News

Liberals defend discretion but work on process

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OTTAWA

The new Liberal government appears ready to pick up where the old Conservative one left off in defending the prime minister's unfettered discretion to fill Senate vacancies when he wants.

The Liberals are working rapidly to devise a new Senate appointment process. (Five "independent" appointees are expected in January).

But at press time the Trudeau government had not backed away from the stance taken in litigation by the previous Harper government that there is no obligation on the prime minister to appoint Senators within a reasonable time after a vacancy in the red chamber occurs.

The Liberals have stuck to that position in the federal government's appeal slated for argument at the Federal Court of Appeal Jan. 25, Vancouver lawyer Aniz Alani told *The Lawyers Weekly*.

Alani is suing the prime minister and governor general in Federal Court to oblige the government to fill longstanding Senate vacancies.

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>
> **Aniz Alani**
> Lawyer

The previous government tried to get his judicial review application dismissed summarily, but Federal Court Justice Sean Harrington declined last May to strike out the novel case which, if successful, could also provide leverage for speeding up dilatory judicial appointments.

Alani launched his judicial review after former prime minister Stephen Harper remarked in December 2014 that he felt no public pressure to fill Senate vacancies.

Harper later announced a "moratorium" on appointments to the Senate—which had its last member appointed March 25, 2013. At press time there were still 22 empty seats in the 105-seat upper house.

The majority Liberals are expected to fill most of those vacancies this year given the government's need to drive its heavy legislative agenda through the Conservative-dominated Senate.

At the same time the federal government continues to reject Alani's contention that Section 32 of the *Constitution Act 1867* requires Senate vacancies to be filled within a reasonable time, and not solely if and when the prime minister decides.

Alani contends the issue of abolishing the Senate by attrition remains live and relevant despite the Liberals' stated intention to fill the vacancies soon.

"Until we have an independent, determinative source telling us the scope of the prime minister's obligations regarding Senate appointments, we're always going to be at the mercy of whether the prime minister feels any public pressure to appoint Senators or not," Alani explained.

"It remains the position of the Conservative Party and the NDP — which are the two obvious alternatives to a Liberal government right now — that the Senate should be essentially abolished indirectly by attrition."

Section 32 of the *Constitution Act, 1867* stipulates the governor general "shall" appoint Senators "when a vacancy happens." By constitutional convention, the governor general appoints only on the advice of the prime minister.

Alani is asking for a declaration that the prime minister must advise the governor general to appoint recommended Senate nominees within a "reasonable time" after a vacancy occurs.

Justice Harrington concluded it was premature to accede to the government's argument that the

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Jury still out on new Quebec labour tribunal

LUIS MILLAN

In a move applauded by business and denounced by unions, the Quebec government has created a new labour, employment and workers' compensation tribunal and consolidated several other boards in an effort to streamline services and improve the province's administrative justice system.

The government expects the changes, effective this month, will save about $15 million during the next three years.

But much uncertainty surrounds the impact of the reorganization.

Although Bill 42 received Royal Assent last June, the regulations delineating the powers of the new bodies have yet to be drawn up.

"It's an interesting development but it's difficult at this stage to qualify it as positive or not," said Élodie Brunet, a Montreal employment and labour lawyer with Lavery, de Billy.

"Only time will tell whether the new and large administrative structures will be more efficient."

Bill 42 establishes a new body called the Administrative Labour Tribunal that will take over jurisdiction of both the Quebec's labour board and the provincial workers' compensation tribunal. The new tribunal will create four new divisions, including the labour relations division, which will adjudicate matters resulting from the application of the *Labour Code* and an *Act Respecting Labour Standards*; the occupational health and safety division; the essential services division, and the construction industry and occupational qualification division.

However, questions linger around the rules of evidence and procedure that will be applicable before the new tribunal.

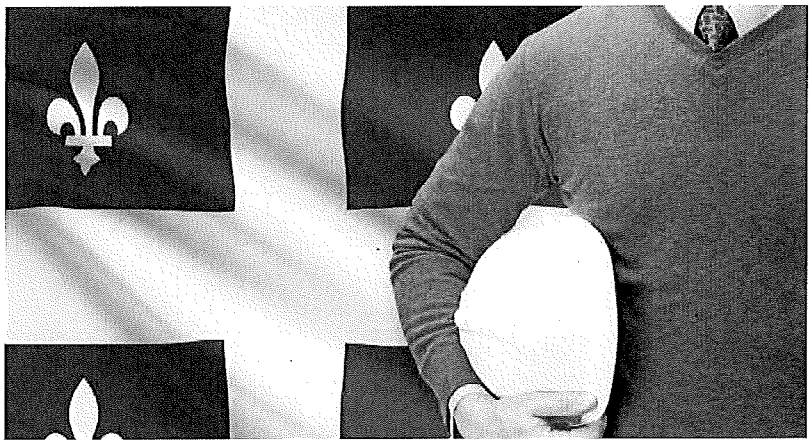
Quebec's labour board and the provincial workers' compensation tribunal currently have separate and distinct rules of evidence and procedure, noted Brunet.

