Canada's extradition process is broken
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Michael Spratt
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Canada's extradition process is broken.

It does not take any expertise in extradition law to reach this conclusion. After all, you don't need to be an expert mechanic to reach the conclusion that an abandoned jalopy is a piece of junk. Sometimes, it only takes one tragic case to show that the law is an ass. And, unfortunately, the heartbreaking case of Hassan Diab is that case.

In 2008, France requested Diab's extradition for his alleged involvement in the 1980 bombing of a Paris synagogue. In the early stages of the French investigation, information from German and Israeli authorities linked Diab to the bombing. But the case against Diab was circumstantial and the investigation gathered dust for almost 15 years.

The investigation was relaunched in 1999 after new information came to light. In reality, not much had changed. The case against Diab was still circumstantial and weak, but French authorities had a new piece of evidence — a positive handwriting comparison analysis between Diab and the bomber.

That is why in June 2011, after a lengthy and contentious extradition hearing in a Canadian court, Diab was ordered extradited to France.

The judge did not really have much of a choice in the matter. You see, the Extradition Act provides that a judge shall order the committal of the person into custody to await surrender if there is evidence that would justify committal for trial in Canada. That is a laughably low standard. There just needs to be some evidence. That evidence can be weak, it can be unreliable, it can come nowhere close to the quality of evidence needed to sustain a conviction. And, unlike in criminal trials, the extradition court cannot weigh the evidence. Even the weakest and most dubious piece of evidence must be given full weight by the judge.

If the extradition judge finds that this ludicrously low bar has been met, the case then moves to the Minister of Justice, who in the exercise of their discretion, can order extradition. There should have been no surprise that the Conservative minister of Justice, Rob Nicholson, quickly ordered Diab extradited to France.

Diab never did face trial in France. After 38 months of solitary confinement in a French dungeon, after missing the birth of his daughter, after losing years of his life, Diab was released and all charges were dropped by a French judge.

But Diab should never had been extradited in the first place as the case was just too shaky. But the extradition judge's ability to prevent an injustice was handcuffed — he did not have the power to throw out a shockingly weak case.

And there was one other unique circumstance in Diab's case — Canada appears to have been hell bent on extradition. Secret memos obtained last week by the CBC showed that senior Justice Department lawyers helped patch up the French case, misled the court and suppressed evidence that could have proved Diab's innocence.

So, back to the handwriting analysis that prompted France's extradition request almost three decades after the bombing. It turned out that the first positive handwriting comparison was based on handwriting samples that were not even Diab's. The French experts had, in fact, compared the bomber's handwriting with samples from Diab's wife. One would be forgiven for thinking the positive match was pretty much a forgone conclusion. The Canadian court had little time for this type of sloppy investigation and it looked like the extradition request would be denied. But then Canada's lawyers stepped in. They were set on helping France and throwing their own citizen under the bus.

The secret memos show that Canada told France they needed to find a smoking gun. Canada told France to conduct a new handwriting analysis, this time with accurate writing samples. They also suggested Diab's fingerprints should be compared with the bomber's.

And then Canada helped France by adjourning the extradition hearing, again and again, to give France time to fix its case. The extradition judge asked Canada's lawyer, Claude LeFrançois, why France needed the adjournment. The CBC reports that court transcripts show that LeFrançois told the court that he had no knowledge of what France was doing — except that he did. France was acting under his direction.

LeFrançois seems to have lied to the court, a cardinal sin, which gave French authorities the time they needed to generate a second handwriting report. This report was not much better than the first. The court ruled that the handwriting analysis was based on questionable methods and on an analysis that seemed "very problematic" and was "susceptible to a great deal of criticism and attack."

But, in extradition hearings, the court cannot discount dubious evidence and so, based on the problematic handwriting analysis, Diab was committed to custody to await surrender to France.

But there was one fact that was hidden from both the court and Diab — the fingerprint analysis, suggested by Canada, was not a match to Diab. This could have been powerful evidence of innocence. But the report was buried by Canada's lawyers and was never submitted to the court or even disclosed to Diab's defence team.

Maybe the result would have been different if the fingerprint analysis had been disclosed. After all, as any honourable Crown prosecutor is well aware, the nondisclosure of exculpatory evidence has been identified as a hallmark of so many wrongful conviction cases. If the fingerprint analysis had not been kept secret, perhaps the court would not have ordered Diab's extradition or maybe the Justice minister would not have been so quick to turn his back on a Canadian citizen.
Diab's case was a completely preventable tragedy. But there may be some good to come out of it. Chrystia Freeland, Canada's minister of Foreign Affairs, told the House of Commons that she was aware of the role government officials played in Diab's extradition and that it was important that Canada look into the matter.

Frankly, “looking into the matter” is the bare minimum. Canada must re-evaluate the entire extradition framework. Courts should be given more latitude to refuse extradition in weak cases. And Canadian officials must be held to account for suppressing evidence and colluding with foreign governments. The actions and representations of LeFrançois should be closely scrutinized and there should be swift action if he or others were involved in suppressing exculpatory evidence or misleading Canadian courts.

And you can get ready to add Hassan Diab’s name to the growing list of Canadians who will be compensated for Canada’s role in perpetuating a miscarriage of justice.

There can be no repairing of the harm that Canada inflicted on Diab, but we can begin to repair our broken extradition system.

Une région où l’arrêt Jordan n’existe pas
Les avocats et les juges travaillent main dans la main et les délais judiciaires ont diminué dans cette région.
Radio-Canada
7 mai 2018

Les délais pour que les causes criminelles soient entendues devant les tribunaux du Bas-Saint-Laurent, de la Gaspésie et de la Côte-Nord ont considérablement diminué au cours des trois dernières années. Ces progrès sont attribuables notamment à une meilleure collaboration entre les juges et avocats de la région.

Selon le juge coordonnateur de la Cour du Québec pour l'Est-du-Québec, Richard Côté, les délais d'audition pour les infractions criminelles qui ne comportent pas d'enquête préliminaire sont maintenant inférieurs à 12 mois dans la plupart des points de service des trois régions.

Il rappelle que ces délais dépassaient les normes parfois de 18 à 24 mois, il y a quelques années, notamment aux palais de justice de Baie-Comeau, Rivière-du-Loup et Rimouski.

Le juge Richard Côté estime que ces progrès s’expliquent entre autres par le fait que les juges sollicitent davantage les avocats pour qu’ils fournissent à l’avance des informations sur l’évolution des dossiers, comme le nombre de témoins ou la conclusion d’une entente entre les parties.

« On a une excellente collaboration des avocats, ce qui fait que lorsqu'on fixe un dossier avec une durée prédéterminée, en général, c'est relativement précis. Cela nous permet de mieux gérer le temps et l'utilisation des salles. Ça demande un travail constant de la part des juges et une collaboration des avocats, et je dois dire qu'on l'a dans la région », explique le juge Côté.

Selon le bâtonnier du Bas-Saint-Laurent–Gaspésie-Îles-de-la-Madeleine, Clément Massé, la possibilité de tenir des enquêtes préliminaires sans juge dans certains palais de justice, comme Rivière-du-Loup et Rimouski, est un autre facteur qui contribue à réduire les délais. Il soutient que ces changements sont « très positifs ».

Des délais inférieurs à la moyenne provinciale

Selon des données du ministère de la Justice, le délai médian des causes en matière criminelle est inférieur à la moyenne provinciale dans tous les districts judiciaires de l'Est-du-Québec, sauf celui de Baie-Comeau.

Ce délai mesure le nombre de jours civils entre la date d'ouverture d'un dossier et sa fermeture. La moyenne provinciale est de 242 jours.

C'est à Gaspé où le délai est le moins long, soit 95 jours, suivi de Rimouski et de Kamouraska, avec respectivement 161 et 162 jours.

