Liberals pick only low-hanging justice fruit with Bill C-39

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Michael Spratt
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This month, the Liberal government took swift and decisive action against zombie laws found lurking in **Canada's Criminal Code. Except their actions were not swift, decisive or principled but instead a half-**hearted grab at only the lowest hanging justice fruit.

Let's first take a step back and look at the problem. As I wrote almost exactly a year ago, there is hidden in plain sight, right at the beginning of the Criminal Code, one of our law's most laughable presumptions: Ignorance of the law by a person who commits an offence is not an excuse for committing that offence. In other words, we assume that every person in Canada knows not just the letter of the law but also the centuries' worth of judicial interpretation that informs our criminal justice system

The Criminal Code is a big book full of antiquated laws, unconstitutional provisions and unjust policies.

Criminal law is a blunt tool that has been overused by successive generations of politicians as a lazy way to deal with complex social problems. The result has been generalized and systemic criminalization of poverty, mental illness and addiction.

But at the same time, Canada's criminal laws are also overly specific — apparently, it is not sufficient to criminalize theft but every possible variation of theft: theft of oysters, theft of telecommunication service, theft of motor vehicle, theft of cattle and theft of mail.

The code also contains antiquated and absurd laws. It is illegal to fraudulently practise witchcraft or sorcery — legitimate witchcraft is perfectly fine. It is also a crime to sell, distribute or produce any comic book or work of art that depicts real or fictitious violence — an odious limit on free speech that has no place in modern society.

The code is also cluttered with laws that have been found to be unconstitutional — in other words, some of the laws that are on the books are not really the law at all.

As the infamously televised Travis Vader debacle illustrates, the Criminal Code is such a mess that even some of our judges don't know the law. Of course, in the Vader case, an unconstitutional section in the code led to a mistrial application, a stunning reversal of a first-degree murder conviction, delays, wasted resources, untold grief to the victim's family and an appeal.

It appears that a disaster of this magnitude is what it takes to spur the federal government into action – after the Vader trial, the justice minister announced a plan to review zombie laws.

So, the justice minister proudly and loudly introduced Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions). The bill will repeal: abortion prohibitions, the Vader murder law, anal intercourse prohibitions, the offence of spreading false news, vagrancy, some impaired driving evidentiary shortcuts and some limits on credit for pre-sentencing custody. The Supreme Court of Canada has found all these provisions unconstitutional.

So, why is this low-hanging fruit? Well, the Supreme Court has already done all of the work and analysis. In some cases, this has been settled law for decades. There is no original progressive thought found in Bill C-39.

It is shameful that it took an almost miscarriage of justice for the government to propose this simple legislation. And make no mistake — at fewer than six pages — it is simple legislation.

There should be legitimate criticism that the government did not go far enough. Sure, the Supreme Court has not ruled on crime comics and witchcraft, but why leave those provisions untouched? And the mollusk lobby must be powerful because thefts from oyster beds are still a separate crime under Canadian law.

But the government did not even repeal all the parts of the code that have been definitively ruled on by the Supreme Court. Minimum sentences for some drug and firearm offences were recently found to be unconstitutional, but they remain untouched.

Why? The only explanation for leaving these clearly unconstitutional sections in the code while removing others is political cowardice.

Apparently, the Liberals are OK with some zombies shambling through the Criminal Code.

There should be a political price for such uninspiring legislation. But there won't be. The response to the partial zombie law repeal announcement missed the mark on so many levels.

The media ran stories such as: "Federal government to end 'zombie laws,' clean up Criminal Code" and "Federal government to axe 'zombie laws' from Canada's Criminal Code" — except there was no real cleanup and not all zombie laws were axed.

Some commentators — such as the normally insightful Chantal Hébert — suggested that the Liberals were reopening the abortion debate. This argument is as misplaced as suggesting that a routine appendectomy should be celebrated as a groundbreaking medical procedure. Yet, partisans and even Conservative Senator Linda Frum adopted the abortion red herring.

And Liberals? They were lined up before the cameras to celebrate their half-hearted and incoherent announcement.

But there should be no backslapping on this one. The fact is that after 18 months of almost complete inaction on the justice front, the government has done less than the bare minimum to update the Criminal Code.

Instead of self-congratulations, the justice minister should actually move forward with marijuana legalization, decriminalization of drug possession, bail reform, fixes to court delays, judicial appointments and minimum sentence rollbacks.

After all, young black men are still disproportionately being charged with simple pot possession, our jails are overflowing with accused with untreated mental health issues, cases are being thrown out of court for delays and scores of Canadians are dying on the streets from opioid overdoses.

But addressing those issues would require more than the bare minimum of effort.

And the sad reality is — even after the announcement of Bill C-39 — unconstitutional and historical zombies still walk our legislation and the government seems content to sit on its hands feeding on low-hanging fruit — until the next legal disaster.

Mafia: la Couronne abandonnerait de graves accusations contre 17 suspects

La Presse Canadienne
20 mars 2017

La décision de la Couronne repose sur la preuve recueillie et les techniques d'enquête utilisées

La Couronne fédérale demanderait mardi l'abandon de plusieurs accusations graves portées de 2014 à 2016 contre une multitude d'individus liés à la mafia de Montréal.

Le nombre de personnes qui profiteraient d'une telle procédure varie selon les sources qui rapportent la nouvelle lundi. Leurs avocats auraient été avisés par écrit vendredi dernier des intentions de leurs homologues du ministère public.

Il s'agit de suspects accusés notamment de trafic, d'importation et de production de stupéfiants, de possession d'armes, d'incendie criminel et d'enlèvement. Ils ont été arrêtés lors du déploiement de l'enquête policière Clemenza de la Gendarmerie royale du Canada (GRC), l'une des plus importantes menées contre la mafia lors des dernières décennies.

Les sources qui rapportent la nouvelle précisent que la décision de la Couronne repose sur la preuve recueillie et les techniques d'enquête qui ont été utilisées. La grande majorité de la preuve serait constituée de millions de messages textes que les suspects auraient échangés et que les enquêteurs ont interceptés.

Il semble que la défense ait contesté avec vigueur la validité de cette preuve.

Liberals urged to scrap 19th century rule that requires laws be printed in books / Government yet to decide on proposal to wean Parliament from costly paper-based publishing

CBC New

Dean Beeby
March 20, 2017

An obscure statute dating from Confederation has Parliament frozen in time, forcing the government to print every new law on old-fashioned paper.

Bureaucrats want to ditch those rules, end the costly printing and make digital versions the new standard — but the Liberal government has yet to decide whether to break with tradition.

At issue is the Publication of Statutes Act, conceived in the 19th century, which requires the Queen's Printer to publish new laws passed by Parliament in an annual compendium that must be printed on quality paper.

The legislation has never been overhauled. Although Justice Canada publishes the laws online as well, the digital versions aren't considered official.

Each year, the Queen's Printer — now part of Public Services and Procurement Canada (PSPC) — must print and distribute about 250 hardcover copies of the annual statutes, destined for a select group of judges, legal libraries and other locations.

The total cost is estimated at about $100,000, including $40,000 worth of printing and distribution through a private firm.

The format is meticulously spelled out in a regulation that helps keep printing costs high:

"The annual Statutes of Canada shall be printed on Number 1 Opaque Litho Book according to Canadian Government Specifications Board Standard 9-GP-29, Grade 2, Type 1, (except moisture content) or equivalent in white colour, English finish, and the basic weight shall be 100 pounds per 1,000 sheets 25 inches by 38 inches."

The detailed specifications continue for three more paragraphs.

Deputy minister makes the case

Last May, a senior official at PSPC pressed the new minister, Judy Foote, to fix the problem, according to a briefing note obtained by CBC News.

"The requirement to print the Annual Statutes predates modern electronic communications (some provisions have not been amended since the 19th century) and does not foster the timely and efficient access to federal legislation for Canadians," deputy minister Marie Lemay said.
Lemay called for the repeal of the regulation, and amendments to the Publication of Statutes Act and other laws to haul Parliament into the digital era. The process would require formal notices, legal drafting and the backing of Parliament, and would take months.

But Foote's spokesperson said rookie members of Parliament need to be updated on the issue before the government decides whether to scrap the printing requirement.

"As the Annual Statutes contain important information for elected members and many MPs are in their first term, Minister Foote, in consultation with the deputy minister, has determined that the department will formally consult with MPs and senators before making any changes to the delivery format," press secretary Jessica Turner said in an email.

But Lemay had specifically cautioned against delay in her briefing note last spring.

"It is important to proceed … as soon as possible," she wrote. "On January 1, 2016, Justice Canada changed the layout of its laws and regulations. They are now incompatible with the format of the Annual Statutes as required."

"Consequently, it will be impossible to print the 2016 Statutes."

Needs repeal

A PSPC spokesperson confirmed that the regulation spelling out the printing format will have to be repealed in order to print the 2016 statutes to the new Justice Canada standard. The 2016 print edition is slated to be distributed in early 2018.

"It is too early in the process to determine their number and cost," spokesperson Jean-Francois Letourneau.

Some 250 copies of the hardcover, two-volume 2015 statutes were delivered to the government on Feb. 2.
CBC News recently reported that Finance Canada plans to spend a record $554,000 to produce paper copies of the 2017 budget, to be released Wednesday.

The previous Conservative government cut in half the number of paper copies of its 2015 budget, to 5,550 from 11,500 in 2014. The Liberals increased the number to 6,100 in their inaugural 2016 budget.

Dawson: Trial delays don't actually need to lead to stayed criminal charges. Who knew?

Ottawa Citizen
Tyler Dawson
March 20th 2017

Criminals – OK fine, alleged criminals – are walking free thanks to a Supreme Court of Canada ruling last summer that placed hard limits on how long trials are allowed to take.

In hundreds of cases, charges have been stayed – meaning the trial is suspended, but the accused isn’t found either guilty or not guilty – and thousands more are at risk of a stay. It’s caused a great deal of brow-furrowing, as even serious cases have been stayed, including a man accused of first-degree murder here in Ottawa. Doubtless, it is damaging public confidence in a justice system that many Canadians already – wrongly, by the way – believe is unduly sympathetic

towards criminals and nasty towards victims. A stay is “a draconic remedy,” says Peter Hogg, one of Canada’s top constitutional law scholars.

So why are charges actually being stayed? Surely there are other, less drastic remedies out there?

The answer lies in a 1987 Supreme Court of Canada ruling called R v. Rahey. It said, quite simply, that the solution to an unreasonable delay in court cannot contribute to further delays. If there has been a Charter violation, wrote then-justice Antonio Lamer, “to allow a trial to proceed … would be to participate in a further violation of the Charter.”

Hence, charges being stayed. Obvious, right?

“It’s based on very simple-minded reasoning that once you’ve reached an unreasonable delay, you can’t possibly continue the case,” Hogg told a Canadian Senate committee recently. “I think that’s a silly way to look at it.”

As Christopher Sherrin, a law professor at Western University, notes, this isn’t how the courts handle other Charter violations. An unconstitutional strip search, he says in a paper exploring alternate remedies to trial delays, may be experienced as “equivalent to a sexual assault.” Yet courts don’t stay charges in response. “Instead, they engage in balancing and sometimes grant no remedy or a lesser remedy, like a sentence reduction,” Sherrin writes.

What Sherrin sees as a mistake is presuming that the trial delay itself is the problem; rather, he argues, the problem is the effect the delay has on the accused, such as threatening rights to liberty, security and a fair trial. “Further delay won’t necessarily make things worse … S. 11(b) of the Charter does not protect one’s desire not to wait,” Sherrin says.

The point is there are other potential solutions, from granting costs to the accused at the completion of trial; to reducing sentences; to relaxing bail conditions in the instance of long imprisonment during trial. “You can address the problem that delay has caused, but you don’t have to terminate the proceedings,” says Sherrin.

Of course, this is all hypothetical. The top court has ruled, and the law is clear that the fix to a trial delay is a stay of proceedings, so unless the Supreme Court feels like revisiting that principle (and it has opted not to in the past), alternatives will remain speculative.

There’s a flip side to all this as well, because when the only remedy is a stay, judges are loath to actually use it. “In a great number of instances either the accused has got nothing because the judge has been loath to grant a stay of proceedings, despite some fairly significant delay, or the accused has received a stay in circumstances where one wonders … whether he really deserved it,” Sherrin says.

