Justice Abella to receive lifetime achievement award
Lawyer's Daily
Carolyn Gruske
March 19, 2018

Supreme Court of Canada Justice Rosalie Silberman Abella is the recipient of the 2018 lifetime achievement award, to be handed out at the Women in Law Leadership Awards (WILL) in November.

The WILL Awards are presented annually to female members of the Alberta legal profession. They are organized by the Association of Women Lawyers (AWL) and The Counsel Network (TCN) with the purpose of honouring women in the legal profession and of recognizing their outstanding dedication, creativity, initiative, achievement and contribution to the community, profession, legal scholarship and pro bono activities.

In addition to the lifetime achievement award, WILL recognizes those who demonstrate leadership in the profession in private practice, in government, in in-house positions, in what it calls a broader role, and in the community. There are also awards for tomorrow's leader and for a law firm operating in Alberta that best demonstrates leadership in fostering an inclusive environment for female lawyers. Nominations open on June 1, 2018.

The 2018 WILL Awards are on Nov. 22, 2018, in Edmonton.

This week at the SCC
Canadian lawyer Magazine
Elizabeth Raymer
March 19, 2018

This week at the SCC:
The Supreme Court of Canada will hear five appeals this week, including a faceoff between the Attorneys General of Canada and Quebec over securities regulation. The remaining appeals concern a lawyer's liability in giving a referral; an employee's ability to sue a labour union local and its directors for wrongful dismissal; the right of expatriate Canadians to vote in Canadian elections; and whether a trial judge correctly gave more weight to a complainant's evidence in a sexual interference case.

March 19 – Quebec – Salomon v. Matte-Thompson
Law of professions: The respondents, Judith Matte-Thompson and 166376 Canada Inc., invested millions of dollars with a capital management company. The funds in which the respondents invested turned out to be a Ponzi scheme, and the respondents lost their investments. They then sued the investment manager and his associate, as well as the applicants, Kenneth Salomon, Thompson's lawyer who referred her to Papadopoulos, and his law firm, Sternthal Katznelson Montigny LLP.

Related news story:
SCC to hear lawyers' liability case regarding non-legal referrals; Insurance Business magazine
Related legal brief:

Quebec: A warning on the scope of a lawyer's duty to advise; Clyde & Co.

March 20 – Ontario – International Brotherhood of Electrical Workers v. Lawrence

Civil procedure: After being terminated from her employment with the International Brotherhood of Electrical Workers, Local 773, Pamela Lawrence sought damages for wrongful dismissal, naming Local 773 as a defendant. Local 773 pleaded that, as a trade union, it could not be named as a party based on the Rights of Labour Act, but Lawrence succeeded in adding several directors of the local as defendants and amended her statement of claim to plead that they were jointly and severally liable for her claim. A majority of the Court of Appeal dismissed Lawrence's motion to quash the applicants' appeal for want of jurisdiction, and the applicants' appeal.

Related legal briefs:
Top 5 Civil Appeals from the Court of Appeal (May 2017); Lerners LLP

Ontario Court Of Appeal Summaries (April 18-21, 2017); Blaney McMurtry LLP

March 21 – Ontario – Frank v. Attorney General of Canada

Constitutional law: The applicants are Canadian citizens residing in the United States, who were refused voting ballots for the 2011 Canadian general election because they had been resident outside Canada for more than five years. They sought a declaration that certain provisions of the Canada Elections Act violated their Charter-protected right to vote. An Ontario Superior Court judge declared the impugned provisions of the Act unconstitutional by reason of violating the applicants' right to vote under s. 3 of the Charter. A majority of the Court of Appeal allowed the Attorney General's appeal, finding that the denial of the vote to non-resident citizens who have lived outside Canada for five years or more is saved by s. 1.

Related news stories:
Expats Will Get Chance To Win Back Voting Rights In Supreme Court Hearing; Huffington Post

Long-term Canadian expats lose right to vote, appeal court rules; Toronto Star

Canadian election: 1.4m expatriates barred from voting after court ruling; The Guardian

March 22 – Quebec – Attorney General of Canada, et al. v. Attorney General of Quebec
Constitutional law: Under Order in Council No. 642-2015 dated July 15, 2015, the Government of Quebec referred the following two questions to the Quebec Court of Appeal:

1. Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

2. Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the Constitution Act, 1867?

The majority of the Quebec Court of Appeal answered "no" to the first and second questions.

Related legal brief:
Constitutional Turf Wars: A Quick Look at Federalism Issues in Securities Regulation; Kendrick Lo, CanLII Connects

March 23 – Ontario – R.A. v. R.
Criminal law: The appellant was convicted of sexual interference at trial by a judge sitting without a jury. The offence was committed against the young daughter of his then-girlfriend. The appellant appealed his conviction, arguing that the trial judge had failed to resolve an inconsistency in the complainant's evidence, nor explain why he accepted the complainant's evidence over the appellant's. The majority in the Court of Appeal dismissed the appeal. Trotter J.A., dissenting, would have allowed the appeal, as in his opinion the inconsistency in the complainant's evidence was significant.

Quelles seront les conséquences du projet de loi 141?
Voyez ce qu'en dit un avocat réputé, dans un avis juridique destiné à un joueur clé du secteur de l'assurance au Québec
Droit Inc
Julien Vailles
20 mars 2018

Avec l'avènement du projet de loi 141, les associations de consommateurs se questionnent. À juste titre, si l'on en croit l'analyse d'un avocat de grand cabinet, qui souhaite conserver l'anonymat. Dans un avis juridique à l'intention d'un joueur clé du domaine de l'assurance et que Droit-inc a obtenu, il détaille les conséquences de ce nouveau projet de loi et dresse un tableau bien sombre de l'avenir pour les consommateurs de produits et services d'assurance comme pour les représentants certifiés.

Et il n'est pas le seul. Comme l'expliquait récemment Me St-Amant en entrevue avec Droit-Inc., avec la Loi visant principalement à améliorer l'encadrement du secteur financier, la protection des dépôts d'argent et le régime de fonctionnement des institutions financières (le projet de Loi 141), la Loi sur la distribution de produits et services financiers sera modifiée de manière à ce que les conseils en assurance ne soient plus l'apanage des représentants certifiés.

Le conseil ne sera plus un acte réservé

Première observation de l'avis : « un cabinet pourra maintenant, sans l'entremise d'une personne physique, offrir des produits d'assurance dans une discipline dès qu'il aura à son emploi un représentant qui peut pratiquer dans cette discipline » et à condition de respecter certains articles de la Loi s'appliquant aux représentants. Un service sera offert « sans l'entremise d'une personne physique » si,

par exemple, le client choisit lui-même les modalités d'assurance au moyen d'un formulaire automatisé, sur Internet.

Dans ce cas, en vertu de la nouvelle Loi sur les assureurs créée par le projet de loi, il faudra cependant remettre au client un document qui fait état de la proposition soumise par ce moyen; il faudra en outre permettre au client de communiquer avec une « personne physique », s'il le souhaite. Cependant, il n'est nulle part précisé si les conseils qui seront dispensés devront l'être par un représentant certifié. Ils pourraient être donnés par une autre personne; il suffit que le représentant certifié soit bel et bien à l'emploi de la compagnie d'assurance, résume l'avis.

Par ailleurs, le projet de loi 141 supprime les références de la Loi actuelle, selon lesquelles les représentants en assurance sont aussi chargés d'agir comme conseillers en assurances.

Conséquences : le conseil ne sera plus un acte réservé et les représentants seront relégués au titre de vendeurs d'assurance et ne seront donc plus des conseillers. En cessant d'être des professionnels dont les conseils sont recherchés, ils perdent rien de moins que leur statut de professionnel.

C'est un peu comme si les actes réservés aux avocats cessaient soudainement de l'être et qu'on abolissait le Barreau!

Du meilleur produit au « conseil adéquat »

Toujours selon l'avis, les consommateurs perdront ainsi la protection conférée par l'ancienne loi, qui leur garantissait que les conseils fournis étaient bien donnés par des représentants certifiés, soumis à un encadrement strict. Avec le PL 141, tous les intervenants impliqués dans la vente d'assurance pourront donner de tels conseils sans encadrement, sauf les représentants certifiés qui demeurent assujettis à des règles strictes.

Cependant, les obligations de ces derniers seront diminuées. Si le PL 141 est adopté, le représentant en assurance devra s'enquérir de la situation de son client pour identifier ses besoins et le « conseiller adéquatement » (article 479 du PL 141), indique l'avis juridique.

Alors qu'actuellement, « Un représentant en assurance doit recueillir personnellement les renseignements nécessaires lui permettant d'identifier les besoins d'un client afin de lui proposer le produit d'assurance qui lui convient le mieux. » (article 27 de la LDPSF).

En clair : on passe de l'offre du meilleur produit à un conseil « adéquat »… Le représentant en assurance deviendra donc davantage un vendeur d'assurance, plutôt qu'un conseiller, dénoncent les associations de consommateurs.

De plus, le client sera le seul responsable de démontrer que son produit d'assurance ne convient pas. En effet, s'il ne fait pas affaire avec un représentant certifié, le seul droit qui restera au consommateur sera… le droit à l'accès à de l'information pertinente. En d'autres termes : à lui de se renseigner sur les produits d'assurance et de faire les bons choix.

Et ce n'est pas tout. La Chambre de la sécurité financière (CSF) n'aura plus de contrôle sur l'exercice des conseillers en assurance et son processus disciplinaire disparaîtra. En cas de litige, il ne pourra plus porter plainte au syndic de la CSF mais devra s'adresser directement à l'assureur.

Canada prepares for legal pot with new license class, strict labels
Reuters
Nichola Saminather
March 20th 2018

TORONTO (Reuters) - Canada's health regulator on Monday set out thresholds for a new class of cannabis cultivation and processing licenses, and outlined strict requirements for the packaging and labeling of recreational marijuana ahead of its legalization this year.

The proposals were published in a document released by Health Canada, taking into account feedback from a public comment period on new cannabis regulations. The final regulations will be published after the cannabis act is passed.

Canada, the first major industrialized country to legalize recreational pot nationally, wants to ensure that the industry is tightly regulated and the product remains out of the hands of people under 18, Bill Blair, parliamentary secretary to the Ministers of Justice and Health, said in a statement.

The proposal includes the introduction of new micro-cultivation and micro-processing licenses to enable small-scale producers to participate in the legal industry, according to the paper.

A micro-cultivation license would authorize the growing of a plant canopy area less than 200 square meters (2,153 square feet), and a micro-processing license would allow the processing of less than 600 kilograms (1,323 lb) of dried cannabis, or its equivalent, each year.

The regulator also said it will require that all cannabis products be packaged in a tamper-evident, child-resistant opaque or translucent container and include a health warning on a bright yellow background, a standardized cannabis symbol and the tetrahydrocannabinol/cannabidiol content.

The product's label and package should be in a single, uniform color excluding any fluorescent or metallic colors, according to the report. Only one brand element, such as a logo, would be allowed in addition to the brand name.

Données personnelles utilisées : qu'en disent les avocats ?
L'affaire Cambridge Analytica pose plusieurs questions légales sur la collecte des données personnelles.
Droit Inc
Delphine Jung
21 mars 2018
Pour Me Antoine Guilmain, avocat chez Fasken et spécialisé en renseignements personnels, cette affaire met l'accent sur deux points fondamentaux : la définition du consentement et la transparence des entreprises.

Lundi, plusieurs médias rapportaient que Cambridge Analytica, une société de profilage d'électeurs, aurait collecté les informations privées de plus de 50 millions d'utilisateurs de Facebook afin d'améliorer la visibilité et l'efficacité de la campagne électorale de Donald Trump.

Au-delà de la dimension politique de cette révélation, cette nouvelle pose de nouvelles questions concernant la protection des données personnelles, fonds de commerce des réseaux sociaux de manière générale.

Le modèle économique de Facebook et consorts consiste à collecter, partager et exploiter autant de données utilisateur que possible.

Il semble même que Facebook ait été au courant de ce qu'a révélé The Observer - le média qui a révélé l'affaire -. Le journal a expliqué que Facebook n'a pourtant pas informé les utilisateurs concernés.

« Il y a tout d'abord l'aspect consentement qui est important et notamment celui d'une tierce personne, c'est-à-dire les "amis" des utilisateurs. Il faut repenser le principe de consentement », dit Me Guilmain.