Le juge Richard Côté précise que les délais actuels dans l'Est-du-Québec sont bien inférieurs aux plafonds fixés par l'arrêt Jordan de la Cour suprême.

La technologie en soutien à la justice

Desservir un territoire aussi grand, qui compte une vingtaine de points de service, représente un défi important, reconnaît le juge Côté.

Il trace un bilan très positif de l'implantation d'un système de juges de garde, il y a environ six ans. Le juge de garde peut entendre, par vidéoconférence, des demandes d'urgence provenant de partout sur le territoire. Il y a, en moyenne, de 5 à 10 demandes du genre chaque jour, notamment pour des comparutions, des gardes en milieu hospitalier ou des dossiers en lien avec la protection de la jeunesse.

« Je me souviens d'une époque où des gens se faisaient arrêter à plusieurs centaines de kilomètres de Rimouski, en Gaspésie par exemple, et le seul juge en place était à Rimouski cette semaine-là. Les policiers devaient amener cette personne-là à Rimouski pour une comparution, ce qui n'avait pas de bon sens », raconte Richard Côté.

Le juge coordonnateur espère que les investissements annoncés par la ministre de la Justice pour moderniser le système judiciaire permettront aux points de service de l'Est-du-Québec de disposer d'équipements vidéo de meilleure qualité.

Cleaning up the mandatory minimums mess
Senator Kim Pate's bill freeing judges from the constraints of mandatory minimum sentences will help address overincarceration and court delays.
Policy Options IRPP
Elizabeth Sheehy and Isabel Grant
May 8, 2018

On April 10, Independent Senator Kim Pate announced her intention to introduce a bill, An Act to Amend the Criminal Code (Independence of the Judiciary), that would grant Canadian judges the authority to impose a "fit" sentence regardless of whether an offence carries a mandatory minimum

sentence of imprisonment. It would free judges from mandatory minimum sentences and enable them to impose sentences below the stated minimum where appropriate.

Judges would remain subject to the Criminal Code and common law sentencing principles that constrain the exercise of judicial discretion. In particular, judges are bound by the principle of proportionality, which holds that the sentence should reflect the seriousness of the offence and the moral blameworthiness of the individual who committed it.

If passed, this bill would have far-reaching and positive impacts, alleviating convicted persons of the burden of unnecessarily long sentences that are not tailored to the particular circumstances of their offences. Without mandatory prison sentences, other sentencing options that may be more effective and less costly would become available. For example, the bill would open up the possibility of community-based sentences, which are currently unavailable if an offence carries a mandatory minimum sentence of imprisonment, even when the accused person presents no danger to the community.

Generally, mandatory prison sentences reduce the willingness of accused persons to enter into plea negotiations with the Crown, given that there is no room to negotiate a sentence, and therefore more cases go to trial.

Permitting judges to avoid mandatory sentences has the potential to respond to other crises in criminal justice, including the overincarceration of Indigenous and racialized people as well as persons with mental illness. This bill also would alleviate the problem of systemic delays in the criminal justice system. Generally, mandatory prison sentences reduce the willingness of accused persons to enter into plea negotiations with the Crown, given that there is no room to negotiate a sentence, and therefore more cases go to trial. Now that the Supreme Court, in the Jordan decision, has set firm time limits on the processing of criminal charges, the dismissal of charges — even very serious charges like sexual assault and murder — will be an almost certain remedy for unconstitutional delay. Bringing flexibility back into sentencing would help reduce delay by encouraging guilty pleas.

Why is such a major policy overhaul being proposed by a senator rather than the Liberal government? After all, the Minister of Justice announced in May 2017 her intention to assess and possibly repeal those mandatory minimum sentences added by the Conservative government led by Stephen Harper. She also stated her intention to conduct a policy review of all mandatory minimum sentences — there are more than 70 such provisions in the Criminal Code and the Controlled Drugs and Substances Act — including those enacted by former Liberal governments.

Yet on March 29 of this year, the federal government introduced significant reforms in Bill C-75, aimed at reducing criminal court delays and overincarceration, without a whisper about mandatory minimums. The long-promised response to the proliferation of mandatory minimum sentences was nowhere to be found in this bill.

We thus face a major policy gap when mandatory minimum sentences are used as political trade-offs and for the crass purpose of appealing to a “law and order” base to gain votes. For example, capital

punishment was abolished in 1976 in Canada, with the trade-off being a mandatory life sentence and harsh mandatory periods of parole ineligibility. The growth in legislative adoption of mandatory sentences began with the Liberals in the 1990s when, as part of the bill that created the long-gun registry, mandatory minimums were imposed for a number of serious offences committed with a firearm, as a concession to the gun lobby. Under Harper's leadership, mandatory minimum sentences were either added or increased with respect to 51 offences in the Criminal Code.

Most people who commit crimes do not know what sentence they would face if convicted. Nor do they make a careful cost-benefit analysis based on the length of the possible incarceration.

Harsh mandatory minimums are often justified by the argument that they will deter individuals from committing crimes and thus serve a crime prevention function. This is the rationale cited most often by judges and politicians to justify harsh punishments. Criminologists have spilled much ink trying to demonstrate that deterrence works. In fact, the literature overwhelmingly shows that it does not. Most crimes are not planned in advance but rather are committed impulsively, under the influence of drugs or alcohol or other situational and systemic pressures. Most people who commit crimes do not know what sentence they would face if convicted. Nor do they make a careful cost-benefit analysis based on the length of the possible incarceration they might face if apprehended.

The costs of imprisonment to society are astronomical. It costs over $100,000 per year to incarcerate a man in a federal penitentiary and even more for a woman, depending on where she is held. In 2015-16, the federal government spent $4.6 billion on corrections, 70 percent of which went to custodial sentences. Moreover, incarceration has uncalculated costs. We know that incarceration increases rather than decreases the likelihood of recidivism and reincarceration. Overincarceration destroys individuals and communities.

But instead of the Liberal government assuming leadership of this critical policy issue, it has been left to individual defence lawyers and the courts to sort it out. There are currently 174 constitutional challenges to mandatory minimum sentences proceeding through the courts, according to the Department of Justice Canada (68 percent of the 256 Charter challenges in the courts). Many of these challenges have already succeeded: the Supreme Court of Canada and lower courts have struck down as unconstitutional numerous mandatory minimum sentences related to weapons offences, drug offences and, most recently, sexual offences against children. The Supreme Court of Canada alone has decided three such cases (R. v. Nur and R. v. Charles; R. v. Lloyd) since 2015 and has another one on its docket.

Millions of dollars are being invested in litigating these sentences on a case-by-case basis, resulting in inconsistent jurisprudence across the provinces and uncertainty as to which mandatory minimums are valid and which are vulnerable to challenge. Senator Pate's bill would go a great distance in reducing the plague of overincarceration and the folly of piecemeal law reform by Charter challenge. Canadians are ready for evidence-based criminal law policy, and the Liberal government has promised to deliver. It is time to trust those who have all the facts before them — judges and the Parole Board — to determine the length of individual sentences.

Le Barreau du Haut-Canada n'est officiellement plus
Le changement de nom a été voté par le Conseil en novembre et aujourd'hui, le Barreau a reçu la sanction royale
Droit Inc
Delphine Jung
9 mai 2018

Les modifications à la Loi sur le Barreau ont reçu la sanction royale, officialisant le nom « Barreau de l'Ontario » pour désigner l'organe de réglementation des professions juridiques dans la province. Les modifications faisaient partie de la loi budgétaire du gouvernement provincial, le projet de loi 31, Loi pour un plan axé sur le mieux-être et l'avenir.

