Lawyers ask judge to declare African-Canadians deserve special consideration in sentencing, like Indigenous people

The Globe and mail
Sean Fine
March 26, 2018

Lawyers for a black man caught carrying a loaded gun are asking a judge to declare for the first time in Canada that African-Canadians should receive special consideration in sentencing, much as Indigenous peoples do.

The federal Criminal Code says expressly that sentencing judges must pay particular attention to the circumstances of Indigenous people. Parliament drafted that provision in 1996 in part to respond to a disproportionate rate of incarceration. Indigenous people make up 27 per cent of federal prisoners, and just 5 per cent of the country's overall population.

But black Canadians, too, are disproportionately incarcerated. They make up 8.6 per cent of federal prisoners (those serving sentences of two years or more) and just 3 per cent of the population.

Lawyers Faisal Mirza and Emily Lam, representing Jamaal Jackson, 33, say African-Canadians, like Indigenous people, have faced dislocation, segregation, disproportionate rates of incarceration and discrimination in employment and education, plus over-policing of neighbourhoods and mistreatment in federal custody.

"In 2018 … the experience of African-Canadians is sufficiently unique that it is in and of itself deserving of special recognition," Mr. Mirza told Ontario Superior Court Justice Shaun Nakatsuru in Toronto. Disadvantage in the black community, he said, may diminish the "moral culpability" of offenders. Just as it is mandatory for judges to consider an Indigenous offender's history of disadvantage, they should also be obliged to perform a similar analysis for black people. "I'm asking that it become presumptively the approach for African-Canadians."

But Justice Nakatsuru, whose Japanese-Canadian father was interned during the Second World War, told Mr. Mirza he is "struggling" with the idea. He said the Criminal Code already provides that all offenders are entitled to consideration of their individual circumstances, including discrimination and disadvantage, when they are being sentenced. To go further than that and create a presumption of special treatment for African-Canadian offenders raises difficult questions, he said. "Where does it end, to take judicial notice of a collective experience?"

Justice Nakatsuru mentioned the experiences of Asian-Canadians and other visible minorities. He said the experiences of African-Canadians are diverse, and in that sense do not fit well within a presumption of shared disadvantage. He also asked what cases, laws or constitutional principles would give him the authority to make such a declaration.

Mr. Jackson has a nearly continuous criminal record dating from his youth, prosecutor Sue Adams told the court. His most serious crime was an armed robbery of a Petro-Canada station with a sawed-off

shotgun, for which he was sentenced to 81 months in prison. Released on parole, he violated his conditions and was returned to prison to serve out the full term. Seven months later, police attempting to fight the spread of guns caught him on a wiretap attempting over a two-day period to obtain a firearm. Judges had made five orders in previous cases prohibiting him from carrying weapons or ammunition. Police caught him with the handgun in Mississauga, west of Toronto, with a single bullet in its chambers.

The prosecutor is asking for a sentence of 7.5 to nine years, plus an additional year for violating his weapons prohibitions. She said she does not oppose detailed histories of an offender being put before the court, but said that given the seriousness and repeated nature of his crimes, he does not deserve special consideration in sentencing.

The defence has not yet recommended a sentence, but is expected to ask for four years.
It submitted a "race and culture assessment" by a Nova Scotia social worker, Robert Wright. Mr. Jackson spent part of his childhood and teen years in Cole Harbour, N.S., and part in London, Ont. As a light-skinned black person, Ms. Lam told the court, he was not accepted by whites or blacks. His extended family was large and had good jobs. But a lack of parental support left him seeking support from his peers. (He also identifies as Indigenous, but an Aboriginal legal group declined to take on his case, Ms. Lam said.)

If Justice Nakatsuru accepts the idea of special consideration, Mr. Mirza asked him to affirm that judges should order detailed reports on African-Canadian offenders, setting out how "intergenerational disadvantage" affected them. Such reports are done regularly for Indigenous offenders.

Mr. Mirza said that, while sentencing judges traditionally take into account the need to deter other criminals and protect communities, they should also consider that "overincarceration" perpetuates disadvantage in the African-Canadian community.

As far back as 2004, the Ontario Court of Appeal said that if racial or gender bias help explain why a crime was committed, it can be considered in sentencing.

The sentencing hearing continues Tuesday. Justice Nakatsuru is not expected to rule immediately.

Barrier to restorative justice is mostly mindset, says Indigenous law scholar
John Borrows is at the CMHR Monday to talk about Indigenous traditional law
CBC News
Elisha Dacey
March 26, 2018

Mindset is the biggest thing stopping the concept of restorative justice, so essential to traditional Indigenous law, from being fully embraced in the Canadian justice system, says an Indigenous lawyer and scholar.

"There's this sense that we have to always be punishing people. And I'm not saying for a second that shouldn't be a part of our system … but it shouldn't be the only part of our system," said John Borrows.

"And it seems like we fetishize that and focus on that to the exclusion to the other possibilities."

Borrows is in Winnipeg tonight to speak at the Canadian Museum for Human Rights about incorporating traditional Indigenous legal systems and the benefits it might have in our current justice system.

"It isn't just focused on blame and trying to assign who has to pay what price for what's gone on, but of course looking at the ways that this could be prevented from happening in the future.

"Restorative justice is about trying to put together relationships once something has broken down."

Borrows is from Chippewas of Nawash First Nation in Ontario and is currently the Canada Research Chair in Indigenous Law at the University of Victoria. His scholarship and work have helped shape the recommendations of the Truth and Reconciliation Commission of Canada.

That only two of the recommendations have been completed so far both worries Borrows, as well as gives him hope.

"I think that that's going to take a long time to be able to get this all together, but I'm feeling there's action on the ground," said Borrows.

While the issue of Indigenous justice due to the recent acquittals of Gerald Stanley and Raymond Cormier is currently top of mind, Canada does have a history of recognizing traditional Indigenous legal systems, said Borrows, going back to when the treaties were first signed.

"We, of course, quickly departed from that," he said, until about 30 years ago when the Supreme Court of Canada created a framework for receiving Indigenous legal traditions.

Since then, there's been the Aboriginal Justice Inquiry in Manitoba in 1991 and the Royal Commission of Aboriginal Peoples, amendments to the Criminal Code, court cases and more, said Borrows.

"So it's long been a part of the political discussion but every once in a while emerges and becomes more public, like at this moment."

The goal isn't to change the laws only for Indigenous people, but for all Canadians, said Borrows. Federal Canadian law allows for different laws in different provinces and municipalities, so this would be an extension of that, said Borrows.

"It's shifting the law for all so that we understand that we have access to resources when we're reasoning through questions that come from many different perspectives. And they can be laws that are about order, about peace, about ensuring security and safety that Indigenous peoples are concerned

about as well." *The lecture takes place Monday at 6:30 p.m. at the CMHR and is open to the public. Admission is $20.*

Supreme Court welcomes its newest member as Martin dons the red robes
Lawyer's Daily
Cristin Schmitz
March 26, 2018

When Supreme Court Justice Sheilah Martin's proud father drove her back and forth to the train that took her from a Montreal suburb to McGill University's law school, her dad assured her she had the right stuff to one day join the nation's highest court.

Jack Martin's unshakeable confidence in his remarkable daughter was borne out yet again March 23 when she donned the ceremonial robes of retired chief justice Beverley McLachlin at a joyous and warm "welcoming" ceremony in the Supreme Court of Canada's courtroom filled with family, friends, dignitaries and other well-wishers.

The former Alberta Court of Appeal judge, who has been sitting on appeals since January, spoke of her deep gratitude for the personal and professional support of many friends and mentors in her career which has included being an author, litigator, law dean, bencher and trial judge.

She singled out also the "constant love" and support of her dynamic 95-year-old mother Lillian, who looked on as her daughter ascended the top bench and who has taught her children "the benefit of hard work, how to stay positive, look on the bright side and how everyone benefits from kindness," Justice Martin said.

Of her late father, who had hoped to study law but gave up that dream to focus on building his family, the judge remembered: "Jack was delighted when I chose law and loved to talk law with me. … We often talked about the fact that there were no women on the Supreme Court of Canada, and since Jack had only daughters he saw why this was unacceptable. Like many parents, he was convinced his progeny were especially gifted and he often talked to me about being a judge and being on the Supreme Court."

Justice Martin recalled that when she called him on March 4, 1982, to arrange, as usual, a ride home from the train station, he informed her " 'Well Sheila I've got good news, and bad news.' He said 'the bad news is that you will not be the first woman on the Supreme Court of Canada. The good news is today the prime minister appointed Bertha Wilson.'

"Well dad," Justice Martin said, "it would have been wonderful if both you and mom could have been here to see me become the 88th judge and 10th woman on the Supreme Court of Canada. But if Jack Martin had been here today no one would have been able to hear the ceremony," she told the audience, which included McLachlin and other retired judges. "He would have cried through the entire thing and the happier the news, the louder the joy."

Justice Martin also thanked her late husband, famed criminal defence counsel Hersh Wolch of Winnipeg and Calgary, who died last July. “When his heart stopped, mine broke,” she said of Wolch.

The colourful litigator had encouraged his wife to apply for the Western vacancy created by McLachlin’s retirement last December, “in part because he thought 77 was the right age to open a satellite office in Ottawa,” smiled the judge. “Hersh would have loved this ceremony and we can all see him at the door, welcoming people to the Supreme Court as if the Supreme Court was his own idea.”

Justice Martin noted that Wolch, who thrived on the cut and thrust of the courtroom, never wanted to be a judge. “He often joked after his first heart attack that had he been without oxygen for a further five minutes he could still have been a judge,” she said to loud laughs from her new colleagues. “And nothing would delight him more than having that story told in the Supreme Court of Canada. But despite his irreverence, Hershy was convinced judging was the perfect job for me. He would say, ‘Sheila, you are the smartest person I know.’ And I’d tell him, ‘Hersh, you need to get out more.’ ”

Justice Martin said she donned her new red robes “amazed, and grateful and humbled … moved by a commitment to law, service and a loving-kindness, by my reverence for this institution and respect for my colleagues, by the many places I call home, and most importantly by the love and support offered up by all of you.”

The speakers at the ceremony included Canadian Bar Association president Kerry Simmons and Federation of Law Societies of Canada president Sheila MacPherson.

“We know the legal system is in good hands,” Simmons said of the court’s newest member. “Your list of educational and legal achievements is somewhat intimidating, and yet those who know you describe you as being unpretentious, smart as can be, and down to earth, respectful of co-workers and a great mentor. People who have worked with you describe you as collegial and collaborative and really good at teamwork. You said at [age] 19 that you wanted to study law to help people solve difficult problems, to right wrongs and to redress unfairness. You believed equal justice for all was as possible as it was necessary, and you still believe that.”

MacPherson lauded Justice Martin as a judge who exemplifies both impartiality and empathy in her decision-making. Her “brilliant career” shows that she possesses highly developed legal and analytical skills, MacPherson said. “She has also shown that she has the innate ability to grasp the emotional core of the human story. We have every confidence that Justice Martin will assume her role with the grace and humility that have been the hallmarks of her professional life to date, and that her contributions on the court will be to its great benefit, as well as to the entire country.”

Phoenix tally surpasses $1B mark
Millions of dollars in costs related to troubled pay system not included in 2018 budget
CBC News
Julie Ireton
March 27, 2018

The department in charge of the federal government's Phoenix pay system now says the combined cost of implementing and fixing the ailing program has exceeded $1 billion.

Several weeks ago, CBC News requested an accurate and up-to-date tally of Phoenix costs from Public Services and Procurement Canada (PSPC).

The department provided a graph explaining all the "investments" it has made in the pay system, but not all the expenditures were included in the federal government's 2018 budget.

They now total $1.192 billion.

The new tally, and the way the government handled its dissemination, has come as a disappointment to some Phoenix watchers.

"Seems like right from the start they've painted a much rosier picture than there was, and [have been] playing a bit of a shell game with the numbers to make it look better, and I don't think it's helpful," said Debi Daviau, president of the Professional Institute of the Public Service of Canada.

"Sinking good money after bad is not a solution that works for public servants, and it doesn't work for Canadians."

Long list of costs
The government now confirms the initial investment to develop Phoenix was $309 million.

This "includes the IBM contract, other professional services contracts and program costs," as well as the new pay centre in Miramichi, N.B.

Phoenix was initially brought in on a promise to save the government $70 million a year, but due to the staggering number of problems with the pay system, those savings have not been realized and are now adding to the department's list of costs.

"The government has decided not to harvest savings of $70 million a year in 2016/2017, 2017/2018 and 2018/2019 to provide departments with additional resources to support employees," said a news release from Public Services and Procurement Canada.

Departmental costs TBD
Just what individual departments have had to spend to support Phoenix is to be determined. According to PSPC, the comptroller general is figuring that out and a report is expected later this year.

According to Sahir Khan, executive vice-president of the Institute of Fiscal Studies and Democracy at the University of Ottawa, that additional sum could cause the Phoenix tally to balloon further.

"As significant as this amount is already, a full accounting of departmental costs will be important to fully understand the lessons to be learned from this," Khan said.

One of the additional costs is $28 million paid out in "advances to unions" which are owed unpaid dues as a result of the pay system's failure.

Growing annual costs
Public Services and Procurement Canada invested $50 million in 2016, then another $142 million in 2017 to improve the technology and hire more workers, including 1,500 compensation specialists at 14 offices.

The federal budget delivered in February promised to invest another $431.1 million to continue "building capacity, enhancing technology and supporting employees," which includes an enhanced client contact centre, and improved training and communication.

The budget also set aside $5.5 million for the Canada Revenue Agency to process income tax reassessments related to Phoenix, and another $16 million will go toward finding a new pay system.

Tallying the Phoenix toll
$309 million: IBM contract, professional services contracts, program costs, 2009.
$210 million: $70 million per year of unrealized savings from 2016 to 2019.
$28 million: Advances to unions from 2017 to 2019.
$50 million: Building capacity, enhancing technology, supporting employees, 2016.
$142 million: Building capacity, enhancing technology, supporting employees, 2017.
$431.4 million: Building capacity, enhancing technology, supporting employees, Budget 2018.
$5.5 million: For CRA to process income tax reassessments related to Phoenix, Budget 2018.
$16 million: Researching a new pay system, Budget 2018.
Total: $1.192 billion.

Justice Canada prosecutor named new judge for Supreme Court of Yukon
Lawyer's Daily
Carolyn Gruske
March 27, 2018

Edith M. Campbell, who is counsel for the northern regional office of the Department of Justice Canada, has been named as a judge of the Supreme Court of Yukon.

Justice Campbell, who is fluent in both official languages, has appeared before courts in two territories and five provinces.

During her career, she has worked with the Quebec and Yukon Regional Offices of the Public Prosecution Service of Canada (PPSC), with the PPSC's competition law section, and has conducted civil litigation files for the Atlantic regional office and the northern regional office of the Department of Justice Canada. As a prosecutor, Justice Campbell has handled criminal matters throughout the Yukon and was assigned to circuit court in communities including Pelly Crossing, Carmacks, Watson Lake, and others.
Justice Campbell fills a new position authorized under Bill C-44.

Ontario judge urged to adopt new way of sentencing Black offenders

The case involving a man convicted of a firearm offence is an opportunity to address the problem of the over-incarceration of Black people, a lawyer argued.

The Toronto Star
Betsy Powell
March 27, 2018

An Ontario Superior Court judge has been asked to adopt a new way of sentencing Black offenders, similar to how courts must consider the impact of the social and cultural history of Indigenous Canadians when determining punishment.

On Tuesday, Toronto defence lawyer Emily Lam told Justice Shaun Nakatsuru her case is an opportunity to address the problem of over-incarceration, which has been viewed as a relevant sentencing factor in cases involving Indigenous offenders, who, like Black people, are over-represented in prison.

“We can’t continue what we’re doing, clearly something needs to change,” Lam said concluding her argument on behalf of Jamaal Jackson, 33, who is originally from Nova Scotia.

Jackson is Black and believes he has Indigenous ancestry. He pleaded guilty last November to possession of a prohibited firearm and breach of a prohibition order. He has a lengthy criminal record and has been incarcerated for much of his adult life.

At the outset of the sentencing hearing, and with the Crown’s permission, Lam submitted a report to the court called an Impact of Race and Cultural Assessment (IRCA), written by Halifax social worker and sociologist Robert Wright.

“It is a founding premise of IRCA’s that a person’s race and cultural heritage should be considered as a significant factor in considering their sentence in a criminal matter,” Wright says in a letter filed with the court. Nova Scotia is the only province that routinely orders — and pays for — such reports, Lam said in an interview.