The simplicity of the Rahey decision is part of its beauty. If an unreasonable trial delay is a Charter violation, then the only solution must be to stop the delay. That means a stay must be granted; any alternate remedy perpetuates the delay and sees the court system participate in

further Charter violations. It's circuitous reasoning, but the Supreme Court got it right three decades ago.

Yet we have a crisis of people accused of serious crimes walking free. I'd say the court got it right with Rahey, but, today's Supreme Court is not the one that ruled in 1987. We may, one day, hear differently from a future court.

Tyler Dawson is deputy editorial pages editor of the Ottawa Citizen.

Six steps Canada must take after embarrassingly long redress for tortured citizens

The Globe and Mail
Alex Neve and Beatrice Vaugrante
March 20, 2017

Alex Neve is secretary-general of Amnesty International Canada's English branch. Béatrice Vaugrante is director-general of Amnesty International Canada's Francophone branch.

Progress in ending the brutal worldwide scourge of torture requires ensuring accountability for this terrible crime. Torturers and those who aid and authorize torture must face justice. Survivors of torture and the families of men and women who suffer and, sadly, often die under torture must receive redress for what they have endured.

So obvious. But so universally neglected.

That is why the welcome news that Canadian citizens Abdullah Almalki, Ahmad El Maati and Muayyed Nureddin are receiving a long-overdue apology and compensation for the many ways that Canadian action and inaction set them up to be tortured in Syria (and also Egypt in Mr. El Maati's case) is an important step in the right direction.

It is disconcerting that it has taken this long.

The torture, illegal imprisonment and other human-rights violations these men went through took place between 2001 and 2004. A judicial inquiry, headed by former Supreme Court of Canada Justice Frank Iacobucci, examined the cases in 2007 and 2008. His report, documenting numerous examples of "deficient" conduct by Canadian officials that contributed to these many human rights violations, has been public record for more than eight years. UN human rights bodies highlighted concerns about these cases in 2005 and called for resolution in 2012.

Against that timeline, it is truly a disgrace that rather than receive prompt redress, they were forced into contentious litigation; for many long years under the previous government and an additional year under the Trudeau government.

That is the past now. But it must also be the beginning of a meaningful commitment to unequivocally standing against torture.

Here are six steps forward:

First, there are others whose claims for redress for national-security-related human-rights violations, including torture, have been contested by government lawyers for far too long. That includes Omar Khadr, Abousfian Abdelrazik and the men who have been subjected to the Kafkaesque world of immigration security certificates and the threat of being deported to torture. They too deserve justice.

Second, we must make sure it can't happen again. Central to what happened to Mr. Almalki, Mr. El Maati and Mr. Nureddin, similarly in the case of Maher Arar, was sharing inflammatory and unverified intelligence, and receiving back intelligence from foreign partners, completely unconcerned about risks of torture. That has been codified now in ministerial directives that allow intelligence to be shared and received, in exceptional circumstances, even if it is tainted by or might lead to torture. That must change.

Third, Canadian laws are still equivocal when it comes to torture. Most notoriously our immigration laws allow deportation to torture in exceptional circumstances. But there is no exceptional justification for torture in international law. The ban on deportations to torture must be absolute.

Fourth, these three men went through their nightmare, in part, because there was ineffective review of the agencies involved. The government's current initiative to establish a parliamentary national security review committee is important, but it is not enough. There is urgent need for comprehensive, expert, integrated and independent review over all of Canada's national security agencies.

Fifth, Canada's voice is needed to lead efforts to end torture worldwide. Steps finally under way to accede to the 2002 torture prevention treaty, the Optional Protocol to the Convention Against Torture, which enables prison inspections to stamp out torture, are encouraging and should be expedited. That will set Canada up to be a more credible global champion for ending torture.

Finally, Canada has to grapple with the fact that concerns about torture seem likely to become a major problem in our relationship with the United States. President Donald Trump is convinced that torture works, though others in his Cabinet reportedly don't share his enthusiasm. It is confused at best; ominous at worst. At all levels possible, including Prime Minister Justin Trudeau and his ministers of Foreign Affairs and Public Safety, the Trump White House needs to hear that Canada will not countenance any nod to torture in our important intelligence relationship.

It has taken far too long to remedy the torture these three men endured. There can be no further delay in reinforcing Canada's stand against torture, at all times and against all people.

Defence lawyers say their ideas to speed up courts being ‘met with silence’

The provincial government's proposals to speed up the criminal justice system are nothing more than short-term fixes that don’t get to the root causes of delays, defence lawyers say.
Toronto Star
Jacques Gallant
March 21st 2017

More funding for legal aid. More judge-alone murder trials. More judges period.

These are just some of the suggestions that have been thrown around by lawyers in the wake of the Supreme Court of Canada’s landmark 2016 ruling, R v. Jordan, which set strict timelines to bring an accused person to trial.

The majority on the court called out a “culture of complacency,” saying all players in the Canadian justice system must find ways to speed up the process, to protect the rights of the accused and to satisfy the public that justice is being done promptly and fairly.

“Real change will require the efforts and co-ordination of all participants in the criminal justice system,” the majority of the court’s judges wrote in Jordan.

In Ontario, “real change” has so far meant appointing 13 new provincial court judges and 32 new prosecutors, among other developments. It’s led Attorney General Yasir Naqvi to ask his federal counterpart, Jody Wilson-Raybould, to think about scrapping preliminary inquiries in most cases, and to immediately fill the 11 judicial vacancies in the understaffed Superior Court.

But criminal defence lawyers are quick to point out that many of these ideas — particularly the controversial move to abolish preliminary inquiries — are nothing more than short-term, and in some cases short-sighted, fixes that don’t get to the root causes of delay. They’ve complained about being kept in the dark on reforms the provincial government is planning, and some of have said they would be more than willing to share their ideas with Naqvi.

“Criminal defence lawyers have always been, to some extent, the black sheep of the criminal justice system. We are like the opinionated uncle that you know you have to invite to family gatherings from time to time, but if you can avoid it you will because it will just make it less comfortable to push your own agenda,” said lawyer Michael Lacy, a vice-president with the Criminal Lawyers’ Association. “We get in the way.”

He acknowledged there have been examples of criminal defence lawyers clogging up the courts with unreasonable conduct, but “we are significant stakeholders in the administration of justice.”

Naqvi told the Star in an interview that he and officials from his ministry meet with the criminal defence bar regularly.

“The Jordan decision is real, it has been a game changer. That is why we have worked very hard to get the appropriate response with appropriate consultation,” he said.

Criminal Lawyers' Association president Anthony Moustacalis has said he and Naqvi met soon after the announcement about prelims, and said Naqvi agreed to keep an open mind.

After the Jordan ruling, lawyers have circulated their own ideas to improve the system. The Canadian Bar Association has joined in by publishing a top 10 list of recommendations.

"As you can see from my blog that was widely circulated among justice system participants, I have stated 13 reasons that could vastly change the efficiency of the system," said Toronto criminal defence lawyer Sean Robichaud.

"Yet I have not been contacted by any member of government to discuss these possibilities and how it could improve the system. I suspect that similar efforts to contribute by the defence are met with the same silence."

Among Robichaud's suggestions: extend court operating hours, including on weekends; ensure clients who are in jail pending trial are brought to court on time; reduce the need to rely on paper, a notorious feature of the court system; allow lawyers to adjourn matters electronically, rather than show up to court for most of the day only for the matter to take less than a minute to be heard.

He's also urging Crown attorneys to consent to judge-alone trials in homicide cases when requested by the defence.

"Almost invariably, that request is denied," Robichaud writes in his blog, meaning the trial will instead be heard by judge and jury. "Judge-alone cases are far more efficient and quick than jury trials . . . This is a very easy fix that will have profound benefits for court delay — all without sacrificing fairness or justice."

For one thing, no jury would mean no jury selection, which can sometimes take weeks.

"It's a balancing of how many resources we can devote and what we can really afford," said Ottawa criminal defence lawyer Anne London-Weinstein, who supports the idea of judge-alone trials when requested by the defence.

"We may not be able to afford all of the procedures that we're relying on now, and we should look at whether we can hang on to jury trials going forward if we can't justify it in terms of how much time they take."

The Canadian Bar Association is pushing for alternatives to prosecuting minor offences and for the repeal of federal legislation around mandatory minimum sentences, which the organization said prevents negotiated resolutions, meaning more matters go to trial.

As a way to avoid bringing weak cases into the system, the association is also calling for Crowns to adopt the standard used by the prosecution in B.C. on whether to pursue charges, which is whether there is a "substantial likelihood of conviction." In Ontario, for example, the test is whether there is a "reasonable prospect of conviction," a lower standard.

And then there's legal aid, which has been a contentious topic in Ontario, even more so post-Jordan.

At the end of their judgment, where the majority wrote about the kind of changes Jordan will likely elicit, the judges said: "Legal Aid has a role to play in securing the participation of experienced defence counsel, particularly for long, complex trials."

Naqvi said the government has made "historic investments" in legal aid to increase access to services, and will continue to add money.

But the low-income cut-off for an individual with no dependants to qualify for legal aid is $13,000, which critics say does not adequately reflect the face of poverty in Ontario and is leaving many individuals unrepresented in court, which in turn clogs the system. A previously planned six per cent increase to the eligibility threshold takes effect April 1.

A veteran judge of the Superior Court called out the low-income cut-off in a ruling last year, when he stayed drug charges against an accused man until the province picked up the tab for a lawyer.

"It should be obvious to any outside observer that the income thresholds being used by Legal Aid Ontario do not bear any reasonable relationship to what constitutes poverty in this country," wrote Justice Ian Nordheimer, saying that Statistics Canada calculates the low-income cut-off for a single person living in a metropolitan area as closer to $25,000.

One thing all parties agree on in terms of resources is the need for more judges. Naqvi said the number of judges he appointed to the Ontario court of justice, which handles less serious crimes and most family matters, was exactly the number requested by Chief Justice Lise Maisonneuve.

But appointing judges to Superior Court, which handles the most serious crimes such as murder, as well as all civil matters, is a federal responsibility.

Yet Ottawa has failed to quickly fill a near record-level number of judicial vacancies in superior courts across the country. There are 11 vacancies in the Ontario Superior Court, and four at the Court of Appeal, the province's top court.

The 17 judicial advisory committees — which screen applicants for federally-appointed judgeships — was left vacant for months, as the Liberals looked to revamp them to make the committees more diverse and transparent.

In late January, Wilson-Raybould announced appointments to seven of the committees, including two that cover Ontario, and said they would immediately begin reviewing judicial applications and create a short list of candidates.

"Ontario commends the federal government for the steps it has taken to restructure its judicial appointments approach," Naqvi wrote to Wilson-Raybould in February.

“That said, Ontario is currently losing hundreds of hours of judicial time every month due to lingering vacancies on the Superior Court bench. In affected regions of our province, this is having a material impact on our ability to meet the Jordan challenge. We therefore request that you, as Minister of Justice, move as expeditiously as possible to fill these positions.”

And while Naqvi may have appointed enough provincial court judges, he didn’t appoint nearly enough Crown attorneys when he announced the hiring of 32 new prosecutors last year, said Kate Matthews, president of the Ontario Crown Attorneys’ Association.

“There was also no announcement of support staff in Ontario,” she said, adding Crowns are already overburdened and spend most of their days in court, and can’t get to other work or find time to speak with the defence.

“Alberta and Quebec both added support staff and that is important because a lot of the reason for trial delay in our view is that cases are far more complicated, there’s far more disclosure, the nature of the disclosure is much more complicated, and a lot of the work that needs to be done is by admin. staff.”

Matthews said a “massive part” of the delay in the court system is related to disclosure — the Crown’s obligation to turn over its evidence to the defence. While Crowns generally get the blame from judges when delayed disclosure leads to a case being tossed, Matthews said it’s difficult to turn over evidence then the Crowns themselves are still waiting for it to come from police.

“We feel there has been a downloading of responsibility from police to Crowns with respect to organization and vetting of disclosure,” she said, with the Crown attorney having to find the time to sift through all the material, which can include a massive amount of paper, in-car camera footage and hard drives.