While the act provides a single procedure for proceedings before the new tribunal, it has yet to be fleshed out by the adoption of regulations. For example, Bill 42 allows a tribunal adjudicator to visit the premises or order an expert report during a hearing.

Under current regulations, those are powers that the provincial workers' compensation tribunal possess but not the Quebec labour board.

Making matters even murkier, Bill 42 does not stipulate whether this power will be limited to the occupational health and safety division or whether it will be applicable to all divisions, Brunet said.

"The generalization of this power is likely to have significant impacts on the way in which labour-related disputes are adjudicated before the new administrative tribunal," remarked Brunet.



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> **Élodie Brunet**
> Lavery, de Billy

There are also concerns that the reorganization could eventually lead to a significant loss of expertise, particularly since each tribunal and commission has over the years accrued and developed highly specialized knowledge.

Much of it will depend on the direction that the president of the tribunal takes. Under Bill 42, the tribunal's president has received broad powers.

The president can assign adjudicators to one or more of its divisions and may reassign or temporarily assign a member to another division. But while Bill 42 states that the president should take account an adjudicator's expertise and experience before assigning work, he is not required to do so.

It hinges on whether the tribunal president will favour a general approach where adjudicators are assigned to several divisions or whether the head will focus on ensuring that adjudicators will be assigned mandates depending on their expertise, said Geneviève Beaudin, an employment and labour lawyer with the Montreal law firm Langlois avocats.

"Will adjudicators who used to oversee cases with the provincial workers' compensation tribunal continue to work in cases that arise from the application of the *Act Respecting Occupational Health and Safety* or will they be also working on cases involving the application of the *Labour Code*?" wondered Beaudin.

"It's not the same thing. The rules are different. It's not even the same subject. The expertise of adjudicators may be an issue. Time will tell."

Organized labour is also concerned about the possible loss of expertise the tribunal may suffer.

Jacques Létourneau, the president of the Confédération des syndicats nationaux, one of Quebec's largest unions, has said it is illusory to believe that the tribunal will be able to be as efficient and as knowledgeable as the organizations it will replace.

From a practical perspective, one of the most significant changes deals with the manner which a party must now submit a dispute to the tribunal, said Beaudin.

As of now, just as is the case under the *Code of Civil Procedure*, a party will be required to file a so-called "originating pleading" and must specify the conclusions sought and set out the grounds in support of them," according to Bill 42.

This marks a significant departure from the current procedure, which essentially consists of filing standard forms that provide little information regarding the alleged facts that give rise to the dispute. Moreover, under the current system, the conclusions sought do not have to be specified.

"That is a major and important change, one that employers have been clamouring for years," said Beaudin. "This could have a material impact on complaints for example of psychological harassment. But it all depends on how the adjudicators will interpret and apply the new rules. If the adjudicators interpret it restrictively, then it will be like the status quo."

But Brunet said the introduction of the originating pleading has also prompted some to assert that it will inevitably hinder access to justice. Since it will place a heavier burden on complainants, it has been perceived in some quarters as being a "brake on access to justice," noted Brunet.

Bill 42 will also consolidate Quebec's pay equity commission, the province's employments standards commission, and the workplace health and safety commission into a single administrative body that will be called the Commission des normes, de l'équité, de la santé et de la sécurité du travail.

That merger should lead the commission to take "appropriate measures to avoid any conflict" with respect to potentially related issues in the application of different regimes, warned the Conseil du patronat du Québec (CPQ), a business lobby group.

The CPQ notes that psychological harassment can be the subject of a labour standards claim and an employment injury claim—and both have different criteria that must be satisfied in both cases.

Government: No evidence PM must act quickly

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matter is non-justiciable. In its notice of appeal, the federal government argues it is "plain and obvious" that Alani's judicial review application is not justiciable "as the prime minister's advice to the governor general with regard to Senate appointments is an inherently political matter based on constitutional convention that is not appropriate for judicial determination."

Ottawa also argues that even if the matter is justiciable, the application is outside the Federal Court's jurisdiction "as the prime minister, in providing advice on Senate appointments to the governor general, is not acting pursuant to an Act of Parliament or a prerogative of the Crown and, as such, is not a 'federal board, commission or other tribunal' subject to judicial review before the Federal Court."

The litigation is bifurcated, with the government's motion to get the case summarily struck out set for appellate argument this month, while a trial on the merits in Federal Court is ready to go, but postponed pending the appeal's outcome.

The federal government contends in its factum that even if Alani does have standing, and even if his judicial review application is both justiciable and within the Federal Court's jurisdiction, "there is no evidence of the existence of a constitutional convention that prime ministerial advice on Senate appointments must be given within a certain time period.

To the contrary, the expert evidence tendered in these proceedings demonstrates that prime ministers have broad discretion in determining when appointments to the Senate ought to be made, according to their personal political assessment of when it is reasonable and appropriate to do so."