Payroll screw-up at Justice Canada worth up to $50M in lawyers' favour

Federal department tied in knots trying to sort out time-off payroll mess dating back to 2007

Dean Beedy, CBC News, February 17 2016

A payroll screw-up at Justice Canada credited several thousand government lawyers with as much as $50 million worth of time off that they didn't deserve, a CBC investigation shows.

The botched accounting — carefully kept out of public financial statements — has tied the department in knots, threatening negotiations for a new labour contract, prompting union grievances and forcing a massive payroll cleanup that has taken more than two years.

An insider tells CBC News that senior officials tried to sweep the issue under the rug, though union and management play down the problem, saying most of the payroll discrepancies are small potatoes or mere misunderstandings.

So far, no government lawyer has been required to reimburse money, though some have had their leave-time adjusted, and hundreds of lawyers who left the department are being contacted to explain the discrepancies.

The Curious Case of the Padded Payroll began in spring 2013, when officials at the Public Prosecution Service of Canada noticed that time-off recorded in a scheduling system known as iCase was not always properly recorded in a parallel payroll system, known as PeopleSoft. Lawyers themselves were supposed to update both systems, but for various reasons did not.

Lawyers took time off work — vacation, for example — but the payroll system remained blind and credited them with paid time-owed that they didn't deserve.

Triggers review

The initial alarm bells triggered a meticulous data comparison of the two systems, for both the Public Prosecution Service and for the Department of Justice, going back to 2007.

The results were shocking. Auditors found 3,747 employees had taken leaves without properly recording the fact in the payroll system, according to an internal Justice Department document obtained by CBC News.

Not counting 651 employees who had already left their jobs, a July 2013 report found 3,096 current employees who owed the department an average of more than four weeks each. The accounting gap was estimated to be worth $25 million to $50 million in the lawyers' favour.

The department launched a massive reconciliation exercise, with lawyers required to account for discrepancies, in many cases signing a document declaring they did not owe the department any money.

The lawyers' union had just negotiated a 12 per cent salary increase for 2014, to bring them in line with rates paid to provincial Crowns, even as other public servants were told to tighten their belts. Management wanted to keep the error quiet, said one person close to the controversy, partly to avoid poisoning new contract negotiations — and partly to protect political masters already feeling the heat for allowing the huge pay increase.

"It just scared them a lot," said the source, referring to the fear a $50-million discrepancy would have to be reported to the House of Commons, causing headaches for then-justice minister Peter MacKay.

"They quickly tried to manage the amounts so that it would be less of an issue." The source requested anonymity to protect against retaliation.

'It was just things that were missed.'- *Len MacKay, Association of Justice Counsel*

Len MacKay, a Halifax-based Crown prosecutor, says his own file showed 12 minor discrepancies. "I had a bunch of these little anomalies, so all I did was remove them from my calendar. I just took it out of iCase."

MacKay, who is also president of the Association of Justice Counsel union, says no members were scamming the system. "There were probably some larger examples out there, when people maybe took some vacation and forgot to put it through. … It was just things that were missed."

The union blamed managers for failing to monitor whether leave time was properly recorded, and it filed a grievance. MacKay says most government lawyers regularly work more than their required 37.5 hours each week, without compensation, so minor time-recording glitches can pale next to the free labour.

Never recorded liability

The Justice Department's public financial statements have never recorded a dollar liability for the padded-payroll problem. An obscure annex to 2013-2014 statements says only that "new key controls were implemented for leave."

One internal document from 2013 pegs the payroll liability at a heavily revised $2.5 million — small enough that it was deemed unnecessary to report it publicly.

A Justice spokesman said the problem was largely clerical, and that new training and procedures have since eliminated the discrepancies.

"In a vast majority of cases, employees have been able to reconcile the information in both systems," Andrew Gowing said in an email.

"Where it was shown that leave was owed, employees retroactively submitted leave requests and their balances were reduced accordingly. In many other instances, what was originally flagged as a 'discrepancy' turned out not to be one after all."

Gowing added that the Office of the Comptroller General was alerted to the reconciliation exercise "early in the process."

The most experienced federal lawyers make about $220,000 in base salary, with most also given lump-sum bonuses each year.

The federal government sets its own standards for "materiality" when deciding whether to report unexpected liabilities, while publicly traded private-sector companies are compelled by strict regulations to disclose multimillion-dollar accounting errors.

But a Treasury Board policy document says: "With very few exceptions, the concept of materiality does not apply in recording and reporting on appropriations usage; all amounts are important."

Système de paye des fonctionnaires fédéraux: des dizaines de millions versés en trop

Louis-Samuel Perron, La Presse, le 22 février 2016

Des milliers de fonctionnaires fédéraux se sont fait payer des dizaines de millions de dollars par erreur au cours des dernières années en raison du système de paye vétuste du gouvernement, toujours en fonction malgré ses 45 ans. Or, ce cafouillage administratif sera bientôt chose du passé promet Ottawa, grâce au nouveau système de paye Phénix, dont l'implantation débutera mercredi prochain, six ans après son annonce.

Système inefficace

Année après année, des fonctionnaires fédéraux sont victimes de l'inefficacité du système de paye. Pas étonnant, puisqu'il dépend d'une technologie désuète et de documents papier. Résultat : en date du 21 décembre dernier, 9240 employés devaient plus de 14 millions de dollars au gouvernement, soit 1550 $ en moyenne, selon des informations obtenues grâce à la Loi sur l'accès à l'information. À la fin 2014, deux fois plus d'employés avaient une dette à l'endroit de leur employeur. Ces 17 000 fonctionnaires étaient tenus de rembourser 20 millions au Trésor public. Ces sommes ne représentent pas les salaires versés en trop pour chaque année, mais plutôt les sommes dues par les employés le 31 décembre de chaque année.