Across Canada, judges regularly request “Gladue” reports — named for a 1999 Supreme Court of Canada case — in cases involving Indigenous offenders. They encourage sentencing judges to be sensitive to the disadvantages and systemic racism faced by Indigenous people and consider alternatives other than incarceration.

The IRCA report includes interviews with Jackson, and his family members, about his childhood in Cole Harbour, N.S., and his path to the justice system which was “complex and tragic. A light-skinned African Nova Scotian with an absent father and a mentally ill mother, his psycho-social and racial identity development was impaired from his earliest years,” the report states.
In her factum filed in court, Lam wrote that “Black Canadians ... have some important shared experiences with Aboriginals, including slavery, colonialism, segregation and racism, which has contributed to their involvement in the justice system.”

She explained to the Star on Tuesday that her argument is not that the experience of Black Canadians is the same as that of Indigenous people.

“The argument is that they are unique and different and not to compare them as apples to apples, but that the impact on the over-incarceration ... is the same,” she said.

It will be up to Nakatsuru to determine how much weight to give the IRCA report, Lam said.

If the judge finds it useful and recommends the criminal justice system should consider “using these reports similar to Gladue reports, and ordering them, that would be a precedent,” she said.

She is seeking a sentence for Jackson of four years incarceration, minus time served in custody.

Crown attorney Sue Adams, who is seeking a sentence in the range of 7.5 to 9 years for possession of a loaded firearm and one year consecutive for breach of probation, told the judge she is not opposed to the courts having more information.

“The more information we have about an offender, their entire history, the better, it’s always important,” Adams said. “I’m not saying that the reports are not important, I’m saying they should be detailed, there should be more than self-reporting, but they shouldn’t be mandatory.”

And courts already rely on a plethora of pre-sentence reports, including psychiatric assessments, psychological and cultural assessments, “but they consistently say background factors and systemic issues do not allow for mitigation of sentence in very serious cases,” she argued.

When asked if he had anything to say, Jackson delivered a passionate, 20-minute appeal to the judge asking for leniency and pledging to live a lawful lifestyle.

“I actually am someone that can successfully reintegrate back into the community and it’s just not talk, or mumble jumble,” he said. “I just swayed the wrong the way and I want to come back and I need that opportunity.”
Nakatsura said he will sentence Jackson April 23.

Saskatchewan judge rejects proposed settlement between opioid patients, producer of OxyContin
The Globe and Mail
Karen Howlett
March 27, 2018

A proposed national settlement capping a decade-long legal battle between the pharmaceutical giant whose pain pill triggered Canada’s deadly opioid epidemic and patients who were given the drug is in limbo.

A Saskatchewan court judge has rejected the settlement, saying the $18-million in compensation that Purdue Pharma, the maker of OxyContin, has agreed to pay is neither fair nor reasonable for the people who became addicted after their doctors prescribed it.

Justice Brian Barrington-Foote of Regina Court of Queen's Bench also says in his judgment dated March 15 that the process followed to award an additional $2-million to the provinces and territories, which were also part of the lawsuit, was "rife with problems."

The proposed settlement would reimburse the provinces for only a fraction of the hundreds of millions of dollars in health-care costs associated with addressing the opioid epidemic. In 2016 alone, the provinces' public drug programs spent $125.3-million on medications to treat patients for opioid dependency, a 35-per-cent increase over two years, according to a report on drug spending published by the Canadian Institute for Health Information. The tally is for every province except Quebec.

Canada's opioid epidemic traces its roots to 1996, with the introduction of OxyContin. The Public Health Agency of Canada released new statistics on Tuesday that show the crisis has worsened significantly in recent months. Between January and September of last year, 2,923 people across the country died of opioid-related overdoses, the agency said, an increase of 45 per cent from the same period in 2016.

Justice Barrington-Foote says he is not satisfied that the assumptions lawyers used to calculate the number of potential victims and the amount of damages were sound. He says lawyers estimated average compensation of $11,000 to $13,500 by dividing $20-million by the projected number of approved claimants. But that approach did not account for the $2-million earmarked for the provinces plus non-refundable expenses.

Courts in Ontario, Quebec and Nova Scotia last year approved the settlement, which is not an admission of liability from Purdue. But it also must be approved in Saskatchewan. The judge said lawyers for the patients can provide additional material to address his concerns or seek certification of their class-action lawsuit – the agreement was reached before the courts could hear an application for certification.

"We have not been able to determine what course we will take as we are reviewing the decision," Halifax lawyer Ray Wagner told The Globe and Mail on Tuesday. "Anything and everything is on the table," he said, when asked whether the lawyers for the patients will seek more compensation from Purdue.

Mr. Wagner's law firm launched the lawsuit against Purdue in 2007 under class-actions legislation in Atlantic Canada and later joined forces with firms in Ontario and Saskatchewan representing people in the rest of the country.

The class-action accuses Purdue of knowing that anyone who took OxyContin would be at risk of becoming addicted and suffer withdrawal symptoms if they stopped. But at no time were these risks disclosed.

Ottawa and the provinces have not undertaken their own court action against Purdue. While the company based in Stamford, Conn., has acknowledged in the United States that its marketing of the drug was misleading, it has not made a similar admission in Canada.

Purdue marketed the drug as safer and less addictive than other opioids. Canada is now the world's second-highest per capita user of prescription painkillers.

"We were encouraging the federal government to take a much more active role in dealing with the national health crisis that these opioids are causing," Mr. Wagner said. However, he added, "there doesn't seem to be an acceptable level of reaction."

In light of the Saskatchewan judge's ruling, British Columbia is considering what options are available to recover its health-care costs from Purdue, Lori Cascaden, a spokeswoman for the Ministry of Mental Health and Addictions, said in an e-mail on Tuesday.

Legislation allows provincial health insurers to recover costs for personal-injury accidents such as slips and falls, medical malpractice or manufacturing defects. The class-action lawyers were required by law to include a claim on their behalf, but the provinces were not obligated to agree with the settlement, legal experts said.

Justice Barrington-Foote says he is not satisfied that the provincial health insurers approved the proposed settlement in accordance with their legislation. He asks why no steps were taken to ensure that past and potential future health care costs for the provinces were identified.

The judgment also says class-action lawyers did not get a separate negotiating mandate from the provinces before reaching the proposed settlement.

Instead, Peter Lawless, a lawyer representing the British Columbia's health insurer, acted as a liaison for all the provinces and territories in the negotiations with the class-action lawyers, the judgment says. Mr. Lawless advised the lawyers in an e-mail dated Jan. 10, 2017, that all 13 jurisdictions were "good to go" with the proposed settlement.

Liberal MPs, advocates want to legalize fees for surrogate moms and sperm donors
Chair of Liberal women's caucus says current ban is 'criminalizing women's bodies'
CBC News
Kathleen Harris
March 27, 2018

A Liberal MP, backed by his party's women's caucus, is pushing for a legal change to allow surrogate mothers and sperm donors to be paid for their services.

Anthony Housefather, chair of the House of Commons justice committee, said Canada's current law is out of step with modern families — with same-sex couples, single mothers and women choosing to have children later in life.

He said the ban on fees creates a grey zone which leaves potential surrogates anxious about breaking the law.

Housefather, who held a news conference on Parliament Hill today with fertility lawyers, doctors and clinicians, plans to table a private member's bill in May after hearing input from constitutional lawyers and other experts. He said he hopes the government will endorse it, though he has received no commitment to date.

"I'm hopeful this is in line with the government's agenda and, in the end result, they will support the initiative," he said.

The Canadian law, which came into force in 2004, prohibits paying a surrogate mother for her services, but does allow reimbursement for certain medical and maternity costs when the surrogate mother is performing the service for altruistic reasons.

Costs that may be covered include maternity clothes, travel for medical appointments, medications and, in some cases, lost work wages.

"Exploiting the reproductive capabilities of children, women and men for commercial gain is strictly forbidden for health and ethical reasons," reads the government website on the Assisted Human Reproduction legislation.

The law does not criminalize a woman who agrees to be or becomes a surrogate mother. But paying for surrogacy, or offering to pay, is illegal.

Contentious ethical issue

Commercial surrogacy has long been a contentious ethical issue, with opponents saying babies should not be treated as commodities and comparing paid surrogacy to prostitution and physical exploitation.

But Housefather said adult women are competent to make their own decisions, calling it "paternalistic" to ban surrogacy on those grounds.

Anita Vandenbeld, chair of the Liberal women's caucus, said her members unanimously support Housefather's initative. She said it's "vital" to update the laws to ensure all Canadians have the right to use modern reproductive technologies.

"Assisted human reproduction is the one area in law where we are still criminalizing women's bodies," she said. "This has to change."

Alana Cattapan, an expert in reproductive ethics and biotechnology at the University of Saskatchewan, said what many surrogate mothers want is better patient care and clear-cut regulations on what is eligible for reimbursement.

Money secondary?

"Receiving money on top of that is secondary. All of the other parts are more important," she said. "So I'm not sure why there's such a move to commercialize this practice when there are so many additional ways that surrogates want to be taken care of [that] might improve the number of people who would volunteer to be surrogates."

She said the number of reported surrogates in Canada has been increasing in recent years, from 285 in 2010 to about 700 last year.

When it comes to egg donations, Cattapan said she believes it's wrong to pay people for access to their body parts. She said there are other ways to encourage people to donate, along the lines of blood and organ donations.

Françoise Baylis, a bioethics and philosophy professor at Dalhousie University, said she objects to the sale of sperm and eggs because it's a "commodification of the human body" that brings with it the risk of exploitation and coercion.

"Canada ought not to allow the commercialization of the human body," she said in an email. "Ultimately, this is about a world view grounded in the belief that the world is a better place if we have some valuable things (e.g., body parts) kept out of the marketplace."

Housefather said he sees the potential legal change as a "modernization" of current laws. The opposition parties say they want to carefully consider the details of any bill before taking a position.

"When the Liberals table legislation in this area, we will carefully review any proposals put forward to make sure it is in the best interests of Canadians," said Conservative justice critic Rob Nicholson.

Consultation required

Don Davies, the NDP's health critic, said his party also will not take a position until it studies the issue.

He said the NDP has opposed any move to commercialize sales of organs or tissues, but understands that fertility issues are profoundly important for many Canadians.

"We come at this from the point of view that we believe in a public, non-profit health care sector, so that will be a general value that I think we bring to the discussion. But I do know that there's Canadians who are in need of reproductive health services," he said.

"That's why I think it's really important to see exactly what's being proposed by Mr. Housefather, and talk it through in our caucus and hear from stakeholders and Canadians before we come to any firm conclusions."

Government bolsters staff dealing with Phoenix ATIPs

Number of frustrated public servants seeking access to pay files continues to climb

CBC News

David McKie, Ryan Tumilty

March 27, 2018

The federal government has had to hire extra workers to deal with the mounting number of access to information requests from public servants desperate for information about their own pay records.

An increasing number of federal public servants frustrated by the problem-plagued Phoenix pay system are submitting formal requests under the Access to Information Act, commonly known as ATIP, in an attempt to solve their pay problems.

According to documents obtained by CBC News under the same legislation, the number of requests for employee pay files jumped from 15 in 2014-15 to 261 in 2016-17.

And the numbers keep rising

"For fiscal year 2017-18, there were 328 requests from people looking for information on pay-related files," said Public Services and Procurement Canada spokesperson Pierre-Alain Bujold in an emailed statement to CBC.

Additional resources

He said the department is adding more resources to deal with the influx.

"To date, PSPC has hired two additional employees, one consultant, and reassigned two full-time and one part-time employee to respond to the increasing number of pay-related privacy requests."

The largest public sector union says while it welcomes the government's attempt to address these new demands, the real answer is hiring more case workers to handle the backlog of claims from workers who have encountered pay problems.

Despite the government's "proposed investment" of $431.4 million to "stabilize" the Phoenix pay system, announced in the recent budget, the Public Service Alliance of Canada said it will continue to push for a lasting solution.

Couple filed requests

Johanna Swanson, an early resolution officer with Employment and Social Development Canada, counsels employees regulated under the Canada Labour Code who complain about not getting paid. Ironically, Swanson has been unable to get her own pay information from her own department.

The Vancouver-based federal employee said she's out thousands in retroactive pay, and has heard from co-workers that requesting her records through access to information could help.

"When my retro pay wasn't correct I didn't know how else to get it fixed," she said. "We were doing a renovation on our house and I was expecting that money."

Swanson said she also waited four-and-a-half months after her third child was born before she finally began receiving maternity leave payments.

Government delays collection of Phoenix overpayments
Phoenix replacement will better mesh HR, pay systems, minister pledges
Cost of Phoenix federal payroll debacle surpasses $1B
Swanson's husband was in a similar situation, and sought a similar solution. Eric Swanson, a real estate investment analyst with Public Services and Procurement Canada — the federal department responsible for the Phoenix pay system — was equally frustrated after waiting too long for answers.

He blames what he calls the "stupidity of the system."

Like his wife, Swanson decided to file a formal access to information request to find out why he was either getting paid too much or too little.

For a $5 fee anyone can file a request for information under Canada's Access to Information Act. Departments and agencies covered by the law have 30 days to respond, but typically ask for extra time.

Johanna Swanson said one of her issues was resolved shortly after she requested her file, but believes that might just be a coincidence.

A daunting task
Johanna Swanson has now received her information, and is now in the process of trying to make sense of it.

That's no easy feat: the file arrived on a CD-ROM, and it took Swanson time just to find a computer where she could view it.

"It's 589 pages, so we would have to print that document and I would have to scour through it to see where the mistakes are," she said.

She hopes the information, which took four months to arrive, will help her sort out some of her outstanding pay issues.

Before Phoenix, Swanson said there was a pay adviser at her office whom she could consult.

"I used to be able to go up there and you could ask a question," she said. "[Now] I have nobody who I can talk to, nobody I can email."

Minister sympathizes

In response to questions from CBC News about the growing number of public servants resorting to access to information to obtain their pay files, the office of Public Services and Procurement Minister Carla Qualtrough expressed sympathy.

"The problems faced by government employees as a result of the Phoenix pay system are totally unacceptable," wrote press secretary Ashley Michnowski in an email. "We must forge ahead on addressing the Phoenix Pay system issues and backlog."

While she's heartened by this response, Johanna Swanson said it does little to address the frustration she feels, not to mention that of her husband and the employees she counsels over the phone.

"I'm just frustrated. I talk to public servants who have called us to try to get help, and I can't do anything to help them, and I can't do anything to help myself."

The human cost of Phoenix: four public servants tell their stories
Ottawa Citizen
J-D Potié
March 28, 2018

It's been two years since the implementation of the Phoenix Pay System and still thousands of public servants aren't being properly compensated for their work.

When the federal government rolled out its pay modernization project back in 2016, its intention was "to save millions of dollars in overpayments to Canada's public servants and speed processing that had caused pay glitches and delays," according to officials at Public Services and Procurement Canada.

Instead, it did the opposite. The project that was supposed to cost no more than $300,000 has so far cost taxpayers more than $1 billion, according to PSPC.

On Tuesday, about 100 member of the Public Servants Alliance of Canada marched downtown demanding the government to fix all the problems it has caused to their bank accounts.

Four protesters tell their stories:

Josh Peterson, 43, firefighter:

"Repairs on my house, I've had to put off. But we're going to borrow off my credit line, which is just incredible, right? We replaced our windows and the retro-pay on the contract was supposed to cover that and so I had six months to order my windows. And once my windows come, I can't pay for them, to keep my family warm.

"Every day I deal with my co-workers who are cancelling their trips, their family vacations, anything, which seems kind of trivial. But this is their life. They can't live their lives."

Kim McDonald, 56, financial officer, Department of National Defence:

“We just choose to not go on vacation. If we don’t get paid one week, because my spouse is also employed in the same unit, then, well I guess we don’t go to Costco this week and we look to see what’s in the freezer.

“This constant not being sure if you’re gonna get paid — you know, Monday morning you log-in and cross your fingers like, ‘Am I gonna win the Phoenix lottery this week or am I not?’ ”

Paul Croes, 60, immigration officer:

“I’ve had to work on no pay … it affects me dramatically. For instance, I’m 60, which means I’ll be going into retirement, hopefully soon, and that’s going to affect me in my retirement.

“Paycheques have never been the same. Like, it’s never been the right amount. I’m just lucky that I’m married well — I’m not on the street. But we all know that we’re two or three or four paycheques away from being on the streets.