Le Barreau du Haut-Canada va désormais s'appeler le Barreau de l'Ontario. « Notre changement de nom est maintenant officiel, a déclaré le trésorier du Barreau (président), Me Paul Schabas. Ce changement permettra au public de mieux comprendre notre rôle, nous rendra plus pertinents et nous permettra de mieux remplir notre mandat principal : servir l'intérêt public. »

Julian Falconer, président du groupe directeur et présentateur de la motion de changement de nom, avait déclaré que plus de 17 000 membres ont répondu aux messages concernant le nouveau nom, 83 % d'entre eux préférant le nom de Barreau de l'Ontario. La majorité des 953 membres du public qui ont répondu à un sondage était également de cet avis.

Cette volonté de changer de nom résultait d'un manque de connexion entre l'institution et le public. Les partisans du changement avaient évoqué un terme archaïque. En effet, la désignation « Haut-Canada » ne décrit plus la zone géographique qu'il réglemente.

Ban on homegrown pot would be paternalistic, former justice minister says
Anne McLellan, who chaired the federal task force on cannabis legalization, says a ban would be both paternalistic and unenforceable.
Toronto Star
Joan Bryden
The Canadian Press
May 10, 2018

OTTAWA—Banning Canadians from growing a few marijuana plants in their homes or backyards once recreational cannabis is legalized would be both paternalistic and unenforceable, former federal justice minister Anne McLellan says.

McLellan, who chaired the federal task force on cannabis legalization, offered that opinion Wednesday during an appearance before the Senate's social affairs committee, which is examining the federal government's bill to legalize pot use.

The bill would allow individuals to grow up to four plants per dwelling — a provision that has raised concerns among senators, apartment and condo owners, municipalities and police.

Moreover, the Quebec and Manitoba governments have decided to prohibit home cultivation altogether — a move which could ultimately lead to a legal squabble over constitutional jurisdiction between Ottawa and the provinces.

McLellan declined to weigh in on the potential constitutional dispute, but she vigorously defended the task force's recommendation, adopted by the government, that individuals be allowed to grow a small number of plants.

"Let's not be too paternalistic," she told the committee.

Expanding on that remark later outside the committee, McLellan said banning home cultivation would amount to "the state saying, 'Oh, we've legalized this but, by the way, we don't trust you to grow any of it yourself.'

"It is paternalistic, it is unenforceable," she added, noting that a lot of Canadians already grow a plant or two at home.

In any event, she predicted "very few" people will bother to grow their own weed — running the risk of their pets or kids getting into it, reducing the resale value of their home or getting kicked out of their apartment or condo — once there's a readily available, safe, legal, commercial supply.

"We think there'll be very few of them over time ... just as you discover with wine making," McLellan said.

"Most people say, 'Why would I do this? I can stop on the way home and I've got a whole lot more choice and quality assured at the retail store.' Whereas if you're growing your four plants outside, maybe somebody's fertilizer or pesticide flew over the fence or a dog pees on it. Who knows?"

Last week, the Senate's legal and constitutional affairs committee proposed that the federal bill be amended to prohibit home cultivation. Alternatively, the committee suggested that the bill explicitly recognize provincial authority to ban home cultivation if they choose.

Senators have heard concerns about children getting access to homegrown pot and plants draining power and water in multiple-unit dwellings, triggering complaints about mould and smell.

But Dr. Mark Ware, medical cannabis researcher and vice-chair of the legalization task force, said there are already lockable, self-contained, home-growing modules available that would negate most of those problems.

"It's like a big fridge where you just open the door and there are your four plants, it's all contained, enclosed and sealed," he said.

"Technology is transforming home cultivation," McLellan added. "It's not four mouldy plants in your basement."

Ware said municipalities have a role to play in regulating home cultivation. They could, for instance, require people to obtain a permit to grow pot at home and help educate them on how to set it up safely.

Phoenix pay fixes continue, but results are grindingly slow
Ottawa Citizen
James Bagnall
May 10, 2018

At last, a glimmer of hope in the great battle to fix the Phoenix pay system introduced nearly 27 months ago.

The latest data published Thursday by Public Services and Procurement Canada showed there was a drop of almost three per cent in transactions, or about 18,000 files, in the processing queue at May 2, the end of the last pay period. There were 607,000 transactions in the queue at the government's pay centre in Miramichi, N.B., down from 625,000 six weeks earlier.

More encouraging, the overall backlog has been shrinking steadily since Jan. 24, when the pay centre was struggling with a backlog of 633,000, a drop of about 4.26 per cent.

Less encouraging is what's happening below the surface.

Excluding the retroactive pay transactions related to collective bargaining agreements, representing fewer than 10 per cent of the total, there's been no real progress. For instance, there were 372,000 pay transactions with a financial impact awaiting processing on May 2, down 5,000 from the previous pay period and 12,000 from the Jan. 24 peak.

However, the number of transactions without a financial component — queries about how to interpret pay rules, leave, job titles and so on — increased by 8,000 in the most recent pay period and were up 7,000 from Jan. 24.

A catchall category, transactions "waiting to be closed," also saw its backlog rise by 3,000 in the most recent period and 10,000 since Jan. 24. Nor has there been improvement in the percentage of transactions processed in a timely fashion: Some 52 per cent were done so in the latest pay period compared to 59 per cent in the previous period and a target of 95 per cent.

The upshot is the pay system is still struggling.

Nevertheless, a couple of developments offer Public Services Minister Carla Qualtrough some confidence the worst may be over. First, with the bulk of the collective bargaining backlog behind them for now, pay employees in New Brunswick have more time to tackle the regular pay backlog. Second, a recent pilot project involving 10,000 employees at Veterans Affairs and two other federal departments managed to reduce the pay backlog by 24 per cent between December and April.

This was accomplished by assigning 25 pay employees to sort out issues specific to the departments, a kind of SWAT team approach. This is in contrast to trying to solve pay issues across government according to the type of pay transaction that is causing difficulty. Pay patterns can vary a lot by department. Auditor General Michael Ferguson will offer his views on the pilot project and other matters related to Phoenix pay reconstruction on May 29.

Earlier this month, Qualtrough widened the pilot project to include 12 new departments with 32,000 employees, including Justice, Treasury Board and Immigration. This means nearly 15 per cent of the federal government's employees are now having their pay issues dealt with under the new approach. If it works as well as the pilot project suggests, it should be reflected in the numbers for the next pay period.

But government employees know from hard experience that Phoenix pay has a nasty habit of offering new surprises. They'll believe there's improvement when they see it.

Supreme Court deems Quebec pay equity law unconstitutional
CTV News
May 10, 2018

OTTAWA – The Supreme Court of Canada has ruled that Quebec's pay equity law is unconstitutional. The top court looked at two cases centred on women's access to equal pay, based on Quebec's pay equity legislation.

In one case -- Quebec (Attorney General) vs. Alliance du personnel professionnel et technique de la sante et des services sociaux -- the Supreme Court dismissed the Quebec government's appeal, finding that Quebec's pay equity law was unconstitutional.

The law was intended to remove the pay gap between men and women by requiring employers with 10 or more employers to implement pay equity, but the Supreme Court has found that the law, passed in 1996 and amended by the provincial Liberals in 2009, violates the Charter.

The 2009 amendment made it so employers had to review what they pay employees every five years, but workers unions and women's organizations argued that the changes to the law lead to delaying equal pay between the five year audit periods, and therefore ongoing pay discrimination against women.

The Court found that that delay violated women's equal rights and placed the burden on women, for their employers' non-compliance.

In the second case -- Centrale des syndicats du Quebec vs. Quebec (Attorney General) -- the Court found that the law was discriminatory, as it delayed pay equity for women in female-dominated workplaces. At the time of implementation, Quebec had challenges calculating the appropriate compensation for female dominated workplaces and allowed the province's pay equity committee six years longer to find a solution for these workplaces.

Several unions challenged this delay arguing it was discriminatory to women. The Quebec Court of Appeal previously found that the delay did not violate the women's equality rights, rather that Quebec's law violated equality rights under the Charter because there was no male job class to compare the pay scale to for predominately female professions.