Dans ce cas, « les données personnelles recueillies concernaient des informations sur les utilisateurs eux-mêmes, mais également sur leurs amis et notamment leur contenu "aimé". Cette dernière situation pose un problème évident de consentement, car ces individus n'étaient pas au courant de cette collecte. Il faut ici préciser que les paramètres de confidentialité jouaient dans l'équation et que, aujourd'hui, cette fonctionnalité n'est plus offerte », ajoute-t-il.

En effet, le vice-président de Facebook, Andrew Bosworth a répondu à la polémique sur Twitter en disant: « les gens ont choisi de partager leurs données avec des applications tierces et si ces applications tierces ne respectaient pas les accords de données avec nous / les utilisateurs, cela constitue une violation. Aucun système n'a été infiltré, aucun mot de passe ou information n'a été volé ou piraté ».

Retrouver un consentement éclairé
Pour Antoine Guilmain, il faut fixer des balises pour « retrouver un véritable consentement ».

Me Éloïse Gratton, avocate chez BLG, elle aussi spécialisée en respect de la vie privée et protection des renseignements personnels, estime même qu'il est devenu difficile d'obtenir « un consentement éclairé » de la part des utilisateurs des réseaux sociaux et plateformes du genre.

Elle tient cependant à rappeler que les lois au Canada sont plus rigoureuses qu'aux États-Unis en matière de protection des données personnelles. « Ce n'est pas parce qu'ils sont mis en ligne que les renseignements personnels ne sont plus protégés », dit-elle.

Pour elle, le fait que ce soit une entreprise qui aurait récolté ces données pour un parti politique donne une autre dimension à la problématique. « Les partis politiques passent entre les mailles du filet d'un régime national concernant les données personnelles », explique l'avocate.

Me Guilmain met aussi l'accent sur les répercussions en termes d'image que peut avoir ce genre de pratique, notamment pour les entreprises. « Les contrats de consentement doivent être plus clairs pour que le client se sente en sécurité. De manière générale, cela peut avoir un impact positif sur l'image de l'entreprise. Celles qui s'inquiètent de la protection des données personnelles sont généralement fières de le mettre en avant. En fin de compte, cette confiance a une conséquence sur le chiffre d'affaires », dit-il.

Il faut absolument que les entreprises sortent de cette « vieille mentalité selon laquelle, la protection des données personnelles, c'est juste réglementaire », poursuit-il.

Lundi, les actions de Facebook ont d'ailleurs chuté de près de 7%, ce qui a fait perdre 36 milliards de dollars à l'entreprise.

Plus largement, Me Gratton estime qu'il y a un vrai travail d'information et d'éducation à faire auprès du public. La plupart ne prennent pas conscience de ce qu'implique une banale inscription sur Facebook, Instagram ou LinkedIn.

« Ils cliquent parfois sans réfléchir. Je pense par exemple aux tests, aux jeux ou aux applications qui modifient les photos de profil. Ce sont des entreprises tierces qui demandent un accès aux données personnelles. Les gens ne comprennent pas toujours l'utilisation secondaire qui sera faite de leurs données », conclut-elle.

Car combinées, les données peuvent en révéler beaucoup sur chacun des utilisateurs. Graĉe aux "j'aime", aux pages suivies, aux photos, à votre situation relationnelle, Facebook est capable de connaître l'orientation sexuelle de quelqu'un, ou le parti politique pour lequel il est le plus susceptible de voter.

Les plus téméraires finiront peut-être par se désinscrire des réseaux sociaux, mais Frederike Kaltheuner, qui dirige le programme d'exploitation des données à l'organisation caritative Privacy International, prévient: « vous pouvez supprimer votre compte Facebook, mais vous serez toujours suivi dans votre vie en ligne et de plus en plus dans votre vie hors ligne. Les téléphones mobiles sont par définition un dispositif de suivi ».

B.C. judge strikes down mandatory minimum sentence for sexual interference
Justice Gordon Weatherill says prison time for mentally disabled man a "grossly disproportionate" punishment
CBC News
Bethany Lindsay
March 21, 2018

A B.C. judge has struck down another mandatory minimum sentence, calling it a "grossly disproportionate" punishment for a mentally disabled man convicted of a child sex crime.

Dylan William Scofield pleaded guilty in 2015 to two counts of sexual interference, a crime that carries a mandatory minimum sentence of one year behind bars.

But in a decision last month, B.C. Supreme Court Justice Gordon Weatherill described that sentence as "cruel and unusual punishment."

On Friday, the judge ruled that the infringement on Scofield's Charter rights was not justified in a free and democratic society.

"Due to the exceptional circumstances of this case, including that Mr. Scofield was a first-time offender who suffers from significant cognitive deficits, the fit and proper sentence should be a six-month conditional sentence," Weatherill wrote.

He said the only appropriate response was to strike the mandatory minimum from the Criminal Code.

"While Parliament's intention — to sanction all sexual offences against children with a term of imprisonment — seems clear, there are a number of potential exceptions or safeguards that could have been included in the section," Weatherill wrote.

Scofield was 22 at the time of the offences, which involved two 15-year-old girls. He met both online in 2013.

The court heard that Scofield has an IQ of just 59 — currently defined as "extremely low" — and that cognitive testing has placed his intellectual function in the extremely low to borderline range.

He did not have a criminal record before abusing the two victims and has not committed any crimes since his arrest. A psychologist testified that Scofield is not generally inclined to pursue underage girls.

'Your decisions in life can have repercussions'

As part of his sentence, Scofield will have to submit a DNA sample, and his name will be added to the sex offender registry.

Weatherill acknowledged that a conditional sentence might not seem appropriate to everyone, but said the law required him to balance several different factors.

"Mr. Scofield, I hope you think long and hard about your actions and the harm you have caused to L.N., M.L. [the victims], their families, those closest to them, and the impacts on your community. Your decisions in life can have repercussions and reverberations that you may not feel but can profoundly affect others," Weatherill wrote.

Crown prosecutors are currently reviewing the sentencing decision to decide if they should appeal, according to B.C. Prosecution Service spokesperson Dan McLaughlin.

Mandatory minimums challenged

The judge's decision in Scofield's case should not come as a surprise, according to Yvon Dandurand, a criminology professor at the University of the Fraser Valley.

It follows rulings from the Supreme Court of Canada that have overturned mandatory minimums on some drug trafficking and firearms offences, as well as similar decisions in the lower courts.

But he said Scofield's case also shows how necessary it is for Ottawa to reform the mandatory minimums introduced by the previous Conservative government as part of a 2012 omnibus crime bill.

"This keeps coming up. It occupies the time of the courts, it costs us all money, so we need to fix that problem as early as possible," Dandurand said.

The federal government has signalled that reforms are on the way, and civil servants have been monitoring constitutional challenges to the sentencing regimes.

There are a few options for how to approach the problem, according to Dandurand. That includes wiping out some or all of the mandatory minimums, reducing the sentence lengths or creating exemptions in the law that would allow judges to exercise their discretion in exceptional cases.

Two years ago, Dandurand prepared a report for the justice department that surveyed how countries like the U.S., New Zealand and South Africa have created exemptions to their mandatory minimums.

"Sometimes, we've heard of that as a 'safety valve,'" he said. "Our laws in Canada have taken away that judicial discretion, so that is probably one of the easiest ways to move forward."

Spokespeople for the Department of Justice did not respond to emails Tuesday requesting an update on the reform process.

Concerns raised about growing trend to oral judgments at Supreme Court
Lawyer's Daily
Cristin Schmitz
March 21, 2018

Some Supreme Court watchers are raising questions and concerns about the top court's growing practice of disposing of cases orally from the bench, without subsequently issuing written reasons.

In the Supreme Court's winter session that ends March 23, the nine judges have orally blown away nearly 29 per cent of the 21 appeals they have heard — including an 8-1 decision on March 20 in a civil case in which leave to appeal had been granted. Of the six oral judgments thus far in 2018, four came in as-of right criminal appeals, and two originated from criminal and civil cases in which the court granted leave to appeal.

A look at the court's s own statistics indicates that the trend toward more oral decisions from the bench emerged in 2014. It is reflected in the court's track record in 2017, when the judges issued brief oral

judgments from the bench — without written reasons to follow — in almost one quarter (16) of the 67 judgments they rendered last year.

Most of the oral judgments in 2017 came in as-of right criminal appeals (12 cases) — some of which presented the high court with the task of error correction, and little more to talk about.

But court watchers say some of the as-of-right appeals heard by the judges called for more than, for example, the terse majority and dissenting oral reasons supplied by the judges last month in R. v. G.T.D. 2018 SCC 7 (see story here).

The court did not respond to requests for comment.

G.T.D., a significant decision on the Charter right to counsel, was handled "in a disappointingly perfunctory way," according to a case comment by Queen's University criminal law professor Don Stuart, editor of the Criminal Reports.

"Supreme Court of Canada rulings on appeal-as-of-right cases are being increasingly delivered in a shoddy, disengaged way," Stuart told The Lawyer's Daily. "For a court that has insisted that lower courts have a Charter duty to deliver reasons for judgments, this is particularly disappointing. Given the huge resources available at the Supreme Court, litigants, the rule of law and the doctrine of precedent deserve better."

Eugene Meehan of Ottawa's Supreme Advocacy, a leading Supreme Court agent, said oral judgments have not been confined to as-of-right criminal appeals. (In 2017, the Supreme Court gave oral judgments in four cases that were granted leave to appeal on the basis that they raised issues of public importance — of which some had interveners.)

"Where leave has been specifically applied for, and specifically granted, on the basis the appeal meets the national importance test, some lawyers question whether a single sentence, or paragraph from the court does the job," remarked Meehan.

"The role of Canada's highest court, Canada's national court, is instructional and educational, as well as jurisprudential. Is there enough instruction, enough education, contained within one sentence, one paragraph?"

Litigator Adam Goldenberg of McCarthy Tétrault in Toronto advised counsel whose clients want written guidance from the top court to tailor their arguments to that end.

"It cannot be assumed safely that simply because a case is before the court, even though it got before the court by leave, that the court is necessarily going to be inclined to write reasons and give guidance," he explained.

"I think it is something that counsel has to be … aware [of] — that the court is more likely than it has been in the past to decide a case from the bench," he remarked. "So if what you want, as counsel, is

guidance on the development of the law, or some statements from the court that will further the development of jurisprudence in a particular area, you don't just need to make the case for why your point of view on a particular issue is worth accepting, but also on why the court needs to provide such guidance at all."

Criminal law litigator James Foy of Toronto's Addario Law Group said it's not evident to him why the court has been moving to more oral judgments for the past four years. Each of the nine judges recently acquired another law clerk — bringing the contingent in each judge's chambers to four, he noted.

"It seems like a work management kind of issue because it means there's one less [judgment] to work on, but … they've been hearing less and less cases every year so that kind of explanation falls apart," he said. "And so we're left to kind of guess, and that's a problem because you want to have a transparent process. We just can't know what is driving the change."

University of Ottawa constitutional law professor Carissima Mathen said it is significant that most oral judgments are rendered in as-of-right appeals. "In such cases, I think it quite appropriate for the court to decide that its role is to settle the particular dispute at hand, rather than determine broader points of law," she suggested.

By contrast, it seems to undercut the court's rationale for granting leave in the first place when the court orally dismisses from the bench a case for which leave was granted, Mathen observed. "And yet it may be that the court finds it important to deliver the finality that only it can do, without a whole lot of doctrinal guidance. The other possibility is that, in at least some of these, there are deeper disagreements that the court does not wish to expose for fear of causing confusion. And so, it may decide not to issue fully fleshed out reasons at a particular point in time."

Certainly, the Supreme Court's judges are under pressure to get out the door a number of important reserved judgments (including deciding whether Trinity Western University will get accreditation for its nascent law school) before the June deadline when retired chief justice Beverley McLachlin can no longer cast her vote.

Foy speculated the highest court might also be behaving more like the intermediate courts of appeal, which allocate their writing time to the more important or complex cases, while issuing endorsements for the rest.

"Where you have cases of less importance, there is maybe an instinct to deal with those cases in summary fashion, where possible, so that you can devote more resources to the more complicated cases," he remarked.

However, developments in the 1970s and 1990s — which gave the judges more control over their docket, were meant to reduce the court's focus on error correction in individual cases, and expand its modern role in developing the law of the land and providing guidance to a much broader audience than the parties in a case, he noted. "Instead of treating all cases like a potentially jurisprudential case, they've designated as-of-rights — with exceptions obviously, but few exceptions — as being where their

only job is error correction — which is kind of a departure from the modern vision of the Supreme Court of Canada … as a different type of appellate court. ...”