Marc Blanchard, 44, aquatic science technician, Department of Fisheries and Oceans:

“I have been overpaid. Then the overpayments were clawed back without asking me how I would like to pay them back. So I received zero pay on a paycheque, partial pay. I’ve had pay interruptions.

“It’s like a lottery every two weeks whether or not you’re actually gonna get paid properly. So it’s a lot of stress, on home-life and on everything, just whether or not you’re gonna have the money you’re entitled to every two weeks.”

PSPC launches new ‘ambassador’ program to help employees navigate Phoenix fixes
The Hill Times
Emily Haws
March 28, 2018

Nearly 250 public servants within Public Services and Procurement Canada are volunteering to help their colleagues find fixes for Phoenix-related pay problems.

“Across government, departments are putting in place measures to support employees facing pay issues,” PSPC spokesperson Pierre-Alain Bujold said in an emailed statement. “This grassroots initiative, made up of PSPC employees, will help employees navigate the many available pay-related services, tools, and resources.”

Expected to start in the coming days, the volunteer program, called HR-to-Pay Ambassadors, was officially launched in the department on March 22 after the 248 ambassadors completed a half day of training on March 14.

It's too soon to tell if the program will have any impact, Mr. Bujold said, adding the program stems from an internal working group. The number of ambassadors per branch or sub-department of PSPC will vary, but overall the 248 ambassadors will cover the department's 13,500 employees, or a ratio of about one ambassador for 50 employees. Since it was implemented in February 2016, the Phoenix pay system has left about 75 per cent of the government's approximately 262,000 public servants overpaid, underpaid, or not paid at all.

There was no formal selection process for the role, said Mr. Bujold.

"Senior executives sent a call-out to their respective teams to identify employees interested in taking on that role. Employees volunteered and were appointed ambassadors," he said. "These employees are taking on the role of ambassadors while performing their regular duties."

But these volunteers should be paid for their extra work, said Professional Institute of the Public Service president Debi Daviau, both because the government has said money is no object when it comes to fixing Phoenix, and because it will be hard to balance their own work and own pay issues with finding time to help others.

The pay system was procured by the previous Conservative government to consolidate pay and save the government $70-million annually, but so far the government has sunk in over $1-billion, including the latest budget announcement of $447-million to fix the system and begin looking for a new one.

The program, which falls under the human resources branch of PSPC headed by assistant deputy minister Donna Achimov, is expected to run for as long as it's necessary. Mr. Bujold said the public service unions received a heads-up about the ambassadors during the week of March 19, and "are supportive of the approach."

Ms. Daviau said both she and Public Service Alliance of Canada national president Robyn Benson had asked for the program when they last met with the ministerial working group assembled to tackle Phoenix in late 2017.

"I said 'I don't know what you call them, but they would basically be pay clerk-lites,'" she said, as they need people to help workers figure out if they're being paid correctly and direct them to resources, given that "the market's tapped for compensation advisers and it takes like a year and a half to train them."

Ms. Benson, who represents 189,000 bureaucrats as the head of PSAC, echoed Ms. Daviau, saying the program will be helpful for employees.

"However, there are other pressing issues affecting federal public service workers that the government continues to delay," she said in an emailed statement, adding the government has yet to give a start date to its commitment not to claw back overpayments or emergency salary advances until an employee's file is resolved and they receive three correct paycheques.

Liberals advised to ditch 'tough on crime' approach to justice system
Lawyer's Daily
Cristin Schmitz
March 29, 2018

Canada's criminal justice system needs a major cultural shift to broaden its focus from deciding guilt and meting out punishment to helping to rehabilitate and reintegrate people — especially the estimated 70 per cent of accused with mental health or substance abuse problems, the Liberal government has been told.

That is one of the key overarching messages Justice Minister Jody Wilson-Raybould has been hearing during her criminal justice review over the past two years during which she has asked justice system participants how to make criminal justice "fair, efficient and compassionate, using evidence and sound information."

Paving the way for Criminal Code and Youth Justice Act amendments Wilson-Raybould will introduce in the Commons March 29, the Department of Justice (DOJ) recently posted a summary report of the many suggestions for reform the Liberal government received from judges, prosecutors, defence counsel, victims' advocates, police, Indigenous leaders, government officials, mental health professionals and others during 19 round table discussions the federal justice minister held across the country in 2016 and 2017.

Wilson-Raybould said in the report titled "What we heard: Transforming Canada's criminal justice system" that "the conversation" for transforming the criminal justice system will continue.

"Systemic change cannot be completed in one mandate, but I am convinced this review can provide the foundation for addressing some of the most challenging issues facing the criminal justice system today," she wrote.

The DOJ summary report highlights dozens of remarkably complementary suggestions for reform that, if taken together, create a coherent — if controversial — roadmap that leads far away from the "tough on crime" direction followed by the previous Conservative government for nearly a decade.

"Almost all round table participants stressed the same major concern … that most people who come in contact with the criminal justice system are vulnerable or marginalized individuals. They are struggling with mental health and addiction issues, poverty, hopelessness and prior victimization," says the report.

"While Canada's criminal justice system works well in some areas, it isn't meeting its intended objectives for most people who come in contact with it," states the document posted on the DOJ's website March 22.

The report — which does not disclose specifically who was invited to the round tables — states that many justice system players told the government that the justice system's problems include a massive over-incarceration of Indigenous people and people with mental health and substance abuse problems

— a phenomenon that has only grown with the enactment of mandatory minimum penalties (MMPs) that can produce unfair sentences, especially for people with addictions and mental health challenges.

The Liberal bill to be introduced in the Commons March 29 is expected to reflect the advice from participants at the roundtables that legislative measures are needed to reduce the incidence of thousands of breach of recognizance and other administration of justice charges which clog the overburdened justice system and jails, without contributing much to public safety. The bill might also address the negative effects of some MMPs by re-introducing some judicial discretion via a "safety valve," or reduce the number of mandatory minimum penalties — as recommended by many at the round tables.

According to the DOJ's summary report, some of the recommendations for reform were:

Apply to the adult justice system the successful alternative approaches that have been used successfully to divert youths from the criminal justice system and provide more support services to adults to break the cycle of crime.

Transform the system by making alternative measures and therapeutic approaches the new norm; work with legal aid plans to devise innovative solutions.

Rebuild the criminal justice system on a foundation of restorative justice principles, in a trauma and culturally informed way. In appropriate cases, the focus would be on repairing the harm caused by the crime while holding offenders responsible for their actions, based on the principles of accountability, responsibility and respect for all parties. Research has shown victims and offenders report higher levels of satisfaction and lower rates of re-offending after participating in restorative justice.

Eliminate restrictions that confine restorative justice to certain low-level and non-violent offences and (according to some) lift the moratorium on its use in sexual assault cases since restorative justice is said to work best for cases involving interpersonal violence and relationship breakdown.

Fund and administer restorative justice initiatives well and track results.

The criminal justice system should collaborate, or integrate systematically, with the health and mental health sectors and other social support systems. (Some B.C. participants said 90 per cent of the worst offenders in that province experience severe trauma, and struggle with mental health and addiction problems — most of which could be successfully treated with the proper resources and services.

Avoid imposing recognizance conditions that criminalize behaviour that is not criminal.

Extend the Gladue provisions — which require a court to take into account an Indigenous offender's history and unique circumstances — to other marginalized communities, such as African-Canadians.

Extend Crown precharge screening and approval countrywide.

Give judges more discretion to make decisions based on an accused's circumstances, including applying mandatory minimum penalties only to the most serious crimes, or using sentencing guidelines or presumptive sentencing as an alternative.

Expand the use of conditional sentences.

Revamp the bail and remand regime, including promoting release without conditions, and ensuring that judges don't impose conditions offenders won't be able to meet (e.g. requiring a non-recovering alcoholic not to drink, without the existence of supports to help her to comply with the prohibition).

Enable police to modify certain bail conditions for matters unrelated to public safety.

Greatly reduce the reliance on incarceration and increase the availability of alternative options to the criminal justice system, including making the goal of sentencing rehabilitation.

Offer enough structured and supervised programming to keep former inmates safely in communities. Most offenders on probation cannot follow conditions without help as they may have medical problems that affect their memory or ability to make decisions.

Improve information for, and about, victims of crime, including automatically giving crime victims information, rather than requiring them to request information.

Provide more funding and resources for victims, including legal representation, especially for sexual assault complainants.

Civil court proceedings backlogged after 2016 Jordan decision
'It's twisted, there's something wrong with the system,' woman waiting for estate to be settled says
CBC News
Carolyn Dunn
March 28, 2018

A few years ago, Sandra Peredery was gardening and taking care of the home and acreage she shared with her common-law husband.

Today, as a civil case over the property she's called home for years drags on, she is chopping wood to fuel the stove. It's the only source of heat in the ramshackle mobile home she's living in about a half-hour's drive north of Edmonton.

Four years ago, Peredery's common-law husband of ten years died. Within a year or so of his death, the 56-year old had negotiated her portion of his estate. But two others with claims to the estate are mired in a legal battle that's dragged on for years and kept her from accessing her share of the estate.

There's more than one cause driving delays in Canada's civil courts, but one of the biggest strains on the system came in July 2016. That's when the Supreme Court of Canada issued a 5-4 decision that some criminal cases were taking too long, denying swift justice for accused criminals.

The court ruled provincial offences need to be tried within 18 months of a charge and Superior Court charges need to be tried within 30 months.

Hundreds of serious criminal cases including murders, sexual assaults and drug trafficking were stayed by courts because the accused constitutional right to a timely trial was infringed.

To avoid such cases, many jurisdictions in the country funnelled resources from civil courts, which handle lawsuits, personal injury claims, family law and estate claims, to handle those top priority criminal cases.

That means in many areas, delays in civil cases — which were already a problem — are getting worse.

The Trudeau government is set to introduce legislation Thursday designed to help ease the burdens the Jordan decision is having on the system, but Peredery doesn't hold out much hope the measures will help her.

'It's twisted'
Mark Feehan, Peredery's lawyer, tells her if the case over the estate proceeds to trial, there likely won't be a court date before 2021.

For Peredery, who lives on very little income, waiting for the case to be resolved has been a challenge.

"I get it. I have to start over. But, I didn't think I'd have to start over from under the barrel, not even the bottom. It's twisted, there's something wrong with the system."

In addition to being Peredery's lawyer, Feehan is also president of the Alberta Civil Trial Lawyers Association in Edmonton.

"We don't want alleged murderers walking the streets, and we all understand that. But family law or estate arguments or personal injury they all just kind of got put on the back burner."

Neil Wittmann, Alberta's recently retired chief justice, says the system is struggling under the strain of the deadlines.

"You cannot keep up the pace that this court is presently being subjected to and get the quality of justice I think the public deserves."

Alberta was one of the places that couldn't simply redirect resources from civil to criminal courts to help deal with backlog in the criminal courts due to the Jordan decision.

For example, in Calgary in 2016, the average time for a civil case to be brought to trial was 92 weeks. Today, it's double that.

"People, like me, I don't even think we're on the back burner. I think we've been put on the side to cool," Peredery says.

Prosecution policy unfair to Indigenous offenders, says N.W.T. lawyer
Lawyer wants judges to have greater discretion when sentencing repeat impaired driving offenders
CBC News
Emily Blake
March 28, 2018

A Yellowknife defence lawyer is voicing concerns that a federal prosecution policy unfairly affects Indigenous offenders.

The Public Prosecution Service of Canada policy says the Crown should seek increased penalties in cases of impaired driving where an offender has a prior impaired driving conviction, unless there are "exceptional or compelling circumstances."

This means if convicted, an offender will be sentenced to a mandatory minimum of 30 days in jail for a second offence and 120 days for subsequent offences.

The policy gives Crown counsel some discretion to consider things like the nature of previous convictions and sentences, and Gladue factors — an Indigenous offender's unique cultural circumstance, which can include trauma that leads to addictions.

Lawyer Peter Harte said he thinks increased penalties are imposed too often in the territory, and said the policy takes away a judge's ability to take Gladue factors into account when determining a sentence. In cases with Indigenous offenders, judges consider Gladue factors for sentencing options other than jail time.

Harte said automatically imposing jail sentences in these cases fails to address underlying issues like trauma and addiction and that he would like to see more supports in the territory.

"It's just so rare that I deal with people who are criminals in any sort of sense of the word," he said.

"They're not making choices to become offenders, they're not making choices to end up in conflict with the law; they've got a host of other social issues that underlie the conflict."

'That just seems unfair,' says lawyer
The Public Prosecution Service of Canada is responsible for almost all criminal prosecutions in the northern territories, whereas provinces have their own prosecution services and policies.

And according to Harte, the federal prosecution office's policy on increased penalties is harsher than in almost all of the provinces.

In Ontario, for example, prosecutors must seek increased penalties only in cases where the previous impaired driving conviction was within a five-year period. Beyond that it is within a prosecutor's discretion. British Columbia policy sets the time frame within three years.

Harte said he's seen cases in the N.W.T. where offenders with dated prior offences — even going back 10 years — get jail sentences where it probably wouldn't have been the case in the provinces.

"At some point that just seems unfair that for the rest of your life you're subject to a mandatory minimum penalty," he said.

Because a greater percentage of offenders in the territories are Indigenous, Harte said the federal policy also goes against the Truth and Reconciliation Commission's Calls to Action to address the overrepresentation of Indigenous offenders and depart from mandatory minimum sentences.

The mandatory minimum sentence is not automatic; the Crown must apply for it. In these cases, the law dictates the Crown must notify the accused (before they enter a plea) that it's going to seek increased penalties.

Andrew Murie, the CEO of Mothers Against Drunk Driving Canada, supports the federal prosecution office's policy. He said the policy takes impaired driving seriously and he would like to see the same process across the country.

He also acknowledged the importance of addressing social issues like addictions and said he would like to see more support for offenders.
"When you get the person in the system for a second time, it's not just about penalizing them. It's assessing what their needs are and so you know if they do have overlying issues like addictions, then let's get them help for that," said Murie.

The Public Prosecution Service of Canada said it is open to hearing concerns with its policies but said there should be no assumption that any changes will be made.

Bureaucrats working under Harper and Trudeau rejected IBM's advice to delay Phoenix
Global News
David Akin
March 28, 2018

IBM Canada advised federal bureaucrats working for both the Harper government and the Trudeau government to delay the start date for the troubled federal payroll project known as Phoenix, advice bureaucrats working for both administrations could not accept, Global News has learned.

IBM was one of the key contractors on Phoenix and was speaking Wednesday in detail for the first time about its role with Phoenix.

IBM officials were set to testify Wednesday night in front of a Senate committee probing the Phoenix problems, and hours before that testimony, told Global News that the federal bureaucrats leading the project were advised as early as July 2015 that the original target dates to turn the system on in October and December 2015 were too ambitious and that the government should move the start back by about eight months.

“We started offering this advice in July of 2015,” said IBM Canada vice-president Regan Watts. “We continued to give that advice to the government, through July, August, September, December and the early part of 2016, that, in our judgment, the project was not ready to go live.”

But bureaucrats told IBM that payroll specialists had already been given notice that their jobs were being moved and centralized at a processing centre in Miramichi, N.B. That, IBM says, was one of the reasons that bureaucrats said they needed the system to be up and running no later than April 2016.

IBM told the government it would not be able to implement some of the customizations of the software that the government had wanted, a condition which the government found acceptable in order for the government to activate the system in April 2016.

“Ultimately, we’re in the advice business,” said Watts. “We offered our advice to the client and the client made a decision and we supported their decision by making adjustments that were required to support a ‘go live’ on their timeline.”

But almost from the moment the system was turned on, it started causing headaches for the federal government’s 290,000 employees. Some were getting paid too much, some not enough, and some not at all.

Eighteen months after its launch, more than 150,000 employees still had an outstanding problem with their pay, according to an auditor general’s report tabled last November.

Senator Doug Black of Alberta, one of those expected to grill IBM at Wednesday’s Senate committee hearing, has already indicated he believes that the federal government should have sued IBM.

Meanwhile, as the Phoenix problems mushroomed over the last year or so, so did the political acrimony. Conservative politicians argued the current Liberal government could have delayed starting Phoenix while the latest federal budget from the Liberals blamed the Harper government for “a flawed business plan” that was “under-resourced and suffered from poor planning and implementation.”