All things considered, the Jordan decision should not have come as such a shock to governments, say Crown attorneys and defence lawyers, some of whom have long pushed for the reforms that are only now being given more attention.

“This isn’t like Jordan dropped out of the sky and nobody saw it coming,” Matthews said. “This has been an issue brewing for a long time, and to the extent the provincial governments didn’t react right away, even that is a bit distressing. All this shows is there’s no proactive approach to justice. It’s all reactive.”

Challenge of Quebec secession law makes it before the courts after 16-year wait

The provincial law, known as Bill 99, was adopted in 2000 by the Parti Québécois government of the day and was meant to counter the Clarity Act.
Toronto Star / Canadian Press
Pierre Saint-Arnaud

March 20th 2017

MONTREAL—The long-awaited constitutional challenge of Quebec's secession law finally found its way before a judge on Monday, nearly 16 years after it was launched.

The provincial law, known as Bill 99, was adopted in 2000 by the Parti Québécois government of the day as a direct response to the federal Clarity Act.

Drafted by the Lucien Bouchard-led PQ, it affirms the legal existence of the Quebec people and its right to self-determination.

The law was meant to counter the Clarity Act, which states a "clear majority" vote on a clear question on secession would be required before any negotiations are held.

Keith Henderson, an English professor and former leader of the now-defunct Equality party, launched the constitutional challenge in 2001.

In 2013, Stephen Harper's Conservative government chimed in with federal lawyers seeking to have Bill 99 declared invalid, much to the chagrin of provincial politicians who unanimously denounced the move.

Henderson said Monday his belief is the law is unconstitutional because it gives Quebec the right to unilaterally declare independence, doing an end run around the Constitution in the process.

Monday was spent debating whether the court would accept certain documents.

Henderson said he hopes the judge hearing the case will deal with the core issue of where the source of power lies — a popular referendum or the Constitution of the country.

"The law that has passed makes no reference to the Constitution whatsoever," Henderson said. "It bases the source of power on a referendum, one by 50 per cent plus one.

"It gives the government of Quebec the authority to determine its legal and political status inside the country."

The Supreme Court of Canada has ruled that a constitutional amendment is required for a province to change its status.

"What that means is Quebec doesn't decide all by itself, alone," Henderson said. "It means that Canadians have a right to weigh in and have their word on the future of their own country, which I regard as perfectly normal."

There are other questions — whether groups such as aboriginal communities or areas of the province that are largely English-speaking could secede from Quebec.

“Once you open Pandora’s box this way, a lot of strange things emerge,” Henderson said. “That’s something else the Quebec government didn’t consider.”

Henderson said he doesn’t know why Quebec Premier Philippe Couillard, a staunch federalist, is defending the law.

When the law passed in 2000, the Liberals voted against it because they thought it was unconstitutional, he noted.

The Quebec government fought for nearly seven years against Henderson’s right to have standing in the case. That, and health issues among participants on both sides, caused delays.

“What can I say, the wheels of justice grind very slow,” Henderson said.

Supreme Court of Canada to rule Thursday on bail issue in Oland murder case

Canadian Press
Kevin Bissett
March 20th 2017

FREDERICTON — The Supreme Court of Canada will rule this week whether New Brunswick's Court of Appeal was wrong in denying bail to Dennis Oland while he was awaiting an appeal of his second-degree murder conviction.

"This is a big deal. It has been decades since the Supreme Court of Canada has taken on the issue of bail pending appeal," said Nicole O'Byrne, a law professor at the University of New Brunswick.

"This case gives the court the opportunity to come in and clarify the law."

Oland, 49, was denied bail by the New Brunswick Court of Appeal early last year following his conviction in the murder of his father, well-known businessman Richard Oland. The 69-year-old was bludgeoned to death in his Saint John office in 2011.

But Dennis Oland was subsequently granted bail by the same court last October, when his lawyers appealed his conviction and a new trial was ordered. He had spent 11 months in prison.

A new trial is not expected until at least 2018.

Even though Dennis Oland had been released on bail, his lawyers proceeded with arguments before the Supreme Court in an effort to get clarity on the issue of bail pending appeal in murder cases.

They say it is rare in Canada — finding none in New Brunswick and only 34 cases in Canada.

Lawyer Alan Gold told the court that his client does not want to be "haunted" by the prospect of another unsuccessful bail hearing if his second murder trial takes an "unfortunate turn."

A cross-section of interveners, including the Criminal Lawyers Association of Ontario and attorneys general from three provinces, all agreed the bail provisions need to be clarified by the top court because they are currently interpreted differently across the country.

"This will be a precedent-setting case," said O'Byrne.

She said lawyers are now required to prove exceptional circumstance when seeking release pending appeal.

"If there is an exception for exceptional circumstances such that people could be granted bail pending appeal, is there a better case than Dennis Oland?" she asked. "He has no criminal record, he's proven he can live under bail conditions because he did, and the fact that it has been set down for retrial proves that the appeal is not frivolous.

"This comes down to being a test case on how do you ever grant anybody bail pending appeal if Dennis Oland doesn't fit that criteria?"

The decision is expected Thursday morning.

Non, l'enquête préliminaire n’est pas désuète !

Droit-Inc
Jean-François Parent
21 mars 2017

Il est faux de dire que la procédure cause des retards, affirme l'Association du Barreau canadien. Récemment, plusieurs ministères de la Justice provinciaux ont réclamé à Ottawa l'élimination de l'enquête préliminaire.

Invoquée lors de crimes graves, « c'est une procédure ancienne instituée à l'époque où les accusations n'étaient pas nécessairement déposées par des juristes, pour vérifier si on avait suffisamment de preuves pour justifier un procès », soutenait récemment la juge en chef de la Cour du Québec Lucie Rondeau à la première chaîne de Radio-Canada. La magistrature québécoise planche actuellement sur une révision en profondeur de la procédure, jugée trop lourde.

Mais voilà, dans une lettre envoyée la semaine dernière à la ministre fédérale de la Justice Jody Wilson-Raybould, l'ABC qualifie de « hautement spéculative » la relation de cause à effet entre les enquêtes préliminaires et les délais judiciaires.

Me Loreley Berra, présidente de la section du droit pénal de l’ABC « L’enquête préliminaire semble réduire l’utilisation de ressources judiciaires (…) soit en éliminant les accusations faibles

», qui soutient que son rapport coûts-bénéfices est immense, écrit Loreley Berra présidente de la section du droit pénal de l'ABC dans sa missive datée du 14 mars.

L'ABC plaide donc pour le maintien de l'enquête préliminaire, expliquant qu'elle n'est utilisée que dans 25 % des causes qui y sont admissibles, et la totalité de ces causes « ne dépasse pas 5 % du volume total des causes, et ce, n'importe où au Canada », écrit Me Berra.

Selon les données de l'ABC, « les enquêtes préliminaires ne constituent qu'au plus 2 % des comparutions (et) la grande majorité des enquêtes préliminaires prennent deux jours ou moins ».

La procédure limiterait également les retards, notamment parce qu'une « erreur commise à cette étape peut être corrigée, ce qui permet d'éviter d'éventuels retards » plus tard en cours de procès.

Enfin, « l'élimination de l'enquête préliminaire négligerait les vrais problèmes d'efficacité », poursuit l'ABC, qui affirme que l'idée selon laquelle on réglerait les problèmes soulignés dans l'arrêt Jordan est « spécieuse ».

Pour le criminaliste québécois Didier Samson, l'enquête préliminaire est un outil important dans l'arsenal des avocats de la défense. « Ça sert surtout pour la défense afin d'établir ce que la preuve est, et surtout ce qu'elle n'est pas », fait-il valoir.

Ainsi, il arrive en cours d'enquête préliminaire que l'on découvre que toute la preuve n'a pas été divulguée. « Stratégiquement, c'est essentiel pour nous », poursuit Me Samson. Il observe par contre que la procédure peut tout aussi bien servir la couronne, qui voudra par exemple valider sa preuve avant d'aller à procès, et s'assurer ainsi d'avoir une condamnation.

En outre, la procédure « permet d'alléger la lourdeur du processus de divulgation de la preuve », explique Didier Samson. La défense devant parfois faire plusieurs demandes consécutives pour obtenir toutes les preuves pertinentes à l'élaboration de sa stratégie, l'enquête préliminaire se trouve, dans les faits, à réduire le risque d'avoir de longs délais.

D'ailleurs, dans une entrevue donnée à Droit-Inc juste avant les Fêtes, le criminaliste Jean-Claude Hébert identifiait plusieurs facteurs qui alourdissent inutilement la justice. « La divulgation de la preuve par exemple, alors qu'on nous fournit tout, revient à chercher une aiguille dans une botte de foin. Dans les milliers de documents soumis, on ne sait pas ce qui est vraiment important », déplorait-t-il.

A Supreme Court ruling will determine how much we value our water

The Globe and Mail
Maude Barlow
March 21, 2017

Maude Barlow is the national chairperson of the Council of Canadians and author of Boiling Point: Government Neglect, Corporate Abuse and Canada's Water Crisis.

This week, three Yukon First Nations and two conservation groups are at the Supreme Court of Canada, fighting to protect one of the planet's most pristine watersheds – the Peel River Watershed. The case will have significant ramifications for First Nations rights and consultations.

The Peel is not yet a household name, but it is an ecological treasure.

I travelled to the Yukon a few years ago. The territory is known for gold, but it is rich in water, from clear lakes to the blue-green rush of the Yukon River. Walking along the river's edge in Whitehorse, I felt the depth of history in a place where people have been living for thousands of years.

Canadians consider ourselves rich in freshwater, but any country can experience drought if water isn't protected. Our water is increasingly threatened by industries and governments clinging to the myth of abundance. This myth tells us that we'll never run out of water and, if we do, technology will save the day. Meanwhile, thirsty industries use our increasingly scarce water to pump up their profits.

The Harper government gutted freshwater protection laws such as the Navigable Waters Protection Act, the Canadian Environmental Assessment Act and the Fisheries Act. These acts are now undergoing reviews, but the Trudeau government is still approving projects under the weakened legislation.

If we don't protect the places where water is still pure, we will lose them.

The Peel is one such water source. Six rivers drain the Yukon's northern mountain ranges to join the Peel River, which flows north to the Arctic Ocean. The 68,000-square-kilometre watershed is unspoiled by industry. Its forests, tundra and wetlands are home to healthy populations of caribou, moose, bears and wolves and provide refuge for migratory birds, waterfowl and falcons. Fish are plentiful – the Gwich'in people of Fort McPherson still rely on fish dried in traditional shacks along the banks of the Peel River.

The Peel Watershed is not only rich in freshwater, plant and animal life, but also in oil, gas and mineral resources, which industries want to extract. The legal effort to protect the watershed from this threat has brought together the First Nations of Na Cho Nyak Dan, Tr'ondek Hwech'in, and Vuntut Gwitchin, alongside CPAWS Yukon and the Yukon Conservation Society. Their fight is not just about protecting the land and water. It is about democracy and the future of Indigenous rights in our country.

The case hinges on the Final Agreements, modern treaties between Yukon First Nations, Yukon and Canada. In these agreements, First Nations ceded title to their traditional territories in exchange for rights to a small portion of the land and a meaningful say in planning for the remainder.

During land-use planning for the Peel Watershed, First Nations and conservation groups asked for 100-per-cent protection from industrial development. After a seven-year planning process,

the independent planning commission recommended that 80 per cent of the watershed be protected, leaving 20 per cent open to development. First Nations and conservation groups agreed to the compromise.

Then came the betrayal: At the last moment, the Yukon government decided to open up 71 per cent of the watershed to industrial development. Outcry was instant from First Nations, regional stakeholders, environmental groups and the public. The legal case was launched.

Courts ruled that the Yukon government had acted dishonourably, but the most recent judgment allows the government another chance to open the Peel up to development. Thanks to public campaigning, the newly elected Yukon government has committed to implementing the commission's original plan for 80-per-cent protection. But a dangerous legal precedent has been set, and an important trust has been violated.

The Supreme Court judgment will clarify what happens when governments breach their obligations under modern treaties. It will also inform future land-use planning in the Yukon. If we want First Nations rights to be respected in Canada and if we care about our irreplaceable wild lands and waters, this judgment matters.