The Supreme Court agreed, in considering the union's appeal to Canada's top court. However, the Supreme Court did not strike down the law.

The Canadian government has pledged to bring forward its own version of pay equity legislation for federally-regulated workplaces by the end of 2018.

Un nouveau bâtonnier pour Montréal !
Il s'est donné la mission de proposer un plan stratégique concernant les changements qui bouleversent la profession.
Delphine Jung
10 mai, 2018

Me Michel P. Synnott devient dès aujourd'hui le nouveau bâtonnier de Montréal. Il succède à Me Brian Mitchell.

L'annonce en a été faite hier soir, lors de l'assemblée générale annuelle des membres.

Il devient ainsi le 153e bâtonnier de Montréal.

Me Synnott détient un bac en droit obtenu à l'Université de Montréal, ainsi qu'une maîtrise en droit de la santé obtenue à l'Université de Sherbrooke. Il a été admis au Barreau en 1986.

Après avoir œuvré plusieurs années en pratique privée, il se joint à la direction des services juridiques de la Commission de la construction du Québec en 2003, où il pratique en litige civil et commercial.

Il souhaite que son Barreau soit « novateur et précurseur, pour affronter avec optimisme les nombreux changements auxquels la profession a été confrontée au cours des dernières années », comme la réforme de la gouvernance du Barreau du Québec, l'augmentation significative des femmes avocates ou encore la pratique de la profession modulée par la technologie.

Les quatre « J »

Pour faire le point sur leur impact, le bâtonnier va inviter son Conseil à une réflexion stratégique sur la gouvernance, sur les finances et sur l'avenir de la pratique professionnelle. Concernant les changements qui affectent l'environnement professionnel des avocats, Me Synnott a décidé d'étudier la question sous quatre angles, qu'il a qualifiés comme étant les quatre « J » de la justice : les Justiciables, les Juristes, les Jeunes et le monde Judiciaire. Au terme de cette réflexion, il espère proposer un plan stratégique triennal qui permettra à la section d'envisager l'avenir avec confiance, cohérence et pertinence.

Nouveaux membres au Conseil

Outre le bâtonnier Synnott, le Conseil 2018-2019 sera composé de Mes Alexandre Forest (premier conseiller), Francisco Couto (trésorier), Sophia M. Rossi (secrétaire), Alex Goupil (représentant le Jeune Barreau de Montréal), Michael N. Bergman, Marie Cousineau, David Ettedgui, Extra Jr Laguerre, Caroline Larouche, Julie Mousseau, Alexandra Popa et Robin Schiller.

Lors de l'assemblée générale annuelle, le Prix Pierre-Fournier a également été remis à Me Magali Fournier, en reconnaissance d'une contribution exceptionnelle au Barreau de Montréal et à ses activités. C'est en effet pour rendre hommage à un collaborateur hors-norme décédé subitement l'an dernier, feu Me Pierre Fournier, que le Conseil a décidé de donner son nom au Mérite.

Équité salariale : victoire partielle pour les syndicats à la Cour suprême
Les juges du plus haut tribunal du pays ont rendu leur décision dans deux causes touchant la loi adoptée par Québec
Radio-Canada
10 mai, 2018

La Cour suprême annule trois articles de la loi québécoise sur l'équité salariale que contestaient les syndicats. Elle inflige toutefois une rebuffade aux éducatrices en garderie, qui espéraient recevoir une compensation rétroactive pour le délai supplémentaire qu'elles ont eu à subir.

Les juges du plus haut tribunal du pays ont ainsi rendu jeudi leur décision dans deux causes touchant la loi adoptée par Québec il y a une vingtaine d'années qui oblige les employeurs à maintenir l'équité salariale au sein de leur entreprise.

Victoire syndicale

Dans un premier jugement, ils ont donné raison à l'Alliance du personnel professionnel et technique de la santé et des services sociaux, qui en avait contre des modifications apportées à la loi en 2009.

Ces modifications faisaient en sorte que les employeurs n'étaient désormais plus contraints qu'à évaluer tous les cinq ans le maintien de l'équité salariale, plutôt que de le faire de façon continue. Ces changements avaient été adoptés pour faciliter la tâche aux entreprises, alors que moins de la moitié des employeurs se conformaient à la loi à l'époque.

Cette raison n'est pas valable aux yeux de la Cour suprême du Canada.

« Le régime, en privilégiant les employeurs, renforce l'un des facteurs-clés de l'iniquité salariale : l'inégalité du rapport de force entre les employeurs et les travailleuses », écrit la juge Rosalie Abella, dans une décision partagée 6 contre 3.

« En tolérant les décisions des employeurs qui entraînent des iniquités salariales pour les femmes, le législateur envoie le message selon lequel il ferme les yeux sur cette inégalité du rapport de force, perpétuant ainsi davantage le désavantage », poursuit-elle.

Selon la magistrate, l'équité salariale n'est pas un « droit épisodique ou occasionnel ». La Cour suprême maintient ainsi les décisions des tribunaux québécois, qui avaient conclu que des articles de la loi sur l'équité salariale contrevenaient à la Charte canadienne des droits et libertés, qui garantit l'égalité.

Défaite pour les éducatrices

Cette victoire syndicale est assombrie par une défaite des éducatrices en garderie dans le second jugement rendu par le plus haut tribunal du pays.

La cause était portée par la Centrale des syndicats du Québec (CSQ), qui représentait majoritairement des éducatrices en garderie et interprètes en langage gestuel, des emplois sans comparateur masculin.

Dans ce cas de figure, les femmes ont dû attendre six ans de plus que leurs collègues oeuvrant dans des milieux de travail mixtes pour obtenir l'équité salariale, ce que la CSQ a plaidé être discriminatoire.

Dans une décision partagée, la juge Abella conclut qu'il y a bel et bien eu violation des droits des femmes garantis par la Charte. Cette violation était toutefois justifiée parce que ce délai visait simplement à trouver la bonne solution, dans un contexte peu courant.

« Il s'agissait d'une question complexe qui commandait d'importantes recherches et analyses », écrit la juge Abella.

« Bien qu'il s'agisse d'un cas limite, j'estime que le dossier étaye la conclusion selon laquelle le Québec n'a pas agi de façon déraisonnable dans les dispositions qu'il a prises pour que le délai ne dépasse pas des limites raisonnables », signale-t-elle.

Solving Phoenix could take up to nine years, NDP MP estimates, but minister disagrees
'That's just not acceptable,' says NDP MP Randall Garrison. Public Services Minister Carla Qualtrough disputes his estimate, but won't say exactly when the system will be fixed.
The Hill Times
Emily Haws
May 10, 2018

The government isn't saying when the Phoenix pay system will be running smoothly with no backlog, but NDP MP Randall Garrison says at the rate it's moving, it could take up to nine years.

Mr. Garrison (Esquimalt-Saanich-Sooke, B.C.) made the comments during Thursday's House Government Operations Committee meeting, which saw Public Services and Procurement Minister Carla Qualtrough (Delta, B.C.), deputy minister Marie Lemay, and the associate deputy minister in charge of fixing Phoenix

Les Linklater appear to discuss this year's main estimates and departmental plans. Other senior officials from Public Services and Procurement Canada as well as Shared Services Canada were also present.

The backlog of Phoenix cases waiting to be processed at the government's Public Service Pay Centre sat at 607,000 as of May 2, according to a government website tracking the issue—372,000 of those are considered "beyond normal workload."

To try to speed up processing to fix cases of public servants being overpaid, underpaid, or not paid at all, in December the government implemented a pilot project at the pay centre with Veterans Affairs; Innovation, Science, and Economic Development; and the Federal Economic Development Agency for Southern Ontario, in which certain pay-adviser teams in the pay centre, or pods, were assigned to work with specific departments.

