Liberals and public service are falling out of love. It's time for them to kiss and make up

John Ivison, National Post, December 20 2015

All new relationships run into a few bumps along the way, and the exhilarating love story between the Liberal government and the federal public service is no exception.

Six weeks in, the initial intoxication has worn off and the other's annoying habits are being exposed.

Exasperated senior Liberals complain the public service has not functioned as an effective bureaucracy should for a very long time.

Under the Conservatives, all tour logistics and stakeholder outreach, such as relations with the provinces, were handled by political staff.

Thus, when Justin Trudeau went overseas for four international summits, or sought to convene a first ministers' meeting, the public service struggled to respond, they say.

We're pulling political levers and finding out the levers are not attached to anything.

Neither did the bureaucracy know how to prepare briefing books for question period — another function that, under Harper, was assumed by the political issues management staff in the Prime Minister's Office.

"A lot of the muscles have atrophied," said one insider. "We're pulling political levers and finding out the levers are not attached to anything."

Senior public servants take umbrage at this criticism. "We pulled off four summits in three weeks — there was impeccable support from the Department of Global Affairs and the embassies, which responded heroically," said one top bureaucrat.

Meanwhile, the public service is having its own adjustment issues. While the Harper regime required ministers to have pre-clearance to go to the bathroom, the tight message track did at least instill discipline. Ministers were too intimidated to freelance opinions or spend money without authorization.

In the case of the Liberals, ministers are out making spending commitments without restraint. Just last week, Fisheries Minister Hunter Tootoo promised the Kitsilano, B.C. Coast Guard station would re-open “as soon as possible,” while Indigenous and Northern Affairs Minister Carolyn Bennett suggested the Shoal Lake 40 First Nation in Manitoba will get its long-awaited all-weather road.

“They don’t have the money for that,” said the public servant. “There is no fiscal budget allocating process, and they are going to end up even further out on a limb.”

These relationship problems were inevitable as the emotional overdrive of the early days wore off. Fiscal discipline will come, because it has to. A cabinet retreat next month would seem to be a good juncture for the finance minister, Bill Morneau, to tell his colleagues to stop saying anything that might have spending implications.

The government is hurtling headlong toward a $20-billion deficit, unless it reins in spending. The fiscal problems keep piling up. The latest setback is said to be the discovery that the money the Conservatives had allocated for First Nations education — which was thought to be baked into the fiscal framework — may not be there after all. If that is confirmed, it will be another $1 billion or so the Liberals have to find.

There are things the government can do. It is not obliged to pay out the $4.3 billion the Harper government promised dairy farmers in compensation for opening up the market under the conditions of the Trans-Pacific Partnership. It could, perhaps, demand to see proof of losses before awarding compensation.

It could also slow the pace of its infrastructure roll-out to reduce the size of the deficit — though this may prove counterproductive, given the Liberals’ best hope of returning to balance by 2019 is from stimulus-induced economic growth.

One thing is clear — if the government is going to tackle its problems successfully, it needs to get its love life with the public service back on track.

Now the nerve transmitters have stopped tingling, expectations will have to be tempered on both sides if a more mature relationship is going to evolve.

'There's quite a spirit of optimism across the public service'

Mark Burgess, Hill Times, December 21 2015

After at least a decade of declining influence, public servants are looking at a return to their traditional role as advisers and "to flex some of the muscles they haven't flexed for some years," as one expert put it. But there are some concerns about how long it will take the bureaucracy to regain its mojo in the face of big expectations around transparency and delivery.

"There's quite a spirit of optimism across the public service," said Karl Salgo, a veteran of the Finance Department and the Privy Council Office who's now with the Institute on Governance.

"I think for the most part there's reason to believe that they're not being cynical about it, that they're taking the government at its word that it does want to do things differently and that this will better enable them to better play the traditional role they have as advisers and go back to flex some of the muscles they haven't flexed for some years."

The anecdotal evidence in Ottawa points to a buoyant bureaucracy hopeful about its new political masters after a Conservative government that largely ignored advice from public servants, relying heavily on its political staff. The early evidence of this new mood was Prime Minister Justin Trudeau (Papineau, Que.) being cheered upon his inaugural visit to the Global Affairs Department's Pearson Building in November.

"It's like the liberation of Paris," said one lobbyist speaking on a not-for-attribution basis.

One longtime public servant told *The Hill Times* that there's "definitely an optimistic atmosphere.

"I wouldn't go so far as saying the morale in the PS is a lot better but rather there is a renewed energy and enthusiasm under the new government which is leading to a more hopeful public service," the source said.

Other public servants speaking on a not-for-attribution basis described a "positive energy" and "team effort," with the new government listening and seeking advice.

"It's hard to describe because it suggests that one leader has had an enormous impact, but this is what happened almost instantly. We are working harder, for longer hours and happy to be in this position," the source said.

The Liberals' activist agenda, which requires a bigger role for the federal government, and early moves to unmuzzle bureaucrats and restore the long-form census have all been well-received.