The hearing will happen Wednesday, on World Water Day. A favourable judgment would be a victory for the people who have been standing up to protect the Peel Watershed and all water in Canada.

La crédibilité des traités modernes en jeu à la Cour suprême du Canada

Radio-Canada
Julie Landry
21 mars 2017

La Cour suprême du Canada se penche à partir de mercredi sur le dossier du bassin versant de la rivière Peel, au Yukon. Les Premières Nations et les environnementalistes se battent depuis des années pour préserver cette zone de 68 000 kilomètres carrés au Yukon alors que le gouvernement voudrait l'ouvrir à l'exploration minière et gazière.

Ce qui est en jeu dans cette cause, c'est la crédibilité des processus d'aménagement du territoire qui sont prévus dans les traités modernes. Ces traités, qui ont surtout été signés dans les territoires canadiens, obligent le gouvernement à consulter les Premières Nations quand vient le temps d'aménager une portion du territoire.

Dans le cas du bassin versant de la rivière Peel, la consultation a été faite pendant sept ans par la commission indépendante d'aménagement qui a conclu, en 2011, que 80 % du territoire devait être préservé.

Mais le gouvernement du Yukon a rejeté ce plan et en a proposé un nouveau qui prévoyait de ne préserver que 30 % du territoire. Ce nouveau plan s'est fait sans passer par un nouveau processus

de consultation auprès des Autochtones. Le gouvernement a été poursuivi et a perdu dans les deux premières instances.

Une cause largement suivie
La crédibilité même de ces traités a été ébranlée par la décision du gouvernement du Yukon, selon le professeur de droit de l'Université d'Ottawa, Sébastien Grammond.

En se penchant sur les obligations des gouvernements de respecter les traités modernes, la Cour suprême du Canada pourrait prononcer un jugement qui toucherait toutes les Premières Nations qui ont signé un traité moderne.

« Alors s'il y a une décision qui assoit très clairement les fondements de ce processus-là et qui dit que le gouvernement ne peut pas faire ce qu'il veut, qu'il est assujetti à des normes de conduite et qu'il doit respecter l'esprit du traité, ça je pense que ça contribuerait considérablement à la crédibilité de ces traités-là », croit-il.

Les environnementalistes suivent le dossier avec grand intérêt et se battent aussi pour l'intégrité du processus de consultation qui leur a pris tant de temps et d'énergie, explique Joanna Jack, la coordonnatrice des programmes de conservation au Yukon pour la Société pour la nature et les parcs du Canada.

Mais le coeur de leur lutte reste la préservation du bassin versant de la rivière Peel qui est une des rares zones complètement préservées sur la planète.

« C'est vraiment un trésor. C'est quelque chose comme un cadeau. Si on ne prend pas soin de ce cadeau-là, qu'est-ce qu'on aura pour nous, mais aussi pour les générations qui viennent? », se demande Joanna Jack.

Dans le cadre de son travail, elle côtoie beaucoup les Premières Nations dans les communautés de la rivière Peel et dit que malgré toutes les années de lutte, la passion pour ce territoire et l'espoir de gagner cette cause juridique perdurent.

Stern: How easy is it for police to search your texts? The Supreme Court is set to decide

Ottawa Citizen
Simon Stern
March 21, 2017

On Thursday, the Supreme Court will hear a case posing the question of how far your privacy rights travel along with the text messages you send from your phone.

Do the police need a legal basis to search your phone, so long as the only texts they read are the ones that you've received from others? Or can the police search for those messages without any reason at all, on the assumption that after someone hits the "send" button, any expectation of privacy in the message disappears?

Last year, in R v. Marakah, the case now pending before the Supreme Court, the Ontario Court of Appeal ruled that your privacy rights in a text message vanish after you send it. By a two-to-one margin, the court held that the sender has a constitutionally protected interest in writing and sending a text message, but not in the message itself – so long as the police obtain it by searching the recipient's phone.

If that decision is affirmed, it would allow the police to search anyone's phone without having to give a reason, if they only look at the messages that came from other senders. In 2015, the British Columbia Court of Appeal divided the other way on this question, ruling by a two-to-one margin that everyone has a privacy right that continues even after the message has been sent.

Why have the courts found this issue so difficult?

They have been using the wrong analogies. Text messages and letters should receive the same kind of privacy protection. Some are meant to be shared, others aren't, and the distinctions between these categories remain the same whether you are texting or using Canada Post.

For the ones that aren't meant to be shared, most people would be shocked to hear that the police can read them without any legal basis.

Judges have allowed themselves to be distracted by superficial differences. Because text messages are faster and more casual, they don't seem like letters. Those differences show why texting is so pervasive, making it easy to lose track of their significance.

The Supreme Court usually explains privacy rights in terms of values like autonomy, dignity and integrity. As the court has often emphasized when discussing privacy rights, these values are important because they are essential for protecting the rights of citizens to express themselves and to choose their own path, in a free and democratic society. If we look to those basic values, it's hard to see why text messages aren't just as important, in exactly the same ways, as letters.

That doesn't mean that the police are never allowed to read the messages on your phone, it just means they need a valid legal basis for it. What kind of basis? In a recent decision, R v. Chehil, the Supreme Court held that if the police can give an objective reason for believing that criminal activity (like selling illegal drugs) is occurring in a specific place, they should be allowed to search there, in narrow, targeted fashion.

In Chehil, this objective basis – under the standard of "reasonable suspicion" – justified the use of a sniffer dog whose only function was to detect, from the outside of a locker or backpack, the presence or absence of drugs.
The same rationale applies to text messages.

No one has yet come up with a device that can be placed on a box of letters, and can pick out only the ones sent by a certain person. But it is possible to search electronic information that way, in the narrow, focused manner that Chehil permits.

In this case, it would mean the police may look only for messages from someone already identified as a suspect, without inspecting any others. Allowing for this kind of search would mean that everyone is protected from random and groundless searches of their phones, while permitting a limited search just when the police can justify their suspicions.

Simon Stern is an assocate professor of law at the University of Toronto.

A year after landmark ruling, Métis, non-status Indians chart way forward Daniels Symposium in Ottawa named after Métis leader who started historic court battle

CBC News
March 21, 2017

Métis and non-status Indigenous people from across Canada are in Ottawa this week for a symposium on how to proceed following a landmark Supreme Court of Canada ruling last year.

In April 2016, Canada's highest court ruled that the federal government had jurisdiction over Métis people and Indigenous people without Indian status, meaning the government also has the same responsibility to them as it does to status Indians and Inuit.

Historically, status Indians were registered on an official list maintained by the federal government. They qualified for certain rights and payments not available to other Canadians, depending on the terms of applicable treaties.

Under this system, non-status Indians and Métis were either never registered or were considered ineligible to register by federal officials.

The 2016 Supreme Court ruling changed all that, at least theoretically.

But little has happened in the intervening months, so a two-day gathering called the Daniels Symposium — named after Métis leader Harry Daniels, who started the landmark rights case in 1999 — aims to identify a unified way forward for the people affected.

"I know that there's a lot of questions, and lot of people don't understand the case and what it means," said Daniels's son Gabriel Daniels on CBC Radio's Ottawa Morning on Tuesday. "And I know if he was here, he would be taking us in the direction that we need to be going."

Harry Daniels died in 2004, before he could see the case come to a conclusion and impact some 200,000 Métis and 400,000 non-status Indigenous people.

The hope is that last year's unanimous ruling can serve now as a starting point for those pursuing land claims and additional government services including health care and education.

'It's going to be a long road'

But apart from establishing a legal framework, lawyer Lanise Hayes believes nothing has changed since the ruling.

"It's going to be a long road," Hayes said on Ottawa Morning.

She said she hopes the two days of discussions and meetings will result first in some kind of consensus on how to identify non-status and Métis people in Canada based on both objective and subjective criteria.

"Once we can come up with some consensus on identity, I hope that we can come up with a plan moving forward on what does this mean?" she added.

"Now that we have identity, what kinds of rights come from this? And what types of services are governments able offer, and work together in offering?"

Daniels wants community members, grassroots leaders, legal experts, and politicians who are in Ottawa for the symposium to find common ground to chart a course ahead.

"I want to see more unity amongst all Aboriginal people, and I would like to see five organizations working together more than they have. And I would want to see our leaders negotiating for land, and not being focused on money."

B.C.'s top judge says system needs 'shock therapy' to improve access to justice
The Canadian Press
Geordon Omand
March 22, 2017

VANCOUVER – A dose of “shock therapy” is needed to reform Canada’s justice system, which is failing to meet the legal needs of everyday people, British Columbia’s top judge says.

Chief Justice Robert Bauman said Wednesday that while the core of the country’s legal system is worth preserving, dramatic action is needed to address entrenched problems, from timely access to criminal justice to the cost of legal advice and the challenges around self-representation.

Access to justice goes beyond ensuring people get their day in court, and includes understanding your rights, knowing how to navigate the system and recognizing when you have a legal need in the first place, he said in an interview.

“Part of the challenge is, is my institution viable?” asked Bauman, who was appointed chief justice in 2013 after serving as head of the B.C. Supreme Court.

“Are we really, apart from government and wealthy individuals and corporations, able to resolve disputes for most people? Are they able to get to us?

“We’ve got to shake the foundations enough to question those usual assumptions and be open to changing them from the ground up.”

Talk of reform has been gaining traction in recent years, culminating with last year’s landmark decision from the Supreme Court of Canada that set time limits on bringing someone accused of a crime to trial. The ruling pointed to a “culture of complacency” and highlighted the need for efforts from everyone in the justice system to speed up the legal process.

“It got our attention,” Bauman said about the ruling.

“We’re not the donkey and it’s not the two-by-four, but it’s necessary to get the attention of the players and to bring home to them the significance of the underlying problems.”

A society that values the rule of law as a bedrock of democracy but has so many people with unmet legal needs is not sustainable, he added.

Bauman said he is heartened about a recent announcement that the province’s law society and law foundation have each pledged $150,000 over three years for Access to Justice B.C., which he chairs. The organization is a discussion group that includes not only lawyers and judges but also representatives of First Nations’ groups, health-care workers, municipal leaders, business people, self-represented litigants and immigrants.

The bulk of the funding will go towards hiring a co-ordinator to keep the organization on track, he said.

Bauman commended the resilience and overall effectiveness of Canada’s system of law and spoke optimistically about the prospect of reform.

“The people who say it’s hopelessly broken are wrong. It’s not,” he said during the interview at his office in downtown Vancouver.

“I understand the cynicism and the sense of frustration with the problem. And I understand why some people think it’s intractable. It’s so large. It’s so deeply rooted,” he added.

“But the fact is, at the end of the day we’ve got something worthwhile preserving.”

Budget 2017: What's in it for justice?

CBA National (website)
Justin Ling
March 23 2017

The federal budget proposes to spend $55 million over five years to hire new judges, aimed mostly at Alberta and Yukon, to speed up the trial process in Canada. But there is otherwise little in it to alleviate the burden on the Canadian judicial system

The prospect that scores of charges being thrown out due to trial delays caused by an over-burdened court system has been top-of-mind since the Supreme Court handed down its ruling last year in R. v. Jordan, setting a ceiling on delays at trial.

In fact, dozens of cases have been stayed, with Crown counsel shouldering the blame for not bringing cases forward fast enough. Lawyers across the country have called for a hike in spending to hire more judges, help legal aid, and streamline the court administration process.

But even the government expects that the allocated money will create only 28 new judicial positions across the country.

Some money — $2.7 million over five years — is being set aside to fund training and education on the bench as a response to a recent string of much publicized news stories about judges acting inappropriately. The investments will go to the Canadian Judicial Council to support programming that will "ensure that more judges have access to professional development, with a greater focus on gender- and culturally-sensitive training."

The budget also commits $55.5 million over five years for "community-based programs that use restorative justice approaches as an alternative to the mainstream justice system and corrections." Indigenous peoples have been vastly over-represented in the criminal justice system for decades.

There's also $1 million per year, for two years, to expand bilingual access to court services nation-wide.