Sommes dues au gouvernement fédéral par les employés en date du 31 décembre de chaque année

- 2012 : 18 millions, 15 522 employés (1159 $ en moyenne)
- 2013 : 19,6 millions, 16 403 employés (1196 $ en moyenne)
- 2014 : 20,4 millions, 17 131 employés (1194 $ en moyenne)
- 2015 : 14,3 millions, 9240 employés (au 21 décembre) (1551 $ en moyenne)

Causes multiples

Les erreurs de paye se produisent dans de nombreuses circonstances, le plus souvent pour des raisons indépendantes de la volonté des employés, comme lors d'un changement d'horaire, d'une cessation d'emploi ou de la prise d'un congé sans solde. « Présentement, tout est fait avec du papier qui passe de bureau en bureau. Le temps que ce soit traité par le système de paye, les données sont rentrées et c'est trop tard, il y a des trop-payés », illustre Brigitte Fortin, sous-ministre adjointe de la direction générale de la comptabilité, de la gestion bancaire et de la rémunération, Services publics et Approvisionnement Canada (SPAC). Les ministères sont tenus de recouvrir intégralement les sommes dues avec les premiers fonds disponibles de l'employé.

290 000 fonctionnaires

Le vieux système de paye fédéral renaîtra enfin de ses cendres mercredi lors de la première phase d'implantation du système Phénix. À partir du 24 février, les payes de 120 000 employés fédéraux de 34 ministères seront traitées à partir du centre de service de Miramichi, au Nouveau-Brunswick. Deux mois plus tard, le 21 avril, le système Phénix sera ensuite déployé dans les 67 autres ministères du gouvernement. Ainsi, le 4 mai prochain, les quelque 290 000 fonctionnaires fédéraux recevront une paye qui aura été traitée par un système automatisé.

Modernité

Finis les « écrans verts » et les « codes » dépassés d'un système anachronique, Phénix devrait faire rentrer le système de paye de la fonction publique fédérale dans le monde moderne. « Le nouveau système de paye automatise et permet un libre-service. Donc, les gestionnaires et les employés vont pouvoir rentrer leurs données et on va pouvoir les lire immédiatement pour faire les changements sur les prochains chèques de paye. Ça va permettre une meilleure rapidité des paiements », explique Brigitte Fortin. Ainsi, les erreurs de salaires devraient être évitées « tant et aussi longtemps que les entrées de données sont effectuées à temps par les employés et les gestionnaires ».

77 mois

Ce projet de 300 millions avait été lancé par le gouvernement Harper à l'été 2010 en vue d'une implantation complète en 2016-2017. L'initiative n'était pas un luxe : quelques mois plus tôt, la vérificatrice générale du Canada Sheila Fraser écrivait dans son rapport annuel que « les systèmes de paye et de pensions menaçaient de s'effondrer », selon un rapport gouvernemental de 2008. « Le budget a été respecté. On a pris 77 mois à compléter le projet et au départ, on en prévoyait 75 mois. C'est quand même raisonnable », souligne la haute fonctionnaire Brigitte Fortin. Le gouvernement prévoit économiser environ 70 millions par année une fois le système bien en selle.

« Bonne décision »

L'Alliance de la Fonction publique du Canada (AFPC), qui représente 170 000 travailleurs, dont une majorité de fonctionnaires fédéraux, se réjouit que le gouvernement ait accepté de repousser l'implantation du système Phénix initialement prévue en octobre dernier. « Le ministère a écouté nos demandes et a pris la bonne décision. [...] Nous constatons maintenant que plusieurs problèmes que nous avions soulevés ont été résolus. Nous pensons que ça devrait bien fonctionner », soutient Chris Aylward, vice-président exécutif national de l'AFPC. *La Presse* rapportait au printemps dernier que de sérieux problèmes de formation chez les employés du Centre des services de paye de Miramichi avaient causé de nombreuses erreurs de

paye partout au pays. Le syndicat n'a pas voulu se prononcer au sujet des millions de dollars versés en trop aux fonctionnaires par erreur.

Brison says millennials will staff next 'golden age' of public service

Kathryn May, Ottawa Citizen, February 15 2016

The next “golden age” of Canada’s public service will be led by millennials, says Treasury Board President Scott Brison, and that means the federal workplace must change to attract highly valued workers under age 35.

“We are really well-served by an excellent public service, but we have a lot of work to do in engaging millennials more fully, in terms of transforming our public service to be open, more accountable, more transparent and less partisan,” said Brison.

Canada’s aging population poses challenges for the federal government to ensure it employs enough skilled people of all ages. The public service is emerging from an era of spending restraints and cuts with a smaller, older workforce of employees 18 to 65-plus.

In briefing books for Prime Minister Justin Trudeau, who is also the minister of youth, bureaucrats say the average age of new hires is now 37 and warn not enough young people are being hired permanently. In fact, in the final years of the Tory tenure, the number and proportion of permanent employers under age 35 decreased.

The Liberals, however, are targeting the large millennial generation and are working to ensure they have enough of them while adapting the public service to make it more millennial-friendly.

This growing segment of the workforce — between 18 and 34 — will soon surpass the GenXers and Baby Boomers who have shaped the public service for the past 50 years. A generation comfortable in a digital environment, millennials are seen as adaptable and innovative given the right tools, work environment and independence.

However, Brison’s drive isn’t simply about age and bringing in more youth. Rather, he is looking to unleash the cultural change in the public service that politicians have promised for years. He is turning to millennials, who are generally seen to have the skills and attitudes to drive that transformation, which Brison argues could create a better workplace for all public servants.

Brison is predicting another “golden age” in the public service, similar to the post-war heyday of big ideas and policies that the leading edge of the Baby Boomers helped to implement, including such things as medicare, old age security and the Canada Pension Plan.

“We believe we have an opportunity to restore and create another golden age of public service where we actively recruit the best and brightest millennials to the public service,” Brison told the Citizen.

Linda Duxbury of Carleton University’s Sprott School of Business has studied generational differences for a decade. She says millennials want less hierarchy, fewer rules, meaningful work, good working relationships, respectful managers, autonomy, recognition for their work, flexible schedules, open communication, tolerance for risk-taking, and fewer barriers to innovation. They put a premium on friends, family and hobbies and want work-life balance.

That’s a tall order for government. Blueprint 2020 is still the main road map for modernizing the public service, but briefing documents for Trudeau flag a number of “people management” issues to be tackled. They include: cumbersome staffing and classification rules, too many layers of decision-making, harassment, a toxic work environment, and rising mental health claims, outdated tools and business processes.