The relationship between ministers and the bureaucracy is also changing, at least in some cases. Another public servant speaking on a not-for-attribution basis said the new minister has already spent more time at the department than his predecessor.

"If you're a public servant that wants to be dealing with issues that really matter to Canadians, if this isn't motivational, what will be?" said former parliamentary budget officer Kevin Page, in an interview.

There was no mention of the public service in the government's Dec. 4 Throne Speech, aside from stating a commitment to "open and transparent government," but the mandate letter for Treasury Board President Scott Brison (Kings-Hants, N.S.) was more explicit. Mr. Brison was charged with ensuring "that departments and other federal organizations are able to use the best available information" and "rely on sound evidence to make decisions."

"I expect you to instill a strengthened culture of measurement, evaluation, and innovation in program and policy design and delivery," the letter said. "This should include publicly releasing all key information that informs the decisions we make."

Mr. Brison's mandate letter also contained instructions for reforming the public service, including "devoting a fixed percentage of program funds to experimenting with new approaches to existing problems and measuring the impact of their programs."

This has led to some concern about the bureaucracy's ability to deliver. Mr. Salgo, who from 2004 to 2012 worked in the PCO's Machinery of Government Secretariat, said there are some areas "where the actual machinery probably has atrophied a little bit" and others where certain skills haven't been practised.

The Liberal government has spoken frequently about its consultative approach to policy-making but Mr. Salgo said that process has been diminished.

"There will be some need to relearn or to grow skills that have not been hugely used," he said.

One former senior public servant speaking on a not-for-attribution basis said some bureaucrats are nervous about the new expectations. While most are thrilled about a new government that wants their advice, there's some anxiety about their ability to deliver it.

The concern is that the government's commitments on transparency and accountability will expose a public service that isn't up to the challenge, and that its capacity for producing evidence-based policy has atrophied.

After a decade with a Conservative government that relied on political staffers for advice and had the public service primarily in "comms mode," the source said, there's a good deal of rot in the bureaucracy.

When Mr. Page was the PBO, he said departmental officials weren't even seeking data on important issues such as crime, even with government legislation going through Parliament.

"I worry that in many cases they just weren't doing the work," he said. "My sense is they were always capable of doing it but you can get to the point where if your cabinet minister doesn't want to release it or you're told by the Prime Minister's Office not to release it, over time you stop doing it."

The Liberal government's honeymoon phase will be over soon, the former senior public servant said, and journalists will be looking to hold it to account on its transparency promises.

Donald Savoie, the Canada Research Chair in public administration and governance at the Université de Moncton and one of Canada's leading experts on public administration, told *The Hill Times* last month that Ottawa's culture of blame could sidetrack plans for a more open public service.

Mr. Trudeau's letters to all ministers said it's important to acknowledge mistakes: "Canadians do not expect us to be perfect—they expect us to be honest, open, and sincere in our efforts to serve the public interest," he wrote.

While that may be true for most Canadians, Prof. Savoie said, it's a different story in the capital.

"The blame game in the Ottawa bubble matters a great deal," he said in an interview last month, pointing to the 24-hour news cycle and the opposition parties' reflex to pounce.

One of the government's first opportunities to demonstrate its commitment to transparency—the Department of Finance's fiscal update last month—was largely wasted, Mr. Page said, with

not nearly enough detail included. Finance Minister Bill Morneau's (Toronto Centre, Ont.) office wasn't at full speed so it was up to bureaucrats to deliver a document up to the promised standards, he said.

"For me it's a signal from the public service that they weren't ready," Mr. Page said. "They should have been listening. All the cue cards were there from the platform: we're going to be releasing costing information with every document, we're going to be evidence-based. They missed an opportunity to jump on it."

He said he expects them to be more prepared come budget time. Mr. Brison was instructed in his mandate letter to "ensure consistency and maximum alignment between the estimates and the public accounts and exercise due diligence regarding costing analysis prepared by departments for all proposed legislation and programs."

The Liberal government has also signaled its intent to more clearly define the boundaries between political staff and public servants, a source of tension in the previous government. The rules around exempt staff are restated in a "thorough and comprehensive way" in the updated "Open and Accountable Government" guide for ministers and parliamentary secretaries, Mr. Salgo said.

"Public servants do have something they can point to that's pretty explicit and precise around where the parameters are," he said.

A new code for the 'kids in short pants'

Anna Esselment and Paul Wilson, Globe and Mail, December 14 2015

Anna Esselment is an assistant professor of political science at the University of Waterloo. Paul Wilson is an associate professor in the Clayton H. Riddell Graduate Program in Political Management at Carleton University.

Ottawa will soon be flooded with eager political staffers ready to serve the new Liberal government. They are tapped through a variety of sources: national and local campaigns, provincial Liberal governments, academia and the government-relations world. More than 20,000 résumés were uploaded to the Liberal Party website in the scramble for positions.