Don’t blame us for Phoenix failures, IBM officials tell Senate
iPolitics
Kyle Duggan
March 28, 2018

Officials from the company that installed the Phoenix pay system cannot say when it will finally be fixed. And they said they flagged concerns about the process months before Phoenix went live in February 2016.

“It’s really hard for us to say (when Phoenix will be fixed),” Beth Bell, an IBM Services vice president and partner, told the Senate finance committee Wednesday evening. “We don’t sit on the broader governance (of the system) and we don’t see the full picture, so it would be really hard for us to even take a guess.”

IBM officials, however, did say they are not to blame for the problems of overpayment, under-payment or non-payment that are plaguing public servants and that has cost the federal government more than $1 billion since being installed two years ago.

IBM officials told the Senate that they flagged issues as early as summer 2015, and warned the government it was too soon to bring the system online in early 2016. The company advised the feds that the system could be ready by July or August 2016 – no sooner. But bureaucrats said that it had to be ready by April 2016 because it already started laying off compensation advisers tasked with handing out paycheques to employees.

The system also went “live” in February 2016 without doing a pilot project first – which was part of the original plan, and initially scheduled for July 2015.

Bell said there was a culture in the federal government that “made it difficult to speak truth to power.”

“Bad news didn’t flow uphill.”

The government hired IBM in 2011 to implement the Phoenix payroll system, built with an off-the-shelf software called PeopleSoft, developed by Oracle. Since the pay modernization project was brought online in early 2016 – planned under the Conservatives and launched under the Liberals – tens-of-thousands of public servants have experienced pay issues. Many still do.

Public sector unions want the government to scrap the project and start fresh, but the officials from IBM said that wouldn’t fix the overall problem.

Regan Watts, head of innovation, citizenship, and government affairs at IBM Canada, said there is “no silver bullet.” Replacing the software and starting fresh “will not wash away the issues.”

“That’s not going to solve anything,” he said.

Watts said the “vast majority” of Phoenix’s problems came from “[human resources] business processes, the amount of training employees received…data entry – including accuracy and timeliness, and lack of ongoing root cause analysis.”

The committee's chair, Conservative Sen. Percy Mockler, suggested the committee "might" ask the officials to come back again at a later date.

The committee also heard from officials from the Australian state of Queensland which implemented a payroll system for its own health workers in 2010 only to experience similar issues. That payroll disaster ended with a $1.2 billion price tag after thousands of health workers were also overpaid, underpaid or not paid at all.

Queensland Health director general Michael Walsh ominously said that there are "still residual issues today" with the pay of some employees. Walsh said the pay issues led to a "drop in morale," and a "loss of confidence" in the pay system.

"There is no real quick fix, and changing a system brings about the same issues as implementing a new system," he told the Canadian senators. "Yes it was very frustrating, yes we wanted to fix it, but no, we didn't go back."

The one difference between the two countries, he noted, was that their system was stabilized within a few months – after the third pay run. But in Canada, the problems haven't been contained yet.

Queensland sued IBM over the issue and ultimately lost in the spring of 2016.

Public Services bureaucrats previously said that case was not on the department's radar when the Phoenix contract with IBM was being signed.

Vers la décriminalisation des grossesses payées ?
Un député veut décriminaliser le paiement des mères porteuses et la ministre de la Santé se dit « ouverte » à l'idée
Radio-Canada
28 mars 2018

Le libéral Anthony Housefather compte déposer un projet de loi en mai aux Communes.

Le député veut modifier la loi actuelle, adoptée en 2004, qui, selon lui, oblige les couples canadiens qui en ont les moyens à aller aux États-Unis où ils peuvent payer pour obtenir des ovules ou pour convaincre une femme de porter leur enfant.

La ministre de la Santé Ginette Petitpas Taylor n'a pris aucune décision. « Mais je dis que je suis ouverte d'esprit puisque nous reconnaissons qu'il y a plusieurs Canadiens et Canadiennes qui considèrent cette option ces temps-ci. Puis, je pense qu'on ne peut pas tout simplement fermer la porte », a affirmé la ministre à son arrivée aux Communes, mardi après-midi.

Le député Housefather, qui avait tenu une conférence de presse quelques heures plus tôt, cite l'appui de plusieurs de ses collègues libéraux.

La présidente du caucus des députées libérales le confirme. « Je n'ai rencontré personne au caucus, surtout pas au caucus des femmes, qui est contre ça », a assuré Anita Vandenbeld.

Les ministres Diane Lebouthillier et Marie-Claude Bibeau mettent, prudemment, un bémol. « Pour moi, ce qui prime, c'est d'assurer la santé et la sécurité des femmes », a dit la première. »

« Quand on parle de payer pour le service, là, c'est toute une question d'éthique. J'ai besoin de plus de temps pour réfléchir à la question », a dit la seconde.

Pour la députée Alexandra Mendès, c'est tout réfléchi. « Le principe en soi, je crois, c'est pour protéger d'abord et avant tout les couples de même sexe qui voudraient avoir un enfant et qui parfois après avoir payé tous les frais et tout, se retrouvent sans l'enfant à la fin de la grossesse », a-t-elle souligné, tout en admettant qu'il y ait un risque de commercialiser le corps des femmes, d'où son appel à un débat de fond et à une loi très encadrée.

Sa collègue Hedy Fry, elle, sursaute devant l'idée qui, dit-elle, a des « relents de la Servante écarlate », ce célèbre roman de Margaret Atwood récemment présenté en série télévisée. En tant que médecin, Dr Fry voit d'un mauvais oeil le marchandage des parties du corps humain et fait le parallèle avec la vente d'organes dans certains pays pauvres.

« Je crois qu'une femme peut décider d'être mère porteuse pour plusieurs différentes raisons », a dit M. Housefather quand on lui a demandé si des femmes pauvres et vulnérables ne seraient pas poussées à faire ce geste. « Je ne vois pas un grand problème si une femme décide que ça, c'est une avenue économique (...) Si c'est une décision de la femme, moi, je n'ai pas de problème », a-t-il ajouté.
Quant à la comparaison avec l'interdiction, par exemple, de payer pour un rein ou un don de sang, ceux qui appuient M. Housefather protestent. « C'est une question très différente lorsqu'on parle de quelqu'un qui veut une famille (...) Je ne pense pas que nous devrions pénaliser les gens qui veulent désespérément une famille », a lancé une autre collègue libérale du député, Judy Sgro.

« C'est leur seule option? Puis l'adoption? (...) Ce n’est pas parce qu'on est en 2018 qu'on va plus instrumentaliser le corps des femmes », lui a répondu Monique Pauzé, du Groupe parlementaire québécois.

Chez les néo-démocrates, aussi, on est tiède. « Disons que d'instinct ou d'emblée, le fait de payer pour des échanges de tissu humain, on a une certaine réticence. Mais j'aimerais beaucoup voir le texte de la loi avant de vous répondre de manière catégorique », a dit Alexandre Boulerice.

L'éventuel projet de loi, déposé par un député d'arrière-ban, ne liera pas le gouvernement et chaque élu pourra voter comme bon lui semble. Mais au cabinet, on peut déjà deviner un appui de taille : le président du Conseil du Trésor qui, avec son conjoint, a fait affaire avec une mère porteuse.

« Les familles comme la mienne ont choisi les options dans les autres pays, par exemple. Et c'est cher de le faire. C'est possible de le faire, mais (...) c'est trop cher pour beaucoup de familles », a noté Scott Brison.

Justin Trudeau, à qui on a demandé son opinion par trois fois, à ses entrées et sorties de la Chambre des communes mardi, n'a jamais desserré les lèvres.

Liberals introduce legislation to speed up Canada's criminal-justice system
The Globe and Mail
Sean Fine
March 29, 2018

The federal government is proposing to scrap most preliminary inquiries, abolish peremptory challenges and make it easier for accused people to be released on bail as part of sweeping legislation intended to speed up Canada's snail-like criminal-justice system.

As The Globe and Mail reported on Monday, the limits on preliminary inquiries and related proposals would be the biggest structural changes to the justice system thus far under the current government. Bill C-75, introduced in Parliament on Thursday, is a response to a Supreme Court ruling in the summer of 2016 in a case known as Jordan that roiled the lower courts by setting time limits for trials.

The changes "are a direct response to issues that have plagued the courts for too long," federal Justice Minister Jody Wilson-Raybould told reporters.

The bill goes beyond problems caused by delays to address a longstanding concern that Canada's provincial jails contain more people awaiting trial than have been found guilty – and that many of them are Indigenous, addicted or mentally ill people denied bail. The changes to preliminary hearings would also address concerns that complainants in sexual-assault cases are obliged to tell their story over and over in court proceedings.

The bill would also abolish peremptory challenges of jurors, which came under fire when a Saskatchewan farmer was acquitted in the death of an Indigenous man after his defence team challenged potential jurors who appeared to be Indigenous themselves. Amid the outrage that followed, Ms. Wilson-Raybould tweeted that the justice system needed to do better.

The bill drew a mixed reaction. Ontario Attorney-General Yasir Naqvi said he expected the changes to make a real difference in reducing delays. Quebec Attorney-General Stéphanie Vallée asked why the government had taken so long. The wider legal community offered both applause and criticism.

"I don't think they've actually got to the heart of the Jordan problem as yet," Toronto lawyer Frank Addario said in an interview on behalf of the Criminal Lawyers Association. The Jordan ruling set limits of 18 months in Provincial Court and 30 months in superior courts from charge to trial completion.

Preliminary inquiries are used to determine if the Crown has enough evidence to go to trial. They have been a staple of the justice system since the first written Criminal Code in the 1890s.

The government's proposed law would eliminate an estimated 87 per cent of the 9,100 preliminary inquiries held each year, Ms. Wilson-Raybould said. Such proceedings would not be available unless the

criminal offence carries a maximum penalty of life in prison. Crimes such as sexual assault, and many drug offences, would not be eligible.

Mr. Addario said the elimination of most preliminary inquiries will swing the balance to the Crown, and away from the protection of the rights of the accused.

The new bill still needs to be debated in Parliament and approved before becoming law. Last April, as legal challenges over delays mounted in several provinces and judges threw out cases, Ms. Wilson-Raybould met with her provincial counterparts at their request and publicly promised changes in five areas. They met again in September. Ontario, Quebec and Alberta have poured millions of dollars into hiring extra judges, prosecutors and court staff since the Jordan ruling.

The legislation also attempts to reduce the number of "administration of justice offences" (including the violation of a bail condition) that land in court.

It would also allow prosecutors to treat 136 offences currently punishable as "indictable" (more serious) as less serious "summary" offences. It would hike the maximum penalties for summary offences to two years less a day to give prosecutors greater options; currently, some are as low as six months.

The one area of the five the government did not touch on involves mandatory minimum penalties. The previous Conservative government established or increased obligatory penalties for 60 drug, gun and sexual offences. They are perceived to clog the system because fewer people plead guilty when they face mandatory jail terms.

"What we want to be able to do is advance sentencing reforms that will stand the test of time," Ms. Wilson-Raybould said in explaining the lack of action on minimum sentences.

In an interview, Ms. Vallée said she was surprised at the lack of a response on minimum penalties. "We did have a lot of discussion around the table when the ministers met."

She said delays still beset the justice system in Quebec. "The pressure of Jordan is still there," she said. "I'm surprised that it took almost two years at the federal level to come up with a response."

Mr. Naqvi said the reduced number of preliminary inquiries would mean fewer delays. "These are really bold reforms," he said in an interview.

Ian Carter, an Ottawa lawyer authorized to speak for the Canadian Bar Association, which represents 36,000 lawyers, said there is no evidence preliminary hearings cause delays. Generally, though, he supported the proposed changes.

"My overall take is that it's a bold bill introducing significant changes to the justice system." For instance, the bail changes mean "more people are going to be released on bail with fewer conditions, and the bail hearings themselves will be faster. All good things."

The government would single out those charged with repeat domestic-violence offences for tougher treatment in bail court. They would have to show why they should be released, rather than the Crown having to demonstrate why they should be locked up.

Mr. Addario said the government missed out on more beneficial approaches. “The way to have attacked the Jordan problem would have been to attack mandatory minimums, which are clogging the courts,” he said. He also called for a change to the system under which police in some provinces lay charges and the Crown does it in others, and for something to be done about “the number of cases involving drug addicts and mental-health cases coming into the courts.”

Ottawa’s justice reforms will change how juries are selected, bail is set and trials are held
Bill C-75 outlines changes meant to make the courts more fair, and addresses concerns that the legal system is stacked against Indigenous peoples.
The Toronto Star
Tonda Maccharles, Ottawa Bureau
Jacques Gallant, Legal Affairs Reporter
Bruce Campion-Smith, Ottawa Bureau
March 29, 2018

OTTAWA—The Liberal government has proposed sweeping reforms to Canada’s legal system to change the ways juries are selected, to streamline bail conditions, and to speed up trials.

Federal Justice Minister Jody Wilson-Raybould said the bill aims “to bring about a wide-reaching cultural shift in the criminal justice system and how it is administered throughout the country.”

Tabled Thursday in the House of Commons, Bill C-75 would amend the criminal code, the youth justice act and other laws. A key part the 200-page package addresses concerns that the legal system is stacked against Indigenous people. It proposes to abolish what are known as peremptory challenges, which allow Crown and defence lawyers to dismiss a certain number of potential jurors without having to give a reason for their objection.

The move comes after a reportedly all-white jury acquitted a Saskatchwan farmer of murder in the fatal shooting of Colten Boushie, a 22-year-old Indigenous man. The high-profile acquittal of Gerald Stanley prompted protests across the country, and an emotional and highly publicized trek to Ottawa by members of the Boushie family, who pleaded for change.

“I can understand the desire to respond to the Stanley case, and to the occasional abuse of (peremptory challenges), but they are not getting at the problem of non-representative juries,” said lawyer Frank Addario, a former president of the Criminal Lawyers’ Association.

“The criminal code could have been amended to require representative juries, which would create an obligation on the part of the provinces to create representative jury panels...This was a good opportunity to right that wrong.”

Wilson-Raybould said systemic racist attitudes across the justice system are “a challenge that we face” but said the bill “is a start” towards enacting changes that fall within federal jurisdiction.

“This is a call to action for all actors in the justice system,” she said.

In response to a Supreme Court of Canada ruling that slammed a “culture of complacency” in the legal community, the bill takes square aim at reducing criminal trial delays by proposing new limits on preliminary inquiries. It would restrict the pretrial hearings to cases where the offence carries a possible life sentence, such as murder. There are some 9,100 preliminary inquiries held each year. Thursday’s change would reduce that by 87 per cent, Wilson-Raybould said.

The legislation would also reclassify many offences. All indictable crimes with maximum sentences of 10 years or less — 136 in all, ranging from theft over $5,000 to prison break offences — could be prosecuted as summary offences, a more streamlined process.

Under this change, the maximum penalty for “summary conviction” offences would be raised to two years less a day, up from six months for many offences now. The federal Justice Department believes more prosecutions would shift into provincial courts — freeing up court time in superior trial courts. Upon conviction, those sentences would be served in provincial jails, not penitentiaries.

“Once passed, this legislation will have a real effect on court delays,” Wilson-Raybould told reporters. She said the measures are supported by police and provinces and territories.

Ontario Attorney General Yasir Naqvi told the Star Thursday he’s confident that the provincial court has the necessary resources to deal with an influx of summary conviction offences, and has no plans to add more judges.

“We feel that we have the capacity within the Ontario Court of Justice to deal with those additional cases given now that preliminary inquiries will not be taking place in a large number of cases,” he said.

Naqvi had urged Ottawa last year to amend the criminal code to limit the use of preliminary hearings. He argued this was necessary in the wake of the Supreme Court of Canada’s landmark 2016 ruling, Regina vs. Jordan, which set strict timelines to bring criminal matters to trial: 18 months in provincial court and 30 months in Superior Court.

“This is a time to engage in bold reform; the Supreme Court of Canada was very clear in calling everyone out on the complacency in the system,” Naqvi said. “The need (for preliminary hearings) is far, far limited given that we live in this new reality in trying to get these cases done in either 18 or 30 months.”

Preliminary hearings, which take place in provincial court, traditionally served two purposes: a discovery purpose, allowing defence lawyers to know the case against their client, and a screening purpose, meaning a judge would decide whether there was enough evidence to send the accused to trial in superior court.

Defence lawyers have argued preliminary hearings still serve a purpose, particularly when it comes to narrowing issues ahead of a trial, thereby saving time.

“The experience of people who work in criminal law is that preliminary inquiries are a useful tool to reduce delay, settle cases, and sharpen up the issues for trial,” Addario, the criminal defence lawyer, said.