Foy added that brief oral reasons from the Supreme Court can sometimes produce more uncertainty — which can in turn trigger more litigation. The judges are prone, for example, to declaring that they are deciding a case “substantially for” the reasons of the majority or dissenting judges below.

“Now you’re just left with the mud that you had before,” Foy remarked. “Other times they don’t say the word ‘substantially’ and … so you’re left to guess: ‘Does that mean they agree with everything. [in the judgment below that they are endorsing]? Is that law?’ ”

Goldenberg, who has written about the rising number of oral judgments in his firm’s Canadian Appeals Monitor, told The Lawyer’s Daily he is looking into the consequences of the Supreme Court orally dismissing as-of-right conviction appeals (i.e. when the court doesn’t subsequently supply written reasons) for people who wish to subsequently apply to the federal minister of justice for a conviction review on the basis that they were wrongfully convicted.

“I know that advocates for the wrongfully convicted are certainly going to be among those most concerned by criminal appeals-as-of-right being dismissed, essentially summarily, by the Supreme Court — or allowed summarily if they’re Crown appeals,” he explained. “And that’s because of the implications of not having reasons from the Supreme Court about why a conviction was allowed to stand when subsequently that person wants to persuade the minister to refer their conviction to a court of appeal for further review.”

Mathen told The Lawyer’s Daily she doesn’t consider it practical or feasible for the Supreme Court to articulate a test for when written reasons are required. “It would make the possibility of issuing oral judgments very remote, and I think such judgments continue to have value,” she observed.

Meehan said some litigants prefer a brief oral judgment, perhaps for strategic reasons. But “for the unsuccessful party, an overly short decision can be tough to digest,” he observed. “They have lived with the matter for years and if it is finally coming to an end, detailed reasons help bring a measure of closure. And if you’re losing, it’s good to know why. When you get arrested by the police, even they tell you why.”

He suggested there might be “a happy medium” to be struck in some cases between judgments that run just a few paragraphs and those which run hundreds of paragraphs.

“Some busy trial judges, when writing decisions, operate on the basis of ‘do enough, write enough, to get the job done’ — that is don’t write an LL.M. thesis on everything,” Meehan pointed out. “Does that same principle apply to the Supreme Court? Is more needed? Is more helpful? Tough question, because sometimes more is not needed. And sometimes it is.”

Feds shell out $250K to bureaucrats for Phoenix-related financial losses
The Hill Times
Emily Haws
March 21, 2018

The government has paid out 86 per cent of the more than 1,400 claims it has received since the program started in September 2016.

The government has doled out nearly $250,000 since September 2016 to cover financial losses public servants have incurred because of the Phoenix pay system, according to the Treasury Board, which unions say indicates the program is working well despite seemingly low engagement.

From September 2016 to January 31, 2018, 1,452 claims have been processed government-wide, said Treasury Board spokesperson Martin Potvin in an emailed statement. Of that number, 1,244 claims (86 per cent) were fully or partially approved; 167 (11 per cent) were not eligible; and 41 claims (three per cent) are still in progress.

Known as the "Claims for expenses and financial losses due Phoenix" program, it reimburses bureaucrats being charged financial penalties because of pay issues stemming from the Phoenix pay system, which was launched in February 2016.

The Professional Institute of the Public Service of Canada (PIPSC) applauds the program, but add the low claim numbers indicate either employees don't know about it or don't have faith in it.

Dividing $250,000 by the 1,244 fully or partially approved claims, the average payment per claim is about $200. There is no indication of how many individual employees have filed claims, however, as Treasury Board doesn't track that information. One employee may file multiple claims.

"We fought for the claims office to be created and it actually seems to be working relatively well," said Debi Daviau, president of PIPSC, which represents 57,000 government scientists and IT workers. "It seems that those who are going through that process are finding it to be okay for what it covers, and the only concern is that it doesn't cover everything."

Public Service Alliance of Canada president Robyn Benson said workers deserve greater compensation for the losses, and reiterated that the government should "[hire] additional compensation advisers and [invest in the] additional resources needed to ensure our members are paid accurately and on time."

She added that Phoenix problems "have been very time-consuming" and "members are still overwhelmed with all they have to do to report problems and get emergency pay, let alone filing a claim for out-of-pocket expenses."

The program also provides bureaucrats with up to $200 to cover obtaining tax advice because of Phoenix, and offers interest-free advances for government benefits that have decreased due to paycheque overpayments causing higher income brackets.

The Phoenix pay system was supposed to consolidate payroll and save the government $70-million annually, but so far it's cost the government $460-million; with another $447-million announced in the Liberals' latest budget to fix the system and start looking for a new one.

The money to cover employees' financial losses comes from individual department and agency budgets, said Mr. Potvin, and each claim is assessed individually and processed outside of the Phoenix system.

The most commonly approved claims were for interest fees, bank fees, and accounting fees. To make a claim, employees must provide a summary of their pay issues and the fees they were charged because of them. They must also provide documentation such as bank or credit card statements.

"Claims for late payment charges, penalty fees, and private insurance premiums have also been paid," said Mr. Potvin in the statement.

PIPSC hasn't run any specific campaigns to educate members about the program, but they have linked the website in their Phoenix updates. PSAC also hasn't run any specific campaigns, but posts regularly on social media and their website about how to access available supports.

Ms. Daviau said the program is "quite appropriate," but added some cases are complex and not all penalties are covered. For example, it doesn't compensate workers for their inability to invest in their pension plan or other more ambiguous losses.

Those are expected to be covered in the ongoing Phoenix damages negotiations, said Ms. Daviau. The government announced it initiated formal damages talks in the budget.

"[The talks] are going relatively well. It's been made slightly more complicated by the fact we can't get accurate reporting out of [Public Services and Procurement Canada]," she said, adding it's not a matter of the department withholding information, but that the Phoenix system itself is making accessing that information complicated. She said she is hopeful that they will resolve the damages discussion in the near future.

Originally the pay problems were scheduled to be resolved by October 2016, but the 2018 federal budget announced $16-million over two years for the Treasury Board to engage in exploratory talks about moving forward with a new pay system.

Meanwhile, Public Services and Procurement Canada aims to get Phoenix to a "steady state" or consistently paying public servants correctly on time, although this state does not solve more long-term issues, hence the discussion around an alternative system.

In the fall, Public Services and Procurement Minister Carla Qualtrough (Delta, B.C.) said she was hopeful Phoenix would reach a steady state by the end of 2018. However, even once it is at a steady state the Public Service Pay Centre in Miramichi, N.B., would have a massive backlog of open cases to clear.

The Public Service Pay Centre's "dashboard"—a government website tracking the issue—was updated Friday, and showed the backlog decreased by 4,000 cases. Despite the good news, the government warned it could go up again and "a continual decline is not expected until later this spring."

Until it's all resolved, the government will continue to pay out claims for financial losses. More than 61 per cent of the claims came from 10 departments or agencies, with the top being Employment and Social Development, Fisheries and Oceans (which includes the Coast Guard), Correctional Services Canada, Public Services and Procurement, and Environment and Climate Change.

Ms. Daviau said she wasn't surprised by the departments listed as "it seems reasonable that they'd have a higher number of claims."

Treasury Board doesn't specifically track claims by employee type, said Mr. Potvin, but said that full-time, part-time, casual, students, retired employees, and those on leave without pay have made claims.

Mr. Potvin noted the claims have been submitted on a relatively consistent basis since the program's inception, with only significant increase coming between May and July 2017 for those claiming tax expenses.

"We expect a similar increase again this year for claims for tax advisory services, claims for employees whose income is being taxed at a higher tax bracket (new for 2018)," he added.

According to federal law, if reimbursement of an overpayment doesn't occur in the same tax year it was given, than an employee is responsible for the gross overpayment instead of the net overpayment, which has deductions. The law caused headaches for bureaucrats in December.

Since then, the government has said it won't claw back any overpayments until all issues on an employee's file are resolved and they receive their correct pay for three periods.

Les juges sont-ils à l'abris du #moiaussi ?
Serait-ce parce qu'on ne dispose pas suffisamment d'information sur le harcèlement sexuel commis par les juges au pays?
Droit Inc
Jean-François Parent
21 mars 2018

Il aura fallu qu'une demande en accès à l'information soit logée au Conseil canadien de la magistrature pour apprendre que deux enquêtes avaient été menées pour inconduite sexuelle.

La demande, faite par le magazine LawyersDaily (édité par NexisLexis), a permis d'apprendre que deux plaintes avaient été faites contre des magistrats en 2012. Ce sont les seules plaintes enregistrées dans la dernière décennie, selon le magazine.

L'une des plaintes alléguait qu'un juge de la Cour supérieure de l'Ontario avait eu des propos déplacés et qu'il avait touché certaines parties du corps d'une de ses employées. Pendant l'enquête du CCM, le juge a pris sa retraite.

« Cet incident n'a vu le jour que lorsque le LawyersDaily a demandé au CCM combien de plaintes à caractère sexuel visaient les 1 158 juges des cours supérieures au pays », écrit le magazine.

L'avocat et directeur général du CCM, Norman Sabourin, a expliqué au LawyersDaily qu'il n'y avait eu, à sa connaissance, que deux plaintes de nature sexuelle. Celles-ci ont été reçues en 2012. La première a été citée plus haut. La deuxième, qui concerne un juge toujours en exercice, révèle que des employés chargés de réparer l'ordinateur du juge avaient été exposés « par inadvertance » au matériel pornographique que le juge avait téléchargé.

Une plainte n'est pas toujours une option

Dans la foulée du mouvement de dénonciation #MoiAussi, qui a affligé plusieurs secteurs comme la culture et les sports, certains refusent de croire que ces deux incidents soient les seuls à s'être produits dans les palais de justice du pays.

C'est le cas de la plaideuse torontoise Simona Jellinek, qui représente des victimes d'agressions sexuelles. Selon elle, le dépôt d'une plainte de nature sexuelle contre un magistrat n'est pas une option pour plusieurs, employés ou juristes, étant donné « les relations de pouvoirs, les sensibilités et les répercussions potentielles » qu'une telle plainte peut avoir sur une carrière.
Pour la sénatrice indépendante Marilou McPhedran, juriste de formation et spécialiste du harcèlement dans les milieux professionnels, « si on a affaire à une plainte (de cette nature), la situation est très sérieuse pour la profession, et elle doit être mise sur la table », dit-elle.

La sénatrice exhorte le milieu à remettre en question la confidentialité des situations délictuelles. S'il n'existe pas de mécanisme d'examen des plaintes qui soit public et transparent, dit-elle en substance, alors « il n'existe pas suffisamment d'information sur le phénomène pour que le milieu juridique soit en mesure d'affirmer que les choses vont bien. Si on sait une chose concernant l'exploitation et le harcèlement sexuel commis par ceux qui sont en relation de pouvoir, c'est que les plaintes sont beaucoup moins nombreuses que les incidents vécus ».

Elle ajoute que les cas d'autocensure sont nombreux, notamment chez les femmes aux premiers échelons de la profession juridique. On joue trop facilement sa carrière à se plaindre de comportements inappropriés, soutient Marilou McPhedran dans les pages du LawyersDaily.

Le CCM se défend bien de jouer l'autruche, se disant vigilant et conscient que les avocats et les employés des palais de justice « sont dans une position vulnérable et qu'ils doivent bénéficier de toute la protection possible », dit Norman Sabourin au magazine. Il signale d'ailleurs que le CCM est le seul de son genre à réagir aux plaintes anonymes et à protéger cet anonymat le cas échéant.

Norman Sabourin n'a pas répondu rapidement à nos demandes de commentaires.

Accusation erronée : un homme acquitté d'avoir fait craindre un acte terroriste
Un résident de Brossard, qui a fait croire à la police américaine qu'un de ses collègues planifiait un acte terroriste, a été en partie blanchi par la Cour
Radio-Canada
21 mars 2018

Cela est survenu en raison d'une erreur dans les chefs d'accusation, mardi au palais de justice de Montréal.

En août 2016, le résident de Brossard Hasnat Miftahul Syed se procure un téléphone cellulaire prépayé et fait trois appels anonymes auprès de la police américaine.

L'homme de 37 ans dénonce un de ses collègues qui devrait passer la douane américaine au volant d'un véhicule bourré d'explosifs et de drogues, pour planifier un attentat terroriste, possiblement dans l'État de New York.