Such committed political staffers (also known as "exempt staff" since they are exempt from normal public-service employment rules) are an essential ingredient of parliamentary

government. They give ministers the kind of partisan advice that public servants cannot – and should not – provide.

However, these proverbial "kids in short pants" can also attract controversy. Recent examples at the federal level in Canada include the Liberal advertising sponsorship scandal, interference with access to information and the 2013 Wright-Duffy affair in which the prime minister's chief of staff resigned after writing a $90,000 personal cheque to a senator who was under investigation for improper expense claims.

Political staffers have also been in the eye of the storm in other jurisdictions, such as the "gas plant scandal" in Ontario, the leaking of cabinet documents about the privatization of BC Rail to lobbyists, the Children Overboard Affair in Australia and the "sexing-up" of the Iraq weapons of mass destruction dossier in Britain.

Episodes like these heighten concern that political staffers are unaccountable and uncontrollable.

As a consequence, there have been calls for separate accountability measures for political staff. Justice John Gomery, who headed the inquiry into the sponsorship scandal, recommended a code of conduct for ministerial staffers – something which has been adopted in Britain, Australia and New Zealand – and the Ontario Integrity Commissioner has recently pushed for clarifying the rules and expectations for ministerial staff behaviour.

Recently, Prime Minister Justin Trudeau took an important step in the direction of increased accountability by including, for the first time, a code of conduct for federal ministerial exempt staff when he announced his updated guide for ministers, Open and Accountable Government.

Much of the content is not new: Paid with public funds, exempt staff must support government business, not party activities; they should provide ministers with political support and advice but must complement and not undermine the non-partisan work of the public service, nor may they give direction to public servants.

Previously, these instructions were scattered through various documents; the new code makes all these provisions visible in one place and, vitally, makes following them a condition of employment. This guarantees that they will be noticed and will be taken seriously.

The code breaks new ground too. It forbids political staffers from deceiving or knowingly misleading Parliament, ministers, public servants or the public and, positively, requires that staffers treat everyone with whom they have contact "with respect and courtesy." These provisions are welcome since, in the 24/7 political hothouse environment of the permanent

campaign, tensions run high and exuberant partisans can occasionally forget some of the basic rules of professional interaction.

The new code also comes as the traditional composition of political staff is changing because of the impact of the former Conservative government's 2006 Federal Accountability Act, which introduced a five-year ban on lobbying by former exempt staffers and also narrowed their opportunity to transfer into public-service employment. Taken together, these changes tend to limit the supply of available talent, leading to younger, less-experienced staff. In this respect, a written reminder of their proper role, expectations and limitations will be helpful.

Canadians should not expect the code of conduct to bring about an end to episodes of wrongdoing by political staff. Over the next four years, there will be cases in which Liberal aides make bad judgment calls that result in questionable behaviour. But the advent of a code has the potential to make a positive contribution to the nascent professionalism of the political staff role, and we are pleased to see one in place in Canada.

Improving public access to information will make government better, Trudeau says

Jim Bronskill, National Post, December 19 2015

Ensuring Canadians have access to federal information will mean more — and sometimes difficult — public scrutiny, but ultimately it will lead to better government, the prime minister says.

The Liberals will conduct a "proper review" of the decades-old Access to Information Act with the aim of figuring out "what is actually going to work," Justin Trudeau said this week in a wide-ranging roundtable interview with The Canadian Press.

He reaffirmed the new government's commitment to modernizing the federal access law, which has changed little since coming into effect on July 1, 1983, when Trudeau's father was prime minister.

It was an era when steel filing cabinets full of paper greatly outnumbered personal computers holding digital files, and many complain the access law has not kept pace with technological change or greater expectations of transparency.

The legislation allows applicants who pay $5 to request information in federal files, such as briefing notes, studies, correspondence and expense claims.

Ideally, requests are supposed to be answered within 30 days, but departments and agencies often take much longer. Not all agencies are covered. Cabinet records are almost completely off-limits for 20 years. And officials can withhold a wide range of information, including advice from bureaucrats and lawyers, security-related material and correspondence from other governments.

Information commissioner Suzanne Legault, an ombudsman for users of the law, recently said she was struggling to clear a backlog of some 3,000 complaints from dissatisfied requesters.

During the election campaign, the Liberals said government data and information should be open by default, in formats that are modern and easy to use.

Trudeau has asked Treasury Board President Scott Brison to work with Justice Minister Jody Wilson-Raybould on a review of the access law to ensure the information commissioner is empowered to order government files to be released — something she cannot do now.

He also wants Canadians to have easier access to their own personal information and says the law should be extended to ministerial offices — including his own — as well as to the administrative institutions that support Parliament and the courts.

In addition, Trudeau has directed Brison to accelerate and expand open-data initiatives and make government data available digitally.

In the interview, the prime minister made it clear he was not wedded to those changes alone.