It’s unclear precisely what actions the government will take to make the bureaucracy more millennial-friendly. It has a list of election promises to restore trust in the public service and to make government more open, transparent and collaborative. Brison’s mandate letter from Trudeau asks him to “instil a strengthened culture of measurement, evaluation, and innovation in program and policy design and delivery.”

The government’s plan, however, faces fierce competition for these workers from the private and non-profit sectors.

Brison was on a panel at the World Economic Forum in Davos last month trying to convince millennials why they should work in governments.

“What we’re hearing is that if we are going to attract millennials to public service, public service has to become less bureaucratic, more meritocrative, less partisan, more transparent and more open. And I think if you ask citizens of any country, regardless of age, they would view these as good objectives.”

Many who want to make a difference go to NGOs, drawn by clearer causes, fewer rules and less hierarchy. But Brison said government is where they can really “move the needle.”

"While a young person can make a difference in the future of the world in an NGO, the same smart, talented, idealistic young person can actually make a bigger difference in government if government gives them the tools to do that. "

As a potential sweetener, he said the government could explore movement between NGOs and the public service through exchanges, secondments or as advisers on special assignments.

"I doubt in most cases that somebody leading an NGO can so do as much as a 30-year-old cabinet minister like Maryam Monsef in our cabinet, who is actually making cabinet-level decisions on the future of the country," said Brison in Davos.

"At the end of the day, in a democratic country, the decisions are still made by people who put their names on ballots and who aspire to lead."

Brison argues the timing is right. Canada's youth faces high rates of unemployment and underemployment, and the last of the boomers, who still comprise 36 per cent of the public service, will be leaving someday soon.

The Liberals also have a very different view of the public service than the Conservatives, who wanted less and smaller government. Brison repeatedly says a strong and innovative public service is needed to deliver the government's activist agenda.

"The Conservatives denigrated public servants for 10 years, and the reality is those Conservative attacks were based on an ideological bias and shoring up their voting base," said Brison.

Duxbury said that decade took its toll on the public service's image as a workplace where employees aren't managed or treated well.

She said the government won't attract bright and creative thinkers with a "whack-a-mole" culture where "anyone with new idea is afraid of sticking up their head and risk getting whacked if it's wrong or makes a minister look bad.

"You are never going to get these creative young thinkers until you change the culture of government, and the problem for a charismatic prime minister is that everyone is expecting magic and miracles, and culture change takes time so he has to manage expectations."

Government wraps consultations on inquiry into murdered indigenous women

The Canadian Press, February 14 2016

A national inquiry into missing and murdered indigenous women will come a step closer to reality today, as the Trudeau government wraps up consultations on how best to conduct an in-depth examination of the issue.

Indigenous Affairs Minister Carolyn Bennett and Status of Women Minister Patty Hajdu are to wrap up consultations with a final meeting today in the nation's capital.

The pair has been on a cross-country tour since early December to meet with the families of murdered or missing aboriginal women and girls, seeking their input on what a national inquiry should look like and what it should attempt to accomplish.

Bennett said last week they've heard from 1,300 people, many of whom believe police have ignored their concerns about missing or murdered loved ones.

The federal government hopes to have the inquiry up and running by the summer but it must first decide what the inquiry's mandate should be.

Bennett said it requires a balancing act to ensure the inquiry's focus isn't too narrow or too broad.

A 2014 report by the RCMP concluded 1,017 aboriginal women had been murdered between 1980 and 2012, and that another 164 were considered missing.

Indigenous women make up 4.3 per cent of the Canadian population but the report found they account for 16 per cent of female homicides and 11.3 per cent of missing women.

Former Conservative prime minister Stephen Harper resolutely refused to launch a national inquiry into the issue, arguing that indigenous women need action, not more studies.

However, Prime Minister Justin Trudeau promised during last fall's election campaign to immediately launch an inquiry as part of his bid to establish a new "nation to nation" relationship with indigenous peoples.

L'enquête nationale sur les femmes autochtones devra être élargie

Marie Vastel, Le Devoir, le 16 février 2016

Le drame survenu dans la communauté autochtone de Lac-Simon la fin de semaine dernière confirme que le mandat de l'enquête nationale sur les femmes autochtones devra être élargi, pour tendre la main aussi aux hommes de ces communautés, a reconnu la ministre fédérale responsable du dossier, Carolyn Bennett. Un nouveau pan qui s'ajoute au mandat de cette enquête qui s'annonce bien large.

Un policier âgé de 26 ans, Thierry LeRoux, a été tué samedi soir lors d'une intervention qui a mal tourné à Lac-Simon, près de Val-d'Or, en Abitibi. Le présumé tireur, Anthony Raymond Papatie, a été retrouvé sur les lieux de l'événement, où il s'était enlevé la vie. Une tragédie comme celle-là démontre, pour la ministre Bennett, qu'une enquête sur la violence faite aux femmes autochtones ne pourra pas ignorer l'autre sexe.

« Il ne fait aucun doute que les hommes et les garçons doivent sentir qu'ils font partie de ce processus, en termes de ce qu'ont été les causes profondes de tout cela et afin qu'on puisse renverser la situation avec l'aide de ces hommes et garçons », a fait valoir la ministre des Affaires autochtones lundi.

Ces causes profondes de la violence faite aux femmes sont les mêmes que celles qui ont mené au drame de Lac-Simon, à son avis. *« Le lien entre les pensionnats autochtones et les abus contre les enfants, qui mènent à la dépendance, qui mène à l'incarcération, qui mène à la violence, fait partie de cet héritage colonial de notre pays. Et il va être très important qu'on s'y attaque de front »*, a expliqué Mme Bennett, en faisant le point au terme de deux mois de préconsultations auprès de survivantes de cette violence et de familles de victimes.

Racisme et colonialisme

Cette première série de discussions doit permettre au gouvernement de dresser le mandat de la commission d'enquête nationale, qui devrait être annoncé lorsque l'enquête se mettra en branle probablement cet été.

Or, ce mandat risque en outre de se pencher aussi sur les sévices infligés aux femmes autochtones par les corps policiers, comme ceux dénoncés à Val-d'Or l'automne dernier. Un *« problème systémique »* qui s'étend au-delà de l'Abitibi, avait déploré la ministre Bennett en janvier.