La police arrête le collègue en question, mais l'enquête permet de démontrer que l'histoire de M. Syed est sans fondement. L'affaire se retourne contre lui et il est accusé d'avoir commis un acte qui a faussement fait craindre des activités terroristes et de méfait public.

Vengeance contre son collègue

La poursuite a tenté de démontrer lors du procès que M. Syed avait inventé les allégations pour se venger de son collègue. D'ailleurs, le jour même de l'achat du téléphone cellulaire, le 11 août 2016, il avait reçu un avertissement écrit de la part de son patron pour mauvais rendement.

Mais l'accusé s'est défendu en expliquant qu'il avait été effrayé en entendant son collègue parler de ses projets terroristes au bureau.

Dans sa décision, mardi, le juge Robert Marchi, de la Cour du Québec, a statué que cette version des faits était carrément « invraisemblable ».

Le magistrat doute qu'une personne qui planifierait un attentat terroriste en discuterait de façon ouverte, sans se cacher, devant ses collègues. Il croit aussi que si M. Syed avait eu de réelles craintes, il aurait pu se confier à son superviseur, avant de communiquer avec les autorités. Même si le tribunal croit aux arguments de la poursuite, il a seulement reconnu l'accusé coupable de méfait public, mais pas pour avoir fait craindre un acte terroriste.

Erreur dans les chefs d'accusation
Selon le juge Marchi, le mauvais chef d'accusation a été porté contre Hasnat Miftahul Syed, après son arrestation.

Il aurait dû être accusé d'avoir transmis des renseignements qui ont faussement fait craindre des activités terroristes, et non pas d'avoir commis « un acte ».

Il y a très peu de jurisprudence pour ce type d'accusations, ce qui pourrait expliquer qu'il y ait eu une certaine confusion, selon la procureure aux poursuites criminelles et pénales Carolyne Paquin, qui n'était pas au dossier lorsque les accusations ont été portées.

Le Directeur des poursuites criminelles et pénales va étudier la possibilité de porter la décision en appel.

De graves conséquences

Hasnat Miftahul Syed risque un maximum de cinq ans de détention pour méfait public. La poursuite va insister sur les graves conséquences d'avoir menti pour déclencher une enquête.

« Monsieur a fait plusieurs appels et il y a eu quand même une enquête policière de longue haleine. Ce sont des coûts pour les contribuables, a soutenu Me Paquin en marge de l'audience. Il y a eu des séquelles chez la personne qui a été ciblée au départ comme ce potentiel terroriste. C'est quelqu'un qui a été arrêté à son domicile devant sa famille. Théoriquement, lorsqu'il aurait passé les douanes, il aurait pu y avoir des répercussions énormes », a-t-elle ajouté.

L'avocat de M. Syed a affirmé que son client est sous le choc d'avoir été déclaré coupable de méfait public et qu'il est trop tôt pour décider s'il interjettera appel.
« Il y a beaucoup d'émotion pour M. Syed aujourd'hui. C'est un moment qui va être difficile, il va falloir absorber tout ça. On va pouvoir prendre position dans les prochains jours », a expliqué Me Nicolas Welt.

Les observations sur la peine auront lieu le 29 mars.

Former Supreme Court of Canada chief justice Beverley McLachlin to be judge in Hong Kong
McLachlin joined by Baroness Brenda Hale, current head of U.K.'s supreme court
CBC News
Peter Zimonjic
March 21, 2018

Hong Kong's top court has appointed former Supreme Court chief justice Beverley McLachlin to sit as a non-permanent common-law judge on the Court of Final Appeal.

McLachlin, who recently retired from Canada's Supreme Court, will take up her new role once her appointment is endorsed by the Legislative Council, an elected body in Hong Kong that functions as a parliament or legislature.

The Court of Final Appeal routinely invites judges from other common law jurisdictions to be non-permanent members and has included judges from the United Kingdom, Australia and New Zealand over the years.

The court was established in July 1997, replacing the Judicial Committee of the Privy Council in London as the highest appellate court in the former British colony, now a special administrative region of China.

The court can have up to 30 non-permanent judges at any one time. At present there are three non-permanent Hong Kong judges and 12 non-permanent common-law judges.

When hearing an appeal the court sits with five judges, the chief justice, three permanent judges and one non-permanent judge that is either a Hong Kong judge or a common-law judge.

McLachlin stepped down from the Supreme Court in December after 28 years, including almost 18 years as chief justice.

She is being appointed along with Baroness Brenda Hale from the U.K.. Hale is the first woman to sit as president of the U.K.'s Supreme Court, a position she took up in October.

When Hale and McLachlin are confirmed the court's number of non-permanent common-law judges will rise from 12 to 14.

Former Supreme Court justice, Cabinet minister among alumni at Hart House debate
2018 Hart House Alumni Debate focuses on Canada's constitution
The Varsity
Kathryn Mannie
March 21, 2018

The most recent Hart House debate saw a multi-generational group of speakers take the stage to tackle the tricky Section 33 of the Constitution of Canada.

The annual Hart House Alumni Debate was held on March 13 in front of a packed crowd in the Debates Room. Each year, the Hart House Debates & Dialogue Committee organizes a debate that hears voices from both alumni and student participants.

This year, the featured debaters included former Justice of the Supreme Court of Canada Louis LeBel, Member of Parliament and former Cabinet Minister Michael Chong, recent U of T Law alumnus and current commercial litigator Anisah Hassan, and current fourth-year undergraduate student and multi-title winning debater Sarah Millman.

Commenting on the selection of the participants, Aceel Hawa, Chair of the Hart House Debates & Dialogue Committee, said that they "wanted to target alumni that would not only represent a variety of different age groups, but also different life experiences as well."

The debate addressed the role of Section 33 of the Canadian Charter of Rights and Freedoms, better known as the 'notwithstanding clause.' Section 33 is considered to be a particular controversial item in the constitution.

Section 33 allows federal parliament and provincial legislatures to enact laws that override certain freedoms entrenched in the charter. In essence, it allows legislative branches to override the Supreme

Court of Canada, making it possible to pass legislation that the Supreme Court would strike down as being unconstitutional.

Following the structure of parliamentary debating, the four debaters were evenly split into two sides: the Government, consisting of LeBel and Millman, and the Opposition, consisting of Chong and Hassan. The Government's position was that the Supreme Court should have the final say on legislation while the Opposition argued that legislative branches should have the right to ultimately decide.

In making his case, LeBel described the notwithstanding clause as "the wart on the nose of our great constitution." While the notwithstanding clause doesn't directly affect many Canadians due to its rarity of use, LeBel told The Varsity that it is still an important issue to discuss. "It raises basic questions about 'what is this constitution?' [and] what is the nature of the state we have?'," said Lebel. "Here is a very good example, I would say, of the difference between the text of the constitution and the life of the constitution."

After hearing ten-minute speeches from each of the debaters, the audience left the room through a selection of two doors in order to tally the votes for and against the motion. While the results were close, the Opposition came out on top.

Describing the reasons for his vote, audience member and U of T alumni Ben Atkins said that he "liked the argument that, if you eliminated the notwithstanding clause, you affect the way in which judges are appointed."

Chong, reflecting on the importance of the debate, told The Varsity that "politics is incredibly important. It governs every aspect of our lives and the more people get involved the more they can make a difference."

"[Debate] has pushed me to think critically about everything," said Millman, in an interview with The Varsity.

"It's been hugely important because it has informed the way I think for my courses, and the way I engage with politics, and the way that I look at any news story. It just changes the way you think."

Phoenix fallout: Federal government will need to review all employee pay files
iPolitics
Kathryn May
March 21, 2018

The federal government will have to conduct a review of all employees' pay records to ensure they are accurate once the troubled Phoenix pay system is finally fixed, say federal officials.

Senior bureaucrats at Public Services and Procurement Canada told MPs at the Commons government operations committee Tuesday that some kind of a review will be needed to restore confidence and assure employees they are being paid properly.

“We are aware that over time, once we get to the point of stability in the system, we will need to offer some file review for employees so they can understand their pay stubs and they are getting what they are entitled to and, if there are any anomalies, we are able to address them,” said Less Linklater, the associate deputy minister who is overseeing the fixing of Phoenix.

It’s been two years since the calamitous rollout of the Phoenix pay system, built by IBM using PeopleSoft software. Today, half of Canada’s public service faces some kind of pay problem, eroding confidence in the system.

NDP MP Daniel Blaikie, who questioned whether an audit of files was needed, asked what process the government had in place to determine who owed union dues.

Phoenix has failed to collect union dues properly and no one knows how much is owed. The government has advanced the unions $14 million to cover outstanding dues over two years.

Public Services Minister Carla Qualtrough said some of these issues should be resolved by a pilot project at the Miriamichi pay centre in which compensation advisers are working in ‘pods’ dedicated to specific departments.

She said these teams are shifting from processing transaction by transaction to resolving all of an employee’s outstanding pay issues “to make them whole.” She said this provides the “big picture of an individual” and better understanding of what an employee owes the government and visa versa

But unpaid union dues are just the latest frustration public servants have faced over the past two years. The fickle Phoenix, which has overpaid them, underpaid them, not paid them at all or fouled up their tax slips, has left many wondering if they are even getting the correct pay every two weeks.

It’s unclear when a review would be conducted, but Qualtrough has said that Phoenix won’t be ‘stabilized’ before the end of 2018.

Many argue a review has to be done before the government launches a new pay system to ensure clean and accurate files are moved to the new system. Phoenix was dogged from the start by a large backlog of uncompleted files with data and records that had not been properly cleansed before they were moved to the new pay system.

The federal budget has given Treasury Board $16 million to begin the search for a Phoenix replacement.

Linklater said Treasury Board will appoint a senior bureaucrat to lead the process, co-ordinating input from key players, such as the chief information officer; chief human resources officer and comptroller general. Unions, the industry, and compensation staff who are processing pay transactions will also be consulted.

The budget also gave the PSPC more than $431 million towards stabilizing Phoenix.

That money will spent on hiring more compensation staff; improving or adding new technology and supporting employees. These expenditures will support new training, a revamped call centre and the claims office responsible for any out-of-pocket expenses employees faced because of Phoenix pay foul-ups.

Phoenix has cost the government more than $1 billion, including $645 million dealing with the pay crisis. The government now has 14 offices, including the main pay centre in Miramichi. N.B. and several satellite pay centres. The 550 compensation advisers who were supposed to process all pay transactions now number 1,500.

The Office of the Comptroller-General, the government's chief financial officer, is also leading a major spending review to get a full picture of Phoenix costs. It will drill down into the millions that departments have spent — on top of normal pay costs — to manage Phoenix problems. That is expected to be completed by May.

The government is also expected to issue a $2-million contract next month with Oracle, which developed the PeopleSoft software that Phoenix and many departments' human resource system are built on.

Linklater said Oracle will bring a "fresh eye" to the customization of its software to handle federal payroll and whether "it could be undone or revamped" to improve efficiency.

IBM was hired by the government to customize PeopleSoft and adapt it for the government, which has one of the most complex pay regimes in the country. The government has so far agreed to pay IBM more than $225 million.

That contract, however, has been amended with IBM now working on a "managed service arrangement" which Linklater said shifts more of the risk and responsibility to IBM because it must come up with a solution for problems when they arise. Under the previous "task authorization" arrangement, the government specified the work to be done.

The existing contract expires in 2019.

"They are taking on more risk, more of the routine running of pay; the 365 24-hours a day, which frees up our crown resources to focus more on the higher value, technical and functional fixes that will bridge some of the inefficiencies that we have" said Linklater.

IBM has come under fire for several high-profile system failures. Queensland Health in Australia unsuccessfully sued IBM over a botched pay system that will cost more than $1 billion to fix. Last year, Pennsylvania launched a lawsuit against IBM over a failed upgrade to its unemployment compensation system.

IBM has gotten off much easier with Phoenix and, so far hasn't had to publicly answer for its role in how Phoenix was planned, tested or the problems that cropped up. PSPC officials have maintained that IBM did nothing wrong and delivered what was asked of it under the contract.

The Senate, which is holding hearings on Phoenix, has asked IBM officials to testify at hearings next week.

BY THE NUMBERS:

PSPC recapped for MPs the costs for Phoenix so far.

$309 million: cost to develop Phoenix, which was part of the Transformation of Pay Administration Initiative

$210 million- foregone savings over three years that departments used to to deal with Phoenix problems.

$14 million – advances to unions for union dues they are owed over two years.