“Access to information is about better governance, and it’s about ensuring that the decisions we take are thoroughly justifiable on a broad level,” he said. “And that’s not always easy, but it is certainly what’s going to lead to better outcomes.”

In a broad sense, the federal government must dispense with the notion that secrecy is necessary for decision-making behind the doors of cabinet, caucus and the bureaucracy, said Sean Holman, an assistant professor of journalism at Mount Royal University in Calgary.

“That’s really the test of openness for any kind of access-to-information reform in this country.”

Certain classes of records, such as audits and ministerial calendars, should be released as a matter of course so "we get used to the idea that government should be operating in the sunlight, not in these darkened, private spaces," he said.

Legault tabled a report earlier this year recommending dozens of changes to the access law — the latest in a long line of calls for reform. She welcomes the prospect of a federal review, but hopes it happens "in a timely manner."

Holman said history suggests the Trudeau government's planned study will lead nowhere.

"The fact that this isn't something the government appears to be doing immediately is concerning in and of itself," he said.

"The longer governments stay in power the more seductive secrecy becomes."

The Supreme Court gives a boost to refugees

Allan C. Hutchinson, Globe and Mail, December 14 2015

Allan C. Hutchinson teaches law at Osgoode Hall Law School at York University.

As Canada prepares to accept planeloads of Syrian refugees, it is good to know that the Supreme Court of Canada has put its own stamp of approval on a more humanitarian procedure for refugee applicants. In so doing, it confirmed that compassion and law are not always at cross purposes.

As with so much else in government bureaucracy, the front-line immigration officials are at the sharp end of making crucial decisions about who can and cannot get into Canada. Too often, they have taken a formalistic and legalistic approach to their difficult duties. In this week's decision, the Supreme Court directed that a more flexible and sympathetic approach be taken.

Jeyakannan Kanthasamy is a young Tamil. He lived in northern Sri Lanka. Five years ago, as a 16 year old, he was arrested and detained by the Sri Lankan army and police. Afraid for himself and his family, plans were made to send him to Canada to live with his uncle. After he arrived here, he made a claim for refugee protection.

The Immigration and Refugee Protection Act requires that those seeking permanent resident status must apply from outside of Canada. However, there is an exception allowed where the

applicant's return to their home country would place the applicant in danger. The relevant section used the words "hardship that was unusual and undeserved or disproportionate."

The immigration officer came to the conclusion that Jeyakannan's circumstances had not met that standard. His appeals of that decision to the Federal Court were both denied. However, in a 5 to 2 decision, the Supreme Court of Canada found for him and ordered a reconsideration of his application.

In a strong and sensitive judgment, Justice Rosalie Abella laid out a clearer and more empathetic procedure that should be utilized by immigration officials. She took great pains to argue that, in such circumstances, a contextual, not categorical, approach is required to complement the Act's underlying purpose of compassionate relief.

Justice Abella insisted that the words "unusual and undeserved or disproportionate hardship" should instead be treated as "descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose" of the Act's exceptional provision. Those guidelines are simply that, guidelines. The ultimate responsibility of immigration officials is to assess "all relevant humanitarian and compassionate considerations." A literalistic and segmented look at each term is no way to do that.

All this was particularly so in the case of a child, like Jeyakannan. Justice Abella chastised officials for taking an unduly narrow approach. Instead, she concluded that there was a failure to "give sufficiently serious consideration to Jeyakannan's youth, his mental health, and the evidence that he would suffer discrimination if he were returned to Sri Lanka." The demands of compassion are at their most compelling in the case of children.

The two dissenting justices were not without sympathy for Jeyakannan and his circumstances. But Justices Moldaver and Wagner took the view that, as long as the immigration officials had acted within broad reasonable bounds, their decisions should not be disturbed, even if others would have done something different.

This kind of deferential approach in such serious and often life-and-death matters seems to elevate bureaucratic legalism over humane compassion. If Canada is to deliver on its promise to be a nation of caring citizens, then it must insist, along with Justice Abella, that a humanitarian policy demands a humanitarian practice of decision-making by those entrusted to make such decisions; the process is not an end in itself.

Of course, there are no easy answers in solving the immigration and refugee puzzle. Security and selection must have a role to play. But it is in times of crisis and challenge that our collective mettle and commitment to humane values will be tested most.

Aide à mourir: LeBlanc «assez optimiste» sur l'obtention d'un délai

Mélanie Marquis, La Presse Canadienne, le 15 décembre 2015

Le gouvernement fédéral a bon espoir que la Cour suprême du Canada lui accordera le délai qu'il réclame pour élaborer et faire adopter un projet de loi sur l'aide médicale à mourir.

Le leader du gouvernement en Chambre, Dominic LeBlanc, estime que les arguments mis de l'avant par Ottawa sont assez solides pour convaincre les magistrats du plus haut tribunal au pays d'accéder à la demande.

«Je peux vous dire que nous sommes assez optimistes», a-t-il plaidé en point de presse au parlement à sa sortie d'une rencontre du conseil des ministres, mardi.