Et de l'avis de Claudette Commanda, membre du conseilde bande de Kitigan Zibi et professeure à l'Université d'Ottawa, l'enquête nationale devra surtout se pencher sur le racisme et le colonialisme affichés à l'endroit des Premières Nations. *« Parce que le racisme est une cause fondamentale qui entraîne ces effets »*, a plaidé Mme Commanda, qui a participé à certaines journées de préconsultations. *« Je crois dur comme fer qu'il ne faut pas mettre un Band-Aid là-dessus. Il faut s'attaquer au problème, et c'est le racisme : le racisme contre les populations des Premières Nations et, évidemment, le racisme contre nos femmes. »*

Le gouvernement Trudeau a promis la tenue d'une enquête nationale de deux ans pour étudier les causes de l'assassinat de plus de 1000 femmes autochtones et la disparition de plus de 150 autres en 30 ans. Or, il semble que la ministre Bennett et ses collègues à la Justice, Jody Wilson-Raybould, et à la Condition féminine, Patty Hajdu, aient été convaincues au fil des préconsultations qu'il leur faudra également se pencher sur une série d'autres problèmes qui affligent les communautés autochtones du pays.

Une lourde responsabilité

Les ministres Bennett et Hajdu ont clos une vingtaine de préconsultations lundi, dont elles sont sorties une fois de plus les yeux embués, car les témoignages étaient de nouveau *« poignants »*, a relaté Mme Bennett. La tâche des deux derniers mois aura été lourde, ont-elles admis.

« Si vous voulez faire le travail comme il faut, il vous faut pouvoir être témoin de toute cette douleur et être capable d'empathie sans vous perdre dans cette tristesse. Et c'est un exercice

d'équilibre délicat », a reconnu la ministre Hajdu, visiblement émue par les derniers récits qu'elle venait d'entendre, la voix tremblante par moments.

« Le plus difficile, c'est l'espoir qu'expriment plusieurs des participants qui parlent à des gens qui peuvent réellement faire une différence dans leur vie, a renchéri la ministre Bennett. *Et la responsabilité qu'on en ressent, sur le fait qu'on doit faire des gestes concrets qui feront cesser cette tragédie. Je ne crois pas qu'on ait tenu une seule consultation où quelqu'un ne nous a pas dit "tout ça doit cesser". »*

Mais elle a laissé entendre que les communautés pourraient voir de premiers changements dès le budget ce printemps. *« Nous n'attendrons pas la fin d'une commission de deux ans pour aller de l'avant et répondre à des problèmes urgents qu'on nous a rapportés en matière de logement, de refuges, de racisme et de sexisme chez les forces policières, et d'aide à l'enfance »*, a prévenu la ministre Bennett.

Why Canadians should pay more attention to their Supreme Court

Konrad Yakabuski, The Globe and Mail, February 18 2016

Canadians seem to watch in mild horror the crass partisanship and politicization that surrounds Supreme Court nominations in the United States. It's happening now as the death of Justice Antonin Scalia has U.S. politicians fighting over whether President Barack Obama should get to name another judge before he leaves office, likely tilting the court in a more liberal direction.

The U.S. system has its flaws, none more destructive than the political exploitation of the top court to mobilize the liberal and conservative extremes in the Democratic and Republican parties. But it's not all bad. Heightened political scrutiny means Americans are acutely aware of the role their Supreme Court plays in their democracy and, accordingly, pay due attention to it.

Contrast that with the indifference Canadians show toward our Supreme Court. While Mr. Obama faces relentless questions about whether a president in his final year has the legitimacy to make such a long-lasting appointment – even if it's clear that he has the legal authority – former prime minister Stephen Harper faced no sustained criticism when he named a Supreme

Court judge days before launching an election campaign, one that resulted in him being turfed from office.

The July appointment of Justice Russell Brown, a committed conservative, could prove to be the most consequential of Mr. Harper's tenure, which says a lot considering that seven of the court's current judges were named by him. But outside of legal circles, the nomination hardly registered. It certainly wasn't an election issue.

Should it have been? There are those who argue that dragging the Supreme Court into our election campaigns would compromise its independence and sully its image. But it is the court itself that has thrust itself into our politics by virtue of its vastly enhanced policy-making powers in the Charter of Rights and Freedoms era. For starters, in the past two years alone, the court has struck down Canada's prostitution laws, reversing its own 1990 decision; extended aboriginal rights, making resource development subject to extended litigation; ruled one of Mr. Harper's nominees ineligible to sit on the court; quashed a minimum sentencing law; and struck down the Criminal Code ban on assisted death.

"One would be hard-pressed to find another actor in Canada who has had a greater impact on such a wide range of issues than the court has in the last year," the Ottawa-based Macdonald-Laurier Institute said in designating the Supreme Court as its Policy-Maker of the Year for 2014.

The court was every bit as active in 2015, although there was more dissent within its ranks, as former Harper legal adviser Benjamin Perrin notes in a review of the court's top 2015 decisions. When a majority of judges invoked hypothetical circumstances, rather than the facts in the case at hand, to strike down the mandatory minimum sentence for possessing a loaded prohibited firearm, three judges dissented, saying: "It is not for this court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture."

Why isn't the court's role and composition a regular matter of political debate here? The Harper government tried that early on, but its motivations were always suspect in the eyes of its critics. Its moves to make the appointment process more transparent (by requiring, for instance, nominees to submit to a parliamentary hearing) were abandoned after its failed nomination of Marc Nadon degenerated into a political free-for-all that destroyed trust on all sides.

The Liberals promised a Supreme Court nominating process that is more "transparent, inclusive and accountable to Canadians." But other than vowing to name judges that are "functionally bilingual," their campaign undertakings were too vague to mean anything.

Barring a resignation or death, Prime Minister Justin Trudeau will likely make only one addition to the court during his first term, but one with major implications. Beverley McLachlin, Canada's longest-serving Chief Justice, will reach the mandatory retirement age of 75 in 2018. Mr. Trudeau will have to decide whether to elevate a judge already on the court to chief justice – the typical route that could involve promoting a Harper appointee – or going outside for a new top judge. Whatever he does, Canadians would do well to pay attention for a change.

Supreme Court to rule on Google appeal over order to remove company's website from search results

Julius Melnitzer, Financial Post, February 16 2015

The Supreme Court of Canada will reveal on Thursday whether it will hear an appeal from an order Google to remove a company's websites from all its worldwide search results.