$50 million – the amount of the first funding injection in 2016 to help hire more staff and fix Phoenix

$142 million – amount of the next funding instalment in 2017; most going to PSPC to hire more people, improve technology and support employees

$431 million – amount given to PSCP in 2018 budget to stabilize Phoenix

$16 million – amount the budget gave Treasury Board to start looking for a Phoenix replacement

$5.5 million – amount to Canada Revenue Agency to handle processing of tax re-assessments needed because of pay issues.

Projet de loi sur les normes du travail : pas assez contre le harcèlement ?
Après le dépôt du projet de loi, une avocate déplore le manque d'engagement concernant le harcèlement.
Droit Inc
Delphine Jung
22 mars 2018

Après le dépôt du projet de loi sur les normes du travail, une avocate déplore le manque d'engagement concernant le harcèlement.

« Cela faisait 15 ans qu'on n'avait pas touché à cela », dit Me Marianne Plamondon, avocate chez Langlois et présidente de l'Ordre des conseillers en ressources humaines agréés (CRHA). « Ce projet de loi était hautement attendu tant par les syndicats que le patronat », ajoute-t-elle.

Parmi les mesures phares annoncées par le gouvernement Couillard, celles qui concernent la conciliation famille-travail prennent la plus grande place : augmentation du nombre de semaines d'absence autorisée pour aider un proche et absence autorisée de 104 semaines, au lieu de 52 semaines en cas de décès d'un enfant mineur entre autres.

« Il y en a pour tout le monde, tant les syndicats que le patronat », résume Me Plamondon.

Le bémol du projet de loi se situe au niveau des annonces faites concernant le harcèlement psychologique. Rien de nouveau n'a été amené par le gouvernement.

« La notion de harcèlement sexuel était déjà incluse dans la jurisprudence, donc pour moi cet élément du projet de loi n'est pas une avancée », dit l'avocate.

Simple effet d'annonce, le gouvernement stipule dans son projet de loi que tout employeur aura l'obligation d'adopter et rendre disponible à ses salariés une « politique de prévention du harcèlement psychologique et de traitement des plaintes ». « Il faut savoir que la plupart des employeurs avaient déjà mis en place une telle politique », rétorque Me Plamondon.

Quand elle entend le gouvernement parler d'un « renforcement », elle se dit « plus ou moins d'accord ». Pour elle, l'avancement aurait été d'obliger la tenue d'une enquête comme c'est le cas en Ontario. « Il y a une obligation de mener une enquête par un tiers externe pour faire la lumière sur les faits lorsqu'il y a une plainte », détaille-t-elle.

Autre mesure phare, l'obligation pour les agences de placement d'obtenir un permis délivré par la CNESST.

« On sait que les agences de placement étaient nombreuses au Québec à employer des travailleurs immigrés qui ne connaissaient pas nécessairement leurs droits. Ils voyaient parfois l'agence fermer les portes et se retrouvaient sans salaire. »

L'employeur sera désormais solidairement responsable du paiement du salaire au salarié, poursuit Me Plamondon, et ce dernier aura droit au même traitement que les salariés de l'entreprise. « Il n'est plus question de payer un employé d'agence à 18 dollars de l'heure alors que les salariés de l'entreprise gagnent 40 dollars de l'heure », précise l'avocate.

Enfin, dans son projet de loi, le gouvernement permet aux personnes embauchées depuis plus de trois ans au sein d'une même entreprise de bénéficier de trois semaines de vacances payées par an. Auparavant, il fallait travailler depuis cinq ans au moins dans une même entreprise pour prétendre à cette troisième semaine de vacances.

Quoi qu'il en soit, les élections approchant, le timing est tout de même « serré » pour aller jusqu'à l'adoption de la loi, concède l'experte.

Fausse avocate: la communauté juridique ébranlée
La pratique illégale du droit de la DG des Grands Frères Grandes Soeurs de l'Outaouais suscite de nombreuses questions
Radio-Canada
22 mars 2018

Yvonne Dubé s'est faussement présentée comme avocate et a pratiqué le droit sans autorisation de septembre 2011 à mars 2012. Depuis 2015, elle se conforme à une injonction de la Cour supérieure de l'Ontario qui l'empêche de pratiquer le droit sans autorisation.

Mais quelles sont les autres conséquences de se faire passer pour un avocat?

Bien que le cas d'Yvonne Dubé soit exceptionnel, son parcours ébranle la communauté juridique. Elle a représenté illégalement des clients dans des causes criminelles à au moins 12 reprises.

« C'est surprenant parce que j'imagine toujours que c'est difficile de se faire passer pour un avocat », lance le criminaliste Me Jean-Pierre Rancourt. Plusieurs avocats d'Ottawa et de Gatineau ont refusé de commenter l'enquête de Radio-Canada en entrevue, par crainte d'y être associés.

En Ontario, comme au Québec, une personne exerçant le droit illégalement peut être contrainte à payer des amendes, ce qui n'a pas été le cas de Mme Dubé.

Le professeur adjoint à la Faculté de droit de l'Université d'Ottawa, Alain Roussy, explique que les pénalités s'élèvent généralement à 25 000 $ ou 50 000 $. « Ce n’est pas la fin du monde, mais c'est quand même un montant qui pour le commun des mortels peut être assez élevé pour l'empêcher de continuer d'agir. »

Selon cet expert de la Loi sur le Barreau de l'Ontario, élever ces pénalités à 100 000 $ ou 200 000 $ diminuerait probablement le risque de récidive. « Ça aurait un effet dissuasif supplémentaire », dit M. Roussy.

Infraction criminelle?

Un individu, qui ne respecte pas les clauses d'une injonction émise par un tribunal, s'expose à l'emprisonnement.

Les personnes qui s'improvisent avocats pourraient s'exposer à d'autres accusations criminelles. Mais cette procédure peut être complexe, le Code criminel ne prévoyant pas d'infraction spécifique pour les personnes oeuvrant sans permis comme avocat, contrairement aux militaires ou aux policiers.

Me Jean-Pierre Rancourt estime qu'une personne qui s'improvise avocate pourrait, sous certaines conditions, être accusée de fraude. « Si elle a, par exemple, représenté des clients, chargé des montants d'argent et s'est fait passer pour une avocate, peut-être qu'il y a de la fraude, à ce moment-là ce sera aux policiers de vérifier. »

Mieux protéger la profession

Dans une conversation téléphonique, le directeur de la Fédération des associations du Barreau de l'Ontario, Michael Ras, a qualifié l'exercice illégal de la profession d'un avocat de « troublant ». Il enjoint ses membres à dénoncer toute irrégularité en s'adressant au Barreau de l'Ontario.

La Fédération a toutefois refusé d'accorder une entrevue à Radio-Canada pour nous donner de plus amples commentaires. M. Ras estime que c'est au Barreau de l'Ontario de répondre à toutes les questions relatives à cet enjeu. L'organisme de réglementation a, lui aussi, refusé de répondre à nos questions à la caméra.

Me Jean-Pierre Rancourt estime que les législateurs devraient s'assurer de mieux protéger la profession, par exemple, en modifiant le Code criminel pour y ajouter des infractions spécifiques à la fausse représentation d'avocat.

Alain Roussy ajoute pour sa part que ce sont surtout les plus petits cabinets qui sont plus susceptibles d'être plongés dans de telles circonstances, puisqu'il « y a moins de structure de surveillance ». Il souligne que de plus en plus d'avocats réfléchissent à la possibilité d'avoir une réglementation plus proactive en Ontario, ce qui permettrait de superviser les cabinets et pas seulement les avocats.

Un tel changement permettrait, selon M. Roussy, de mieux prévenir les dérives dans la profession, mais aussi de mieux répondre à plusieurs problématiques, dont les conflits d'intérêts et même les pratiques discriminatoires à l'embauche.

Protection des citoyens

« Le fait qu'on soit avocat, c'est ça qui donne une bonne protection au citoyen », lance la secrétaire du Barreau du Québec, Sylvie Champagne. Les membres du Barreau sont tenus de respecter plusieurs normes, qui garantissent la qualité du travail. « Si on fait une faute professionnelle, le citoyen pourra nous poursuivre et être indemnisé », indique-t-elle.

La responsabilité incombe aussi aux citoyens de faire leurs propres recherches avant d'embaucher un avocat, croit Mme Champagne. « Les gens sont protégés, mais comme dans n'importe quel domaine il faut que le citoyen soit conscientisé et doit faire sa vérification. »

Le Barreau du Québec craint néanmoins de voir une augmentation du nombre de personnes utilisant sans autorisation le titre d'avocat en raison de l'offre croissante des services d'information juridique en ligne. « Seuls les avocats et les notaires peuvent donner des conseils juridiques au Québec », dit Mme Champagne.

La Cour suprême a déjà statué que se faire représenter par une personne qui s'improvise avocat n'invalide pas nécessairement les procédures judiciaires.

Une juriste à la Commission canadienne des droits de la personne
Cette juriste multidiplômée – notamment de Harvard – passe du ministère de la Justice à la Commission des droits de la personne
Droit Inc
Delphine Jung
22 mars 2018

Geneviève Chabot a été nommée vice-présidente de la Commission canadienne des droits de la personne en janvier 2018.

Avant d'obtenir ce poste, elle a travaillé en tant que conseillère au ministère de la Justice du Canada, au Yukon pendant un peu plus de quatre ans.

Elle a également été vice-présidente de la Commission des droits de la personne du Yukon et a enseigné à temps partiel les cours Droits et libertés et Preuve civile, à l'Université d'Ottawa.

C'est d'ailleurs à cette université qu'elle a complété son baccalauréat en droit en 2008 puis, en 2009, son diplôme d'études supérieures spécialisé en common law et droit transnational (Juris doctor). Me Chabot est aussi détentrice d'un baccalauréat en Arts, psychologie de l'Université Laval, d'une maîtrise en droit de l'Université Harvard et d'un diplôme d'études supérieures de l'Université Athabasca en rédaction législative.

Après avoir été clerc auprès du juge Louis LeBel, elle a été embauchée comme avocate au cabinet Osler, à Montréal. Elle y a essentiellement pratiqué en litige commercial.

Parallèlement à ses engagements professionnels, elle s'est impliquée au sein de l'Association du Barreau canadien, section Yukon.

Nominations now open for 2018 Guthrie access to justice award
Deadline for submissions is May 17
Canadian Lawyer Magazine
Amanda Woodrow
March 22, 2018

Nominations for the Law Foundation of Ontario's Guthrie Award are now open.

Created in 1996 to honour H. Donald Guthrie, a Law Foundation trustee for 21 years, including 13 years as chairman, the Guthrie Award recognizes individuals who have devoted their careers to improving access to justice.

The number of nominations varies from year to year, and Tanya Lee, chief executive officer of the Law Foundation, says it's a hard decision to choose recipients each year.

“We’re not looking for one type of person. We know many people work in different sectors with regards to providing better access to justice, and there’s a strong range of nominees, so it’s hard to choose,” she says.

Guthrie Award winners have many different legal backgrounds, varying from community legal clinics, the judiciary and non-profit organizations. Past recipients of this award have improved the youth justice system, advanced justice for Indigenous communities, assisted women in abusive situations, and strengthened community clinics to help the poor.

Here are some of the previous recipients of the Guthrie Award in the last 10 years:

In 2017, professor Reem Bahdi won the award for being the Canadian Bar Association’s first equality adviser and assisting in creating the Arab Canadian Lawyers Association.

In 2015, Julie Matthews won on merit; she was highly respected in the justice and non-profit sectors and was involved in many projects that allowed individuals to seek legal aid and educated legal professionals and the public on the law and the resources that were available to the powerless and poor.

In 2014, the award was presented to Kimberly Murray, who improved access to justice for Aboriginal Peoples as well as her public service as an educator, attorney and community leader for 20 years.

In 2013, Justice Stephen Goudge was recognized as one of Canada’s most respected appellate judges and an inspiration outside of the Ontario Court of Appeal for his activities aimed to promote access to justice.

In 2011, one of the University of Toronto’s Faculty of Law professors, Judith McCormack, won the award for her lasting impact on her students entering the legal field and her success in achieving systemic changes in legal clinics, law schools and the tribunal sector.

In 2009, the recipient of the award was not a person, but the Barbra Schlifer Commemorative Clinic for its stance and involvement in addressing the underlying causes and immediate consequences of violence against women.

In 2008, Alan Borovoy won the award for his four decades of leadership, specifically as an advocate for the Canadian Civil Liberties Association.

“We hope this award is meaningful to others as much as to the law foundation because we are engaged with this and we all strive for the same goal,” Lee says.