The legislation, which comes with 100 pages of explanatory notes, does not offer more money to help provinces pay for more services in provincial courts and jails that are expected to handle more criminal cases, or for more legal aid services, or addictions and mental health services, to deal with Indigenous offenders or other marginalized groups Wilson-Raybould insisted must be given more support.

Among the other measures announced Thursday:

Steps to curb intimate partner violence. These include a reverse onus at bail for accused persons charged with an offence involving such crimes and with previous convictions. As well, strangulation would become an elevated form of assault.
Updated bail procedures to increase the scope of conditions that can be imposed by police without having to seek court approval.

Le gouvernement fédéral propose un système de justice plus moderne et efficace
Radio-Canada
Isabelle Maltais
29 mars 2018

La ministre de la Justice fédérale, Jody Wilson-Raybould, a déposé un projet de loi jeudi à la Chambre des communes afin de moderniser le système de justice. Le but avoué du gouvernement est d'accélérer la tenue des procès et de rendre le système plus efficace.

De nombreux changements au Code criminel sont prévus dans ce projet de loi, bâti d'après une consultation qui aura duré près de 18 mois auprès de divers intervenants du milieu.

Afin d’accélérer le processus judiciaire, le projet de loi veut notamment restreindre le recours aux enquêtes préliminaires, qui consistent en une audience facultative tenue par un juge de la cour provinciale et qui permettent de déterminer s'il y a suffisamment de preuves pour envoyer l'accusé en procès.

L’enquête préliminaire est actuellement utilisée de façon variable d’une province à l’autre, par exemple la Nouvelle-Écosse l’utilise fort peu, contrairement à l’Ontario.

En vertu du projet de loi, seul un adulte accusé d'un crime passible d'emprisonnement à perpétuité pourrait désormais demander une enquête préliminaire, ce qui éliminerait 87 % de celles-ci, selon la ministre Wilson-Raybould.

Liberté sous caution

Le gouvernement propose aussi de modifier le processus de liberté sous caution, entre autres pour imposer des conditions « raisonnables et pertinentes » aux accusés à qui l'on permet d'éviter la prison avant et pendant leur procès.

Pour le ministère de la Justice, les conditions de liberté imposées présentement sont difficiles à respecter pour certaines personnes, par exemple si on interdit à un alcoolique de boire de l'alcool. Le non-respect des conditions mène alors à de nouvelles accusations, ce qui criminalise des actes qui ne sont pas a priori criminels.

Les changements visent à faire en sorte que les juges tiennent compte de la situation des accusés pendant leur enquête sur cautionnement, notamment de leur appartenance à une nation autochtone ou à une population vulnérable, comme les personnes qui présentent des problèmes de santé mentale ou de dépendance.

Ils veulent également donner la possibilité aux policiers d'imposer des conditions sans avoir à demander l'approbation du tribunal, afin de réduire la pression sur les ressources judiciaires.

Le gouvernement veut de plus diminuer la pénalisation des infractions commises contre l'administration de la justice en général, comme le défaut de comparaître devant le tribunal et le manquement aux conditions de probation, moyennant qu'aucun préjudice n'ait été causé à une victime.

Sélection des jurés

Afin d'assurer l'impartialité et la représentativité d'un jury, le projet de loi veut également abolir les récusations péremptoires, qui permettent aux procureurs de la Couronne et de la défense d'exclure un candidat juré sans donner de raison.

Ce serait de plus au juge de décider s'il y a lieu d'exclure ces jurés.

Violence entre conjoints

Le gouvernement fédéral veut rendre plus sévères les peines imposées aux conjoints violents, anciens ou actuels.

Il entend notamment autoriser des peines maximales plus élevées lors de récidives.

Réactions des milieux politique et juridique

Les conservateurs ne se disent pas contre l'idée de moderniser le système de justice canadien, mais s'inquiétaient, avant le dépôt du projet de loi, du fait que le gouvernement propose trop de mesures en faveur des détenus. Le parti n'a pas encore réagi officiellement au projet de loi en tant que tel.

Les néo-démocrates estiment pour leur part que le fédéral aurait pu aller un peu plus loin dans ses propositions, entre autres en ce qui a trait aux peines minimales obligatoires. Le gouvernement de Justin Trudeau a promis une révision des 63 peines minimales prévues au Code criminel, nombre qui avait augmenté sous le règne des conservateurs.

Le député Peter Julian a aussi souligné que le système judiciaire manquait cruellement de ressources.

Du côté judiciaire, certains avocats criminalistes s'inquiètent de l'abandon des enquêtes préliminaires, qui permettent, disent-ils, de vérifier la crédibilité des témoins

« Lorsqu'une personne ment, l'enquête préliminaire permet souvent la démonstration de ce mensonge-là, par le fait qu'elle parle à l'enquête préliminaire et au procès. Cela permet de faire la démonstration des contradictions. L'abolition de l'enquête préliminaire peut mener à mon avis à des condamnations trompeuses », affirme l'avocat criminaliste Michel Swanston.

Le président de l'Association du Barreau canadien au Québec, Stéphane Lacoste, déplore lui aussi l'élimination de ces enquêtes, lesquelles, affirme-t-il, « servent bien la justice et permettent souvent d'accélérer le dossier ».

M. Lacoste mentionne également que, selon la loi actuelle, les juges possèdent des pouvoirs pour limiter dans le temps les enquêtes préliminaires. « Ce n'était pas un bar ouvert où on pouvait passer des semaines et des semaines », lance-t-il.

De son côté, la juge à la retraite Suzanne Coupal n'est pas d'accord avec les deux avocats, et pense plutôt que c'est une bonne idée de laisser tomber l'enquête préliminaire, car cela permettra de récupérer pour les procès le temps d'audience qui leur est dévolu.

Selon elle, cette enquête n'est plus aussi nécessaire qu'auparavant, car l'entièreté de la preuve doit maintenant être remise à la défense avant le procès, ce qui n'était pas le cas antérieurement. « Je pense que les avocats devront apprendre à travailler différemment quand viendra le temps d'évaluer la crédibilité des témoins », commente-t-elle.

Réforme de la justice: le fédéral revoit la sélection des jurés et les enquêtes préliminaires
Journal de Québec
Agence QMI
29 mars 2018

OTTAWA – Aux prises avec un système plombé par les délais et difficile d'accès, le fédéral est allé de l'avant jeudi avec une réforme majeure de la justice au pays. Si l'opposition a salué l'accélération des procédures, il reste fort à faire, prévient-elle.

«C'est un changement de culture face aux problèmes qui minent les tribunaux depuis trop longtemps», a déclaré jeudi la ministre de la Justice, Jody Wilson-Raybould, en présentant le projet de loi C-75.

La législation est notamment une réponse aux enjeux soulevés par la Cour suprême en rendant l'arrêt Jordan, dont la limite de temps imposée à la durée des procès a causé plusieurs arrêts de procédures depuis 2016.

Un processus plus rapide

La législation s'attaque entre autres aux enquêtes préliminaires. Cette étape durant laquelle les parties évaluent la preuve avant le début d'un procès sera dorénavant réservé aux crimes passibles de la prison à vie.

Cela réduira de 87 % le nombre de causes nécessitant une enquête préliminaire, selon le ministère de la Justice.

Le projet de loi C-75 vient également reclasser plus de 130 offenses passibles de 10 ans de prison et moins en infractions mixtes. Pour ce type d'infractions, un juge peut décider de procéder par voie sommaire plutôt que par une mise en accusation, accélérant ainsi les procédures.

Encore du travail à faire

Les partis d'opposition ont salué un pas dans la bonne direction pour ce qui est de la réduction des délais.

Le Parti conservateur a toutefois rappelé que le gouvernement n'avait toujours pas réglé le problème du manque de juges au pays. «Là-dessus, il n'y a aucune raison pour qu'il y ait encore des délais. Ça traîne depuis deux ans», a critiqué le porte-parole de l'opposition officielle en matière de justice, Pierre Paul-Hus.

Le Nouveau Parti démocratique a fustigé de son côté le manque de courage des libéraux, qui n'ont pas aboli les peines minimales obligatoires imposées sous le gouvernement Harper. «C'était une de leurs grandes promesses et ils n'ont toujours pas agi», a déploré le critique néodémocrate en matière de justice, Alistair MacGregor. La ministre Wilson-Raybould a dit consulter encore les provinces sur cet enjeu.

Autochtones et populations vulnérables

Plusieurs mesures sont prévues afin de rendre la justice plus accessible et plus sensible aux réalités des peuples autochtones et des populations surreprésentées en milieu carcéral comme les toxicomanes ou les sans-abri.

Le projet de loi abolira entre autres la récusation péremptoire des jurés, en vertu de laquelle la défense ou la couronne pouvaient exclure des jurés sans motif. Un juré pourra toujours être exclu, mais il faudra que ce soit justifié et approuvé par le juge.

Selon Ottawa, cette mesure permettrait d'avoir des jurys plus représentatifs dans des causes touchant des communautés autochtones, par exemple, comme celle qui a mené à l'acquittement de Gerald Stanley en février dernier pour le meurtre de Colten Boushie en Saskatchewan.

Le processus de remise en liberté provisoire sera également assoupli.

Pour sa part, le Groupe parlementaire québécois s'est insurgé de voir que le projet de loi C-38 sur la traite de personnes allait devoir repartir à zéro en étant jumelé à C-75.

«Pendant ce temps-là, des adolescentes continuent d'être victimes des proxénètes. C'est d'une nonchalance terrible», s'est désolé le député Rhéal Fortin.

New federal bill would change jury selection, cut many preliminary hearings
iPolitics
Beatrice Britneff
March 29, 2018

The federal justice minister has tabled a mammoth bill that proposes, among other things, changing the way juries are selected and doing away with preliminary hearings for most criminal cases.

Bill C-75, if passed, would update the Criminal Code to reform jury selection so the panels are "more representative of the Canadian population."

The minister had previously indicated that this would be forthcoming after the outrage that flowed from the decision to acquit Saskatchewan farmer Gerald Stanley in the shooting death of 22-year-old Colten Boushie, a member of the Red Pheasant First Nation. Indigenous jurors were not included on the panel for that trial.

The changes proposed Thursday are part of Justice Minister Jody Wilson-Raybould's plan to clean up and speed up criminal court processes, at the federal and provincial levels.

"Once passed this legislation will have a real effect on court delays," Wilson-Raybould said during a news conference on Parliament Hill. "It will help reduce over-representation of indigenous people and marginalized people in the criminal justice system. It will make our juries more representative of the communities they serve and they will make the criminal justice system fairer, more efficient and effective."

Preliminary inquiries are hearings that occur in certain serious criminal proceedings to determine whether there is enough evidence for the case to move to trial. They've been a central element of the Canadian criminal justice system for 125 years. They will continue for the most serious crimes – those that carry a life sentence.

The move to curtail preliminary inquiries flows from a 2016 decision by the Supreme Court of Canada that laid down new rules to reduce the time it takes for a criminal trial to be heard. Wilson-Raybould also said she heard, during her consultations, that these hearings can re-traumatize victims by having them make multiple appearances in court.

Provincial and territorial justice ministers are behind the move to review preliminary inquiries to address court backlogs. Some, including the Ontario attorney general, called on their federal counterpart abolish them altogether.

Justice department officials told reporters in a technical briefing that more than 9,000 preliminary inquiries were held in 2014-2015. Wilson-Raybould said she estimates the proposed changes would reduce those hearings by 87 per cent and is “confident” that reform, in turn, will reduce delays.

But not everyone is in favour of scrapping these inquiries. In a letter addressed to Wilson-Raybould and Ontario Justice Minister Yasir Naqvi one year ago, the Canadian Bar Association (CBA) cautioned against the elimination or significant limitation of preliminary inquiries, arguing that they in fact “save time and resources in superior courts.”

In a phone interview with iPolitics following Wilson-Raybould’s announcement, Ian Carter – vice-president of the CBA’s criminal section – said the association took a “close look” at the issue and “didn’t see any evidence that suggests that [reducing preliminary inquiries] would reduce delays.

“In some cases (it) had the potential to add to delays in the sense that preliminary inquiries can be used to cut off charges before they get to trial that probably shouldn’t have been laid in the first place,” said Carter, an Ottawa-based defence lawyer. “And they can focus issues between the parties so to make the ultimate trial shorter. … Plus you’re taking procedural rights from an accused person.

“We’re disappointed (the government) went in that direction.”

Many criminal defence lawyers in Canada have also argued against putting preliminary hearings on the chopping block.

Changes to the jury process

Bill C-75 also proposes to end peremptory challenges, which give Crown and defence lawyers the power to exclude a potential juror without a reason.

If passed, the legislation would shift that power to judges. It will still be possible to challenge a potential juror – for example, if impartiality is in question – but the final decision will rest with a judge.

“Juries that are viewed as not being representative of Canadian society may lead to a lack of confidence in the justice system,” background documents on Bill C-75 read. “These changes would promote fairness and impartiality in the selection of jurors and the criminal justice process.”

Mandatory minimum penalties not in bill

Bill C-75 also includes proposed reforms Wilson-Raybould has already brought forward – including changes to victim surcharges and axing redundant, outdated and unconstitutional provisions in the Criminal Code. Missing, however, is any mention of mandatory minimum penalties – another controversial issue from Stephen Harper’s tough-on-crime agenda the Liberal justice minister has committed to address.

“What we want to be able to do is advance sentencing reforms that will stand the test of time,” she said.

When pressed further by reporters about the length of time it's taking her to do so, Wilson-Raybould confirmed her department is "still pursuing the sentencing reforms" and will do so "in a responsible way" – but refrained from saying whether she would bring a bill forward on mandatory minimum sentences before the next federal election.

Asked whether the delay is due to not having support from her provincial and territorial counterparts on mandatory minimums, or if it's because she worries about being seen as 'soft on crime,' Wilson-Raybould said neither of these were the case.

Conservative MP and justice critic Michael Cooper called the 300-page document tabled today "an omnibus bill," saying the fact it ropes in four other pieces of proposed legislation demonstrates a "failure" by the Liberal government "to move important justice legislation forward." Cooper decried the reclassification of certain offences to hybrid offences but acknowledged there could be "parts" of the bill that will help reduce court backlogs.

NDP MP Alistair MacGregor responded to the justice minister's announcement on behalf of his party, lauding many of the proposed changes Bill C-75 contains. But he said it's "disappointing" not to see the bill address mandatory minimums, noting the Liberal government is more than halfway through its mandate. Cooper, meanwhile, said he's "pleased" Bill C-75 didn't touch those sentences, calling them an "important part" of Canada's criminal justice system.

Both Cooper and MacGregor also referenced outstanding judicial vacancies on benches across the country and implored the justice minister to make those appointments.

R v. Jordan fallout
After Barrett Jordan successfully argued that his four-year trial infringed his Charter right to "be tried within a reasonable time," the Supreme Court set out new limits for trial timelines in its 2016 ruling: a maximum of 18 months in provincial court, or 30 months in superior court, from the moment a charge is laid to the trial's conclusion.

Within a year following the controversial R v. Jordan ruling, more than 200 criminal cases across the country were tossed out due to unreasonable delays. The number of applications submitted by defence lawyers requesting a case be ended – or "stayed" – also spiked.

Wilson-Raybould told The Canadian Press in an interview last summer that the Supreme Court's Jordan ruling urged her to quickly deal with inefficiencies in the criminal justice system.

The other changes Bill C-75 proposes include:
Reclassifying certain criminal offences "to allow for less serious cases to proceed summarily and thus more quickly in provincial court"
"Modernizing and streamlining" bail processes, including tougher standards for people who have been charged with domestic abuse and have a history of violence
Providing judges with more "robust" case management tools; and

Amending to the Youth Criminal Justice Act in several ways “to reduce the numbers of youth charged, prosecuted and sentenced to custody for administration of justice offences
When Wilson-Raybould was appointed justice minister, Prime Minister Justin Trudeau instructed her to “undertake modernization efforts to improve the efficiency and effectiveness” of Canada’s criminal justice system. The Liberal leader also tasked her to “conduct a review” of changes made to the system under the previous Conservative government – as well as “address gaps in services to Aboriginal people and those with mental illness.”

Wilson-Raybould held consultations and roundtable discussions with stakeholders on these issues from May 2016 to November 2017.

Ahead of her announcement Tuesday, the Justice department posted the final report detailing what Canadians had to say about criminal justice system reforms on March 22.