"You said you'd make progress of [reducing the backlog of cases by] 5,000 a month. In your pilots you said you got another 10 per cent improvement," said Mr. Garrison during the meeting. "If you actually do the math on the transactions, that means that in about nine years you'll finish with the outstanding transactions. That's just not acceptable."

Ms. Qualtrough refuted the idea, saying that the pod-model pilot at the pay centre reduced the overall backlog of the three departments it was tested on by 24 per cent.

"If you see a 24 per cent reduction over four months in three departments, I mean, that's not nine years if you can reduce the other 70-some odd per cent in the next year or so," she said, but added it's not clear if the other departments would have the same success.

Senior officials are continuing to work with departmental human resources staff to stress the importance of timely, accurate data to reduce retroactive payments, as Phoenix has a hard time calculating them, the PSPC officials indicated.

Mr. Garrison said even if there is a 25 per cent decrease in the backlog across the board, the pay problems would still take two more years to solve. He said he has 1,000 constituents with Phoenix issues, including 80 new cases from Department of National Defence firefighters Wednesday. His riding includes a naval base in Esquimalt.

The Phoenix pay system was supposed to save the government about $70-million per year, but so far the Liberals have spent more than $1.2-billion trying to fix it. The project had two parts: it took off-the-shelf software and IBM configured it to the government's 32 HR systems, and then the government centralized pay for 46 departments at the Public Service Pay Centre in Miramichi, N.B. Since then, multiple satellite pay centres have been opened.

Originally, the pay centre was transaction-based, meaning one adviser would solve only maternity-leave cases, for example. This meant if a bureaucrat had multiple issues, multiple advisers addressed them. The pod model allows advisers to address all types of issues a bureaucrat may have and has teams aligned with specific departments.

Due to its success, last week the pay-pod model began to be rolled out for all departments and agencies the pay centre services. It's being put in place in phases, to be fully implemented by mid-2019.

Opposition MPs press government on $7-billion 'slush fund'
While Phoenix took up most of the meeting, committee members also pressed the witnesses on defence procurement, the National Shipbuilding Strategy, Canada Post, and accountability concerns regarding the Treasury Board's $7-billion budget vote, which critics call a "slush fund."

The funding will be approved by Parliament through one central vote, with the Treasury Board then allocating it to specific departments once they've passed a Treasury Board submission process.

It's part of the Liberals' new plan meant to improve the federal spending-approvals process.
"All the money in the estimates should be reflected in the departmental plans. [They] should show what the money is going for, how it will be spent, and—just as important—what the planned results are," Conservative MP Kelly McCauley (Edmonton West, Alta.) said after the meeting. "They have [$653-million for PSPC] under the Treasury Board vote in the estimates, so that's $650-million of taxpayers' money that will be spent, [but] the procurement department has not stated how it would be spent, or what the outcomes will be," he added.

"And worse is: not a penny of that will show up detailed in the public accounts…all it will show is a lump sum of $650-million transferred from Treasury Board to PSPC."

There is also $289-million earmarked for Shared Services Canada. The exact details of what it's being spent on will be revealed in the supplementary estimates later in the year, said PSPC chief financial officer of finance and administration Marty Muldoon, but it won't be voted on.

"We are in transitionary year, you know. The process is changing over so that in the future, budget items would have been secured and available to be added to the main estimates before we appear before this committee," he told the committee. "We will get there, but this is that awkward transitionary year where not everything has been completely lined up."

Of the earmarked PSPC money, $307-million is going toward Phoenix, and Mr. Muldoon said it will be used to maintain and improve capacity.

He said the spending was not in the departmental plan because "it would be presumptuous of us to put in published documents [that] which has not been voted [on] by Parliament ahead of the schedule." Another $275-million will be used for property repairs and maintenance.

The Liberals have said getting Parliament to approve the funding before it is detailed would allow them to put the money into programs faster.

At the end of the meeting, Mr. Garrison put forward a motion to delay the vote approving the main estimates and departmental plans, and Mr. McCauley filibustered it. Committee chair Liberal Yasmin

Ratansi (Don Valley East, Ont.) asked the committee members, of which most are Liberal MPs, if they wanted to keep listening to him, but they decided to adjourn the meeting instead.

Réforme des normes du travail : le Québec, bien loin de la France!
Notre chroniqueur propose un regard croisé sur les normes du travail nouvellement réformées du Québec et celles en vigueur en France
Droit Inc
Sébastien Parent
10 mai 2018

À chaque 1er mai, le gouvernement du Québec augmente le taux horaire du salaire minimum, qui s'est élevé cette année de 11,25 dollars à 12 dollars. Parallèlement, en mars dernier, la ministre du Travail, Dominique Vien, déposait son projet de loi 176 visant à modifier la Loi sur les normes du travail et à faciliter la conciliation famille-travail. Une modernisation des normes minimales du travail qui était attendue depuis déjà plusieurs années.

Bonbons à saveur préélectorale ? Possible.

Cela dit, les nouvelles normes du travail proposées dans cette réforme sont-elles exorbitantes ? Pour y répondre, posons un regard croisé sur certaines normes du travail de la France, dont le modèle a inspiré, à l'époque, notre législation en la matière.

Plus de vacances !

Excellente nouvelle pour les passionnés de voyage (ou pour les plus sédentaires qui préfèrent consacrer leur été à la rénovation de leur résidence), ils pourraient acquérir une troisième semaine de vacances après avoir cumulé trois années de service continu au sein de la même entreprise.

Or, en vertu de la loi actuelle, il faut plutôt compter cinq années de service continu avant de pouvoir passer de deux à trois semaines de vacances annuellement. Ce n'est pas le Pérou, comme on dit.

La France offre, quant à elle, cinq semaines de vacances payées, et ce, dès la première année de travail. Quand même tentant d'envisager un déménagement outre-Atlantique, non ?

Des journées de maladie rémunérées

En cas d'absence pour cause de maladie, le salarié peut s'absenter de son travail, pendant une période d'au plus 26 semaines sur une période de 12 mois consécutifs. À ce jour, cette absence est sans salaire tandis qu'avec la réforme projetée, les deux premières journées seront rémunérées par l'employeur. Chez nos cousins français, le salarié touche des indemnités de remplacement du revenu tout au long de sa période d'absence en maladie, à l'exception de quelques jours de carence au début de celle-ci. Pour en ajouter, la durée de ces indemnités oscillera entre six mois et trois ans, selon notamment le nombre d'heures travaillées antérieurement à l'arrêt de travail.

Conciliation famille-travail

Contrairement à la croyance populaire voulant que le salarié soit libre d'accepter ou non d'effectuer des heures supplémentaires, la Loi sur les normes du travail permet à l'employeur d'exiger quotidiennement que ses employés travaillent jusqu'à quatre heures au-delà de leurs heures habituelles. En principe, le salarié pourra toutefois refuser de travailler plus de 50 heures sur une base hebdomadaire ou pour certains motifs reliés à ses obligations familiales.

Pour sa part, le projet de loi 176 entend réduire la durée quotidienne d'heures supplémentaires obligatoires, en permettant au salarié de refuser de travailler plus de deux heures au-delà de ses heures habituelles. Autre nouveauté, il pourra aussi exercer son droit de refus lorsqu'il n'aura pas été informé du temps supplémentaire requis au moins cinq jours à l'avance, sous réserve de certaines exceptions.

En France, le nombre d'heures supplémentaires maximales par jour est établi à 10. En revanche, la durée normale de la semaine de travail est de 35 heures et un salarié ne peut être tenu de travailler plus de 48 heures par semaine. De plus, la durée hebdomadaire moyenne ne pourra pas dépasser 44 heures sur une période de 12 semaines consécutives. Meilleure conciliation famille-travail qu'au Québec, mais rien qui puisse se rapprocher de la société des loisirs qu'avaient prédite certains futurologues…

Le Québec, encore une colonie ?