The nomination period ends May 17. For more information on submitting a nomination, visit the Foundation website.

Crown may seek Supreme Court of Canada appeal in Hells Angels murder case

Dean Daniel Kelsie's convictions in October 2000 shooting in Dartmouth, N.S., overturned in December

CBC News
Blair Rhodes
March 22, 2018

The Crown may seek to appeal to the Supreme Court of Canada a ruling by Nova Scotia's highest court that quashed the convictions against one of the men accused in a Hells Angels murder nearly two decades ago.

Dean Daniel Kelsie, 45, was found guilty of first-degree murder and conspiracy to commit murder in the Oct. 3, 2000, shooting death of Sean Simmons in the lobby of an apartment building in north-end Dartmouth.

But last December, his convictions were overturned by the Nova Scotia Court of Appeal and a new trial ordered.

On Thursday morning, Kelsie was brought into Nova Scotia Supreme Court to provide an update on his status. He told the judge his case has stalled because the Crown is still considering whether to appeal the Court of Appeal ruling to the Supreme Court of Canada.

"I think it's going to be pursued," Crown prosecutor Peter Craig said in reference to a possible appeal. "The ultimate decision hasn't yet been made."

Kelsie said until the Crown makes a decision on appeal, "My situation is stagnant."

"Three judges already quashed my sentence after 18 years in prison," Kelsie said, referring to the three-member Court of Appeal panel who ruled in December. Kelsie has been in custody since his arrest in 2001.

At Kelsie's first trial in 2003, the jury heard that Simmons was shot to death because he'd allegedly had an affair with a Hells Angel. Kelsie was accused of pulling the trigger.

Two other men, Neil William Smith and Wayne Alexander James, are both serving life sentences for their roles in Simmons's killing. A fourth man, Steven Gareau, was set free last month after a judge ended the prosecution against him.

Gareau had been twice found guilty of first-degree murder, but both convictions were overturned on appeal. Last month, Justice Campbell ruled that it would be unfair to subject Gareau to a third trial.

On Thursday, Kelsie told Justice Glen McDougall that Toronto lawyer Philip Campbell has agreed to represent him in his new trial, but that Campbell was unable to appear with him on this occasion.

Without Campbell present, McDougall agreed to a request to put Kelsie's matter over for two weeks to allow time to sort things out.

Former top aide to Stephen Harper loses appeal to Supreme Court on influence peddling charge
High court upholds conviction, sends Bruce Carson back to court for sentencing
CBC News
Kathleen Harris,
Mar 22, 2018

The Supreme Court of Canada has rejected an appeal by a former top adviser to Stephen Harper, upholding Bruce Carson's influence peddling conviction related to the sale of water treatment systems on First Nations reserves.

The ruling means Carson will return to court for sentencing on the charge, which falls under fraud offences and carries a potential prison term of up to five years.

In an 8-1 decision, the majority of justices adopted a broad interpretation of what constitutes "business relating to the government" under the Criminal Code section on influence peddling.

Writing for the majority, Justice Andromache Karakatsanis said business related to government includes all publicly funded transactions where the government could impose or amend terms and conditions that would favour one vendor over another, not just those facilitated under the existing operational structure.

"The offence captures promises to exercise influence to change or expand government programs," the decision reads.

An accused does not need to actually have influence with the government, or succeed in influencing government, to be found guilty of influence peddling, because the law targets anyone "having or pretending to have influence with the government," the judgment reads.

One dissenting view
Carson had demanded a benefit, which was a sales commission for his then-girlfriend who was employed by H20 Professionals Inc., in exchange for helping the company land contracts by leveraging his contacts with government and First Nations officials.

In a dissenting view, Justice Suzanne Côté took a narrow interpretation, arguing that "business related to government" must be related to the actual operational structures in place at that time of the alleged offence. At the point in time, when Carson was assisting H20, the federal government had granted First Nations complete autonomy on the purchase of point-of-use water systems, she noted.

At trial, Bruce Carson was found not guilty of influence peddling for trying to persuade First Nations communities to buy water treatment systems being sold by a company that employed his then-

girlfriend. The Ontario Court of Appeal overturned the acquittal, leaving the final say to the country's highest court.

The trial judge found the Criminal Code offence of influence peddling applies narrowly to transactions involving the government, while a majority on the appeals court found the offence has a much broader reach.

Carson did not deny he had influence with the government, or that he demanded a sales commission for his girlfriend Michele McPherson in exchange for helping H20 sell their systems to First Nations bands.

A document filed by Carson's lawyer Patrick McCann with the high court said evidence at trial was "overwhelming" that the department of Indian and Northern Affairs Canada (INAC) had no control over or approval role in the purchase of the water purification systems. The First Nations bands had "complete autonomy" in the use of their funds for those purchases.

"Using one's influence to assist in doing business with entities such as First Nations Bands, charitable institutions, start-up companies and others which receive government funding or subsidies and over which the government has no control, cannot affect the integrity of the government and should not attract prosecution (under the Criminal Code)," the factum concludes.

In a response for the Attorney General of Ontario, lawyer Roger Shallow noted that Carson had arranged meetings between H20 principals and INAC and First Nations officials, and led the company to believe he could get them in front of the "right people" to "push it through."

'Morally blameworthy'
"The appellant's undisputed conduct was intentional, morally blameworthy, and compromised government integrity and the appearance of government integrity, the very type of harm the (Criminal Code) section was intended to prevent," he wrote. "The factual findings made by the trial judge compelled a verdict of guilt."

In 2016, Carson was found guilty on three counts under the Lobbying Act over work he did on a national energy strategy while director of the Canada School of Energy and Environment and later as the vice-chair of the Energy Policy Institute of Canada.

McCann told CBC News those convictions were appealed to the Superior Court, where one of the convictions was overturned. The Crown is seeking leave to appeal that ruling at the high court, but Carson is not participating in their application, he said.

Carson had a history of financial problems and was convicted of fraud in the 1980s and 1990s before he was hired as an adviser to Harper.

He worked closely with Harper from 2006 to early 2009, and wrote a book called, '14 Days: Making the Conservative Movement in Canada,' about the early days of the Conservative government.

Quebec judge orders journalist to identify sources
iPolitics
Kevin Dougherty
March 22, 2018

QUEBEC – In a new twist in the trial for fraud and conspiracy of former Quebec deputy premier Nathalie Normandeau and five co-accused, a Quebec Superior Court judge has ordered a Radio-Canada journalist to name her sources.

Justice Jean-François Émond on Thursday reversed a decision by trial judge André Perreault in February that two reporters subpoenaed by the defence did not have testify. Perreault had based his judgment on Bill S-231, adopted unanimously in Parliament last October, that recognized the right of reporters to protect their sources.

Judge Perreault indicated late Thursday afternoon he was prepared to hear the testimony of Radio-Canada journalist Marie-Maude Denis on Monday.

In his decision, requiring Denis to name her sources, Émond left it to Perreault to decide how he would protect the identity of her sources "for as long as judged useful," meaning there could be a temporary publication ban.

Asked for comment, Denis said Émond's decision "cannot stand."

"No one will trust us," said the award-winning investigative journalist.

Senator Jean-Claude Carignan, who introduced Bill S-231, said he was disappointed by the Émond decision, predicting the case would be settled in the Supreme Court of Canada.

Émond ruled on an appeal by lawyers representing Marc-Yvan Côté, a former Quebec Liberal minister and fundraiser, who is one of the five co-accused.

Émond found that Perreault had ignored the fact the case is "sub judice" and in stating that the reporters, Louis Lacroix and Denis, had said under oath that they did not know the names of their sources.

Émond pointed out that while this was the case for Lacroix, who never met or knew the identity of "Pierre," Denis did state that she knew the names of her sources.

Denis said in a sworn statement her source required anonymity in return for providing her information about Côté.

In a statement on Thursday, Radio-Canada's director-general of information Michel Cormier announced the public network would appeal.

“The protection of confidential sources is fundamental to the exercise of investigative journalism,” Cormier said. “This principle is recognized by a federal law and has been confirmed by a favourable judgment of the Supreme Court of Canada. “This (principle) is confirmed by a broad consensus in the country.”

Côté’s lawyers object that information from police files about their client has been leaked to the media.

Émond agreed that journalists have received elements of evidence in the case and did “not hesitate to publish this information,” ignoring the rule of sub judice “which forbids comments, notably in the information media, susceptible to influence the judicial decision to come.”

Côté’s lawyers say the leaks have been directed from the upper echelons of UPAC, Quebec’s police permanent anti-corruption squad and are arguing that, for that reason, the case should be thrown out of court.

Jacques Larochelle, Côté’s main lawyer, alleges the leaks have been “carefully orchestrated by a group of police officers working in the decision-making level of UPAC, for obscure reasons.”

Lawyers of the prosecution side do not deny that police officers are the sources of the leaks, noting that internal investigations to date have not positively identified the leakers, but that the leakers “did not act in the interests of the state.”

The case against Normandeau and Côté centres on illegal political contributions to the Quebec Liberal Party, alleging that in return the Liberal government granted subsidies and contracts to the firm making the illegal donations.

Quebecers go to the polls Oct. 1 in the province’s first fixed-date election and opposition parties in the province argue that the Liberals, in power for the last 15 years, with a brief 18-month Parti Québécois interregnum, have been corrupt in the past. The opposition parties allege that the Quebec Liberals have not overcome their past practices.

Premier Philippe Couillard responds that the party has turned the page on questionable financing practices.

As well, the premier says, changes in Quebec’s party financing law, setting a ceiling of $100 of party contributions, make it impossible for companies to make such illegal contributions.

Previously, the maximum donation was $3,000 and companies would have their employees write personal cheques, which the employer would reimburse, a practice that was illegal in Quebec, where only voters are allowed to give to a party or candidate.

La crème des plaideurs vous livre leurs techniques

Toutes les techniques de plaidoirie seront abordées lors de cette formation de cinq jours

Droit Inc

Delphine Jung

22 mars 2018

Cette formation vise à permettre aux avocats de parfaire leurs techniques de plaidoirie et de présentation devant les tribunaux. Elle est parrainée par l'UQAM et dirigée par Mes Michel Décary, avocat-conseil chez BCF et Sébastien Richemont, associé chez Woods.

Plusieurs juges et plaideurs feront partie des différents panels, notamment les juges Lucie Fournier, Diane Quenneville ou encore Marie-Josée Hogue.

Côté avocats, Mes Sophie Melchers de Norton Rose Fulbright, Pierre Lefebvre, de Langlois et Sylvain Lussier d'Osler seront présents.

« Nous avons décidé de réitérer l'expérience de l'année dernière qui avait été concluante. On avait eu 50 inscriptions et on a dû refuser du monde, car les locaux étaient trop petits. Il y a un vrai engouement », explique Me Richemont.

L'idée de cette formation qui s'étale sur cinq jours (les mercredis 11, 18 et 25 avril et le 2 et 9 mai) est « d'offrir un condensé de ce qui se fait pendant une semaine à Sherbrooke, mais en 15 heures », explique l'avocat.

Le but est aussi de permettre aux participants de poser leurs questions aux intervenants. « On va donc essayer de se limiter à 50 places », ajoute Me Richemont.

Pour lui, il existe actuellement beaucoup de formation sur des sujets particuliers du droit, mais l'aspect technique un peu moins.

Ainsi, toutes les techniques de plaidoirie seront abordées en ordre logique : de la préparation du dossier à l'appel en passant par les interrogatoires et l'administration de la preuve.

« Nous allons utiliser des cas fictifs utilisés partout en Amérique du Nord », poursuit l'avocat.

La formation est évidemment destinée à tous les plaideurs, quels que soient leur domaine de pratique et leurs années d'expérience.

Elles auront lieu les 11, 18 et 25 avril et les 2 et 9 mai, de 17h30 à 20h30, au pavillon Hubert-Aquin de l'UQAM.

Phoenix replacement will better mesh HR, pay systems, minister pledges
Carla Qualtrough tells senators 2 systems have to be better linked
CBC News
Ryan Tumilty
March 22, 2018

The replacement for the beleaguered Phoenix pay system will have to better integrate the government's human resources and pay departments, Public Services and Procurement Canada Minister Carla Qualtrough told senators at a committee hearing Wednesday night.

In the government's budget released in February, $16 million is set aside to replace the pay system that has continuously failed to pay employees correctly since it was launched more than two years ago.

Qualtrough told senators at the finance committee they have learned a new system can't put pay and human resources in silos.