Criminal justice reforms may cut down Indigenous overrepresentation, lawyer says
Around 25% of Canada's inmates are Indigenous, according to the Department of Justice
CBC News
Nick Boisvert
March 30, 2018

Reforms proposed by the Liberal government could succeed in reducing the overrepresentation of Indigenous people in the criminal justice system, a Toronto lawyer says.

The changes include new bail rules, the elimination of most preliminary inquiries and would end a lawyer's ability to dismiss jurors without justification.

"There are some things in the bill that will help to minimize overrepresentation," said Promise Holmes Skinner, a senior manager with Aboriginal Legal Services in Toronto.

The 300-page bill includes a host of proposals designed to improve efficiency and reduce delays at Canadian courts. Holmes Skinner says a few of the reforms may have a greater impact on Indigenous overrepresentation than others. This includes reforms on bail condition and jury selection.

According to Justice Minister Jody Wilson-Raybould, Indigenous people accounted for 25 per cent of all inmates in Canada, yet just 4.3 per cent of the population, in 2016.

Bail reforms
The bill includes a proposal to streamline the bail process by giving judges and police more power to set conditions, rather than automatically jailing some accused offenders.

Holmes Skinner explains those changes may help address ongoing concerns around "fail to comply" issues, in which people can face additional charges after breaching certain conditions of their bail.

In most cases, she says those compliance violations do not amount to actual crimes, such as drinking alcohol or failing to keep the peace.

"People are being convicted of doing activities that are not illegal … because they're already wrapped up in the system and they live in poverty and they have a lack of resources," Holmes Skinner told CBC Toronto.

She added that an improved and more flexible bail process "will minimize the number of people in custody who are factually innocent."

Juror dismissal changes
The bill also calls for an end to peremptory challenges in jury selection, which currently allows lawyers to excuse certain potential jurors without the need to provide justification.

Some justice advocates say that practice was used to stack the deck in favour of Gerald Stanley during his recent murder trial in the death of Colten Boushie.

Stanley was found not guilty of second-degree murder in the killing of Boushie, a 22-year-old Indigenous man.

Critics say the trial was biased because Stanley's lawyers excused five potential jurors who appeared to be Indigenous.

Holmes Skinner called the practice a "tragic issue" and said Indigenous advocacy groups have been calling for the banning of peremptory challenges for decades.

"We are happy to see this," she said. "It's not the answer but it is vital."

Bill C-75 still needs parliamentary approval, but Wilson-Raybould explains the country will benefit if it is eventually passed.

"This bill … makes substantive changes that are going to transform the justice system in terms of efficiencies, in terms of recognizing vulnerable individuals and Indigenous peoples and the impacts the system has on them," she said at a Thursday news conference on Parliament Hill.

Nearly 7 in 10 public servants surveyed have been impacted by Phoenix pay system
Ottawa Citizen
Aedan Helmer
March 30, 2018

Nearly seven in 10 federal public servants say their compensation has been affected by the troubled Phoenix pay system, according to an internal government survey, while only a fraction of those said they are satisfied with support they've received to resolve pay-related issues.

The results of the latest Public Service Employee Survey, conducted every three years since 1999 and published by the Treasury Board of Canada Secretariat, are meant to gauge employees' opinions on the workforce, its leadership and workplace well-being.

A total of 174,544 employees from 86 federal departments and agencies responded to the survey, a response rate of 61.3 per cent, down 10 per cent from the last time the survey was conducted in 2014.

Federal employees in the national capital region represented by far the largest group surveyed, with nearly 44 per cent of respondents working in the NCR.

The survey added five new questions in 2017 related to compensation and the Phoenix pay system.

Of those who responded, 69 per cent said their compensation has been affected, with one in three (34 per cent) saying they were underpaid, 18 per cent said they were overpaid, and 22 per cent said they were missing regular pay.

Pay-related issues were the most common cause of stress at work, according to the survey, with 34 per cent listing compensation as the most prevalent cause of stress, while 32 per cent said there were not enough employees to complete work, and another 26 per cent pointed to a heavy workload.

One in five federal employees indicated their work-related stress level is either high or very high, with 29 per cent saying they "feel emotionally drained" by the end of the work day.

Other respondents listed harassment and discrimination in the workplace as a source of stress.

Nearly one in five employees (18 per cent) said they had been the victim of harassment on the job in the past two years – half of those respondents said they had been harassed by co-workers, while 63 per cent said they had been harassed by someone in a position of authority.

Those respondents who said they had been harassed in the last two years said the harassment took the form of an offensive remark (57 per cent), unfair treatment (48 per cent), being excluded or ignored (45 per cent), aggressive behaviour (41 per cent), humiliation (41 per cent), and excessive control (40 per cent).

Of those who said they were harassed, only eight per cent said they filed a grievance, while one-quarter said they took no action at all.

Half of respondents said they were satisfied with the way harassment-related matters were resolved within their organization.

Survey findings related to harassment remained largely unchanged from the 2014 survey.

Eight per cent of employees said they were the victim of workplace discrimination, the same ratio indicated in the 2014 survey.

Of those, the vast majority (79 per cent) said they were discriminated against by employees who had authority over them.

Gender-based discrimination increased sharply from 24 per cent in 2014 to 30 per cent in the 2017 survey.

Others felt they were discriminated against based on age (25 per cent), race (24 per cent), national or ethnic origin (19 per cent), with each of those numbers representing a slight increase from the results of the 2014 survey.

Others said they were discriminated against based on disability or family status (both 16 per cent).

Of those who said they experienced discrimination, only seven per cent filed a grievance, while half took no action.

Of those who took no action, 61 per cent said reporting the discrimination would make no difference, and 44 per cent said they feared reprisal.

Despite those issues, 80 per cent of respondents said they like their job, with a majority of employees saying they receive “meaningful recognition” for good work, and 87 per cent saying they are “proud” of the work they do.

The 2017 survey contained 119 questions, including 17 opinion-related questions new to the survey related to compensation and workplace well-being.

The survey was conducted over a six-week period from August to September, 2017.

Projet de loi pour réduire les délais: de la poudre aux yeux ?
Pour les criminalistes, ce projet ne règlera pas les problèmes fondamentaux du système et pourrait en occasionner des nouveaux.
Droit Inc
Delphine Jung
30 mars 2018

Jeudi, la ministre de la Justice fédérale, Jody Wilson-Raybould, a déposé un projet de loi à la Chambre des communes afin de moderniser le système de justice.

De nombreux changements au Code criminel sont prévus, mais n’ont pas réussi à convaincre des criminalistes comme Mes Tiago Murias et Valérie La Madeleine.

Le ministère évoque notamment l’idée d’abolir les récusations péremptoires qui permettent aux procureurs de la Couronne et de la défense d'exclure un candidat juré sans donner de raison.

Enlever un droit à l’accusé

C’est sûrement le point qui irrite le plus les criminalistes. « Elles existent justement pour permettre un jury impartial à la fois pour la Couronne et pour l’accusé, dit Me Murias. Les abolir enlève des droits aux deux parties. Par exemple, si une personne du jury arrive avec à un procès pour terrorisme avec un t-shirt « Free Palestine », il n’y a aucune raison avouable pour la récuser. Pourtant, la Couronne pourrait avoir des craintes objectives que cette personne puisse être impartiale dans un tel procès. Les récusations péremptoires existent exactement pour éviter de telles situations », dit-il.

« C’est enlever un droit à l’accusé », dit aussi la criminaliste Me La Madeleine.

Pour son confrère, le gouvernement agit par démagogie en essayant de « légiférer par faits divers pour calmer la foule en oubliant les raisons sous-jacentes à la présence de certains articles dans le Code criminel ».

Le verdict de non-culpabilité dans le procès d’un fermier accusé d’avoir tué un Autochtone en Saskatchewan avait en effet soulevé l’indignation de certaines personnes qui avaient évoqué la façon dont la défense s’était débarrassée des citoyens autochtones présents dans le jury.

Revamper les enquêtes préliminaires
Afin d’accélérer le processus judiciaire, le projet de loi veut aussi restreindre le recours aux enquêtes préliminaires. Dans un reportage, Radio-Canada a pourtant rappelé les chiffres de Statistiques Canada qui indiquent que seulement 3 % de toutes les causes criminelles ont fait l’objet d’une enquête préliminaire.

« L’enquête préliminaire est en désuétude depuis le changement du Code criminel, dit Me Murias. Le gouvernement se dit donc à raison que puisque ce mécanisme n’est plus utilisé, il faut l’abolir. C’est une mauvaise idée. Il y aurait une autre façon de rendre utile l’enquête préliminaire, mais ma vision n’est pas très populaire. On pourrait par exemple la rendre plus alléchante et faire en sorte que le seuil de l’enquête préliminaire soit la prépondérance de preuves. Ça ferait en sorte que seulement les dossiers solides vont à procès », suggère-t-il. Il assure que cette idée n’est pas pro criminel, mais plutôt « pro efficacité ».

La criminaliste estime quant à elle que ce ne sont pas les enquêtes préliminaires qui expliquent l’engorgement du système de justice.

Du gros bon sens pour les conditions de remises en liberté
Le gouvernement propose également de modifier le processus de liberté sous caution, entre autres pour imposer des conditions « raisonnables et pertinentes » aux détenus. Sur ce point, encore une fois, les deux criminalistes s’entendent et approuvent cette suggestion.

« Il y a des conditions de libération qui devraient être interdites. Le fait de demander à quelqu’un d’alcoolique de ne pas consommer de l’alcool c’est ridicule. Il faut que les conditions puissent être respectables, car sinon les gens seront arrêtés pour des bris et c’est ce genre de choses qui engorge le système judiciaire », explique Me Murias qui trouve que cette idée est « la meilleure du projet de loi ».

« Il faut être logique et faire preuve de bon sens », ajoute Me La Madeleine. Pour l'avocate, le gouvernement devrait plutôt s'attaquer à l'éducation des policiers et des procureurs de la Couronne qui accusent à la va-vite. « Il faudrait plutôt tendre à une déjudiciarisation de certains dossiers », dit-elle.

Quoi qu'il en soit, elle estime que toutes ces propositions ne « vont pas apporter de changements majeurs » et que les problèmes de délais ne se règleront pas comme ça.

D'autres idées pour réduire les délais
Me Murias aurait aimé que le gouvernement s'attaque aux peines minimales qui crée des injustices et qui sont l'une des plus grandes causes de délais judiciaires selon lui.

« Quelqu'un qui mérite une lourde peine aura sa lourde peine. La peine minimale ne sert strictement à rien. Elle fait que ceux qui ne l'auraient pas mérité la reçoivent, et ceux qui l'auraient mérité l'ont de toute façon. En plus, ça fait des accusés qui n'ont pas grand-chose à perdre », ajoute-t-il.

La ministre Vallée veut plus de juges
Le ministre québécoise de la Justice, Stéphanie Vallée, a également réagi aux annonces de Mme Wilson-Raybould. Elle parle « d'avancées positives », mais souligne que « beaucoup de choses restent encore à faire de la part du gouvernement canadien pour permettre de ramener les délais de traitement des dossiers sous les seuils prévus par la Cour suprême dans l'arrêt Jordan en juillet 2016».

Par ailleurs, la ministre Vallée réitère que le gouvernement du Canada doit procéder rapidement à la reconnaissance et à la nomination des six juges à la Cour supérieure et d'un juge à la Cour d'appel, postes créés par Québec en décembre 2016. « Le gouvernement fédéral, au même titre que les autres intervenants du système de justice, est un acteur de premier plan dans la réduction des délais de traitement des dossiers criminels», dit-elle, soulignant que ce projet de loi est une première étape qui s'inscrit plus de 20 mois après la décision de la Cour suprême. « Nous souhaitons que le Gouvernement du Canada agisse rapidement dans ce dossier et qu'il emboîte le pas, comme le Québec l'a fait avec son plan d'investissement en justice. »

Here's why lawyers should advocate for greater diversity in their profession
If lawyers refuse to stand up for diversity, they're not true advocates of justice.
Ottawa Citizen
Paula Ethans
March 30, 2018

What happens when a law society tells lawyers to promote diversity? A battle of beliefs.
The Law Society of Upper Canada (LSUC) recently released a diversity policy, in which lawyers must draft and submit a "statement of principles" annually, promising to promote diversity in the legal profession. This policy was inspired by a working group report that found that there was systemic racism within the profession.

According to the LSUC consultation paper, only 17 per cent of Ontario lawyers are racialized (i.e. not Caucasian). Of that 17 per cent, many noted having been denied files at their workplace, struggling to find articles, and not having mentors.

Simply put, some of the most talented lawyers in Canada don't have the same opportunities as their peers, because of their skin colour.

Atrisha Lewis, in Canadian Lawyer Magazine, said, "I experience daily frustrations that are not experienced by many within our profession: Have you ever had to explain that you are the lawyer and not the client, articling student or legal assistant? Have you ever had racial slurs hurled at you while you walk to court with your robing bag and bankers boxes in tow?"

The new statement of principles has lawyers divided into many camps, one of the loudest being the "defenders of free speech."

These critics see the policy as an unfair imposition of values on their practices and personal lives, and are pushing back against it to uphold free speech (known as "freedom of expression" in Canada).

Some believe the LSUC is calling lawyers racists, but this is not the case. The working group found systemic racism in the profession, which refers not to individual actions but overarching policies. It manifests itself through unconscious biases, nepotistic hiring processes and micro aggressions.

Lawyers are advocates. If lawyers refuse to advocate for diversity, then they're not true advocates of justice. When lawyers only advocate to uphold the status quo, ensuring groups historically excluded from power and opportunities continue to be deprived, they're perpetuating inequity.

Arguing that the statement of principles infringes upon lawyers' freedom of expression is flawed. Under the Charter, expression is only protected when it doesn't infringe on another's rights. If infringement is found, it can be saved under Section 1 of the Charter if the infringement is justified. Here, if a court found infringement, it would very likely be justified.

These critics also fail to consider other scenarios where the LSUC compels speech. For example, lawyers must plead allegiance to The Queen when they are called to the Bar. By the critics' definition, this is compelled speech for anyone who opposes Canada's colonization. So why haven't they protested this infringement of free speech?

More practically, what expressions are lawyers concerned will be infringed? Which words or actions will they have to change under this policy? If lawyers are being discriminatory, it's for the greater good that the LSUC compels different behaviour.

I, too, value freedom of expression, but it's wrong for lawyers to use it solely to uphold the status quo. The LSUC isn't compelling lawyers to fund Planned Parenthood or join Black Lives Matter. It's simply telling lawyers to try to make their profession more equitable.

Lawyers opposing the diversity policy are using free speech as a smokescreen. They like how the legal profession is – an old boys' club – and don't want it to change. They fear a future where they'd no longer hold all the power in their field. Bottom Line: we have a profession that doesn't treat everyone fairly, and that needs to change.

As advocates, lawyers are meant to ensure that everyone has a fair shot in life, regardless of personal characteristics. If some lawyers refuse to promote diversity in the profession, are they the kind of advocates our justice system needs?

Paula Ethans is a third-year law student at the University of Ottawa.

Editorial: Justice reform bill could trip over its own good intentions
Ottawa Citizen Editorial Board
March 31, 2018

If the federal government is to be faulted for its ambitious justice reform bill, it is perhaps because the legislation tries to accomplish too much at one time. Bill C-75, unveiled Thursday, presents a wide array of targets for opponents to aim at.

Some, for instance, will balk over eliminating preliminary inquiries in all but the most serious cases. Justice Minister Jody Wilson-Raybould boasts the bill would end such hearings in 87 per cent of cases, speeding up court cases. But many experts think doing away with prelims will actually slow things down.

Or, they may worry over changes to jury selection. The bill does away with the right of both Crown and defence to reject jurors without citing their reasons; the change comes in the emotionally charged aftermath of the Colten Boushie case, in which several Indigenous people were excluded from the jury trying a non-Indigenous man for Boushie's death. Some see this part of the bill as hastily contrived.

There will also be people fearful of specific changes to the bail system. For instance, the bill specifies a "reverse onus" on those facing domestic assault charges who have previously been convicted of similar offences; it means these accused would have to satisfy a judge as to why they deserve bail, rather than the Crown having to argue why they should be kept in custody.

Still, both the broad intent and general direction of Bill C-75 deserve applause. Once the Supreme Court of Canada, with its so-called "Jordan decision" in 2016, said Canadian courts had to rule more quickly or serious cases would be tossed out altogether (many were), Wilson-Raybould had no choice but to act.