Au final, l'on reproche souvent au Québec d'accuser un retard de plusieurs années, parfois même des décennies, relativement aux innovations de la France en matière de normes minimales d'emploi. Force est de constater que, avec cette réforme proposée par le gouvernement libéral du Québec, les choses ne s'amélioreront pas de sitôt.

Quand on se compare, on se désole parfois.

Me Sébastien Parent est doctorant en droit du travail et libertés publiques à la Faculté de droit de l'Université de Montréal. Il est aussi chargé de cours à Polytechnique Montréal où il enseigne le droit du travail. Auparavant, il a complété le baccalauréat ainsi que la maîtrise en droit à la Faculté de droit de l'Université de Montréal. Il est également titulaire d'un baccalauréat en relations industrielles de la même institution. Écrivain dans l'âme et procureur devant la Cour suprême du Canada dès le début de sa carrière, Me Parent est l'auteur de divers articles en matière d'emploi et agit aussi à titre de conférencier.

Accommodements raisonnables : rien de nouveau dit un prof de droit
Tout ce qu'a fait le gouvernement, c'est un travail de codification, dit un professeur en droits et libertés
Delphine Jung
May 10 2018

Louis-Philippe Lampron, professeur de droit à l'Université Laval était l'invité de Paul Arcand, au 98,5 ce matin, pour revenir sur l'annonce de la ministre de la Justice, Stéphanie Vallée concernant les accommodements raisonnables.

Pour lui, le gestionnaire n'est pas plus avancée concernant les règles les entourant et n'est pas plus en mesure qu'avant de prendre une décision éclairée.

La ministre a en effet expliqué que chaque situation serait jugée au cas par cas, en spécifiant que certains grands principes devraient être respectés comme l'égalité homme-femme et la neutralité de l'État.

« Le gestionnaire est un peu mieux équipé, car les balises se retrouvent dans un seul document alors qu'avant elles étaient éparpillées dans différents jugements de différents tribunaux. Tout rassembler dans un même document aura des vertus pédagogiques », dit le professeur.

Rien à changer dans le fond pour lui. « Ils ont annoncé qu'il y aura des balises claires lorsqu'ils ont proposé le projet de loi 62, mais en fait ils ont simplement énoncées celles qui existent déjà. La seule chose qui a changé, c'est que désormais, on peut refuser à une femme de porter le niqab ou la burqa pour des motifs liés à la communication. Pour le reste, c'est bonnet blanc blanc bonnet », poursuit-il.

Le journaliste Paul Arcand a ensuite soulevé la question du port du hijab par des fonctionnaires et notamment des policiers. « Les fonctionnaires qui doivent exercer la contrainte étatique pourrait justifier le fait d'empêcher des employés de porter des symboles religieux, mais est-ce conforme à la Charte ? », demande-t-il.

Par ailleurs, pour M. Lampron, dire que chaque situation sera réglée au cas par cas signifie que oui, on pourrait interdire le port de la burqa dans les organismes publics, tout comme on pourrait l'autoriser.

« Pourquoi avoir donné l'impression qu'on interdit le niqab et la burqa, alors que dans les faits, on ne les interdit pas ?», questionne le professeur.

Learning from our success in reducing youth imprisonment
Canada's success in reducing youth imprisonment in the last two decades is evidence that reform of the justice system is possible, with the political will.
Policy Options - IRPP
Anthony Doob, Jane Sprott and Cheryl Webster
May 10, 2018

On an average day in 1997, 3,825 young people (ages 12 to 17) were serving sentences in Canadian youth prisons. By 2015, that number had decreased to 527, an 86 percent reduction. This is a drop from 157 per 100,000 12- to 17-year-olds to 23. Canada's successful decrease in the number of youths serving sentences in prison may provide lessons that can be applied to other areas of public policy. Specifically, it may help us understand Canada's failure to reduce substantially its rate of adult imprisonment and also that of youth pretrial detention.

The youth imprisonment rate stands in stark contrast to its adult imprisonment rate (ages 18 and over). Figure 1 presents these diverging trends (using estimates when data were unavailable for certain years

in some provinces — mostly for pretrial custody of youths). https://infogram.com/doob-fig1-1hkv2n7q1mqp6x3

The reduction in the incidence of youth imprisonment did not just happen by itself. It dates back to at least 1965, when a Department of Justice committee suggested that imprisonment of youths be "a last resort." Subsequent legislative proposals (in 1970) and committee reports (in 1975) also recommended reduced use of court and prison for youths. By the late 1970s, the Liberals (in 1977) and the Conservatives (in 1979) had released outlines of their (very similar) proposals to replace Canada's youth justice legislation. Unsurprisingly, both sets of recommendations urged restraint in the use of youth court and imprisonment. The scene was set for change.

The 1982 *Young Offenders Act (YOA)* came into force in 1984. In contrast with its predecessor, it legislated restraint in the use of youth imprisonment. Yet it was largely unsuccessful in achieving this goal. In fact, when speaking in 1994 at second reading of amendments to the *YOA*, Minister of Justice Allan Rock described the *YOA* as a qualified failure in controlling or reducing the use of custody.

The stated expectation [of the Young Offenders Act] was that the emphasis for young people caught up in the criminal justice system would be on community based, positive, rehabilitative dispositions so that they were not sent to custody…For the most part that promise has not been fulfilled. In fact the level and extent of custody as a sentence for young offenders found guilty in youth court are vastly higher than first expected. Over 30 per cent of those young offenders found guilty…receive a sentence involving custody.

Part of the reason the *YOA* failed — we suggest — is that it used what might loosely be called "aspirational" language. This suggested — but did not require — restraint. On limiting the use of incarceration, for example, the *YOA* instructed the court that less serious offences should result in "non-custodial dispositions *whenever appropriate*" and that "custody shall only be imposed when all available alternatives to custody *that are reasonable in the circumstances have been considered*" (emphasis added). Notably, it was only in the mid-1990s that more prescriptive language prohibiting the use of custody started to be used. As an example, a 1994 amendment stated that "an order of custody *shall* not be used as a substitute for appropriate child protection, health and other social measures" (emphasis added).

In addition to amending the *YOA*, the minister of justice at the time asked the Commons justice committee to conduct a thorough examination of youth justice. Simultaneously, a federal-provincial-territorial committee did its own examination. The recommendations of the Commons justice committee in 1997 and of the federal-provincial-territorial committee in 1996 were somewhat different. Yet both recommended a reduction in the use of court and custody. Hence, by the mid-1990s, the need for legislative change to bring about restraint was well established.

The Youth Criminal Justice Act *limited the use of youth court and youth imprisonment…Prison was to be resorted to only under very narrow — and explicit — conditions.*

In May 1998, the government responded with an unpredicted decision: rather than amending the *YOA*, it would develop an entirely new act. The *Youth Criminal Justice Act (YCJA)*, introduced in March 1999, provided the mechanism to ensure that the use of youth court and youth imprisonment were limited. Police were instructed that they "shall," in all cases, consider noncourt approaches (such as warning or cautioning the youth) in responding to offending by youths. However, the Act also states that

the "failure of a police officer to consider [options other than charging the youth] does not invalidate any subsequent charges." More importantly, for youth, prison was to be resorted to only under very narrow — and explicit — conditions. The wording to accomplish the agreed-upon goals was specific and operational, not just aspirational.

Equally important, it took four years for the *YCJA* to come into force. This period allowed the federal government to ensure that those administering youth justice understood that in order for them to be in compliance with the law, important changes would be required. Extensive education programs were established and federally funded for judges. Similarly, new programs designed to be substitutes for formal court processing were developed. Restraint in the use of youth court and custody was henceforth to be the guiding principle. An award was established for innovative police programs to keep youths out of court (it was awarded for the first time in 2000 — almost three years before the *YCJA* came into effect).