The decision last year of the British Columbia Court of Appeal, in a case called Google v. Equustek, sent a clear message that Canadian courts are increasingly willing to ignore provincial and national borders to ensure that justice is done in the business world. It is the most expansive ruling on the scope of Internet jurisidiction in the common law world to date. Still, the case is in line with other Canadian decisions that have seized jurisdiction over entities operating in Canada and tried to regulate not only what these entities can do in Canada but also in the rest of the world.

But not everyone's happy about it, largely because Google's singular connection to B.C. was that it indexed Canadian websites and advertised in the province. Concerns include adverse implications for Canadian businesses abroad and a backlash from other jurisdictions seeking to make orders that affect conduct in Canada.

As it turns out, the Court of Appeal was alive to the prospect of expansive orders in other jurisdictions.

"I note that the courts of many other jurisdictions have found it necessary, in the context of orders against Internet abuses, to pronounce orders that have international effects," the Court of Appeal stated, going on to list a number of cases from around the world, including the high-profile "right to be forgotten" ruling from the European Court of Justice.

What's clear then, is that the delicate balancing act in deciding these types of cases represents a global conundrum pitting the need to impose order and enforce orders on the Internet while respecting the territorial limits of courts' jurisdiction. On Thursday, we'll find out if Canada's highest court is ready to take on the challenge.

The God that fails: C-51, review committees and the dangers of window dressing

Matthew Behrens, rabble.ca, February 17 2016

Among the Harper era's most destructive legacies is a toxic stew of repressive "anti-terror" laws that, in building on similarly repressive measures brought in under Jean Chrétien and Paul Martin, extended major new powers to Canadian state security agencies Canadian Security and Intelligence Service (CSIS), Communications Security Establishment Canada (CSEC), Canadian Border Services Agency (CBSA) and the RCMP, among numerous others. Last year, Justin Trudeau infamously voted in support of C-51 (The Anti-Terrorism Act, 2015), claiming his support of the law was necessary to ensure his electability.

During the federal election, the Liberals promised to revisit C-51 with amendments they felt would make it more palatable. More recently, Public Safety Minister Ralph Goodale has hinted at a consultation process, committee hearings, and even a broader dialogue on state security issues. While it sounds like a typical Liberal plan (a good listen before they go ahead with their preordained agenda), it nonetheless provides us some space to raise serious questions about the current and traditional role of CSIS, the RCMP, and CBSA, among other agencies, in violating the rights of targeted, vulnerable communities.

Given that the 1984 creation of CSIS from the ashes of the scandal-plagued RCMP Security Service did not change the dynamics of repression in Canada (most former Mounties simply moved their desks to the new CSIS), now would be a propitious moment to discuss dismantling CSIS as an ultimately lawless, dangerous outfit. As this column has repeatedly documented, CSIS has undertaken a sweeping series of illegal and unethical activies over 30-plus years: complicity in torture; defiance of court orders; lying under oath to judges; illegally recording lawyer-client calls; terrorizing targeted communities; acting as ISIS recruiters; targeting labour unions, peace activists, Indigenous people and environmentalists; and a lengthy list of other practices which have endangered the lives of many Canadians. Despite this, CSIS gets an annual

free pass and an occasional love tap on the wrist from its watchdog, the Security Intelligence Review Committee (SIRC).

Indeed, the work of those who struggle to end the real threats to our collective security -- climate change, war and Canada's booming armaments business, a grossly disproportionate income inequality, a deeply rooted colonial racism, and an epidemic of violence against women -- would be a lot easier if we weren't constantly the focus of investigation by the likes of CSIS and the RCMP. Think of how the heroic Cindy Blackstock was viewed as a security threat for exposing the wretched living conditions of Indigenous children. Members of Canada's Arab-Muslim communities could certainly sleep better at night too, not having to worry that their children were being coerced into spying on the community as a sign of their loyalty to Canada. And without an active CSIS, the number of terror threats coming to trial would decrease significantly, given how many of those cases are either initiated by or facilitated by agents of the Canadian state, perhaps no more clearly than in the Nuttall entrapment case currently being heard in B.C.

Beware the window dressing

But instead of questioning the mandates and core practices of these secretive, unaccountable outfits, efforts are already underway to save the system by putting up some nice-looking window dressing and further entrenching a parallel system of secret government. While there is no evidence that repeal of C-51 and the whole slew of post-9/11 "anti-terror" legislation would harm the security of Canadians one whit, some members of the academic-security complex are exercising a preferential option for the powerful in trying to design face-saving measures to keep C-51 intact.

Out front in narrowly framing the issue as one of technical and legalistic details are professors Kent Roach and Craig Forcese, who, despite providing much good research on state security measures over the years, nonetheless write in their 2015 book ***False Security*** that:

"[W]e have rarely opposed such laws, although often urged refinements and improvements. And even with C-51 and the earlier 2015 law, Bill C-44, we did not dispute their purported objectives, merely their means and omissions. Our focus has always been on repairing 2015's security laws, not burying them, something that has put some distance between us and some rights groups that we work with and admire."

Herein lies the danger in whatever national discussion about C-51 and the broader state security environment will ensue: our goal should not be making a fundamentally oppressive network of invasive, privacy-busting, human rights-violating agencies work more efficiently.

While polls indicate most Canadians opposed C-51, Roach and Forcese appear to have taken it upon themselves to save the law with a discussion paper and proposed legislation that is currently making the rounds in Ottawa. "Bridging the National Security Accountability Gap" calls for increased levels of state security review via a "Super SIRC" that would have an expanded review mandate for more government agencies, a secret committee of parliamentarians, and an "Independent Monitor" who would, in the words of the proposed law, hold office part-time "during good behaviour." In theory, it's an interesting idea, and one much needed, especially for agencies like CBSA, which has no review process whatsoever. But a siloed focus on after-the-fact review fails to question the state security narrative that continues to do so much up-front damage to so many individuals, families and communities.

Worse still is the fact that expanded review does nothing to ultimately hold agencies accountable: there is no discussion of creating the capacity to lay charges against agency officials for the wrongdoing that ruins lives. Nor is there any infrastructure proposed that allows independent officials to step in and stop an operation that is acting illegally and at great risk to individuals whose lives are in peril because of shoddy "intelligence" work, exaggerated threat assessments, false labelling, and other systemic problems that have marked CSIS since its birth.