The budget also sets out somewhat vaguely the government's intention to "put in place a national strategy to strengthen the transparency of legal persons and legal arrangements and improve the availability of beneficial ownership information."

Les requêtes Jordan ont triplé en quatre mois!

Droit-Inc
Jean-François Parent
22 mars 2017

Elles ont bondi de 222 à l'automne à 656 le 21 mars...

Les requêtes pour faire cesser les procédures minées par de trop longs délais se multiplient au Québec. Ainsi, « considérant la nature évolutive du dossier, le Directeur des poursuites criminelles et pénales, évalue avoir reçu en date du 21 mars 2017, 656 requêtes signifiées après le prononcé le 8 juillet 2016 de l'arrêt Jordan de la Cour suprême », peut-on lire sur le site du DPCP.

En novembre, le nombre de requêtes s'établissait à 222. Au 21 décembre, le DPCP en recensait 368.

Cette semaine, le total est de 656.

Au DPCP, on ne pouvait faire aucun commentaire quant à la nature des requêtes. « Toutes les mesures sont prises pour réduire les délais, assure cependant le porte-parole Jean-Pascal Boucher, qui ajoute que les délais judiciaires sont « un problème multifactoriel ».

« On met tous les efforts pour réduire les délais, avec les partenaires de la Table Justice-Québec », poursuit Me Boucher.

En octobre, la Table, qui réunit la magistrature, le Barreau, la Sécurité publique, les avocats, le DPCP et la Justice notamment déposait une série de recommandations pour réduire les délais dans le système de justice.

Que le nombre de requêtes ait explosé ne surprend pas le criminaliste Michel Dorval, que se dit plutôt étonné qu'il n'y en ait pas plus. « L'arrêt Jordan a été rendu en juillet; on est rendus presqu'en avril et les choses empirent », constate l'avocat de la défense, qui est est d'avis que le navire « prend l'eau de partout ». « Les intervenants sont remplis de bonne volonté, mais c'est tout le système qui est à reconstruire. »

Celui qui a plaidé pour la Couronne pendant une vingtaine d'années observe un enlisement généralisé du système judiciaire, qui menace de s'écrouler sous son propre poids. « Des tas dossiers sont activés dès qu'il y a la moindre petite apparence de preuve, on fait des conférences de négociation, de gestion, de discussion et de toute sorte de choses—aux frais des clients--, Ottawa n'a toujours pas nommer les sept juges manquant à la Cour supérieure... On dirait qu'on ne prend pas la chose au sérieux », déplore Me Dorval.

Son pessimisme s'appuie notamment sur le fait que l'histoire lui démontre que rien ne bouge, même lorsqu'une crise survient. « Le problème des délais a été abordé dans l'arrêt Askov, en 1990! La Cour suprême avait alors un délai de neuf mois » pour les procès.

Presque 40 ans plus tard, on se retrouve au point de départ.

« C'est bien beau d'investir, mais on a besoin d'un vrai changement. Et ce n'est pas avec les maigres sommes consenties à la Justice qu'on y arrivera! »

Le ministère de la Justice est doté d'un budget de 868 millions $ pour l'exercice 2016-2017. C'est 1 % du budget québécois de 76,5 milliards $.

« On consacre moins d'argent au système de justice qu'à réparer Montréal! », ironise-t-il.

CLERK OF EXECUTIVE COUNCIL TO RETIRE FOLLOWING DISTINGUISHED CAREER: PREMIER

Military News
March 22, 2017

Premier Brian Pallister today announced the retirement of **Donna Miller** as clerk of the executive council and cabinet secretary, the province's highest-ranking civil servant, who has

served as a distinguished member of the public service for the governments of both Manitoba and Canada.

Miller was appointed clerk of the executive council and cabinet secretary on Oct. 1, 2015, and was re-appointed by the premier during the transition to a new government in April 2016.

"It has been a privilege to have been able to work alongside Ms. Miller over the past year as our team of ministers made the transition to government," said Pallister. "Her extensive knowledge of government processes has been of tremendous value as we have moved forward together with policies to build a stronger province."

Miller's extensive career in the public sector began in 1986 as counsel in constitutional law with Manitoba Justice. In 1991-92, she served as constitutional advisor to the Manitoba government during the Charlottetown Accord. She was appointed director of constitutional law in 1992, where she remained until 1999 when she accepted a position with **Justice Canada as regional director of Manitoba.**

During her time in the public service at Justice Canada, Miller served as senior regional director, prairie region (2001-05) and as associate deputy minister (2005-10).

From 2010 until her appointment as deputy minister of justice and deputy attorney general of Manitoba in 2013, Miller taught and conducted research at the University of Manitoba, serving as the visiting Duff Roblin professor of government (2010-11) and teaching at both the faculty of law and the department of political studies. Miller has held many volunteer positions within the community and received the Queen's Diamond Jubilee Award in 2013 for her contributions to public service.

"Donna has been a dedicated advocate on behalf of the citizens of Manitoba," added Pallister. "I thank her for her service and wish her much happiness and success as she leaves public service."

Miller will step down as clerk and formally retire on April 3. Fred Meier will assume the role of acting clerk of the executive council and acting cabinet secretary effective April 4.

"I would like to thank the governments of this province – past and present – for giving me the opportunity to assume a variety of roles during the course of my public service career," said Miller. "No role has been more rewarding than that of clerk where I have come to know, appreciate and rely upon the caliber and breadth of talent and experience across the Manitoba civil service. It has been an honour to serve. I am so delighted that Fred Meier has accepted the appointment of acting clerk and acting cabinet secretary. The civil service will be in very good hands under Fred's capable leadership."

Meier is currently the associate clerk of the executive council, deputy minister of sustainable development and the deputy minister responsible for Crown services in Manitoba. He entered the Manitoba civil service in 1997 as part of a management internship program and joined Manitoba Conservation in 2000. In 2013, he was appointed deputy minister of municipal government and deputy minister responsible for Manitoba Hydro. In October 2016, he was

appointed deputy minister of sustainable development and deputy minister responsible for Crown services.

The premier also announced the following changes to the senior ranks of Manitoba's civil service:

Bruce Gray becomes acting deputy minister for sustainable development;
Gray has been a public servant for 26 years and has served as an assistant deputy minister for the province of Manitoba since 2005. During that time, he has held responsibility for all divisions of the department of finance, along with the administration and finance, and water stewardship and biodiversity divisions within the department of sustainable development.
Jim Hrichishen, deputy minister of finance also takes on responsibility for Crown services.

Vice journalist must turn over materials to RCMP, appeals court rules

Reporter Ben Makuch had fought the RCMP's production order, arguing police use of journalists to further criminal investigations would make sources reluctant to come forward.
Toronto Star
Alyshah Hasham
March 23 2017

After VICE Media reporter Ben Makuch published three stories about accused terrorist Farah Shirdon in 2014, the RCMP demanded he hand over all his communications with Shirdon.

The ensuing legal battle that set press freedom against the interests of law enforcement reached the Court of Appeal, which on Wednesday upheld a lower court's decision not to quash the order to produce the documents.

The ruling is being criticized by press freedom and civil liberties organizations for putting a "chilling effect" on public interest reporting and free expression.

"The message this sends is that the police can use journalists to gather evidence and information for a criminal investigation," says lawyer Iain MacKinnon, who represents VICE Media. "This may in fact encourage police forces to issue more of these production orders or search warrants against the media. The court had an opportunity to make clear that this should be an absolute last resort and they chose not to do that."

The Court of Appeal panel of three judges found that Superior Court Justice Ian MacDonnell took into account the special position of the media and specifically considered concerns about the "chilling effect" of requiring the media to produce material for the police.

MacDonnell found that the material — primarily screenshots of messages between Makuch and Shirdon — sought by the RCMP provides the best and most reliable evidence of what Shirdon said, that the information was not available from any other source, that Shirdon was not a confidential source, that much of the material was published by Makuch, and that the material "could provide important and highly reliable evidence to support very serious criminal charges."

Shirdon has been charged with terrorism-related offences in absentia.

It was “reasonable, on this record, to find the balancing of the competing interests favoured making the production order,” Justice David Doherty wrote.

The court also rejected the argument made by VICE that Crown must show that the material sought is essential to the prosecution since it would be impossible to accurately assess what the Crown needs at the early stage of a production order.

“If journalists cannot protect their sources, then the information they provide will dry up, leaving Canadians uninformed and democracy impoverished,” said Tom Henheffer, executive director of Canadian Journalists for Free Expression (CJFE), in a statement that criticized the production order as little more than a “fishing expedition.”

Makuch has previously said he had published all information relevant to the public.

The CJFE and a coalition of media organizations including Reporters Without Borders and News Media Canada, are calling on the government to change the laws governing the use of production orders to create more protections for journalists and their sources. They also urge the RCMP to withdraw the production order.

VICE Media intends to seek leave to appeal the decision at the Supreme Court of Canada, according to a statement from Ryan Archibald, the president of VICE Canada.

“This isn’t over,” he said. “VICE Media is prepared to do whatever it takes to support and defend our reporter, and our friend, Ben Makuch. His investigations into the complex world of cyber terrorism and digital security matter more now than ever.”

The statement also calls out the lack of shield laws in Canada that would provide specific protections to journalists, including from having to reveal the identity of confidential sources or share unpublished information gathered during reporting.

That kind of legislation is long overdue, says MacKinnon, noting there are various different shield laws in place in the U.S. and other countries. “Frankly, it is embarrassing that Canada, and a government that claims to believe in a free press, hasn’t taken any steps to protect journalists.”

While the odds of getting leave to appeal are stacked against them given that the Supreme Court of Canada agrees to hear only a limited number of cases, MacKinnon says it has been more than two decades since the top court looked at these issues.

“Technology has changed and the internet has become such a critical component of journalists’ work,” he says, adding that the protection of press freedom is an issue of national and public importance.

Should leave to appeal be denied, VICE Media and Makuch will be left to decide whether they will comply with the production order. If they do not, the Crown could pursue a criminal charge. The penalty is a fine of up to $250,000 and/or six months in jail.

Budget's silence on Phoenix shows public servants 'are not important': PSAC president

Ottawa Citizen
Andrew Seymour
March 23 2017

The public service can expect a "comprehensive review" of at least three departments as part of a federal government effort to eliminate inefficient programs, curb wasteful spending and end ineffective and obsolete initiatives, according to the federal budget released Wednesday.

Exactly which departments will be subjected to the review won't be revealed until sometime down the road, following a budget that featured only modest investments to the public service — and no mention of new money to help fix the problematic Phoenix Pay system that has resulted in some federal workers getting paid too much or others nothing at all.

The two largest unions representing public service workers had been hoping for a $75-million contingency fund so employees could get paid correctly and on time.

"Words don't even describe how disappointed I am that they did nothing to address Phoenix," said Robyn Benson, president of the Public Service Alliance of Canada.

"It's heart-wrenching that they have left out Phoenix in totality," said Benson. "For myself as president of the PSAC and my 100,000 members, that says to them they are not important. It says to them it doesn't matter if you get paid."

Debi Daviau, president of the Professional Institute of the Public Service of Canada, added the government's silence on Phoenix was deafening.

And NDP MP Erin Weir, the party's critic for public services and procurement, said he was surprised to see no details about the Phoenix payroll and Shared Services programs.

They are "huge boondoggles" that could have been addressed in the budget, Weir said.

"Even if it was a commitment of some sort, some verbiage, that would have been helpful to know the government was going to put the resources behind making sure public servants are properly paid," said Daviau.

The budget was vague on when the comprehensive review of departments will begin, but it was among three measures announced to find better value from the public service.

“We’ll be closely watching to make sure those reviews are not done in the Harper fashion, that stakeholders are properly consulted…and if there are cuts, or reallocations of resources that they are done with all the information in front of them and not just as some ideological move,” said Daviau of the departmental reviews.

Benson said she hopes the Liberal government work with unions while conducting the reviews.

“I don’t want them just to go in there and slash, cut and burn, then it will be reminiscent of the Conservatives,” said Benson, who argued the real waste in government comes from the contracting out of services and public-private partnerships.

The government also said it would begin the first comprehensive review in decades of federal fixed assets, such as buildings. The government said it spends $10 billion a year buying, maintaining and repairing owned and leased assets.

