy,” Monsef said.

Monsef says the five board members — three from the federal level and two ad-hoc members from the provinces — will pick candidates based on public criteria. There are currently 22 Senate vacancies, left open by former prime minister Stephen Harper before the election campaign.

Initially, the board will be tasked with recommending nominees to fill five vacancies in the provinces that are currently most under-represented in the Senate: two from Ontario, two from Manitoba and one from Quebec. Those are to be filled by early next year. Another 17 vacancies are to be filled by the end of 2016.

Monsef says the effectiveness of the Senate has been hampered by its reputation for partisanship, emphasizing that the plan for reform is not a constitutional amendment. “We respect that Canadians want us to focus on our priorities and not on opening the constitution.”

The candidates for Senate appointments will need to have a record of achievement and public service, show integrity, be non-partisan and understand the role of the Senate.

Monsef said a few of the requirements the candidates must have include a record of proven leadership and a record of accomplishment in public service, ethics and integrity. They will also be expected to have a perspective on the Senate that is non-partisan, and understand its role within the constitutional framework.

The criteria will also take into account gender and diversity. The board will provide a non-binding shortlist of five nominees to fill each vacancy.

“I’m confident that this merit-based process will result in candidates of the highest quality being recommended to serve Canadians in the Senate,” she said.

Once the transitional phase ends in early 2016, the permanent process will begin.

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“Through this open application process we will consider any refinements to the permanent process based on the lessons learned and the comments received during the transitional process,” Monsef said.

British Columbia Premier Christy Clark announced immediately that her government won’t participate in the process.

“Today’s changes do not address what’s been wrong with the Senate since the beginning,” Clark said in a statement. “It has never been designed to represent British Columbians or our interests at the national level.”

Clark said the Senate should be “fixed or folded.”

Supreme Court of Canada sends mixed message on limitation periods for class actions

Drew Hasselback, Financial Post, December 4 2015

A split Supreme Court of Canada has produced a mix of views on how strictly Canadian courts should apply statutory time limits in class action cases.

The Supreme Court on Friday ultimately dismissed efforts by CIBC to block a securities class action filed against the bank, but it did so just barely.

Three judges would have tossed out the plaintiffs’ claims against CIBC as “time-barred” because they failed to meet a deadline to get the court approval needed to sue for relief offered under Ontario’s Securities Act. Three other judges would have let the case against CIBC proceed because they would have granted more leeway on when to start the clock in the limitation deadline.

The court recognized the confusion. Four of the Supreme Court justices agreed that Canadian judges have the general power to deal with timeline problems by applying a remedy called “nunc pro tunc” which overrides the calendar and removes the confusion. But of those four judges, three would not apply the remedy in the CIBC case.

It therefore came down to one judge, Thomas Cromwell, and his ruling ultimately tipped the case in favour of letting investors sue the bank. Justice Cromwell found that a lower court judge was correct to apply the nunc pro tunc remedy to clean up the timeline mess.

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“This is a proper consideration and I see no error in the motion judge’s reliance on it here. I would put the point more bluntly. Holding that the plaintiffs’ claim is irremediably statute-barred is to defeat that claim by allowing the defendants to take advantage of an after-the-fact ‘gotcha’ — a technical defence, the application of which in this case does not further either the purpose of the limitation defence or reinforce public confidence in the administration of justice.”

The ruling also deals with two other securities class action cases, one against IMAX Corp. and one against Celestica.

In the IMAX case, four justices found that the case was time-barred, but applied the nunc pro tunc doctrine so the case could proceed. In Celestica, a majority of justices simply found that the case was time-barred.

Ontario’s statutory limitation period to obtain leave to bring cases under the Securities Act has attracted controversy.

A 2012 ruling of the Ontario Court of Appeal upheld a strict interpretation of the limitation period that applies to statutory investor class actions filed in Ontario courts. The ruling was controversial. Indeed, a special, five-judge panel of the Ontario Court of Appeal later reversed it in 2014. Meanwhile, the Ontario legislature changed the wording of its Securities Act in the hopes of removing the confusion.