Perhaps most problematic is the fact that Canadian citizens who have been targeted for torture and continue to live with the horrific aftermath are not front and centre in this proposal. Indeed, any honest attempt to bring accountability to the system would insist on having individuals like Abdullah Almalki, Maher Arar, Ahmad El Maati, Muayyed Nureddin, Abousfian Abdelrazik -- all tortured with Canadian complicity -- playing a key role in all meetings and discussions about how to control what is a shockingly corrupt system operating with complete impunity. But none of them are even mentioned in "Bridging the National Security Accountability Gap."

Instead, the tone of the document is almost a consoling sop to CSIS and their spy brethren. Forcese and Roach soft-pedal their approach with anodyne language, noting state security agencies "may stray into patterns, policies or groupthink impairing their effectiveness." By using the qualifier "may," they ignore the substantive public record that such dynamics constitute

standard operating procedure. "Such practices," they continue, "may result in either overreactions causing human rights abuses or underreactions causing security failures." Again, the qualifier "may" ignores the well-documented record of such human rights abuses over the past two decades. They state such agencies have "sometimes misused" their powers, as if it were an aberration rather than a daily practice. They don't call for repeal of these powers; they simply want to see more documentation of them. In all such instances of problematic state behaviour, they conclude, "Review can counter this tendency."

Review cannot help today's targets

But review does not help the pour soul trapped in an overseas Syrian or Egyptian dungeon, being tortured based on questions coming from a Canadian agency, as happened in at least half a dozen cases since 9/11. Review is retrospective. It does not rein in, much less stop, abusive practices, especially when findings are not used to prosecute and, where appropriate, punish the acts of secretive officials whose decisions imperil people's lives.

While we must start somewhere when it comes to reining in and disarming these agencies, these academics' approach seems more concerned with CSIS' feelings than those of the victims of state security policies. Indeed, their approach to dealing with agencies marked by a lengthy history of incompetence, dishonesty, and reckless disregard for human life, is a pitifully low standard: "trust, but verify." What has CSIS, the RCMP, CBSA, and their assorted security agencies done in the past that allows them such a long leash? In a democratic, transparent society, shouldn't any position short of abolition be based on the much higher standard for secretive, unaccountable agencies: mistrust, question, assume illegality based on patterned behaviour over several decades, seek opportunities to hold officials legally accountable, and ensure they do no further damage? But Roach and Forcese's bias is clear: in stating "review can contribute to an agency's legitimacy," they fall into the same trap as SIRC, which time and again sees itself as a liaison between CSIS and the public, trying to explain away CSIS behaviour. As SIRC wrote, for example, in 1995, "Our aim is to provide a steadily broadening and deepening public base of information about what CSIS does, why those activities are necessary, and how well the Service carries them out."

SIRC's understanding of its mandate makes them sound more like a PR agency for CSIS than a watchdog tasked with rooting out problematic behaviour.

Assuming for a moment that review is one answer to the problems we face, Forcese and Roach correctly argue that review should be independent of government and the agencies they review, but herewith lies another conundrum: the only people who will be appointed to conduct review processes will need to be security cleared by that very government. Will someone with the most intimate knowledge possible of the workings of these intelligence agencies, and hence the ability to properly question the workings of these outfits -- say one of the returnees from torture in Syria and Egypt -- be allowed onto the review committee? In case you are unsure of the answer, keep in mind that the Liberal government is continuing to fight the legal claims of three Canadians tortured abroad with Canadian complicity -- Abdullah Almalki, Ahmad El Maati, and Muayyed Nureddin. All suffered intense harassment in Canada and torture overseas during previous Liberal governments.

But the concerns of the victims of CSIS and the RCMP are not what makes this proposed legislation tick. Rather, it is making sure the spies are comfortable. That is why, in proposing a secret committee of state security parliamentarians, Forcese and Roach suggest that it be a small group, since that may make it easier to earn "the trust of intelligence agencies in relation to dealing in sensitive information." But isn't it CSIS and the RCMP who need to earn our trust, not the other way around?

Shutting down whistleblowing

In addition, Forcese and Roach seek with their proposed legislation to tie the hands of this secret group of MPs, denying them the parliamentary privilege they might otherwise enjoy to act as whistleblowers if they see something untowards taking place behind closed doors. As even these academics have acknowledged, much of what is secret is kept under wraps not for security reasons, but to avoid embarrassing the government and the spy agencies. But such a prohibition on parliamentary privilege makes sense if, as the authors point out, the point of review is to enhance the legitimacy and image of these organizations. Thus, to save the hide of CSIS, Forcese and Roach propose that MPs on the committee who feel something needs public disclosure will face a difficult challenge: breaking an oath of permanent secrecy and being subject to charges which could land them in jail for 14 years.

The academics also state that government should not have a unilateral veto over what is disclosed. Agreed, but then their proposed legislation does exactly that. In a section on the secret committee's annual report, they give the Attorney General the power to keep certain

information from public disclosure. Imagine this scenario: the MPs learn that CSIS is complicit in the ongoing torture of a Canadian citizen in an Egyptian dungeon. They wish this to be made public. CSIS objects and then goes to the Attorney General. The Attorney General then goes to Federal Court to argue that under the Canada Evidence Act, the information should not be disclosed and, further, that a hearing into the reasons why must be held in secret as well. Such Canada Evidence Act proceedings can take years. The transparency, accountability and democratic oversight that is the purported point of review is thus stuffed into the ever-expanding secret bureaucracy of state security. The poor soul in an Egyptian prison does not benefit, and any MP who speaks publicly risks jail, thanks to the legislation proposed by Mssrs. Roach and Forcese.

The problem in calling for expanded review with a "Super SIRC" under these circumstances has long been identified even by those with a preferential option for the powerful. Even Wesley Wark (who is far from a radical critic of CSIS) notes a good working relationship with a spy agency "can distort the critical faculties and independence of a review body. It can also lead to the over-valuing of the relationship between reviewer and reviewed at the expense of the review body's public function."