"The partners in this crime are HR and pay and we know we can't just focus on the pay," she said.

"We have learned from everything that HR and pay are mutually dependent. They don't exist in isolation especially in this day of age."

She said the government currently has 32 different HR systems, all of which are integrated into Phoenix with varying levels of success.

Qualtrough said while there is a lot they still need to determine about the new system, it will cover both areas.

"I envision a time where we don't talk separately about an HR system and a pay system," she said.

Backlog didn't grow
While the government continues to find a replacement, Qualtrough said they have no choice but to try and stabilize Phoenix, stopping short of suggesting the system will be fixed.

She said they have seen some small progress in the last month, with the pay centre resolving 4,000 more cases than new cases came into the system.

"This means that the backlog at the Miramichi [N.B.], pay centre did not grow for the first time since last July," she said, while adding it could grow again.

She said compensation advisors are now being grouped into pods dedicated to specific departments, which she said allows them to gain expertise.

"If it's the Coast Guard, you can imagine, it's a different set of transactions than Elections Canada," she said.

She said they hope to transition all the pay advisors to this approach with the goal of reducing wait times for everyone over the next year.

Des victimes américaines de terrorisme iranien dédommagées... au Canada!
La Cour suprême rejette la demande d'appel logée par l'Iran et ses Gardiens de la révolution qui s'opposaient à la saisie de leurs actifs canadiens.
Droit Inc
Jean-François Parent
23 mars 2018

À la fin des années 1980, l'Américain Edward Tracy a passé cinq ans dans les geôles libanaises de la milice armée Hezbollah, financée par l'Iran.

Lui, comme des dizaines d'autres victimes de groupes terroristes soutenus par la République d'Iran, tentent depuis longtemps d'obtenir compensation pour la torture et les sévices qu'ils ont subi. Aux États-Unis, ils obtiennent des jugements contre l'Iran, mais sont incapables de réclamer leur dû... sauf au Canada.

Alors que l'immunité diplomatique rend des réclamations contre des États impossibles aux États-Unis, le Canada permet de rendre exécutoire, ici, un jugement contre un État promoteur de groupes terroristes rendu ailleurs dans le monde.

En effet, en vertu de la Loi visant à décourager les actes de terrorisme contre le Canada et les Canadiens, votée en 2012 par le gouvernement Harper, ces victimes peuvent déposer des requêtes judiciaires ici pour faire saisir des actifs de l'État iranien en sol canadien.

Ainsi, des citoyens d'autres pays, victimes de violences de la part d'un État considéré comme promoteur du terrorisme par le Canada, peuvent demander aux tribunaux canadiens de les aider à obtenir justice et d'ainsi percevoir les dommages gagnés en procès à même les actifs canadiens d'un État tiers.

18 M$ en jeu
Edward Tracy a été pris en otage pendant 5 ans par le Hezbollah au Liban, de 1986 à 1991. Fort d'un jugement rendu en sa faveur en 2003 aux États-Unis, il a demandé à la Cour supérieure de l'Ontario d'homologuer ce jugement condamnant l'Iran à lui verser 18 millions de dollars en dommage.

D'autres victimes américaines de terrorisme financé par l'Iran profitent aussi de ce que le Canada abroge l'immunité diplomatique de certains États qui ont commis des actes terroristes prévu au Code criminel. Cinq causes pendantes devant les tribunaux ontariens viennent ainsi de recevoir le feu vert de la Cour suprême, qui maintient ainsi les jugements visant la saisie d'immeubles et de comptes bancaires détenus au Canada par des représentants de l'Iran.

Edward Tracy et quelques autres de ces victimes, représentés par l'avocat torontois John Adair, de Adair Goldblatt Bieber, a ainsi obtenu la saisie d'actifs totalisant 7 millions de dollars en 2014. Interjettant appel, l'Iran a été débouté en juin 2016. La Cour d'appel ontarienne a rejeté les arguments iraniens,

plaidés par Colin P. Stevenson, de Stevenson Whelton MacDonald & Swan à Toronto, qui opposait l'immunité diplomatique à la saisie de ses actifs.

Inscrite à la liste des États soupçonnés de financer le terrorisme, la république iranienne est cependant privée de son immunité et elle peut donc être poursuivie en justice, en vertu de la loi votée par le gouvernement Harper en 2012, selon la Cour d'appel.

La Cour suprême du Canada a rejeté jeudi la demande d'autorisation d'appel de l'Iran, de son ministère de l'Information et de la sécurité, et de ses Gardiens de la révolution, ces deux dernières entités étant détentrices des actifs dont la saisie a été ordonnée.

Le rejet de la demande d'autorisation de la Cour suprême rend exécutoire le jugement de première instance et permet donc la liquidation des actifs iraniens au Canada, au bénéfice des victimes américaines de terrorisme financé par la république islamique.

L'avocat des victimes, John Adair, n'était pas disponible pour commenter la décision de la Cour suprême.

Residential school survivor says Indigenous Court in Prince George, B.C., marks turning point for justice

Indigenous sentencing program works with elders to develop healing plans for offenders to re-enter society

CBC News
Andrew Kurjata
March 23, 2018

A residential school survivor says the opening of a new Indigenous Court in Prince George, B.C., marks a turning point for reconciliation in the Canadian justice system.

Ray Izony is a member of the Prince George Elders Justice Council, which will help sentence offenders selected to take part in the province's sixth Indigenous Court, and first in the north.

Indigenous Courts (previously referred to as First Nations Courts) work within the existing criminal justice system with offenders who have already admitted their guilt.

Judges work with lawyers, community elders and often victims to come up with a "healing plan" for the offender that is aimed at rehabilitating them back into society while they serve their sentence.

Izony and other members of the Elders Justice Council have been trained in how to take part in this system and will develop healing plans for offenders to follow in conjunction with the rest of their sentence.

"It's very encouraging," Izony said of the grand opening ceremony for the court, held Friday.

"For the first time, I think, First Nations are going to be up there recognized in the justice system... That means healing for our people."

Izony, a member of the Tsay Keh'nay First Nation who attended the Lejac residential school as a child, is one of five members of the council which includes elders from the Lhedili T'enneh, Nisga'a, and Gitksan/Tsimshian nations.

The council worked alongside the Prince George RCMP, Prince George Urban Aboriginal Justice Society and city of Prince George to help bring the court to the city, which has an Indigenous population of over 12,000 people.

Prince George RCMP Supt. Warren Brown said it's long been a goal of his to establish an Indigenous court in Prince George in order to address systemic problems rather than simply having offenders go in and out of jail.

Christina Draegen, who is the northern regional manager of the Native Courtworker and Counselling Association of B.C. and lead of the push to bring the Indigenous court system to Prince George, said she was "overwhelmed" to finally see the work come to fruition.

"For a long time, there's been many tears of frustration thinking that this day would never happen," she said. "And here we are."

The court begins operations April 1.

By the numbers
In 2016, Canada's prison ombudsman provided numbers outlining the overrepresentation of Indigenous people incarcerated in Canada to the federal government. Some of those findings were relayed by Justice Minister Jody Wilson-Raybould in remarks she made favouring restorative justice. They included:

In 2016, Indigenous people represented more than 25 per cent of inmates while making up just 4.3 per cent of the overall population.
Between 2005 and 2015, the Indigenous inmate population grew by 50 per cent compared to the overall growth rate of 10 per cent.
Indigenous women comprise 37 per cent of all women serving a sentence of more than two years.
Incarceration rates for Indigenous people in some parts of Canada are up to 33 times higher than for non-Indigenous peoples.

Soirée bénéfice : objectif dépassé pour Éducaloi
Inquiète pour la survie de son site internet il y a peu, Éducaloi a finalement réussi à souffler un peu.
Droit inc
Delphine Jung
23 mars 2018

L'organisme d'information juridique a dépassé son objectif d'amasser 200 000$. Grâce aux billets de la soirée vendus et à l'encan silencieux qui mettait aux enchères des montres, des places de concert, de match de hockey ou encore du vin, Éducaloi a pu finalement récolter 223 106 dollars.

La soirée s'est tenue au Parquet de la Caisse de dépôt et placement du Québec, hier soir, et tout le gratin du milieu juridique était là. La soirée était placée sous le thème des Jeux olympiques et plusieurs sportifs médaillés ont honoré les invités de leur présence.

Le plongeur Alexandre Despatie, la patineuse Joannie Rochette et la skieuse Caroline Viau étaient ainsi au rendez-vous et arboraient fièrement leur chandail marqué de l'unifolié.

L'événement avait pour but de soulever suffisamment de fonds pour qu'Éducaloi puisse refaire son site internet.

« Nous avons vécu une année de défis, mais nous avons senti beaucoup d'écoute de la part de nos partenaires grâce auxquels nous avons pu assurer l'équilibre budgétaire. Cette soirée-bénéfice sert à amasser des fonds en surplus pour refaire le site internet consulté par 5 millions de personnes par an. Nous devons l'adapter aux tablettes et les téléphones intelligents », a expliqué Me Ariane Charbonneau, directrice générale.

Un vent d'optimisme
« On sent qu'il y a un vent d'optimisme dans la profession qui pousse dans la direction d'un meilleur financement », a dit le bâtonnier du Québec, Me Paul-Matthieu Grondin.

Lors de la période des discours, la ministre Stéphanie Vallée a souligné le « travail olympien réalisé par l'équipe d'Éducaloi » et a expliqué que l'accès à la justice consiste surtout « à comprendre nos droits et le système juridique ».

« Au cours de l'année 2017-2018, ce sont plus de 465 000 dollars que le ministère de la Justice a accordé à Éducaloi à travers différents programmes pour soutenir cet organisme », a-t-elle dit.

La ministre a rappelé qu'elle ne briguera pas un nouveau mandat. « Je vais vous revoir l'an prochain… mais autrement », a-t-elle lancé à la salle qui réunissait pas moins de 400 invités.

Plusieurs des invités ont passé quelques minutes à choisir ce qui comblerait leurs désirs lors de l'encan silencieux. Mathieu Lavallée, associé chez Exponentiel Conseil a lorgné longtemps sur un Chassagne-Montrachet de 2015 pendant que la juge de la Cour du Québec, Anne-Marie Lanctôt misait sur une montre. « C'est bientôt l'anniversaire de mon conjoint… », a-t-elle dit.

La sénatrice Chantal Petitclerc qui devait être présente n'a malheureusement pas pu se libérer. « Elle est en train de voter le projet de loi entourant la légalisation du cannabis », a expliqué Me Yann Bernard, le maître de cérémonie.

More Canadians are acting as their own lawyer because they don't have a choice
CBC Radio
March 25, 2018

It is a trend most Canadian judges and lawyers do not like: a growing number of Canadians are representing themselves in court. Some hire a lawyer then find the legal fees are unaffordable. Others opt to argue their own case from the beginning.

This is happening not just in small claims courts, where self-representation is the norm, but in higher courts, where legal procedures and protocols are challenging for a lay person.

The National Self-Represented Litigants Project (NSRLP) offers help. It is an innovative program at the University of Windsor and the brainchild of Julie Macfarlane. She is a Distinguished Professor in the Faculty of Law and has been spearheading this support network for almost five years.

Julie Macfarlane of the National Self-Represented Litigants Project says Canadians are representing themselves in greater numbers because they simply cannot afford to pay high legal fees. (Mike Kovalski) She tells The Sunday Edition's Michael Enright that those inside the legal system have long seen people who represent themselves as "aberrant" or "those crazy people who think they should be lawyers." Many lawyers have asked her "why I was bothering to talk to these people who dragged their plastic bags behind them into court."

The reality, she says, is that people don't have a choice. Canadians are representing themselves in greater numbers because they cannot afford to pay high legal fees.

"They are everybody, they are you and they are me," she says. "I don't think that either of us would probably be able to go on paying at the rate that it would require to pay a lawyer, at $500-plus an hour for a piece of protracted litigation."

At least half the people in family courts across the country arrive without lawyers. In Toronto, the figure is closer to 80 per cent. Appeals courts are reporting around 30 per cent self-represented litigants, and in civil courts the figure is between 30 and 40 per cent.

"These are people, quite often, with a high level of education. They're intelligent. They're committed to doing it and figuring it out, so we do see some fairly extraordinary victories." At the same time, Macfarlane says, "they are often subject to some of the litigation tactics that lawyers are much more familiar with." Often these tactics cause self-represented litigants to lose their cases.