«Nous avons avancé des raisons, je crois, très précises pourquoi un délai de six mois nous donnera l'occasion de mettre en place une législation qui rencontrera le vide créé par la décision de la Cour suprême», a-t-il ajouté.

Et si la Cour suprême disait non? M. LeBlanc refuse de préciser si les libéraux ont un plan de rechange dans cette éventualité, disant ne pas vouloir «commenter sur des décisions hypothétiques des tribunaux».

Ottawa disposait d'un an pour réagir au jugement rendu le 6 février dernier par la Cour suprême dans le dossier du suicide assisté. Le fédéral a demandé au même tribunal, il y a environ deux semaines, de lui accorder une prolongation de six mois pour se pencher sur cet enjeu délicat.

Les documents de toutes les parties impliquées dans cette cause ont été reçus, a-t-on confirmé du côté de la Cour suprême. La décision du tribunal était toujours inconnue, mardi.

Le gouvernement libéral n'a pas attendu la réponse et a fait adopter vendredi dernier en Chambre une motion unanime visant la création d'un comité spécial qui mènera des consultations sur l'aide médicale à mourir.

Le comité est composé de cinq sénateurs - les conservateurs Kelvin Ogilvie, Judith Seidman et Nancy Ruth, ainsi que les libéraux James Cowan et Serge Joyal - et de 10 députés issus des rangs du Parti libéral, du Parti conservateur et du Nouveau Parti démocratique (NPD).

Les néo-démocrates ont désigné comme représentants la nouvelle députée de Saint-Hyacinthe-Bagot, Brigitte Sansoucy, et son collègue britanno-colombien Murray Rankin. Les libéraux et les conservateurs n'ont pas précisé quels élus de leur formation en feraient partie.

Les travaux du comité spécial mixte devraient débuter dès janvier, et son rapport final est attendu au plus tard le 26 février.

Ottawa espère ensuite déposer rapidement, dès le mois de mars, un projet de loi qu'il prévoit faire adopter en juin, avant l'ajournement des travaux pour l'été, a précisé Dominic LeBlanc.

Tout se passera donc très rapidement si l'on compare avec ce qui s'est passé du côté de Québec, où l'on a consulté pendant plusieurs années avant de finalement faire adopter en juin dernier la Loi concernant les soins de fin de vie, entrée en vigueur le 10 décembre dernier.

Mais les libéraux n'agissent pas trop rapidement, s'est défendu le leader du gouvernement à la Chambre des communes, soulignant que la Cour suprême avait jugé raisonnable d'accorder aux législateurs une période d'un an pour réagir à sa décision.

«C'est un reproche que l'on pourrait faire au gouvernement précédent», a tranché M. LeBlanc, refusant de dire clairement si la ligne de parti sera imposée aux députés libéraux lorsqu'un éventuel projet de loi sera soumis au vote aux Communes.

«M. (Justin) Trudeau, dans la plateforme électorale, a identifié trois circonstances où ça sera difficile d'avoir un vote libre. Les questions qui touchent à la Charte des droits et libertés en était une des situations», a-t-il simplement fait remarquer.

La Cour suprême du Canada a invalidé le 6 février dernier deux articles du Code criminel interdisant à un médecin d'aider des patients gravement malades à mourir, déterminant que les articles en question portaient atteinte à la Charte canadienne des droits et libertés.

«Dans la mesure où ils prohibent l'aide d'un médecin pour mourir que peuvent demander des adultes capables affectés de problèmes de santé graves et irrémédiables qui leur causent des souffrances persistantes et intolérables, l'article prive ces adultes du droit à la vie, à la liberté et à la sécurité de la personne» garanti par la Charte, est-il écrit dans la décision unanime.

Les conservateurs ont été accusés de s'être traîné les pieds dans le dossier de l'aide médicale à mourir, mettant cinq mois avant de démarrer le processus en créant un comité consultatif externe.

Ce comité, dont faisait partie l'ancien ministre québécois Benoît Pelletier, a rendu mardi son rapport aux ministères de la Santé et de la Justice. Il doit être traduit et rendu public prochainement, a signalé un porte-parole du ministère de la Justice.

Whistleblowing in the U.S. can make you a millionaire. In Canada, it can get you fired

Howard Levitt, Financial Post, December 15 2015

Whistleblowing in the United States has seen a record year, with the Securities & Exchange Commission rewarding eight whistleblowers a total of US$37 million. Who hasn't heard about Dieselgate — exposing Volkswagen's faked emission tests and severely tarnishing the German automaker's green image and slowing worldwide sales?

While the essence of whistleblowing is to expose an employer's wrongdoing to the authorities, it is also important to understand its implications in Canada's employment legislation.

Employees have a legal duty of loyalty to their employer. This obligation is so fundamental to the relationship that it binds employees without having to be spelled out in writing. Whistleblower legislation creates an exception to that duty.