That has certainly been the case with SIRC, which started out fairly critical of CSIS in the early years, but has since turned into the author of an annual gold-star, happy-face report card. While SIRC has occasionally done some very good work -- its staff have written some excellent reports identifying serious problems with CSIS -- it operates under the dynamic identified by Wark: they will point out individual problems, but fail to condemn structural abuses and question the broader agenda. In their 1991 annual report, SIRC wrote:

"[O]ur criticisms are no longer based upon strong and fundamental disagreements with the CSIS view of the world [emphasis added]. They are far more the results of differences of opinion regarding the day-to-day implementation of CSIS policies than, as in the past, our opposition to those policies themselves."

SIRC recommendations are not binding on CSIS, which can disregard them with impunity. But let's assume, though, that the notion of review is a viable approach to the state security conundrum. Can it prevent abuses? The answer would appear to be a very strong "No!" Simply look at the lack of action following the new SIRC report which identified CSIS improperly accessing without a warrant taxpayers' personal Canada Revenue Agency files. No one has been

arrested and charged, much less demoted or dismissed. For all we know, the practice continues, because SIRC does not have the power to put a stop to it, much less the resources to stay on top of the issue.

A case study of review's limitations

As another case in point based on real-life circumstances, let's examine the lengthy CSIS record of trading information with torturers that led to the rendition and torture of Abdullah Almalki, Maher Arar, Ahmad El Maati and Muayyed Nureddin. All of this was documented by two judicial inquiries where government witnesses shrugged their shoulders, claimed that the post-9/11 terrain was new to them, and that such unfortunate incidents were unavoidable.

Such claims were patently untrue, as this case example shows. Concerns about CSIS relationships with human rights abusers go back over several decades. In its early years, CSIS clearly wished to trade information with torturers unimpeded by what George W. Bush et al. would later condemn as antiquated notions of international law and the Geneva Convention. In 1989, SIRC raised concerns about the CSIS disbanding of a Foreign Liaison Branch which, SIRC said, acted as "an intermediary... [that could] 'blow the whistle' on the inappropriate dissemination of information abroad."

What followed is a decade's worth of unheeded warnings and concerns. In 1991, SIRC declared quite clearly: "We continue to be concerned about relations with states having an undesirable human rights record." But in classic SIRC style, the deference shown to CSIS is frustratingly supine, since "we recognize the desirability of maintaining limited agreements to ensure that CSIS receives information about emerging threats to Canada's security." Apart from the fact that the definition of threats to the security of Canada is so over-broad as to include just about anything -- and there are countless examples throughout SIRC reports of over-exaggeration and wrongful labelling of alleged threats -- there is no further comment about the problem of receiving torture-tainted allegations. What, exactly, was the desirability of maintaining relations with Assad's butchers or Mubarak's brutes?

Did the concern cited in SIRC's 1991 report change CSIS behaviour? No. The review for 1992-93 noted an example where CSIS:

"[A]ppeared to act without full and prudent regard for a ministerial directive…to ensure that particular caution was exercised when providing information to countries that do not share Canada's respect for democratic or human values, especially where the information concerned Canadian citizens or permanent residents. In this case, the Service communicated to a foreign agency the details of an individual's plans to travel to another country and, possibly, to meet with members of a group associated with terrorist activity. The latter belief was based solely on the uncorroborated beliefs of an informant, and was disclosed even though the Service was aware of reports of human rights abuses by security forces in that country. The individual's full identity was not known to the Service, neither was his citizenship status or any information on his previous involvement with terrorist activity, beyond his believed fund-raising on behalf of the extremist group engaged in the conflict. We consider that the consequences for the individual and his family, had they been identified when they arrived in the foreign country, could have been extremely serious and that a potential tragedy was avoided more by good luck than good judgment. Fortunately, in this case, they were not identified and returned to Canada safely."

It should not provide much comfort to anyone that CSIS got away with it and that a potential tragedy was avoided because of good luck.

Did CSIS practices change when they escaped by the hair of their chinny chin chin? No. In the review for 1993-94 -- in language that would form a cornerstone of the two judicial inquiries into Canadian complicity in torture led by judges O'Connor and Iacobucci over a decade later -- SIRC again reiterated its concern about:

"[T]he possible consequences to individuals whom the Service draws to the attention of authorities in the region we audited. Adverse information about someone deemed to be an extremist can have absolutely devastating consequences to that person and his or her family. The accuracy of the information provided by CSIS must be a paramount consideration, as well as the importance of the investigation itself….We were interested to note that the Service saw fit to provide information to agencies about persons who the Service did not see as engaged in terrorist activities."

CSIS responses as always included patting their SIRC reviewers on the head, assuring them of good intentions, and moving on to engage in the exact same dangerous practices. In 1994-95,

CSIS entered into new arrangements with countries in Latin America and Africa with dismal human rights records.

"The Committee had serious reservations about the new arrangements with these two agencies, based on recent, publicly available information. CSIS said that it relied on information from Canada's Ministry of Foreign Affairs about the human rights issue in these countries. We believe that the Service should also consider information from other sources, in view of the potential for abuse of the information it sends overseas."

CSIS ignores human rights violations

In that same review, SIRC raised concerns about how CSIS assessed the risk of human rights abuses in particular countries, noting:

"[T]wo assessments did not appear to take into account the recent, publicly available information from human rights observers who noted an increase in the reports of arbitrary imprisonment and torture, the latter sometimes involving elements of the security intelligence establishment of the foreign country….We noted too that the CSIS assessments did not address allegations of corruption within the security intelligence establishment and overlooked significant political incidents in the country which took place in 1994. Our concern was that by not considering these information sources, the Service did not present a balanced view of those agencies with which it exchanges information. CSIS responded that it has no mandate to investigate human rights abuses....SIRC's position is one that we have expressed previously: the Service should avail itself of up-to-date, publicly available reports from reliable non-governmental agencies and the agencies of other states. CSIS would then be in a position to consider a wider range of views about the agencies with which it shares information."

Along the way, SIRC repeatedly raised concerns about the failure of CSIS to log exchanges with foreign agencies, which made it difficult for SIRC to conduct its audits (and easy for CSIS to hide unsavoury information about its practices). They raise the issue of "the absence of a paper trail to indicate what was or was not shared with the foreign agencies."