The review will be staged by asset-type — such as engineering assets, science facilities and so on — over the next three years.

The government also vowed to conduct a three-year review of all federal innovation and clean technology programs with the goal of simplifying programming and better aligning resources to improve the effectiveness of those programs.

The government expects to report back on the progress of the reviews in next year’s budget. The expenditure reviews come a year after the government announced annual reductions of $221 million on professional services, travel and government advertising.

The 2016 budget promised a $444-million investment in the Canada Revenue Agency to track down tax cheats.

This year’s budget promises an additional $523.9 million over five years, which the government anticipates will result in an additional $1 billion in assessed tax annually over that time period.

The funding is expected to result in more than 300 new jobs for auditors and other staff at the CRA, with a specific focus on the “underground economy.”

“We’ve long been calling for those investments. Although it probably doesn’t go far enough, it’s clearly a step in the right direction,” said Daviau. “It’s smart for Canadians. For every dollar invested, a minimum of five is coming back.”

The budget put a heavy emphasis on innovation, and that included a promised review of the National Research Council that would examine the future role the NRC would play in creating more opportunities for women researchers while supporting “breakthrough” research.

The budget also established a $2-million budget for the Chief Science Advisor and secretariat and promised to develop a new federal science infrastructure strategy, including for federal laboratories and testing facilities.

The government also vowed there would be a more “integrated and effective approach” to laboratories, information technology and human resources in the federal science community and they’d seek to ensure federal scientists have access to world-class infrastructure, innovative equipment and computer networks.

Daviau said “targeted investment “in science was “not nearly enough to make up for the cuts of the Harper government in terms of decimating critical science programs for Canadians.”

There was also not enough focus on how public scientists play into innovation agenda, she said.

“What we’d like to see know is far more focus on how you use public science to inform and inspire innovation in every sector in Canada,” she said.

Benson said she noted there was a commitment to some spending in other departments, which was positive.

“There is an infusion of money in different areas, so if in fact it is going to be used to improve programs, to hire people, to provide quality public services I’ll be happy,” she said.

There was also a series of less-defined promises that could improve the working lives of the public service.

The government promised to put more women in positions of leadership in the public and private sectors.

The government also signalled there would be more support for federally-regulated employees to request more flexible work arrangements, such as flexible start and finish times, the ability to work from home and unpaid leave to help manage family responsibilities.

There was also the announcement of an additional $7 billion over the next 10 years to create more affordable child-care spaces.

With files from Jon Willing

Sidebar: Other investments in the public service

Public Safety

– $17.4 million over three years to the National Energy Board to enhance oil and gas pipeline safety and oversight. There will be a further $1.9 million over three years to keep Canadians informed on energy, regulations and pipeline safety — investments that the government said will be fully cost-recovered from the industry
– $1.37 million to Public Safety Canada to better safeguard Canada’s critical infrastructure, including transportation networks, power grids and hospitals

– Promising to invest $8.7 million over five years to Natural Resources Canada to expand the list of regulated chemical, and better control of access to the chemicals used to manufacture homemade explosives

Innovation

– Provide $229 million over four years, starting in 2018-19, to Natural Resources Canada and Transport Canada to continue Research and Development in core-clean energy and clean transportation programming
– $200 million to Natural Resources Canada, Agriculture and Agri-Food Canada and Fisheries and Oceans Canada to support clean technology research
– $15 million a year to Global Affairs Canada starting in 2017 to implement strategy connecting clean technology firms with international networks and educating them on business supports provided by Canadian government
– $14.5 million over four years allocated to Natural Resources Canada and Innovation, Science and Technology Canada for the creation of a Clean Technology Data strategy. There will also be $12 million over four years to establish a "Clean Growth Hub" within Innovation Canada.

Housing

– $39.9 million to Statistics Canada to develop and implement a database of all properties in Canada, providing information on purchases and sales, the degree of foreign ownership and homeowner demographics and financing

Budget 2017 bad news for lawyers, other professionals

The Lawyer's Daily
Cristin Schmitz
March 22, 2017

Federal Budget 2017 is a mixed offering to justice system players, with Ottawa abruptly ending a tax advantage for lawyers, while announcing new funding for 28 additional judicial posts, as well as minor increases to support family justice, the Canadian Judicial Council (CJC) and the Federal Courts.

Without consulting with the bar or the other five professions (doctors, accountants, vets, dentists and chiropractors) who have been allowed to use the "billed-basis" accounting method since 1983 (rather than the usual "accrual" accounting method), the government proposes to end — over a two-year transitional period — the advantage of being able to elect billed-basis accounting.

"It is a shocker," commented accountant Kim Moody of Moodys Gartner Tax Lawyers, who said there was no warning of the move from the Department of Finance or the Canada Revenue Agency. "We didn't see it coming," he acknowledged. "Are my partners going to like this? Nope."

(Billed-basis accounting enables taxpayers to defer tax by permitting the costs associated with work in progress to be expensed without the matching inclusion of associated revenues. The government estimates it will gain about $425 million over the next two fiscal years from eliminating the billed-basis election.)

Lawyers and other affected professionals "are going to have to take a hard look at their accounting systems, a hard look at their current practices and [assess] how it's going to impact them," Moody advised. "Thankfully there is a transition period over two years that will lessen the blow. But it will impact them — no question about it."

One of the biggest boosts for the justice system is Ottawa's plan to fund 28 new superior court judgeships (at $314,100 annual salary per judge, plus benefits) in the fiscal year beginning April 1, 2017. An undisclosed number of the new posts are slated for Alberta and Yukon, where the population has greatly outpaced the rise in the number of judges. Further details are to be announced by Justice Minister Jody Wilson-Raybould.

Other noteworthy measures in Budget 2017 include:
•An increase of $2.2 million per year, on top of the $18.9 million the feds already spend annually now on family justice services. Some of that money will be spent on information technology (IT) upgrades to improve enforcement of child and spousal support.
•The CJC will get an additional $540,000 per year, ongoing, to "support programming on judicial education, ethics and conduct," including to upgrade its IT, according to Budget 2017.

"The Canadian Judicial Council is pleased that the government shares its commitment to improve the quality of judicial service in Canada's superior courts and in fostering public confidence," CJC spokesman Johanna Laporte told The Lawyer's Daily. "With this investment, the council will return to adequate funding levels which will allow us to deliver important programming in judicial education and judicial independence," said Laporte by e-mail.

(However the budget's funding is considerably less than the additional $1.3 million (on top of its $1.7 million operating budget) the CJC has wanted: i.e. $700,000 to restore activities lost or delayed due to previous government cuts; $250,000 for staff to help with outreach and tech support, and in-house legal support; and $350,000 for new projects and programs to carry out its mandate to improve the quality of judicial service in Canadian courts. Last year the council's chair, Chief Justice of Canada Beverley McLachlin, publicly protested that the council was on point of being unable to fully discharge its mandate — which includes such activities as updating judges' ethical guidelines and co-ordinating courtroom best practices across the country — because "we've been starved for money.")

•The Courts Administration Service (CAS) for the Federal Court, Federal Court of Appeal, Tax Court and Court Martial Appeal Court will get $1 million in each of the next two fiscal years to help them live up to their obligation to publish their decisions in both English and French. It is a drop in the bucket of the courts' much greater expressed needs. The budget does not mention the $26 million long sought by the CAS for an IT overhaul of the four paper-based courts.

•Job opportunities for lawyers. A new secretariat to support the Cabinet's "Working Group on the Review of Laws and Policies related to Indigenous Peoples" — headed by Wilson-Raybould — will be created, with funding to the Privy Council of $3.1 million over three years.
•The government plans to continue to spend $11.5 million annually on legal aid for immigration and refugee services in the provinces and territories (i.e. no increase).
•The government plans to spend, on an ongoing basis, an additional $11 million per year, on top of the current $5 million it spends, on promoting the use of restorative justice practices via the Indigenous Justice Program (formerly known as the Aboriginal Justice Strategy).
•The government said, without providing any details, that it "will develop a new intellectual property strategy over the coming year" that will ensure the country's IP regime "is modern and robust and supports Canadian innovations in the 21st century."

Supreme Court loosens grounds for bail pending appeal of a conviction

The Globe and Mail
Sean Fine
March 24, 2017

Citing the risk of wrongful convictions, the Supreme Court has made it easier for people convicted of crimes, up to and including murder, to be set free on bail, while they wait for their appeal to be heard. The decision could affect hundreds of convicted offenders each year across Canada, according to the Criminal Lawyers' Association.

The unanimous ruling Thursday comes in the case of Dennis Oland, who was convicted of second-degree murder in the 2011 bludgeoning death of his father, Richard. Mr. Oland was an "ideal candidate" for bail, the court said, because he had no criminal record, was a "loving/caring man" and was neither a danger to the public nor at risk of fleeing. And yet two levels of court rejected his request for release pending his appeal, saying it would harm public confidence in the justice system.

"I know that, sometimes with cases like this, people might think: 'Oh my god, this means people convicted of murder are going to get released on murder pending appeal,'" said Toronto criminal defence lawyer Michael Lacy, who represented the Criminal Lawyers' Association, an intervenor in the Oland case. "But most people don't obtain bail pending their murder trials, because there's something about the nature of the case or the person's own circumstances which suggests they're not a good candidate for bail."

Eighty-one people convicted of first- or second-degree murder in Canada between 1975 and 2016 applied for bail pending appeal, according to information gathered by the New Brunswick Attorney-General's department and presented to the Supreme Court. Most were rejected, many of those for the same reason as Mr. Oland, harm to public confidence, the province said.

It said there should be a general presumption that bail will be denied to convicted people, although in certain cases judges could still permit bail. "Canadians expect that a person convicted of a serious crime and sentenced to a lengthy jail term will immediately begin serving that sentence and will remain in jail," the province said in a legal filing.

The Supreme Court had asked whether it should consider the Oland bail case moot, as Mr. Oland has been free since the fall, after the New Brunswick Court of Appeal threw out his conviction and ordered a new trial, saying his original trial had been flawed. But several provincial governments, intervening in the case, said courts were applying the rules for bail pending appeal in an inconsistent fashion. And Mr. Oland wished to stick with the case, because he could face the same issue if convicted a second time.

The right to bail is protected in the Charter of Rights and Freedoms, and is not to be denied without just cause. There are three justifications in the Criminal Code for denying bail: a risk to public safety; a risk the individual will not show up for trial; and harm to the public interest. It was that third ground – harm to public confidence in the justice system – that was at issue before the Supreme Court. A judge from the New Brunswick Court of Appeal had ruled that, because of the brutality and seriousness of his offence, and because Mr. Oland's grounds of appeal were not so strong as to "virtually assure a new trial or acquittal," his release would harm public confidence.

But the Supreme Court said that was too high a standard. In a ruling written by Justice Michael Moldaver, the court's leading voice on criminal law, it said it was enough that an appeal be clearly "not frivolous" – a standard set out by Louise Arbour, then an Ontario appeal court judge, in a 1993 case in which Guy Paul Morin, one of Canada's best-known wrongly convicted people, participated. (Justice Arbour later joined the Supreme Court.)

Justice Moldaver said judges could simply rely on their experience and the court record to do a preliminary assessment of the strength of an appeal, without thinking in terms of categories such as "reasonable prospect of success." He said Justice Arbour's 1993 ruling "reflected society's acknowledgement that our justice system is not infallible." Among the cases he cited was that of Gregory Parsons from Newfoundland and Labrador, who was wrongly convicted of murder in the death of his mother.

Budget: plus d'argent, plus de juges et moins de retards

Droit-Inc
Jean-François Parent
23 mars 2017

Le budget fédéral prévoit 28 nouveaux postes de juges afin de rémédier aux retards… et des magistrats mieux formés à la spécificité des sexes…
Au premier plan des mesures affectant directement l'administration de la justice, Ottawa veut renforcer la justice familiale en y injectant 107,8 millions de dollars sur cinq ans, à compter de 2017-2018, et de 21,1 millions par année par la suite.

C'est le ministère fédéral de la Justice qui administrera ces sommes, destinées à financer l'offre « de services de justice familiale, d'améliorer l'utilisation de la technologie pour accroître l'accès à la justice et d'assurer une meilleure exécution des obligations en matière de soutien familial », faisant référence aux pensions alimentaires pour enfants ou conjoints.