In Regina, the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, fired its office manager, Linda Merk, after she blew the whistle on alleged financial abuses by union officials Charles Gumulcak and Bert Royer.

Merk charged the union with illegal retaliation under the Saskatchewan Labour Standards Act. In 2005, she finally won the union's conviction in the Supreme Court of Canada. Although the duty of fidelity does not require employees to remain silent in the face of wrongdoing, the same duty does require them to "go up the ladder," exhausting reasonable steps in reporting a problem internally before tipping off authorities or the media.

The Supreme Court in Merk held that the balance between an employee's duty of loyalty and the public interest in suppressing unlawful activity is best achieved if employees are encouraged to resolve problems internally rather than immediately running to the police. This helps ensure the employer's reputation is not damaged by unwarranted and potentially defamatory attacks based on inaccurate information.

However, malfeasance on the part of senior management may make it unreasonable to seek an internal remedy. For example, someone working at FIFA would not have been expected to confront the international football association's president, Sepp Blatter.

In Canada, government workers are afforded greater protection against retaliation for whistleblowing than are private-sector employees. At the federal level, employees are sheltered by the Public Service Disclosure Protection Act, while similar legislation exists in several provinces, including Ontario, Alberta and Nova Scotia. On Dec. 2, Quebec's legislature gave first reading to a similar statute, Bill 87, which the opposition criticizes for failing to protect private-sector workers.

In most provinces, employees who report violations of certain statutes (such as Ontario's Occupational Health & Safety Act) are specifically protected from reprisals. However, few provinces — notably New Brunswick and Saskatchewan — give general protection to private-sector whistleblowers.

A rarely used source of general protection is the Criminal Code of Canada. Since 2004, section 425.1 has made it a crime, punishable by up to five years' imprisonment, for an employer to retaliate against a worker who informs authorities of any law-breaking activity.

Publicizing one's own personal workplace issues, as opposed to institutional wrongdoing, however, doesn't count. There must be a significant public-interest dimension.

In 2009, the Ontario Court of Appeal held that Nico Van Duyvenbode was not acting as a whistleblower when he began a letter-writing campaign complaining that his employer, the Public Service of Canada, was treating him unfairly.

Being recognized as a legitimate whistleblower recently helped Ted Cooper get reinstated at the City of Ottawa with 28 months' back pay. In May 2013, Cooper, a unionized professional engineer employed by the city, was fired for insubordination after sending an email to his supervisor demanding information about a project and threatening to involve the Auditor General. His union grieved the dismissal, seeking reinstatement. In September 2015, the arbitrator, Deborah Leighton, found that "the email was unprofessional and showed bad judgment." Despite this, she concluded that the appropriate discipline was a five-day suspension, not termination.

Cooper's history as a whistleblower tipped the scales, saving him from being found insubordinate. For years, he had waged a campaign to alert authorities about grave miscalculations that risked dangerous flooding in new developments in Kanata, Ont. Cooper's efforts were vindicated in 2008, when then-mayor Larry O'Brien publicly commended his persistence. Perceived errors in later studies sent Cooper back into battle.

Mindful of that background, Leighton wrote: "I am convinced that the email was well motivated in spite of its tone… [F]or years he has worked on his own time to ensure that project is safe for the public. Moreover, he believed that he had a duty as a professional engineer to raise concerns."

Looking ahead to 2016, the Ontario Securities Commission is planning to set up a version of the SEC's whistleblower reward system.

There is nothing like the smile of a newly minted millionaire, especially one brimming with self-righteousness.

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Assisted dying legislation will take until summer, Supreme Court told

The Canadian Press, December 16 2015

The Liberal government is telling the Supreme Court of Canada that those pushing for speedy implementation of right-to-die policies are naive about the legislative process.

In a submission to bolster its request for a six-month extension, the government says implementing a landmark decision on physician-assisted dying will require full parliamentary consideration as well as provincial legislation.

Last February, the Supreme Court struck down the prohibition on doctor-assisted death.

The court gave the federal government a year to come up with a new law recognizing the right of clearly consenting adults who are enduring intolerable physical or mental suffering to seek medical help in ending their lives.

The new Liberal government recently asked the court to extend that deadline to early August to ensure a thoughtful, sensitive and well-informed response.

In its submission to the court, the British Columbia Civil Liberties Association and individuals who spearheaded the case say an extension would be a setback for Canadians who need relief from unbearable suffering.

Improving palliative care 'a major question'

The federal health and justice ministers received a 134-page panel report Tuesday from the federal panel tasked with studying medically assisted dying — a document that will help guide the government in coming months on the high-profile issue.

The report, commissioned by the previous government, will be translated before its public release, likely early in the new year.

While the panel of outside experts heard differing opinions on many aspects of assisted dying, there was near unanimity on the desire for more robust palliative care, said member Benoit Pelletier, a University of Ottawa law professor.

"Almost everyone agreed on the fact that there should be better access to palliative care," Pelletier said Tuesday in an interview.