In other cases, SIRC examined instances regarding foreign agency requests:

"[B]ased on the actual or suspected presence of some Canadians in a region in conflict. [Counter-terrorism] Branch stated that it was sensitive to the issue of providing information to a foreign agency and assured us that both HQ and the SLO [Security Liaison Officer] were conscious of the possible consequences of responding to the foreign requests. But we were left uneasy about the cases, not the least because the Canadians posed no threat to Canada's national security and due to the foreign country's cloudy human rights record."

So, SIRC once again raised the possibility that CSIS sharing of sensitive information about Canadians travelling abroad could have catastrophic consequences. Did this change CSIS behaviour? No. In 1995-96, we see that CSIS shared information with a foreign agency "about the family members of a person who was of interest to the Service. Furthermore, the information that CSIS gave to the foreign agency appeared to violate a restriction on the types of data being provided to services in the foreign country."

Did this change CSIS behaviour? No. In 1996-97, SIRC found that CSIS "provided adverse information about a person to two Federal Government departments and to an allied intelligence agency" that described the individual as a "witting agent" of a foreign intelligence service, "a potentially damaging statement not substantiated by the documentary evidence we saw. In addition, the authority to investigate him was not properly approved; it did not take into account his immigration status, as required by policy. CSIS later rectified the error." Again, the problem inherent in SIRC is clear: it can discover such problems, but it does not explain how, exactly, CSIS rectified the error, what damage had already been done, and how SIRC will not have to repeat such concerns in subsequent reports.

CSIS refuses to change practices

That same year, SIRC, in auditing an overseas CSIS post, "found that despite poor human rights situations and political instability generally in many of the countries in the region covered by the post -- in addition to high levels of corruption in some cooperating agencies -- these organizations continued to receive [favourable CSIS ratings]."

Did *this* change CSIS practices? No. The train of defiance and willful blindness continued in 1997-98, with "an instance where the Service's sharing of information with a foreign intelligence service was questionable," while, in reviewing an overly broad request "from a Canadian law enforcement agency to ask several allied intelligence services to conduct records

checks on more than 100 people suspected of being involved in transnational crime," SIRC found "the grounds for some of the requests to be of doubtful validity. For example, one person about whom information was requested was said to have been 'caught shoplifting.'"

In the years immediately prior to 9/11, CSIS continued business as usual, with SIRC issuing its annual scold that CSIS "should take all possible care to ensure that the information it provides is not used to assist in the violation of human rights." The fact that such cautions continued to be issued means that CSIS clearly acts as its own judge and under its own laws, and that these problems must be systemic given that SIRC annually finds them even in the minor spot checks it conducts (they are spot checks given how SIRC's limited staff and budget prevent it from conducting comprehensive annual audits).

In the years following 9/11, when Canadians were being tortured in Syria and Egypt and secret trial detainees here at home were being detained based on information coming from those same torture regimes, SIRC reviews of CSIS exchanges with overseas agencies sounded like a broken record. A typical reminder to CSIS emphasized the spies "will need to exercise vigilance to ensure that no information received from an agency is the product of human rights violations, and that no intelligence transferred to an agency results in such abuses."

Despite subsequent judicial inquiries and court decisions documenting CSIS and RCMP complicity in torture, those agencies continue to operate under Harper-era ministerial directives allowing them to trade with torturers. But even when such express permission was not provided, CSIS took it anyhow, as indicated by the SIRC review reports.

Throughout SIRC reports is the language of the stern but kindly teacher, one who provides their ward with important disciplinary direction but has no authority to enforce decisions or to mete out legal consequences. In 2001, when CSIS was lying to an Ontario court judge in a warrant application based on information it knew had been obtained in the torture of Canadian Ahmad El Maati, SIRC was busy holding the hand of the then 17-year-old agency, reminding them that "CSIS should strive for the utmost rigour in its warrant acquisition process, ensuring that allegations in the affidavit are factually correct and adequately supported in the documentation."

What to do?

Clearly, Canada's state security agencies continue to act outside the limits of the law, engaging in legally questionable operations and bullying behaviour that terrorizes communities at home while risking lives abroad. Tackling this issue requires a far more critical approach than that proposed by the academic pair who were made media heroes in the anti-C-51 fight, even though they do not support its repeal.

Perhaps a far better approach is to question the mandates of these agencies and their interpretation of the world. Professors Roach and Forcese, knowing what they do about the abuses committed in the name of security, are shamefully applying a Band-Aid to cover up the pus when what's really needed is to lance the boil of state security in Canada.

Instead, their proposed legislation creates additional layers of secret government while accepting the C-51 definition of activities that "undermine the security of Canada." For those with short memories, that definition is so overly broad that it likely includes every reader of this column. Its lowlights include those whose activity "adversely affects the stability of the Canadian economy, the financial system or any financial market in Canada without reasonable economic or financial justification." This section is aimed at Indigenous people resisting exploitation of their lands and pipeline expansion (as well as those brave souls who have shut down Line 9 over the past few months). It also focuses on anyone who "damages property outside Canada because a person or entity with an interest in the property or occupying the property has a relationship with Canada or a province or is doing business with or on behalf of the Government of Canada or of a province," which likely is aimed at those resisting Canadian corporations engaged in toxic mining despoiling overseas Indigenous lands.

The definition also applies to peaceniks and anyone who "impairs or threatens the military capability of the Canadian Forces, or any part of the Canadian Forces," and anyone who "interferes with the design, development or production of any weapon or defence equipment of, or intended for, the Canadian Forces, including any hardware, software or system that is part of or associated with any such weapon or defence equipment." Clearly, this is aimed at anyone trying to stop the production and sale of armoured brigade vehicles for the beheading regime of Saudi Arabia.

If we do have a real consultation on state security, perhaps we can start by tearing up this ridiculous definition of threats to security and naming the true threats that imperil our future. Step one is repealing C-51 and much of what came before it. Another step is refusing to buy

into the false narratives of national security expounded by state security agencies as well as all political parties in the House (all of whom thoughtlessly use the term "radicalization" without an appreciation for the damage it does to targeted communities). Anything less will only perpetuate the human rights violations that Roach and Forcese's secret MPs and Super SIRC will cogitate over behind closed doors while everyone else, including the direct victims, will be left in the dark.

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