Outre l'annonce d'une stratégie nationale contre la violence fondée sur le sexe, Ottawa entend élargir l'offre de formation destinée aux magistrats.

Ainsi, l'immigration, les structures familiales changeantes et l'évolution des questions « liées au sexe et à l'identité » poussent Ottawa à cibler la formation des juges. « Le soutien consenti au Conseil canadien de la magistrature fera en sorte qu'un plus grand nombre de juges auront accès à des activités de perfectionnement professionnel, qui mettront davantage l'accent sur une formation tenant compte de la spécificité des sexes et des différences culturelles », peut on lire dans les documents budgétaires.

Ces mesures seront financées à hauteur de 2,7 millions de dollars sur cinq ans. Par ailleurs, ces sommes ciblent également les infrastructures des technologies de l'information, afin de gérer « de façon exacte et efficace » l'information.

Enfin, Ottawa se dit « déterminé à remédier aux retards dans les cours supérieures du Canada », et y injecte 55 millions de dollars sur cinq ans, et 15,5 millions par année par la suite. On proposera en outre des modifications législatives afin de doter le pays de 28 « nouveaux postes de juges nommés par le gouvernement fédéral ».

Supreme Courts decision leads to government funding

Hanna Herald
Jackie Gold-Irwin
March 23, 2017

On March 9 the NDP announced plans to make new investments in the Alberta Justice system, in response to the Supreme Courts decision to set deadlines for when matters should go to trial.
In a recent letter to the Town James Pickard, the President of the Alberta Crown Attorney's Association expressed the Associations frustrations with the lack of response from the government on the growing backlog of cases that were at risk for being released if they took too long to be resolved.

As per the Supreme Courts decision set by the Barret Jordan case, Court of Queens Bench case trials must now be concluded within 30 months and provincial court matters within 18 months. An extension up to 30 months can be granted if the case includes a preliminary inquiry.
Since the start of 2017 200 cases have had their charges stayed as a result of the decision with a backlog to the Calgary Rural and Regional Response Crown Prosecutors Office, which oversees matters in Hanna, Strathmore, Drumheller, Oyen and many more communities, of 1,500 cases from 2016 being added to the 2017 docket.

The governments plan to add 35 Crown prosecutors and 30 support staff, to the current 15 Crown prosecutors that are currently being recruited now is a start noted Drumheller/Stettler MLA Rick Strankman.

"It's a good start!" Strankman said.

"Our financially challenged Albertan populace is under significant pressure and those that wish to live outside the law, need to be held accountable," Strankman added.

Kathleen Ganley, Minister of Justice and Solicitor General noted that “it’s critical that our justice system works well for Albertans and that they have confidence in it."

"That takes resources, which is why this government is investing in the system. In light of the recent Supreme Court of Canada decision in Jordan, this new investment is more important than ever.”

"“Additional prosecutors will help ease the current workload pressure facing Crown offices throughout the province," agreed Eric Tolppanen, Assistant Deputy Minister, Alberta Crown Prosecution Service.

"This funding will allow the Prosecution Service to return to full complement and look towards growth in target areas. There is more work to do and together with our partners, we are moving in the right direction.”

The increase will mean an additional investment of $14.5 million, with the funding presented as part of the 2017 Budget being presented March 16, and subject to the approval of the Legislative Assembly.

Vice must turn over files to RCMP:Appeal Court

Colin Perkel
The Canadian Press
March 22nd 2017

TORONTO — A Vice Media reporter must give the RCMP the background materials he used for stories on an accused terrorist, Ontario's top court affirmed Wednesday.

In a case that pitted freedom of the press against the ability of police and prosecutors to do their work, the Ontario Court of Appeal said it found no errors in an earlier ruling that went against the Canadian media outlet.

Reporter Ben Makuch, backed by various media and civil rights groups, had fought the RCMP's production order, arguing police use of journalists to further criminal investigations would make sources reluctant to come forward.

However, the Appeal Court said Superior Court Justice lan MacDonnell had been alive to a potential "chilling effect" in this case.

"(MacDonnell) was clearly alive to the concerns about the negative impact of requiring the media to produce material for the police," the Appeal Court said. "He implicitly addressed that concern as it existed on the facts of this case by identifying factors that tended to significantly reduce the potential 'chilling effect'."

Those factors include an absence of a request by Makuch's source for confidentiality — in fact the source was "anxious to tell the world" about his beliefs and conduct, the Appeal Court said.

Vice expressed disappointment with the Appeal Court decision but said it might try to continue its legal battle by seeking leave to take the case to the Supreme Court of Canada.

"Simply put, this isn't over," the media outlet said in a statement.

"Vice Media is prepared to do whatever it takes to support and defend our reporter, and our friend, Ben Makuch. His investigations into the complex world of cyber terrorism and digital security matter more now than ever. Ben's work and the vital principle of a free press must be protected."

The materials in question relate to three stories Makuch wrote in 2014 on a Calgary man, Farah Shirdon, charged in absentia of various terrorism-related offences. The articles were largely based on conversations Makuch had with Shirdon via an online instant messaging app called Kik Messenger.

One story cited Shirdon, 22, as saying from Iraq: "Canadians at home shall face the brunt of the retaliation. If you are in this crusader alliance against Islam and Muslims, you shall see your streets filled with blood."

RCMP want access to Makuch's screen captures of those chats.

In his ruling a year ago, MacDonnell said the screen shots were important evidence in relation to "very serious allegations" and that there was a strong public interest in the effective investigation and prosecution of such allegations.

Makuch has previously said he had published all information relevant to the public.

The Appeal Court rejected Vice arguments that the prosecution should have to prove the information the RCMP wants was essential to its case.

"No one could accurately assess what the Crown does or does not need to prove its case at trial," the Appeal Court said.

"To suggest that a judge can foreclose police access to relevant evidence otherwise producible in law — because the judge thinks the prosecution does not need the evidence to prove its case — is to seriously confuse the role of those who investigate and prosecute crime with the role of those who adjudicate the cases brought by the prosecution against individuals."

The court did partly side with Vice on unsealing part of the RCMP's materials in the force's demand for Makuch to turn over his information.

Members of the coalition that supported Makuch, including Canadian Journalists for Free Expression, Reporters Without Borders and News Media Canada, condemned the ruling for failing to recognize the importance of journalistic source protection.

"If journalists cannot protect their sources, then the information they provide will dry up, leaving Canadians uninformed and democracy impoverished," Tom Henheffer, executive director of the free expression group, said in a statement.

Appeal court says reporter must hand over material to RCMP

Canadian Lawyer Magazine
Elizabeth Raymer
March 23rd 2017

The Court of Appeal for Ontario has upheld a production order requiring a journalist to hand over all his communications with a man charged with terrorism-related offences. Journalist and civil liberties organizations have called the decision a blow to reporters abilities to protect their sources and publish stories in the public interest.

Vice Media lawyer Iain MacKinnon is concerned police may use search orders and production orders more frequently against journalists in the wake of the production order being upheld.
Vice Media lawyer Iain MacKinnon is concerned police may use search orders and production orders more frequently against journalists in the wake of the production order being upheld.
“A free and vigorous press is essential to the proper functioning of a democracy,” Justice David Doherty of the Ontario appellate court acknowledged at the start of his judgment.

“The protection of society from serious criminal activity is equally important to the maintenance of a functioning democracy. Those fundamental societal concerns can come into conflict. When they do, it falls to the court to resolve those conflicts. In this case, claims based on the freedom of the press and those based on effective law enforcement collide at two points.”

In R. v. Vice Media Canada Inc. those two points were, first, a production order obtained by the RCMP requiring production from Vice Media of the communications materials between reporter Ben Makuch and a source, Farah Shirdon. The communications arose from a story Makuch wrote in 2014 about Shirdon joining to fight with the terrorist group Daesh, also known as Islamic State of Iraq and the Levant. Shirdon is believed to have left Canada in 2014 and was subsequently charged with six offences in absentia.

“The appellants argue that the production order undermines their role as the eyes and ears of the community by effectively conscripting them into the ranks of law enforcement,” the court noted. “The police respond that they need the information referred to in the production order to effectively investigate serious crimes.”

The second point of collision was the attempt by the appellants, Vice Media, to gain access to the information the police had relied on to obtain the production order. The appellants argued that the press must have access to information on which police rely to obtain coercive court orders; the police responded that such access would compromise the investigation of serious crimes.

The applications judge rejected the appellants’ application to quash the production order, and placed a temporary non-publication order on the unredacted information in the police material,

which had been under a sealing order. The appellate court found that some information should remain redacted where it named an individual, but that other information should be made public.

The appellants and their interveners, including the Canadian Civil Liberties Association, Canadian Journalists for Free Expression and the CBC, argued the state's ability to compel production of information from the media should be more strictly limited; the appellate court disagreed, calling "reasonableness … the constitutional litmus test."

The application judge had concluded that the same quality of evidence against Shirdon was not available from any other source than Vice Media's reporter, and the material sought, in the form of screen captures of text messages, provided the best evidence of what Shirdon said, which favoured making the production order.

Also a factor in this case, as the Public Prosecution Service of Canada commented by email, was that it did not involve a confidential journalistic source. "As the Court of Appeal noted, there was an absence of any requests for confidentiality, and Mr. Shirdon was 'anxious to tell the world about his beliefs and conduct.' "

Iain MacKinnon, a partner at Linden & Associates in Toronto, who represents Vice Media, told Legal Feeds that complicated the case for the media outlet. "That made it a more difficult argument for us; for a confidential source, courts … may be more sympathetic in preventing police from seizing material."

But, says MacKinnon, in this case "we're not trying to protect a source; we're trying to protect a larger principle of journalists not being an easy target for police seizure.

"My concern would be that police may use search orders and production orders more frequently against journalists. It may cause people to be wary in speaking to journalists if they know that anything they say, any material may have to be handed over to police. People sometimes speak to journalists because they don't want to talk to the police. They may not want to expose themselves to potential harm, danger, or be identifiable, [or] they may not want to get involved in a criminal prosecution as a witness."

The Canadian Civil Liberties Association said in a statement that it "remains concerned about the impact this ruling will have on freedom of the press in Canada, particularly in the contemporary climate. For instance, while we welcome Quebec's recent decision to strike a provincial Commission of Inquiry on the Protection of the Confidentiality of Journalistic Sources, the many reports of police surveillance of journalists in Quebec that gave rise to the Commission are a reminder that Canada still faces substantial challenges in its efforts to protect a free and independent press."

MacKinnon says his biggest concern " is the potential chilling effect: people maybe not wanting to talk to the media, and the risk that [production orders] may become a more common tool … for police to get information"; he likewise notes incidents in Quebec of police wiretapping journalists' phones. "This is another example of police using journalists to further their investigations."

MacKinnon says that he has no formal instructions yet to appeal the decision to the Supreme Court of Canada, though Vice Media has suggested it intends to do that in public comments.

And whether the decision of Ontario's highest court has a "chilling effect" on the media or more demands for production orders remains to be seen, though the Public Prosecution Service of Canada noted that "the following quotation from the decision of the Court of Appeal appears to be of significance: '.. when a proposed production order targets the media, the court must exercise its discretion with care, to avoid compromising — if the police were to compel the media's information too easily — the unique and important role the media plays in society.'"

Quatre nouveaux juges nommés à la Cour du Banc de la Reine en Alberta

Radio-Canada
24 mars 2017

Le gouvernement fédéral a nommé quatre nouveaux juges à la Cour du Banc de la Reine en Alberta, vendredi. Cela réduit du coup le nombre de postes vacants de sept à trois.

Ces nominations visent à réduire l'écart entre l'Alberta et les autres provinces, puisque cette dernière compte moins de juges que les autres par rapport à sa population.

Les nouveaux juges de l'Alberta sont:
•L'avocat de la défense Willie deWit siégera à Calgary;
•L'avocate en litige Michele Hollins de Calgary siégera à Calgary;
•La juge de la Cour provinciale Marilyn Slawinsky est promue à la cour supérieure à Red Deer;
•L'avocate Ritu Khullar siégera à Edmonton.