People told the panel it "needs to be amongst the very important options that are available to people near the end of life," added Dr. Harvey Chochinov, a palliative care specialist who also served on the three-member panel.

As for exactly how such care could be improved, Pelletier said: "That's a major question."

The panel also delved into the need to protect the vulnerable in any assisted dying regime, effective monitoring and reporting practices, and the issue of institutions that refuse to help people end their lives, Pelletier said.

Special committee to begin study

With the research in hand, parliamentarians will conduct a quick, two-month consultation on medically assisted dying as part of the Trudeau government's plan to have a new law crafted, studied, debated and passed by June, before Parliament breaks for the summer.

Government House Leader Dominic LeBlanc says he's confident the process will be sufficient to build a national consensus on the life-and-death issue.

LeBlanc says the last-minute rush could have been avoided had the previous Conservative government adopted a Liberal motion last March to create a special parliamentary committee that would have been mandated to consult and report back with draft legislation by mid-July.

But, apart from setting up the external panel in July, the Conservatives did nothing on the file and now the new government has little time to fill the legal void.

"It was our hope that this work would have properly been done last spring. The previous Parliament chose not to accept our suggestion," LeBlanc said Tuesday after a cabinet meeting.

"So we have the deadline we have. That being said, we are very confident that if the Supreme Court considers and accepts our request for an extension, we can undertake the proper and appropriate process to build the kind of national consensus that's important on an issue ... that's this sensitive."

The government last week struck a special, joint House of Commons-Senate committee that is to consult broadly on the issue and report back with recommendations for legislative change by the end of February.

LeBlanc said Tuesday that the Senate has named its five senators for the committee, while the Liberal Whip's office also has decided on its members.

Justice Department officials will then draft a law which will have to go through the normal legislative process of debate, clause-by-clause study by the Commons justice committee and votes in both the Commons and Senate.

The joint committee will have the outside panel report to guide its deliberations, as well as one from a provincial-territorial expert advisory group on physician-assisted dying, which issued 43 recommendations that governments should take into account.

Supreme Court to decide whether judges can sit outside their home province

Julius Melnitzer, Financial Post, December 15 2015

The Supreme Court of Canada has pledged to hear two cases in May 2016 that will decide whether Canadian judges can hear cases in courtrooms located outside their home provinces.

For most Canadians, the cases at issue deal with a national tragedy, the tainted blood supply scandal that resulted into the Krever Inquiry and billions in class action lawsuits.

Yet for lawyers, the Supreme Court's eventual rulings in the cases will have an impact that should reach beyond the Hepatitis C blood tragedy and set the course for nation-wide class actions in the future. At issue before the Supreme Court is whether judges from British Columbia and Ontario can overturn an ancient common law legal rule that prevents them from hearing Canadian cases argued in courtrooms outside their home province.

"This issue traces back to the old English rule that English judges couldn't sit outside England, because of concerns about access to open courts and sovereignty considerations," explains Chris Naudie of Osler, Hoskin and Harcourt LLP in Toronto. "But how do you apply that in a federal state where a national class action involving a mass wrong has to be resolved?"

The two cases, one from Ontario and the other from B.C., deal with a 1999 nation-wide settlement arising from multi-jurisdictional lawsuits brought by individuals infected with Hepatitis C found in Canadian blood products between 1986 and 1990.

"The settlement involved $1.1 billion, thousands of class members, and required an efficient method of administration," Naudie says.

Judges from Ontario, B.C. and Quebec are supervising the administration of the settlement. Lawyers for the plaintiffs want to extend a deadline for filing settlement claims, and they proposed the motion be heard in a "neutral" jurisdiction, Alberta. Attorneys general from the provinces objected, arguing their judges cannot sit outside home jurisdictions. Conflicting court decisions ensued.

Quebec's Superior Court found that there were no constitutional or statutory obstacles to a Quebec judge sitting outside the province, and that case was not appealed.

The Ontario Court of Appeal ruled that Ontario judges could sit outside the province for that purpose; the British Columbia Court of Appeal ruled that its judges could not. Those are the cases that are heading to the Supreme Court of Canada for an expedited hearing scheduled for May 17, 2016.

Indeed, the need for a Supreme Court ruling is evident from the variety of judicial views emerging out of B.C. and Ontario. Robert Bauman, Chief Justice of the B.C. Supreme Court,

originally found that nothing prevents a B.C. judge from sitting outside the province. The B.C. Court of Appeal overturned his ruling, but stipulated B.C. judges can extend hearings beyond the province by telephone or other media so long as the judge is actually sitting in B.C.

In March 2015, a divided Ontario Court of Appeal held that Ontario judges could sit outside the province so long as there was a video link from the place where the judge was sitting to an open courtroom in Ontario.

“The court was unanimous in its conclusion that there was no constitutional or statutory bar requiring a judge to be physically present in Ontario, but the majority found that the open court principle required a video pipeline to an open Ontario courtroom,” Naudie says. “Justice Harry LaForme, however, did not feel a video link was required because there were practical challenges with it and resorting to it amounted to a form of legal fiction.”