That is why the proposed bill reduces those preliminary hearings, for instance. That's why it also contains other measures such as diverting less serious offences from superior courts and giving judges more discretion about the pace of proceedings. That's also why some other parts of the bail system will be more streamlined. All good, perhaps – though, oddly, the bill doesn't address mandatory minimum sentences, which many lawyers believe seriously clog the courts, since they reduce the possibility of plea bargains that would end trials more promptly.

For its merits, this bill nonetheless feels overly broad, and that girth could prove its downfall. Given how tough it is proving to pass other federal legislation – witness the tussle over marijuana legalization – the government probably shouldn't be mixing priorities in Bill C-75.

It may end up tripping over its own sprawling, if noble, intentions.

How judges use 'hypotheticals' to strike down mandatory minimum sentences
The Globe and Mail
Sean Fine
April 1st, 2018

He was 20-years-old, and after chatting up a 13-year-old girl on Facebook – she had randomly typed "Mike" into Facebook, just for fun – had sex with her in a transit-station washroom. Caught in the act, Michael Alexander Ford of Edmonton was facing a mandatory minimum sentence of one year in jail for sexual interference.

But the judge struck down the obligatory sentence as "cruel and unusual punishment" under the Charter of Rights. It was "grossly disproportionate," she said, not for Mr. Ford but for a "reasonable hypothetical" offender: someone who had survived a brain tumour that left him incapable of learning from his mistakes. That is, an imaginary person.

It's a little-known aspect of how cruel-and-unusual punishment cases work in Canada. A judge must look first at whether the obligatory sentence, when matched to the offender, would be so extreme as to outrage Canadians. If the judge decides it is not that extreme (it can be harsh or disproportionate and still pass muster), the judge then must look at how the sentence would fit a reasonable hypothetical offender. This offender could be drawn from cases in other jurisdictions or be completely made-up, as long as the judge deems her creation "reasonable." If the judge rules the mandatory minimum grossly disproportionate and therefore constitutionally invalid for the hypothetical offender, the judge may then sentence the actual offender as if the minimum does not exist.

n Mr. Ford's case, Justice Joanne Veit of the Court of Queen's Bench could give him a sentence she considered fair, once the minimum was off the table.

Much like the hypothetical offender, Mr. Ford had survived a brain tumour at 14; and while there was no proof of intellectual impairment, his social and psychological development had been arrested at 14 or 15, evidence showed. Moreover, Justice Veit said, the relationship between Mr. Ford and the victim appeared to be one of "genuine affection."

"A court must be careful not to impose a middle-class, Romeo and Juliet type, expectation on what a relationship of genuine affection is for teenagers, especially street kids," she wrote.

She gave him six months in jail.

It is not only Mr. Ford who benefits from her ruling. For the moment, at least, it appears Alberta has no minimum penalty for sexual interference. A sentence of house arrest is now possible.

The Ford ruling – being appealed by the Alberta Crown – demonstrates why many minimums set by Parliament, especially during the former Conservative government of Stephen Harper, have a short shelf life. In dozens of cases reviewed by The Globe and Mail in a national database search, judges have ruled these minimums invalid under the Constitution for guns, drugs and sex crimes against children. In a large number of such cases, they conjured up hypothetical offenders to explain why.

Even some criminal defence lawyers find the courts' use of reasonable hypotheticals puzzling. Usually in Charter of Rights cases, it's the context, including the specific factual circumstances, that is vital.

Mostly, "the courts have been pretty adamant that the alleged unconstitutional effects of a challenged law need to be demonstrated in evidence," Toronto lawyer Matthew Gourlay said in an e-mail. Still, he believes their use is justified because mandatory minimums tend to raise sentences not just at the bottom end but for more serious offences.

The first mandatory minimum to run up against the "cruel and unusual punishment" clause of the Charter (Section 12) at the Supreme Court of Canada was in a 1987 drugs case known as R v. Smith. The federal government had set a minimum seven-year jail sentence for importing drugs. The offender had imported cocaine. But the court said the penalty wouldn't fit a hypothetical first-time offender who brought in a single "joint of grass."

In other words, it was a bad law.
"The basic justification runs like this: the constitutionality of a sentencing scheme cannot depend on who happens to be charged and convicted of a given offence. . . . the scheme is either constitutional for everyone who stands to be punished for violating the offence in question, or it is not constitutional at all," University of Saskatchewan law professor Michael Plaxton explained in an e-mail.

Not everyone accepts the concept. "In the worst case, you could hypothesize some ridiculous character for whom this would be a bad penalty," Grant Huscroft, now an Ontario appeal court judge, said on TVOntario's The Agenda, before the Conservatives appointed him a judge three years ago.

Mr. Harper's government established or increased minimums for 60 offences, largely those dealing with guns or drugs or sex crimes against children.

Its position: Judges couldn't be trusted to hold offenders accountable. Their discretion had to be limited. Parliament's role is to set sentencing parameters, and preserve public confidence.

What happened with the mandatory minimums was a kind of sequel to a judicial rebellion over a victim surcharge. When the Conservatives made a financial penalty for offenders mandatory in 2013, lower-court judges openly sidestepped the penalty when impoverished offenders were before them – giving as much as 99 years to pay, or setting the penalty at $1.50.

With the mandatory minimums, the Supreme Court set the tone. In 2015 and again in 2016, the top court struck down mandatory minimums in illegal-gun-possession and drug-trafficking cases, using reasonable hypotheticals.

“The reality is this: mandatory minimum sentence provisions that apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are constitutionally vulnerable,” the chief justice Beverley McLachlin wrote for a majority in R v. Lloyd in 2016. “This is because such provisions will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.”

The result: Lower-court judges have cover to strike down the minimums and regain their discretion. But the Crown is fighting back. It is trying to argue that hypotheticals such as the one used by Justice Veit are undermining what Parliament tried to do in protecting children. In its court filing at the Alberta Court of Appeal, it said Justice Veit had blamed the victim by attributing to her a “de facto consent” not recognized in the law.

In sexual interference – sexual contact between an adult and a person under 16, the age of consent – there is no such thing as a “low culpability or small offenders,” the Alberta Crown argued.

It demanded 3½ years in a federal penitentiary for Mr. Ford, plus an additional six months for a breach of a court order to keep the peace.

Among the other examples:
In a Northwest Territories case last month, a 33-year-old man faced a five-year minimum for recklessly shooting a prohibited firearm in a public place. He had tried to kill himself, but after a friend pushed the gun from his face, he went out into the street and fired a shot into the snow. The judge said that the five-year penalty would be grossly disproportionate not for him, but for a hypothetical young Indigenous man with no criminal record who had failed to commit suicide in similar circumstances.
In another Alberta case, this one from November, a 35-year-old man was convicted of sexual exploitation for having had sexual relations with a 16-year-old relative over a three-month period. The Court of Queen’s Bench judge said the one-year minimum was grossly disproportionate in the case of a “hypothetical babysitter or teacher whose only sexual contact with a young person is limited to a single instance of inappropriate touching.”

Ending peremptory challenges in jury selection is a good first step
Ottawa Citizen
Kent Roach
April 2, 2018

As we approach the 50th anniversary of the assassination of Martin Luther King, it behooves us to recall this statement from Dr. King: “You don’t have to see the full staircase, just take the first step.”

When it comes to equality and juries, the first and necessary step is the abolition of peremptory challenges. These allow both Crown prosecutors and defence lawyers to exclude people from juries simply because they do not like the way they look.

A number of defence lawyers have criticized the proposed abolition of peremptory challenges contained in Bill C-75, which the federal government introduced last week. These lawyers claim abolishing such challenges will make juries less diverse. They say they use peremptory challenges (often in large cities) to make juries more representative.

Yet this ignores the fact that peremptory challenges were used by the defence to keep five visibly Indigenous people off the jury in the trial of a non-Indigenous Saskatchewan farmer, Gerald Stanley, for the killing of an Indigenous man, Colten Boushie.

It was not the first time this has happened: The defence kept all Indigenous people off the jury in a murder trial in The Pas, Man., in which the victim was Helen Betty Osborne, a 19-year-old Cree woman who had moved there to attend high school.

It also ignores that Bill C-75 would amend the Criminal Code to allow judges to stand aside potential jurors not only to respond to hardship but, when necessary, to promote confidence in the administration of justice – something that was shaken by the all-white jury's controversial acquittal in the Stanley case and by the under-representation of minorities on juries. Much will depend on how this judicial discretion is exercised.

Abolishing peremptory challenges by Crown or defence is no knee-jerk quick fix, as some claim. In 1991, it was recommended by the Manitoba Aboriginal Justice Inquiry chaired by Justices Alvin Hamilton and Murray Sinclair. Retired Supreme Court Justice Frank Iacobucci concluded in an extensive 2013 report that no amount of effort to increase the woeful under-representation of Indigenous people on our juries would work without eliminating the discriminatory use of peremptory challenges.

Some defence lawyers point to the United States for solutions. U.S. courts have required, first the prosecutor and later the defence, to provide some "non-discriminatory" reason to justify the use of peremptory challenges that look discriminatory.

Canadian lawyers could have brought similar challenges since 1985 when Charter equality came into effect, but they have failed to do so. Even if made, such challenges would add time and litigation to our burdened courts. Moreover, they would not likely be effective given that most conclude that American lawyers have been clever enough to find some apparently neutral reason to keep minorities off juries. Canadian lawyers would be no less clever.

But there are many steps still to be taken to climb the staircase to full equality on our juries.

Parliament should push back on a 2015 Supreme Court of Canada decision that held that it was fine to have a jury trial of an Indigenous accused in Kenora in which only eight of 175 prospective jurors were Indigenous. In a prophetic dissent in light of the Stanley verdict, Justice Thomas Cromwell (Chief Justice

Beverley McLachlin concurring) argued that the majority's "reasonable efforts" test was not sufficient given the significant under-representation of Indigenous people on the jury roll, and the result "casts a long shadow over the appearance that justice has been done."

Related to the above, Parliament should modernize the Criminal Code requirement, first enacted in 1892, that the composition of jury panels can only be challenged if the provinces engaged in wilful misconduct. This will require work with the provinces, but there should be federal leadership.

Here are some other things we should do:

• We need to increase the pay of jurors for their difficult public service.

• We should consider allowing permanent residents and volunteers from Indigenous communities to serve as jurors.

• We should consider holding jury trials not just in county seats like Battleford, but in local communities in the North.

There are many high steps in the staircase towards equality, but as Dr. King reminded us, you must take the first step. That first step is abolishing peremptory challenges.

Kent Roach has taught criminal law at the University of Toronto since 1989 and has litigated cases involving jury selection in the Supreme Court of Canada and the Ontario Court of Appeal.

Bill C-75 offers mixed bag of reforms but fails to address a key factor behind delays in justice system
The Georgia Straight
Sarah Leamon
April 1st, 2018

Last week, Justice Minister Jody Wilson-Raybould introduced a massive, 300-page bill, aimed at rehauling our criminal justice system.

While many aspects of Bill C-75 are intended to curb courtroom delay, others are focused on ending intimate partner violence and diversifying juries.

But will this legislation be effective in achieving its objectives?

Some critics are doubtful…but while the bill is far from perfect, there are some positives aspects.

I read Bill C-75 over the weekend so you don't have to. Here's what you need to know:

Preliminary inquiries
One of the most controversial aspects of Bill C-75 is its proposal to do away with preliminary inquiries in the vast majority of criminal proceedings.

Generally speaking, preliminary inquiries are used to test the strength of the Crown's case prior to proceeding to trial. Adults charged with an indictable offence under the Criminal Code will normally have the right to seek a preliminary inquiry, should they wish to.

Bill C-75 restricts preliminary inquiries to only the most serious of offences.

If passed into law, preliminary inquiries will only be available to adult offenders facing the possibility of life in prison.

The Justice Department believes that restricting preliminary inquiries in this manner will reduce their number by approximately 87 percent, nationwide.

Proponents of adopting this measure say that it will help significantly in curbing courtroom delays. They say that it will free up judges, and court time, and allow for criminal proceedings to move in a more expedited manner.

They also argue that preliminary inquiries are outdated legal relics, which are in dire need of reform in any event.

After all, there was a time when Crown disclosure obligations prior to trial were less onerous than they are today. This meant that an accused person may have not known the entirety of the Crown's case against them until they were mid-trial, which put them at a serious disadvantage.

But in 1991, the Supreme Court of Canada expanded disclosure rights in the case of R. v. Stinchcombe. There, it was held that an accused has a charter right to access all of the evidence held by Crown.

Given this significant development in the law, some have argued that preliminary inquiries are no longer necessary.

Even with this development, though, preliminary inquiries continue serving an essential role in our criminal justice system.

Preliminary inquiries help lawyers determine whether a long and costly trial process is necessary. They also help test the evidence and ensure trial fairness. At the end of the day, they help in ensuring that court time is used in an appropriate and resourceful way.

For this reason, their removal may ultimately end up ironically contributing to delays, rather than curbing them.

Intimate partner violence
During the election, the Liberals promised to crack down on intimate partner violence. Some of the measures in this bill appear to be an attempt at making this campaign promise a reality.

Bill C-75 seeks to do a number of things in relation to this issue.

For starters, it makes strangulation an elevated form of assault and creates higher penalties for those who reoffend in the context of domestic relationships.

It also extends the definition of domestic violence to violence against former partners, in addition to current partners.

Finally, and perhaps most controversially, it imposes a reverse onus on bail applications by people accused of domestic assault who have a history of abuse in their past.

Imposing a reverse onus on bail applications for some offenders—and not others—is problematic, to say the least.

If it is to become law, this portion of the bill is likely to be challenged as a breach of charter protections. There is a reasonable likelihood that it will ultimately be struck down.

As a general rule, the government should avoid implementing laws that are constitutionally questionable. Doing so will inevitably result in costly court challenges, which contribute to delay, and ultimately undermines the objective of implementing such laws in the first place.

And while expanding the definition of domestic violence to include former partners seems like a good idea in theory, it may not be so in practice.

Establishing a past history of intimacy may create practical difficulties for the Crown, and at the same time, erode the significance of violence within the context of a domestic partnership.

It muddies the water and creates confusion around what domestic violence actually means.

Domestic violence is a multidimensional issue that requires multidimensional reform. Changes to our criminal justice system will mean nothing without increased community education and prevention programs and more funding for support services.

If the justice minister truly wants to deliver on her campaign promise, she would be wise to explore other options for addressing domestic violence, beyond those embodied in this bill.

Jury selection

The decision to rehaul the jury selection process in Bill C-75 seems to have been made in reaction to the acquittal of Gerald Stanley, which occurred earlier this year. An all-white jury found Stanley not guilty in relation to the shooting death of Colten Boushie, a young Indigenous man.

The decision sent shock waves through our country. Both the justice minister and the prime minister conveyed their personal views using social media.

As a general principle, reactionary reforms to the justice system should be discouraged.

There will always be anomalous cases and unpopular decisions in criminal justice. This is an uncomfortable reality and agonizing aspect of a properly functioning system.

Unpopular courtroom decisions should not be a catalyst for unnecessary change.

That being said, jury reform is long overdue in this country, as is the need to meaningfully address systematic racism.

This is particularly so when it comes to the treatment of Indigenous people within our criminal justice system.

One of the ways that Bill C-75 seeks to foster diversity is through the creation of a more equitable juries. It wants to achieve this by doing away with peremptory challenges, used by both Crown and defence, during the jury selection process.

Peremptory challenges are used to exclude potential jurors without explanation or reason.

They are often used to disqualify jurors who may be more sympathetic to one party or another in a proceeding by virtue of their sex, gender, age or visible racial identity. Peremptory challenges have been blamed for the under-representation of visible minorities on jury panels.

It is in the best interests of fundamental justice for juries to be diverse and representative of society.

So while it may not be wise to do away with peremptory challenges altogether, the notion of restricting them to some degree, and creating concrete guiding principles in relation to them, seems reasonably prudent.

The justice minister has described this measure as a “necessary culture shift”. but only time will tell whether it will be effective in achieving its objective.

To conclude, Bill C-75 has potential…but in many ways, it also misses the mark. In some aspects it goes too far, in others…not far enough.

Perhaps the most disappointing part of this bill is that it does nothing to address the main factor contributing to delay in our criminal justice system: mandatory minimum penalties.

Bill C-75 still has a long way to go.

Sarah Leamon is a criminal defence lawyer at Acumen Law Corporation. She also chairs the PACE Society board in Vancouver’s Downtown Eastside and holds a master of arts in women’s studies from UBC. Follow @SarahLeamonLaw on Twitter.