« Je pratique le droit depuis 22 ans et je voulais faire autre chose. Cela semble être un choix logique et je suis heureux de pouvoir l'obtenir », a dit Willie deWit.

Pénuries et retards

Les nominations se produisent alors que l'Alberta fait face à une pénurie généralisée dans le système judiciaire.

La province a eu du mal à répondre à de nombreux dossiers qui se sont accumulés. La Cour suprême du Canada, dans l'affaire Barrett Jordan, a d'ailleurs déclaré que les tribunaux doivent fixer des dates limites pour entendre les différents dossiers.

Les procès devant la Cour du Banc de la Reine doivent maintenant être conclus dans un délai de 30 mois, et dans les 18 mois pour les tribunaux provinciaux, avec une prorogation à 30 mois si l'affaire inclut une enquête préliminaire.

« Depuis 1996, nous n'avons vu aucune augmentation du nombre de juges nommés par le gouvernement fédéral. Il est donc évident que nous avons connu une augmentation importante de la population depuis, soit environ 1,4 million de personnes, ce qui fait une énorme différence dans la vie des gens qui passent devant le tribunal », a déclaré la ministre de la Justice albertaine, Kathleen Ganley.

« Ça va faire une grosse différence pour les victimes qui attendent le procès de leur présumé agresseur et pour les familles qui attendent de savoir qui aura les enfants à Noël », a-t-elle ajouté.

Dans son budget de mercredi, le ministre des Finances du Canada a aussi annoncé la création de 28 nouveaux postes de juges fédéraux, dont 12 en Alberta à la Cour du Banc de la Reine. Ces 12 postes s'ajoutent aux trois postes vacants dans la province. Le gouvernement fédéral a promis de pourvoir ces postes cette année.

Federal government fills four vacant judges' seats in Alberta

The Globe and Mail
Carrie Tait
March 24, 2017

The federal government has filled four vacated judges' seats in Alberta as the province's judicial system struggles under an immense backlog that has led to a series of cases falling apart, largely due to a landmark Supreme Court of Canada ruling last year.

A former Olympic and professional boxer turned lawyer is among the four Court of Queen's Bench appointees.

Alberta is short on both judges and Crown lawyers at a time when delays have prompted courts to stay cases against people accused of crimes – something that has also happened in other provinces.

The Supreme Court of Canada set trial deadlines last July in a ruling known as the Jordan decision, which aimed to end what the court deemed unreasonable delays. Provincial court trials must be heard within 18 months of charges being laid, with 30 months being the limit in superior court. There is also a clause for "transitional exceptional circumstance," which can be used to sidestep these deadlines.

So far, two men – one in Alberta and one in Ontario – have had first-degree murder charges against them stayed as a result of the ruling. At the same time, 200 cases in Alberta were dropped this year because there weren't enough prosecutors to handle them.

Two of the newly appointed Queen's Bench justices will be in Calgary, one in Edmonton and another in Red Deer, according to a statement the federal Justice Department released Friday. Ottawa, in its budget unveiled this week, also said it would fund 12 new federally appointed judges in Alberta over the next five years. Friday's appointments, however, are not new seats.

Filling the four vacancies will help ease the pressure on Alberta's court system and make the justice process more comfortable for crime victims, according to the province's Justice Minister.

"It is victims who are waiting to have their accused person go to trial. It is families waiting to figure out who has the kids on Christmas," Kathleen Ganley told reporters Friday. "It is a really big deal. This is definitely going to make a difference."

Justice officials in Manitoba have proposed ending preliminary inquiries while other provinces such as Nova Scotia have placed new emphasis on plea bargains.

The key case that ended up at the Supreme Court of Canada originated in B.C., where an increase in judicial stays six years ago led to changes that have somewhat inoculated the province from the fallout of the Jordan decision.

The Alberta government says the province is still short 15 judges in the Court of Queen's Bench and down one justice in the Court of Appeal.

Alberta, in its 2017-18 budget released earlier this month, earmarked $14.5-million to hire 35 Crown prosecutors, on top of the 15 prosecutors it is already recruiting. The money will also be used to hire 30 additional court support employees. In addition, the province allocated $97-million over four years to build a new courthouse in Red Deer. Alberta expects to run a deficit of $10.34-billion in the coming fiscal year.

Ottawa appointed Marilyn Slawinsky, a provincial court judge in Alberta, to serve on the Court of Queen's Bench in Red Deer; Ritu Khullar, the managing partner at Edmonton's Chivers Carpenter Lawyers, to the bench in Edmonton; Michele Hollins, a partner at Dunphy Best Blocksom in Calgary, as a justice in Calgary; and William T. deWit, a partner at Wolch deWit Watts & Wilson in Calgary, as another federal judge in Calgary.

Mr. deWit won a silver medal in boxing at the 1984 Olympics and a gold medal at the 1982 Commonwealth Games. He became a partner at the firm that bears his name in 2000.

Ms. Hollins's practice centred on civil and commercial litigation, with a focus on employment law. Ms. Khullar, whose parents emigrated from India, specialized in labour and employment, privacy, administrative, human rights and constitutional law.

Judge Slawinsky was first appointed to the provincial court of Alberta in 2015. As a lawyer, she was an expert in conflict resolution and was a family mediator.

"These judges are desperately needed in Alberta and will improve access to justice for Albertans, while relieving pressures on our courts," Ms. Ganley said in a statement.

Federal government withheld documents from residential school survivors, lawyer says

Court hears arguments that many students didn't receive proper compensation for the abuses they suffered.

Toronto Star
Jesse Winter
March 24, 2017

Edmund Metatawabin has gotten used to waiting.

"We're always the last ones when it comes to reconciliation and acknowledgement," he says with a sigh.

Now Metatawabin and his fellow survivors of St. Anne's Indian Residential School will have to wait a few more weeks for an important decision in their ongoing abuse compensation case.

Metatawabin, along with a female survivor identified in court only as K-10106 and hundreds of other indigenous children, attended the notorious school in Fort Albany in northeastern Ontario. They say they were victims of horrific treatment including sexual abuse, being shocked by an electrified chair and being forced to eat their own vomit.

Metatawabin and the female survivor are leading a court challenge, arguing that many students didn't receive proper compensation for the abuses they suffered.

They want the Superior Court to order a full-scale inquiry into why thousands of pages of police records from an investigation in the 1990s detailing the abuse were not disclosed when survivors were seeking compensation under the Indian Residential Schools settlement process beginning in 2006.

The documents were not disclosed until a court order in 2014, which harmed the survivors' ability to get fair compensation, argued Michael Swinwood, one of the lawyers representing Metatawabin and K-10106.

When K-10106 first applied for compensation, she was denied because the court didn't believe she had been sexually abused.

What she didn't know at the time was that the law firm she'd hired had previously represented the Catholic Church — effectively putting it in a conflict of interest, Swinwood told a courtroom packed with other survivors of St. Anne's.

The firm also knew about the police investigation documents and that they could help her case and others, but failed to disclose them. So did the Canadian justice department, the court heard.

That experience left her traumatized all over again, Swinwood said.

"The appearance here is looking like more abuse and not like reconciliation," Swinwood told court.

But lawyers for the government argue that Metatawabin and K-10106 lack the standing to press the case, and that the Superior Court doesn't have the jurisdiction to order an investigation into the withheld documents.

The court only has a "supervisory" role in this case, and cannot act to punish the misdeeds of lawyers, argued Crown lawyer Michael Darcy.

The investigation Metatawabin and his lawyers are seeking "effectively asks the court to become a disciplinary tribunal" which would be "inappropriate," Darcy said.

Geoffrey Adair, one of the lawyers representing Wallbridge, one of the firms accused of failing to disclose the documents, argued it is not the court's place to investigate allegations, merely to rule on them.

"That is not its function," Adair said. "It has never been for 1,000 years."

Swinwood argued his clients are not asking the court to investigate anything itself, but to choose someone to examine why and how the records went undisclosed.

"The court is asked to appoint someone to investigate this silence, because it is deafening," Swinwood said.

Superior Court Justice Paul Perell reserved his decision in the case.

Speaking outside the court room, Nishnawbe Aski Nation Grand Chief Alvin Fiddler said the government continuing to fight the survivors in court is an example of its ongoing oppression of indigenous peoples.

"To see Canada, despite all the rhetoric of reconciliation, continue to oppress some of our most vulnerable people . . . our elders, I just can't take it," he said.

Trial timelines cause court headaches

Toronto Sun
Sam Pazzano
March 26th 2017

Thanks to a Supreme Court of Canada decision last year which shares an iconic sports name, basketball and the justice system share one thing in common: A shot clock.

While basketball players must shoot within 24 seconds or risk losing the ball, the Supreme Court, in a case called R vs. Jordan, put hard deadlines on Crown attorneys to bring cases to trial. Or risk losing the case — and having an accused walk free.

Prosecutors must try cases within 30 months at Superior Court level — where jury trials are held — and 18 months at the lower level called the Ontario Court of Justice.

The Supreme Court case was named after a dial-a-dope accused Barrett Jordan, of Surrey, B.C. — not the superstar Michael Jordan.

Barrett Jordan waited four years to go to trial and Supreme Court tossed his case out for delay, stayed his charges and set up ground rules for defining unreasonable delays.

The decision means if the Crown doesn't meet its "shot-clock" deadline — with two notable, broad exceptions — the charges will probably be stayed for violating the accused's Charter right to a trial in a reasonable time. In such circumstances, the accused walks free.

The stays aren't as automatic as a shot clock, but the Supreme Court ruled once the ceilings have been breached, the Crown has to prove there are "exceptional circumstances" to continue prosecuting the case. The burden rests squarely on the Crown.

The exceptions are discrete incidents — such as the death of a participating lawyer's family member — or complex cases, which can take longer to go to trial, the decision stated.

Some experienced defence lawyers offered intriguing solutions to unclogging system to meet the new deadlines.

Prominent defence lawyer John Struthers says the state could start by stop charging 50,000 people a year with possession of pot. Ironically, Jordan itself was a pot case.

Struthers vigorously opposes the scrapping of preliminary hearings — 16 have been dropped this year by the prosecution.

The Crown can bring a preferred or direct indictment, which sends the accused straight to trial at Superior Court.

"There are taking away prelims — three of them are mine, murder cases," said Struthers.

"I have had 11 cases — including three first-degree murder charges — thrown out at prelims."

Preliminary hearings "make it clear if the Crown has a good case as charged or if it should be reduced from a first-degree to a second-degree murder and that can lead to resolutions (guilty pleas) without inconveniencing a jury," said Struthers.

Struther agrees with the province in pushing Ottawa to fill the 11 Superior Court judges' vacancies — five in critically-short Toronto alone.

In contrast to Ottawa, the province has stepped up by appointing 13 new judges at the lower court level — Ontario Court of Justice — and hiring additional assistant Crown attorneys and court staff.

Struthers advocates moving minor domestic disturbances into family court for mediation instead of proceeding as criminal cases.

Criminal law specialist Daniel Brown blames some of the tough-on-crime measures and the inaccessibility of Legal Aid for clogging up the courts.

Measures such as mandatory minimum sentences, delays in pardons (from five years to 10 years), the denial of early parole for non-violent offenders and elimination of conditional sentences for some non-violent offenders encourage more accused to go on trial, says Brown.

The inaccessibility of Legal Aid is also exacerbating the courts backlog because it means more accused people are representing themselves.

Due to their inexperience, these self-represented people waste valuable time and needlessly prolong trials, said Brown.

Veteran defence lawyer Nathan Gorham said the use of "discoveries" proceedings could greatly shorten the runway to Superior Court trials.

Discoveries are hearings — without a judge presiding — where witnesses give sworn testimony to questions asked by Crown and defence lawyers, said Gorham.

"It replaces the preliminary and can happen in two to five months so you could have a Superior Court trial some eight months later," explained Gorham, a 13-year defence lawyer who has used the discoveries process in "countless cases, from importing drugs, gun possession to murder" charges.

"That means within a year you have the Superior Court trial and that's 18 months beneath the Jordan ceiling," said Gorham.

"They have been doing it in Brampton for almost 10 years. But you need Crown consent to do it," said Gorham.

Gorham believes the Jordan ceilings are manageable, but Crowns must screen out "what's important and what's not."