Despite the differences in the jurisprudence, Naudie says the cases seem to generate a rough consensus that judges can conduct hearings that in some way extend beyond their home province. Some judges would require there to be a video link of some kind between the home and outside provinces, while others question whether even that is necessary. “Arguably, these decisions endorse the Canadian Bar Association protocol governing multijurisdictional class proceedings.”

Whatever the Supreme Court decides, the confusion will not necessarily end as other outstanding jurisdictional issues relating to national class actions, not addressed by these cases, will remain.

“These cases will only address part of that mess,” says J.J. Camp of Camp Fiorante Matthews Mogerman in Vancouver. “Still, we believe that it’s smart and appropriate and lawful for judges to sit together outside their home jurisdictions because that would allow them to confer in real time and result in fewer conflicts in the law.”

The SCC has signaled its recognition of the cases’ significance by expediting the appeals, which will be heard in May 2016.

“The resolution of these two cases will shape the scope of inter-jurisdictional coordination for national class actions in Canada by determining whether or not provincial judges may sit outside their own jurisdiction when supervising a settlement in a national class action,” writes Craig Ferris, a partner with Lawson Lundell LLP in Vancouver.”

Focus: Criminal lawyers need to be online sleuths

Shannon Kari, Law times, December 14 2015

Lawyers who are confident they are up to speed on social media sites such as Facebook, Twitter, LinkedIn, and maybe even Instagram may be surprised to find those sites, despite their popularity, are now just a few of the platforms where communications are taking place that might be of use in a criminal court proceeding.

Kik Messenger and WhatsApp are two more recent texting applications that are popular among young people, while sites such as Burn Note and Snapchat promise to put time limits on messages and photos before they are automatically deleted from the cyber world. New online communication tools are cropping up regularly at an almost overwhelming pace.

The question for defence lawyers in this time of rapidly changing technology is whether it is an option or an obligation to keep abreast of these tools.

Adam Weisberg, a Toronto defence lawyer, says the ability to search for publicly available information online about potential witnesses or a complainant is essential.

"The way I look at it is that the more knowledge and information that you have can only be an advantage for your client," says Weisberg.

Something as basic as a Google search is not sufficient, says defence lawyer Daniel Brown.

"We live in a culture where people share things about themselves you would never expect them to share," he notes.

Understanding how to access that information can be as important to a trial lawyer in some cases as knowing the relevant case law, suggests Brown.

In terms of what type of search or investigation is permitted, the rules that govern lawyers in Ontario have not kept pace with the changes in technology.

In the United States, for example, the model rules of professional conduct issued by the American Bar Association refer to the ability to conduct searches of publicly accessible information as an obligation for a lawyer. The same model rules suggest it would be improper though to set up a fake account on Facebook, for example, to try to "friend" an individual and access information from that person's account.

While the Law Society of Upper Canada's professional conduct rules do not address this

scenario explicitly, Brown believes setting up a fake account would be improper. “That is the bright line. We are not allowed to encourage dishonesty to obtain evidence,” says Brown.

However, both Brown and Weisberg say if a client or a friend of the client has access to a Facebook page of interest and is willing to share that information without any attempt at dishonesty, this should be permissible.

The same restrictions apply to private investigators retained by lawyers or law firms to conduct these searches, says Brian King, president and CEO of King International Advisory Group.

“Once you start using ruses, you are stepping over the line,” says King, who has more than 35 years of experience in the private investigations field and is a former president of the Council of International Investigators.

Every investigation “needs to be conducted as if the case is going to trial,” says King, which means employing ethical standards and complying with all relevant privacy statutes is essential.

The advances in technology have made it easier for both lawyers and investigators to find potentially relevant information, but King says there is a skillset required to make online searches effective.

“Just surfing the Internet will get about 40 per cent of what is out there. It is about using the right search parameters that can make all the difference,” he suggests.

Online searches of social media sites and accessible databases can also be a significant help in tracking down witnesses, when the information has not been provided to the defence, says King.

Along with developing a search skill, “it also helps to learn the lingo” used in text messages and other online conversations, says Brown. “I think this is an area where younger lawyers might have a bit of an advantage.”

For clients who may not have the resources to retain an investigator, there are still ways for the lawyer to find relevant information, says Weisberg.

“The primary source [initially] is going to be your client,” he says. That is the first step in determining which social media sites to search.

While it may be more likely that these searches are important in cases involving younger

people, it should still be a consideration in any case, says Weisberg. He says he has come across publicly accessible online conversations about the actual incident that led to a criminal charge, as well as information about the background of witnesses that may help determine what questions not to ask.

The amount of detail available and what people will share online still comes as a surprise to him, says Weisberg. Contrast that to a few years ago, he jokes, when he was trying to find a key witness for his client and went house to house in one neighbourhood only to have residents slam their doors and refuse to talk to him.