Liberal government justice reforms will cause further delays, criminal lawyers say
Aidan Macnab
Canadian Lawyer Magazine
April 2, 2018

Criminal defence lawyers say certain provisions in the federal Liberal government's proposed bill C-75 will increase, not decrease delays in the criminal justice system.

Bill C-75 was unveiled March 29 and the Department of Justice says the legislation will "protect the vulnerable, serve victims, keep communities safe and decrease court delays by making the system more efficient."

However many criminal lawyers took to social media almost immediately, outraged when the bill was released last week.

"This piece of legislation is a betrayal of the liberal promise that the federal government would approach much-needed justice reform through evidence-based policy making. Instead what we have here is a piece of legislation that would trade away a number of well-established procedural protections that ensure the fairness of criminal trials in the hopes that the results would be a decrease in the delays that have plagued the criminal justice system for decades. What is astounding about this trade off is that there is no evidence that any of the measures proposed by the government will, in fact, decrease delays. They may actually exacerbate them," says Annamaria Enanajor, partner at Ruby Shiller & Enenajor Barristers, in an email comment.

Bill C-75 will restrict the availability of a preliminary inquiry to offences punishable by imprisonment for life and strengthen the justice's powers to limit the issues explored and witnesses to be heard at the inquiry.

Frank Addario at Addario Law Group says eliminating preliminary inquiries will not speed up the system but slow it down. He says the process actually promotes settlement.

"The reality is, it's not really contributing to delay," Addario says. "I think that evidence will not bear out the claims that eliminating preliminary inquiries will produce more efficiencies."

The legislation is "cynical, reactionary" and produces results counter to the government's stated objectives, says Michael Spratt, partner at Abergel Goldstein & Partners LLP.

The Conservative government brought in mandatory minimum sentences they said would keep the streets safer but studies showed they increased recidivism and made the streets more dangerous, he says.

Two provisions in the bill that are intended to speed up the process, but Spratt says will serve to do the opposite, are the elimination of the preliminary inquiry and letting the Crown introduce police evidence by affidavit without calling on the police to testify.

“I think both of these provisions are actually going to result in unfair proceedings and will actually result in increased court time,” Spratt says.

The use of preliminary inquiries actually speed up the process, says Spratt, because they prevent delays from happening once trials start as issues can be identified and there is no need to pause to explore third-party records or further disclosure because they have already been handled.

Allowing the Crown to introduce police-officer evidence on paper is a “bizarre provision that came out of left field,” Spratt says.

“That not only weakens the court system and weakens protections against wrongful convictions but it’s going to increase delay because defence counsel are going to have to bring applications to cross examine these officers on their affidavit,” he says. “The fact that we have to take up court time arguing over whether the Crown should take advantage of these procedural short cuts that undercut fairness is in and of itself going to create more delays than those short cuts are ever going to save."

Spratt says the new Liberal plan is a reaction to the Gerald Stanley verdict that will actually make juries whiter, he says. Bill C-75 eliminates peremptory challenges, which are used by the defence and the Crown to eliminate without a stated cause, potential jurors from contention.

An all-white jury served on the trial of Gerald Stanley, the Saskatchewan farmer acquitted of second-degree murder in the death of Colten Boushie. During the trial, defence counsel used peremptory challenges to eliminate potential jurors who were Indigenous.

While the Stanley verdict represented a case where a white accused was provided a white jury via peremptory challenges, defense lawyers more often use peremptory challenges when they have a non-white accused and want to put someone on the jury who looks like their client, says Spratt.

“There was one anecdotal example in the Stanley Trial of defence counsel using peremptory challenges to exclude Indigenous individuals but in 99 per cent of the cases the opposite is actually true,” he says.

“When you look at the peremptory challenge changes by removing peremptory challenges we are probably at risk of having even whiter juries,” he says.

Addario says if the government wanted to make juries more representative, they should have amended s. 629 of the Criminal Code which states that “the accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.” That has been interpreted, including by the Supreme Court, to mean that the racial makeup of a jury can not constitute impartiality.

“I think the government’s goal of getting more representative juries is a fantastic one,” Addario says. “With the stroke of the pen the federal government could have said that the jury array is not going to be impartial unless it’s representative.”

Spratt says it is especially disappointing that there is no minimum sentence reform in the bill, "something that everyone agrees would create a fairer and speedier court system."

He says it is unfortunate that without extensive consultations, the government is getting rid of peremptory challenges while keeping mandatory minimums.

The bill also makes the courts stricter with respect to those accused of domestic violence by increasing the maximum term of imprisonment for repeat offences involving intimate partner violence and provided that abuse of an intimate partner is an aggravating factor on sentencing, according to the legislation.

Addario says that domestic partner violence is a serious issue but must be addressed at the root cause. He says it is ineffective to try and deal with it with the court system.

"It's obviously progressive for the government itself to acknowledge that intimate partner violence is a very serious social problem, and my only caution to the wider community is when the government responds to a social problem with the big stick of punishment it should also make a clear statement that the big stick is not the solution to the problem, it's a response to the problem and the problem remains unsolved. By the time the police arrive, it is already too late to solve the problem of intimate partner violence," he says.

A good first step towards diverse, impartial Canadian juries
The Conversation
Kent Roach
April 2, 2018

The proposal to abolish what are known as "peremptory challenges" in Bill C-75, the Canadian government's new criminal justice bill, should be welcomed.

Peremptory challenges allow both the accused and the prosecutor to challenge and dismiss a potential juror basically because they do not like how that juror looks. They're an invitation to discrimination.

Nevertheless, some defence lawyers have argued that abolition will make juries less diverse.

This ignores the inconvenient fact that the defence team's use of peremptory challenges produced an all-white jury in the Gerald Stanley-Colten Boushie case.

Some argue that abolition is a knee-jerk and quick-fix response to Stanley's acquittal, and even an attempt to stack the jury.

This ignores that England, the birthplace of peremptory challenges, abolished them in 1988. After much research and deliberation, the Manitoba Aboriginal Justice Inquiry also recommended in 1991 that they be abolished.

Finally, arguments against doing away with peremptory challenges also ignore that retired Supreme Court Justice Frank Iacobucci concluded in a well-researched 2013 report that no attempt to address the dramatic under-representation of Indigenous people on juries will work as long as both prosecutors and defence lawyers can use peremptory challenges in a discriminatory manner.

Despite the fact that equality rights under Canada's Charter of Rights and Freedoms have been in force since 1985, defence lawyers and prosecutors have failed to challenge the discriminatory use of peremptory challenges.

The U.S. has developed such jurisprudence, but it slows down trials, the opposite of what Bill C-75 was aiming to do in its response to the Supreme Court of Canada's speedy trial ruling.

Bogus reasons to exclude jurors

What's more, it doesn't work to address concerns about discrimination.

In the U.S., the prosecutor and the defence are allowed to invent seemingly neutral reasons for keeping minorities off the jury. For example, saying: "I am excluding this potential juror because she works for a tribal council" could be just another way of saying: "I am excluding her because she is Indigenous."

Employing the American approach in Canada would therefore only result in complex and ineffective litigation.

Those claiming that the abolition of peremptory challenges could lead to biased jurors ignore what's known as the "challenge for cause" process in Canada's Criminal Code that allows both sides to question jurors about whether they would be impartial.

Bill C-75, in fact, improves "challenges for cause" by mandating that judges, rather than the last two jurors selected for a trial, decide whether a prospective juror is impartial.

The use of two jurors to decide whether other jurors are partial has caused delays and problems in jury selection in the past, and resulted in Criminal Code amendments in both 2008 and 2011.

Transparent and open

The challenge for cause process is transparent and open. It should have been used in the Stanley/Boushie case to ensure that no juror, Indigenous or non-Indigenous, had already made up his or her mind and was unprepared to fairly decide the case on the evidence.

The challenge for cause process could be improved even further —beyond provisions in Bill C-75 — without going to the extreme of the American process that allows prospective jurors to be asked questions that violate their privacy, including how they vote.

The fact that challenge for cause was not used, and that the defence employed peremptory challenges to remove five visibly Indigenous potential jurors, has rightly undermined public confidence in Stanley's acquittal.

Bill C-75 would also allow judges to set aside some prospective jurors, not only on a hardship basis, but to maintain public confidence in the administration of justice. This is in response to findings that Indigenous people are under-represented on juries and the concerns that many Canadians had about the fairness of the jury selection process in the Stanley/Boushie case.

This expansion of judges' power could result in more diverse and representative juries, depending on how they exercise that discretion.

But more work is needed to ensure that juries represent the diversity of our communities. Bill C-75 retains the citizenship requirement for jurors even though many permanent residents, often from racialized groups, might otherwise be competent and impartial jurors.

Bill C-75 does not follow up Justice Iacobucci's recommendation about allowing, in cases where it's appropriate, people who speak Indigenous languages to serve on juries with translation assistance.

The government should also revisit a 2015 Supreme Court of Canada decision that accepts dramatic under-representation of Indigenous people on panels of prospective jurors. Two judges dissented in this case, stressing the importance of justice being seen to be done.

We also need a more modern standard based on equality that ensures a fair and random sample of the community.

Such a change would push provinces to develop better ways to ensure more representative jury panels, including outreach and support of Indigenous and other groups such as African-Canadians who are under-represented both on jury panels and actual juries.

Jury trials, especially in the North, held in smaller communities and not simply the largest city in the region could also ease the barriers and hardships that some Indigenous people face when they serve on juries.

Better pay for jurors would also respond to the under-representation of Indigenous and other racialized and disadvantaged groups on jurors.
Saskatchewan has experimented with deliberately diverse coroner's juries.

In Ontario, there is interest in volunteer jurors from Indigenous communities. With co-operation from the Nishnawbe Aski Nation, more than 500 members of First Nations volunteered to serve on the coroner's juries that deliberated about and made important recommendations about preventing the death of Indigenous youth in Thunder Bay.

Iacobucci's 2013 report supported the use of volunteers to increase Indigenous representation on juries.

Some may fear that volunteer jurors or jurors appointed from the group affected by the case, or jurors from a small community where a crime is alleged to have taken place, may be biased and have no place in criminal trials.

But such arguments forget about the critical "challenge for cause" process for ensuring that all jurors are impartial. Nobody wants biased jurors who have already made up their minds. We should all want diverse juries who reflect the relevant life experience in the case.

More could and should be done, but Bill C-75 is a necessary first step that will correctly remove peremptory challenges that allow prosecutors and defence lawyers to keep people off juries whose looks they do not like.

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Disclosure statement
Kent Roach represented Aboriginal Legal Services of Toronto in the jury selection case of R. v. Williams and the David Asper Centre in the jury selection case of R. v. Kokepenance, both in a pro-bono capacity.

Fairer and quicker? Not necessarily under Ottawa's justice reforms
'As part of its wide-ranging package of reforms to the criminal justice system, the federal government proposes a major change that would make the system less fair and in all likelihood won't make it any speedier, either.'
Toronto Star Editorial Board
April 2nd, 2018

Justice delayed, goes the old saying, is justice denied. The Supreme Court of Canada spoke to that principle two years ago by setting strict limits on the time it should take to get a criminal trial. The court was trying to strengthen an accused person's right to fair and speedy justice.

Perversely, though, the federal government's long-awaited response to the decision may well have the opposite effect. As part of its wide-ranging package of reforms to the criminal justice system, it proposes a major change that would make the system less fair and in all likelihood won't make it any speedier, either.

The change in question involves doing away with almost all preliminary inquiries — traditionally a key way to test the strength of the accusations against someone accused of a crime. In Bill C-75, unveiled late last week by Justice Minister Jody Wilson-Raybould, they would be retained only for charges that carry a life sentence, such as murder. Some 87 per cent of "prelims" would be scrapped, she said.

This will take away a major opportunity for accused people (through their lawyers) to find out how strong the evidence is against them before they get to the stage of a full trial. The Canadian Bar Association, for one, warns it will weaken an important protection for those facing serious criminal charges. Doesn't sound like more fairness.

But will it speed things along and help to unclog the courts? In fact, there's no evidence of that, either. Prelims account for only about 3 per cent of court time, so even cutting that drastically won't accomplish much. More to the point, as Stephanie DiGiuseppe writes in the Star, they weed out weak

cases, increasing the probability of resolving cases before they go to trial, and make trials more focused and therefore quicker.

Doing away with them is highly unlikely to promote the government's goal — and the Supreme Court's command in the so-called Jordan case — to provide accused people with justice in a timely manner.

The rest of Bill C-75 contains a mix of positive and not-so-positive moves.

It proposes streamlining the bail system so that fewer people are held in jail while awaiting trial (but at the same time it would make it tougher for those facing domestic assault charges to get bail).

This is a good step. But the government could have accomplished largely the same thing by simply ordering Crown prosecutors to follow last summer's Supreme Court ruling in R. v. Antic that affirmed the presumption of innocence and the right of accused people to reasonable bail conditions.

Bill C-75 also makes changes to jury selection, a major concern in the wake of the acquittal of Gerald Stanley in the killing of Colten Boushie. The bill does away with so-called peremptory challenges — the right of both prosecutors and defence lawyers to reject jurors without specifying a reason. It gives that power to judges alone.

That sounds good, but legal experts point out such challenges can be used as easily to ensure more diversity on juries as to ensure less (as was the concern in the Stanley trial). It avoids the deeper issues of why minorities are under-represented in jury pools.

There are many other changes proposed in this voluminous bill, but many are rightly concerned about what is not in it — any attempt to address "mandatory minimum" sentencing laws. The Harper government imposed tough minimum sentences for a slew of crimes, making it harder for defendants to reach plea bargains in their cases. Instead, faced with the possibility of a long stretch behind bars, they are much more likely to exercise their right to a full trial, thus further clogging the courts.

While they were campaigning for office in 2015, the Trudeau Liberals identified mandatory minimums as a prime candidate for reform. After more than two years, though, they've done nothing on that front and Bill C-75 remains puzzlingly silent on the issue.

The government would have done better to take action in that area than to undermine protections for people going through the justice system.

Canadian unions seek damages after axing of Phoenix pay system
The Global Government Forum
Liz Heron
April 2nd 2018
The Canadian federal government has opened talks with unions on compensating public servants for the stress caused by the beleaguered Phoenix pay system.

In a joint letter submitted in mid-February, 17 public sector unions called on the government to pay damages to federal employees who have suffered hardship due to the catalogue of errors generated by the computerised pay system over the past two years.

The Trudeau administration indicated in its 2018 budget, which was presented to the House of Commons on 27 February, that it was open to compensating public servants for "the real mental and emotional stress" caused by Phoenix, as reported by CBC.

Cash compensation

Talks between the government and public sector unions over damages "have been advancing" since the budget was announced, the Public Service Alliance of Canada said in a statement on 15 March. Compensation is being sought for "the stress, the time spent dealing with and the catastrophic losses caused by Phoenix pay problems", it said.

PSAC president Robyn Benson said: "For two years, our members have lived in fear every pay day – they have had their lives turned upside down – and through it all they have continued to show up to work and deliver the services Canadians depend on. An agreement on damages won't solve everything, but it is an important part of making our members whole."

The Professional Institute of the Public Service of Canada confirmed in a statement last week that unions are "moving forward on negotiations with the government" for compensation or damages. However, neither the unions nor Public Services and Procurement Canada (PSPC), which is responsible for Phoenix, have revealed details of the talks.

Bulging backlog

The move comes as monthly figures published on a PSPC "dashboard" show that the backlog of pay "transactions beyond the normal workload" dealt with by the federal government rose steadily from 265,000 in June 2017 to a peak of 384,000 in January 2018, when the total number of outstanding transactions reached 633,000.

In February, transactions beyond the normal workload fell by 4,000 to 380,000, leaving 626,000 outstanding transactions. "While the exact number fluctuates daily, it is estimated that more than half of public servants are experiencing some form of pay issue," the dashboard states, adding that "a continual decline" in the number of outstanding cases is not expected until "later this spring".

Throughout the nine months covered by the dashboard, the government has failed to meet its target of dealing with 95% of cases inside the "service standard", with the proportion achieved ranging from 35 to 60%.

In the 2018 budget, the government committed to spending CAN$436.9m (US$338m) over six years to fix the Phoenix system and sort out the backlog of pay and tax problems, as well as CAN$16m (US$12m) over the next two years looking for a replacement for the programme. Phoenix was meant to generate CAN$70m (US$54m) per year in savings for taxpayers.