The impact of this four-year preparatory period was notable. On the one hand, there was a decline in police charging of youths, starting as early as 1998 (figure 2). https://infogram.com/doob-fig2-1h7g6kzyry0g6oy

Similarly, the rate at which youths were sentenced to imprisonment also started to decline (figure 3). https://infogram.com/doob-fig3-1h7g6kzqdyeg6oy

The success of the *YCJA* was immediate. All three figures in this article show that there were substantial one-year decreases in formal youth processing in 2003, the year in which the *YCJA* came into force. And the long-term effects are equally large. Of youth incidents that came to police attention, 63 percent led to charges in 1998, compared with 45 percent in 2015. Similarly, 29 percent of those found guilty were sentenced to custody in 1998, compared with 16 percent in 2015, despite an increase in the proportion of court cases with a guilty finding for violence (from 21 percent to 30 percent).

In brief, fewer youths were brought to the attention of the police. Of this declining number, the police charged a decreasing proportion of them. Of those sent to court, an increasing number of cases were withdrawn. Of those ultimately found guilty, fewer cases were sentenced to custody.
Canada was successful in reducing youth serving sentences for three reasons. First, the view that the incarceration of youths should be avoided was broadly accepted by the mid to late 1990s. Second, the legislation moved from what we would term "aspirational" language to much more explicit and directive "operational" language to ensure that change would occur. Third, the government ensured training, education and financial support, which ultimately promoted and sustained change in the culture of youth justice. In fact, the continuing decline in the use of youth imprisonment to the present day would certainly suggest a long-term shift in the administration of youth justice.

To further substantiate our argument, it is notable that pretrial detention of youth did not decrease substantially over this period. In fact, while 35 percent of youth in custody were in pretrial detention in 2003, we find 56 percent in pretrial detention in 2015. Although the 2003 *YCJA* did, in fact, address pretrial detention, little attention was paid to this aspect of the law. Changes were again made in 2012 but apparently ignored. The lesson seems clear: changes in the law do not ensure actual change. We

would argue that the pretrial detention provisions were not strong and contained little prescriptive language. In addition, training, education and financial support to actually alter youth justice decision-making at this stage of the criminal court process were minimal. In short, pretrial detention was the poor cousin whose increasing importance went virtually unnoticed for at least another decade. Canada's success in reducing youth custody is in striking contrast to its failure in the case of adult imprisonment. While restraint in the use of adult incarceration has been advocated by official commissions and committees for over 100 years, successive governments have been reluctant to take a strong stand in favour of it. A notable current example of this reluctance is the unwillingness of Justin Trudeau's government to do anything about mandatory minimum penalties, notwithstanding its commitment to implement all the recommendations of the Truth and Reconciliation Commission that are within its jurisdiction. That commission recommended, in Call to Action #32, that judges be given the explicit power to depart from mandatory minimums. It hasn't happened. At least part of the explanation, we would suggest, lies in the lack of political will to do it.

Equally notably, "restraint" in the use of custody for adults is also legislated, but largely in aspirational language, making continued imprisonment of minor offenders possible. Further, there is nothing on the horizon to suggest a coordinated legal, educational and cultural push for change in adult sentencing like the one that took place between 1994 and 2003 for youths.

The lesson, we propose, for anyone interested in reducing imprisonment is that change can occur if governments actually want it. The dramatic success in reducing the use of youth court and custody over the last 20 to 25 years stands as powerful testament. It would seem that Canada has simply not (yet) had the political will to make it happen in other areas of public policy.

This article is part of the Widening the Lens on Criminal Justice Reform special feature.

How Beverley McLachlin wrote her first thriller while holding a full-time job as Chief Justice of Canada
'Often women (in books) are beset with problems and a man comes along and fixes them all. I was getting so tired of that kind of drama.'
Toronto Star
Sue Carter
May 11, 2018

In the opening pages of Full Disclosure, former Chief Justice of Canada Beverley McLachlin's new legal thriller, there is a cheeky reference to its author. Vancouver criminal defense attorney Jilly Truitt is walking through the courthouse when she observes a portrait of the Chief Justice "when she was young and looked good." McLachlin delights at the fact that her publisher, Simon & Schuster Canada, didn't edit out her little inside joke. "I'm glad they allowed that little vanity to stay because it gives me great pleasure."

At 74, McLachlin may be new to the writing world, but after 37 years on the bench, she is no stranger to the inner workings of the courtroom. Her expertise provides atmospheric accuracy in a debut novel that sees 30-something Jilly defend a high-profile business mogul accused of murdering his philanthropic

wife. There are professional and personal twists as the deceased is related to Jilly's recent ex-boyfriend, and she must face a fierce Crown attorney who is also her beloved former mentor.

McLachlin first conceived of tough-minded Jilly Truitt back in the late 1970s, after she left law and was employed as a professor at the University of British Columbia. She shared her early writing with her friend, the formidable Anna Porter, who became an encouraging early mentor. Porter had recently launched the now-defunct Key Porter Books, publishing Canadian luminaries such as Dennis Lee, Margaret Atwood, and the late Farley Mowat. She told McLachlin that, while the story needed work, she saw something promising in the writing and in her lawyer protagonist. But McLachlin was waylaid from her creative plans when in 1980 she was appointed as judge to the County Court of Vancouver.

"I'm sure I made the right decision," McLachlin says. "Of course that's not only a full-time job, it's something of a calling and I had to set aside my aspirations to write fiction."

McLachlin rose steadily through the ranks and in January 2000 was named Chief Justice of Canada by Prime Minister Jean Chrétien, becoming the first woman to hold the position. For 18 years, McLachlin devoted herself to her judicial career. But a year ago, facing mandatory retirement, she decided it was time to resurrect Jilly.

Every morning, McLachlin would write before sunrise, inspired by an article about British mystery author P.D. James who juggled a writing career and a full-time job. "I thought if she can do it maybe I can try," McLachlin says. "It was amazing. I would write from 5 to 7, then get up and walk the dog. I'd go to court and do my thing all day."

Few details from the original story made it into Full Disclosure, other than Jilly's ambitions. As McLachlin was writing, she didn't know how the story would end (with a shocker), but pushed through the panic and let herself be driven by her protagonist's journey. "I'd always yearned to do a book with a strong. feminine main character," McLachlin says. "Often women are beset with problems and a man comes along and fixes them all. I was getting so tired of that kind of drama. I know through my work and my life so many strong, able women who are out there pursuing their careers. But I know also the conflicts and challenges they face, and I wanted to try to picture that kind of a person."

Full Disclosure contains other glimpses into McLachlin's world. Those who are familiar with Vancouver landmarks and eating establishments may delight in specific references to her old home city, which she refers to as a character in the book. The Canadian art scene also makes an appearance, in particular the work of the late painter Joe Plaskett.

As Chief Justice, McLachlin will be remembered for her controversial rulings on hot-button topics such as safe-injection sites and Indigenous land rights —both of which appear in the background throughout her novel. McLachlin says her hardscrabble upbringing in Pincher Creek, a small Alberta town located beside a reserve, fuelled her early passion for improving relations between Indigenous and non-Indigenous people. At a press conference marking her last day leading the Supreme Court of Canada, McLachlin gave a speech in which she said she was most proud of her work in constitutionalizing

Indigenous rights. “This is something that is very important to me,” she says, “and I suppose forms part of my conscious and subconscious way of being, so I guess it’s not surprising it comes out in the book.”

The obvious final question for a thriller writer is whether there is a series planned. McLachlin is not discounting more titles, but she recently took up a new post on Hong Kong’s Court of Final Appeal. She also has her sights on a memoir that would document some of the issues that have been important throughout her life.

“I’d love to do another Jilly story,” say McLachlin. “I had so much fun writing it. So while I haven’t got the time right now, I would love to plunge into another one.”

Sue Carter is the editor of Quill and Quire.