"What is really challenging for people representing themselves isn't the stuff we teach people at law school, the substantive law," Macfarlane adds. "It's the procedure." Judges have discretion in how rigidly procedures are applied and, most often, this is where self-represented litigants get tripped up.

This is an area where the NSRLP is helping Canadians. They cannot offer legal advice or act as counsel, but their coaches can help them through the process by guiding people through court procedures and

being "someone who's in their corner." They also keep a national inventory of lawyers who charge affordable fees, and produce resources to help Canadians navigate the court system, such as how to access written court transcripts.

Macfarlane acknowledges some judges are doing an outstanding job in helping people who represent themselves in court, by taking the time to explain procedure and making sure someone isn't disadvantaged, "but it's not something that is consistent across the country," Macfarlane says. The Supreme Court of Canada acknowledged this in a recent ruling, in which it said courts may not treat a self-represented litigant in the same way in which they treat a lawyer.

"Judges need to come to the bench now with a different sensibility about what their job is," Macfarlane says. "We really need to take seriously how we re-equip the judiciary."

The NSRLP is encouraging the "unbundling" of legal services, where instead of working on a retainer and controlling an entire file, lawyers would contract to take on only particular tasks, such as legal coaching, reviewing an application form for divorce or preparing for a case management conference.

Macfarlane says she is surprised by the number of people across Canada who believe our system of legal aid is there to help them if they can't afford a lawyer.

"In actual fact, legal aid only helps the very, very poorest people. And in Ontario, the eligibility level is actually set below the level of welfare," she says. "So it is extremely difficult to get legal aid."

In some legal circles, there is a continued resistance to the trend of self-representation, which Macfarlane says is unfortunate: "This genie is not going back in the bottle."

No legal basis to compensate Manitoba Metis Federation
Winnipeg Sun
Tom Brodbeck
March 25, 2018

The reason Manitoba Hydro's proposed payout of $67.5 million to the Manitoba Metis Federation to buy "50 years of peace in the valley" was so controversial is because it was based on the false assumption that the Metis have land claims in Manitoba.

They do not.

Former Hydro board chairman Sandy Riley and most of the Hydro board resigned last week, citing irreconcilable differences with the Pallister government. Among their concerns was a clash over a proposed payout to the MMF in exchange for the groups' commitment not to block or delay existing or future Hydro projects for the next 50 years.

It was an "unusual transaction," Riley admitted, and very different than any other compensation deal Hydro had negotiated before with Indigenous groups. The reason it was so different is because it wasn't

based on any type of Indigenous land title. Unlike First Nations, the Metis don't have title to a communal land base in Manitoba, nor do they have any legal claim to one.

The proposed payout was not designed to compensate the MMF for land use, displacement or damages to land as a result of a Hydro project because they have no communal land. The payout was simply to buy the MMF's cooperation not to interfere with future and existing Hydro projects.

Hydro "bought" peace "at a very attractive price," said Riley.

But it was a controversial proposal. And Riley said he knew the board couldn't proceed with it unilaterally.
"People might not agree with us and that's why we put it to the government," Riley told the Winnipeg Sun in a lengthy telephone interview last week.

The problem with the proposal is that it's not based on any legal principle. The MMF has the right to be consulted on developments like Hydro projects in some cases under Sec. 35 of the Constitution, as per a recent Supreme Court of Canada decision. But consultation doesn't necessarily translate into a multi-million dollar payout. The Crown can consult meaningfully and even address Metis concerns without giving them a bunch of money.
And that's where Riley and his former board faltered.

The board bought into the idea that it had a responsibility to provide compensation to the MMF where there was no legal basis to do so. They proceeded at best under a very liberal and overly-generous interpretation of recent Supreme Court decisions and at worst a complete misread of them.

A 2013 Supreme Court decision, for example, rejected most of the MMF's legal arguments regarding land transactions in the late 1800s, including a claim that the federal government had a "fiduciary" responsibility to the Metis. They don't, the court ruled. What the top court did rule was that the federal government from 1870 to 1885 did not act "in accordance with the honour of the Crown" when distributing 1.4 million acres of land to Metis children under the Manitoba Act. Government did distribute the land, or scrip redeemable for land, eventually. But delays and administrative foul-ups meant they failed to meet the objectives of the land distribution, which was to give Metis children a head start before the influx of new settlers.

The case had nothing to do with a land claim, though, even though the MMF has tried to characterize it as such. In fact, the MMF wasn't even seeking damages in the Supreme Court case, namely because they knew they wouldn't get any.

"The Métis seek no personal relief and make no claim for damages or for land," the top court ruled. "Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honourably."

What the MMF wanted is a declaration from the court that the government of Canada didn't treat them properly over a century ago and they got that declaration. But that's it. There's no land claim and no legal requirement to make financial redress of any kind.

But for some reason, Riley and his board believed the Supreme Court put a new obligation on them to compensate the MMF for Hydro projects, even though the top court did not recommend a remedy of any kind, much less a requirement for a Crown corporation to negotiate a compensation deal with the MMF.

At the end of the day, there was no legal basis for Hydro to negotiate a settlement with the MMF. And the Pallister government did the right thing by withdrawing it.

Le juge Richard Wagner réclame plus de ressources pour le système judiciaire
Le nouveau juge en chef de la Cour suprême du Canada qualifie de « réveil » l'arrêt Jordan qui vient limiter la durée des procédures judiciaires
Radio-Canada
26 mars 2018

Pour améliorer l'accès aux tribunaux, Richard Wagner estime que les gouvernements devront accorder plus de ressources au système de justice, tandis que le plus haut tribunal du pays devra faire des efforts pour se rapprocher des Canadiens.

En poste depuis décembre, le juge Wagner a une idée claire des choses qu'il veut voir s'améliorer dans le système judiciaire, mais aussi à la Cour suprême.

Dans une première entrevue accordée à l'émission Les coulisses du pouvoir, le successeur de Beverley McLachlin croit que les gouvernements n'ont plus d'autres choix que d'investir dans tout l'appareil judiciaire, alors qu'est réclamé de toutes parts un meilleur accès à la justice.

« Le domaine de la justice, pas seulement au Québec et au Canada, mais dans le monde entier dans les sociétés démocratiques, c'était devenu le parent pauvre des administrations publiques. Il y avait des besoins ailleurs, l'éducation, la santé, ça se comprend. Mais au fil des ans, on s'est aperçu que les budgets n'étaient plus là pour les tribunaux, pour l'aide juridique, pour tous les services qui concernent la justice », avance Richard Wagner.

Si le juge en chef de la Cour suprême croit que le « son de réveil » de l'arrêt Jordan pour « investir dans la justice » a été entendu par les gouvernements, il estime que le seul réengagement de l'État ne suffira pas à améliorer l'accès aux tribunaux.

« (Une) prise de conscience des acteurs également, des barreaux, des avocats, pour agir en conséquence. Les juges, également, et je pense que ça concerne les tribunaux », indique le juge Wagner en entrevue.

Rapprocher la Cour suprême des Canadiens

Pour maintenir la confiance du public envers l'institution qu'est la Cour suprême, Richard Wagner s'engage à rendre celle-ci plus ouverte et plus proche des Canadiens. Le nouveau juge en chef croit que le déclin des médias traditionnels, qui couvrent de moins en moins le plus haut tribunal du pays, force celui-ci à s'adapter pour rejoindre le public.

« À l'ère des médias sociaux et de l'information continue, il appartient de plus en plus aux juges, aux tribunaux, et donc à la Cour suprême d'assumer ce rôle-là, d'aviser et d'informer la population », soutient le juge Wagner.
Pour y parvenir, le plus haut magistrat au pays cite en exemple la présence de la Cour suprême sur les médias sociaux et la préparation de résumés, en termes accessibles, des décisions rendues par la Cour.

À 60 ans, Richard Wagner pourrait être juge en chef pendant 15 ans. Un mandat qui lui donne les coudées franches pour réaliser ses ambitions. Comment imagine-t-il la Cour suprême quand viendra le temps pour lui de céder sa place?

« C'est une bonne question. J'espère que la Cour sera encore très pertinente, comme elle l'est présentement, et à laquelle les gens continueront à accorder beaucoup de crédibilité. »

Shorten timelines and improve perverse system
Law Times
Ryan Handlarski
March 26, 2018

On a recent occasion, I listened to a family lawyer colleague talk about the circumstances of a case where the parties seemed to be really intransigent.

The case had had a number of twists and what seemed to me to be some bad behaviour on both sides. I was curious enough to ask how long the case had been going on.

The answer shocked me and left me feeling a sense of disgust. Seven years.

I do not need to know anything about the case to know that a system that permits a case to have a shelf life of seven years (and sometimes more) is a perverse system.

This can be easily deduced by thinking about the incentives that such a system creates.

In civil law — in every area from commercial litigation to family to personal injury — cases may go on for years with no resolution and no trial.

Cases that are set for trial, after many years of waiting, often or usually settle at the last moment, rather than the parties risking the cost consequences of a trial and paying the fees of civil lawyers for trial (who are basing their fees partly on the amount they get paid for simpler and less stressful tasks that occur during the years before trial).

How is it that, in criminal law, the lawyers are paid to go to trial, yet in civil litigation, the lawyers are somehow frequently paid not to go to trial?

The answer to the above question is simple and obvious: The Rules of Civil Procedure and the system itself permit cases to go on for years.

Therein lies the problem. I was skeptical when the Supreme Court of Canada released R. v. Jordan, setting timelines in criminal matters, but I have been a convert after seeing how the behaviour of the actors in the criminal justice system has changed since the release of the decision.

Judges and Crown attorneys do not adjourn proceedings without very good reasons.

Judges especially understand that if there is a criminal case that does not resolve at an early stage, it has to run within the timelines set by the Supreme Court and must be set down for trial.

The attitude among all parties is: Either you plead guilty or you set the matter down for a trial and this decision has to occur quickly.

It is my contention that this attitude, by and large, produces the most just result for the accused and the complainants and witnesses in a criminal proceeding.

The unnecessary lengthening of proceedings in civil law has another perverse effect, perhaps worse than the fact that it has terrible mental and financial consequences for the parties involved in the litigation: It allows a party with deep pockets that is in the wrong to avoid paying for its wrongful conduct.

A party that is permitted to keep bringing motions, even ones with questionable merit, and avoid setting a trial date is able to potentially cost a party out of the litigation just by continuing to bring motions. This cannot be the intention of a functioning court system dealing with civil disputes.

The legal buzz term “access to justice” rather should be thought of as simplifying and shortening proceedings.

To achieve this, civil litigants must be forced, at an early stage, to either resolve the case or set it down for trial.

The cost of a claim can and should be put to better use with trial preparation and a real review and consideration of the issues and not delay tactics. This will not result in fewer cases resolving and more cases going to trial, as is the case in criminal law.

To the contrary, setting a case down for trial is the best way a legal system can incentivize a resolution.

Facing down a trial focuses attention on whether the litigant has a good or bad case and what the risks are.

It is precisely the exercise of preparing for trial that will focus a party's attention on whether a person has a better chance of achieving their objectives at trial or by resolving with the other party.

Permitting a party to extend the litigation without going to trial allows a party to kick that issue down the road.

Criminal cases frequently resolve at or just before trial, either with a guilty plea, a plea to a lesser offence or a withdrawal of the charges.

It would be the same in the civil system, except that likely a greater percentage of cases would resolve because of the cost consequences and because the stakes to the litigants do not involve the liberty of the parties.

There is an easy way to improve access to justice in all realms of civil disputes in the province.

Learn from criminal lawyers and the Supreme Court's attitude in R. v. Jordan: There should be no more mandatory mediation, the parties should be free to pick up the phone and engage with each other at any time and the court or a judge does not need to be involved.

There should be no more motions; any issues that skirt the main issue can be addressed with a pre-trial motion argued just before the trial.

The system must force the parties to set the case down for trial as soon as possible. Lawyers will not be able to bill to not go to trial and their fees will be adjusted. Litigants with deep pockets will not be able to "motion" (and motion and motion) a party into submission.
Cases will resolve more quickly as the parties will not be permitted to delay bad facts too far into the future.

The process will be shortened and simplified.

The system, as currently constituted, may be a good system for a small percentage of lawyers and a great system for deep-pocketed litigants, but it is the worst possible system for everyone else.

The rules that have allowed a system of endless motions and mediations might have been well intentioned, but it has not worked. If people truly want to improve access to justice, the solution is simple: There should be no more motions and no more mandatory mediations. Just do as we do in criminal law (especially since Jordan) and set the damn thing down for trial and argue it.

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