Moving restorative justice into the mainstream
Expanding the use of restorative justice will require educating both the public and the major players inside the system about the benefits.
Policy Options - IRPP
Alana Abramson
May 11, 2018

Restorative justice is a philosophy and an associated set of practices. A departure from both punishment and rehabilitation, restorative justice is a new way of looking at crime in the Western world. It has been informed by many Indigenous cultures that have traditionally approached harm in relational ways based on community ownership and healing. Restorative justice also has roots in diverse faith traditions and practices related to community justice, victimology and penal abolition.

And yet, despite ample evidence that demonstrates the benefits of restorative justice, only about a third of non-spousal incidents of victimization are ever reported in Canada, and those that are reported are put through the formal court process. More needs to be done to expand awareness around restorative justice, among both the general public and people working within the criminal justice system.

In the 10 years I spent working with a restorative justice program serving North and West Vancouver, I noticed a significant increase in support from both the police and the community. Community members and police officers became more open to this different way of thinking about justice, after learning of the healing that was taking place through restorative justice programs between victims and those who had harmed them.

I recall one case involving an assault by one young person against another. It had a physical impact, and an emotional one on both families. When the families came together to talk about the incident, it was revealed that bullying behaviour had been going on between the youths since elementary school. This buildup of harm is what ultimately led to a serious physical assault. I sat in that circle wondering if things would have escalated to this degree had the school or the parents introduced restorative justice practices to these young people earlier in their lives. It is clear from much of the research from around

the world that restorative justice practices in schools enhance feelings of safety and reduce harmful behaviours like bullying.

The victim-offender reconciliation program offered by the Community Justice Initiatives Association in BC, founded in 1982, is one of the pioneers in the area of restorative justice. CJI remains a leader in the province and beyond by offering quality training in restorative justice, a schools-based program and the Restorative Opportunities Program. The program operates across Canada and provides access to victim-offender dialogues to those impacted by serious and violent crime. It has had positive results, despite an extensive waiting list and few resources. Past participants such as Carys Cragg, whose father was murdered, and Suman and Manjit Virk, the parents of the slain teen Reena Virk, have written books, created films and courageously shared their stories of healing justice through this program.

Currently, the promotion and practice of restorative justice have largely been done piecemeal through individual community-based, non-profit/NGO organizations and some criminal justice professionals.

And yet, despite the abundance of law, research and practice that demonstrates how restorative justice could provide a meaningful justice response for victims, offenders and communities, these processes remain at the margins of Canada's justice system. Currently, the promotion and practice of restorative justice have largely been done piecemeal through individual community-based, non-profit/NGO organizations and some criminal justice professionals. While such advocacy can produce meaningful outcomes for some cases, if restorative justice does not have adequate resources, infrastructure or practice standards, it will remain inconsistent across the country.

What more is required for restorative justice to become a legitimate, well-utilized option?

Advocates, practitioners and researchers are working hard to answer this question. Many of us believe part of the answer lies in providing education both to criminal justice actors and to the public so they can realize the benefits of restorative justice. Information shared should take the form of both storytelling from past participants and the sharing of highlights of Canadian research with respect to satisfaction and recidivism.

From my own research on educating criminology students in university, it is clear that learning about restorative justice impacts the way students think and, ultimately, act both in their own lives and on the job. I recall one student who used restorative justice practices to rebuild a difficult relationship with a parent. Another became a police officer and began using what he called "roadside restorative justice" on the job. In many situations of harm or conflict, the officer would use what he had learned about restorative justice to invite both parties to share right there and then: What happened? Who was impacted and how? Who is taking responsibility for what? What needs to happen to start to heal this relationship or repair the harm?

I have sat in court and watched judges be moved after learning about the outcomes of restorative justice processes that those in court had participated in.

Experiencing the success of such collaborative and compassionate approaches to problem solving has led many to advocate for restorative justice within the criminal justice system. I have sat in court and watched judges be moved after learning about the outcomes of restorative justice processes that those in court had participated in. One judge said, “You and your restorative justice program brought about the healing outcomes that I never could.” I will never forget how affirmed both the parties and I felt about those words.

Increased confidence in restorative justice within the larger criminal justice system is also essential. At present, many criminal justice actors are hesitant to refer cases to restorative justice, not only because of a lack of awareness but also because they worry about the quality of the practices. They have good reason for concern, as many of these programs are severely underfunded and require more resources to access good training, hire qualified staff and support the ongoing development of ethical and principled practice.

In 2016, a group of community-based restorative justice practitioners collaborated in BC to develop recommended principles and standards for restorative justice providers in criminal matters. In keeping with the spirit of restorative justice, adopting these practice standards is voluntary. Whether this project will have impact on referrals and practice is currently being evaluated.

Finally, more robust and stable funding for restorative justice programs is required from the province and federal governments, which directly benefit from cost savings associated with restorative justice. Savings in policing, court and corrections costs resulting from the increased use of restorative justice need to be redirected back into these worthwhile programs. Today most restorative justice programs receive only a maximum of $2,500 from the BC government. Some programs have accessed funds from municipal governments, and others must reapply for yearly grants through various sources. This situation is neither sustainable nor aligned with provincial policy and federal legislation that direct criminal justice actors to provide restorative justice options for victims, offenders and the community.

Canada has a wealth of diverse restorative justice programs operated by dedicated people within Indigenous and non-Indigenous communities. Despite numerous challenges, many of us in the restorative justice community are hopeful about the future of expanding restorative justice throughout the country. Moving restorative justice from the margins to the mainstream of the criminal justice system depends on gatekeepers like the police, courts and judges feeling confident and knowledgeable enough to make referrals. Equally important is an educated public asking for and expecting restorative justice alternatives if they are impacted by crime.

This article is part of the Widening the Lens on Criminal Justice Reform special feature

'Do something': Liberals faced angry backlash over Colten Boushie case
Letters, emails demanded government take steps to address a 'gross miscarriage of justice'
CBC News
Kathleen Harris
May 11, 2018

Justice Minister Jody Wilson-Raybould faced a flood of correspondence from Canadians imploring the Liberal government to act in the wake of a Saskatchewan farmer's acquittal in the shooting death of Colten Boushie.

Wilson-Raybould received hundreds of letters and emails after the Feb. 9, 2018 verdict finding farmer Gerald Stanley not guilty of second-degree murder. The overwhelming majority of correspondents called for an appeal, a public inquiry, reforms to the jury selection process or some form of remediation.

Many saw the verdict as a watershed moment and a test for the government on its commitment to reconciliation with Indigenous people.

"For a government that has made reconciliation a priority and a nation that is faced with a suicide crisis of young Indigenous people who fear their lives will not be valued, the acquittal of Stanley for killing Boushie sets a very dangerous precedent in this nation's efforts to reconcile with its dark past and ensure a better future for Indigenous peoples," warned one writer.

The letters and emails, which poured in from all parts of the country, were released under the Access to Information Act.

Boushie, a 22-year-old Cree man, was shot and killed by Stanley near Biggar, Sask., on Aug. 9, 2016, when he and four other young people from the Red Pheasant Cree Nation reserve drove onto Stanley's rural property.

During Stanley's trial, the jury heard that he believed the individuals were there to steal property, and that he feared for his family members' lives.

One writer who signed off as "Outraged Citizen" called Stanley's subsequent acquittal "atrocious."

"The selection of an all-white jury was wrong in so many ways. This government talks about justice for Indigenous peoples and then this happens. Do something."

The trial heightened racial tensions and raised questions about the jury selection process. Some observers said they believed the process was biased because the defence team excluded five potential jurors who appeared to be Indigenous, though CBC News has not independently determined the reason for their exclusion.

Under Canada's Criminal Code, defence lawyers and Crown prosecutors can exclude people from a jury without giving any reason through so-called "peremptory challenges." Critics say the long-standing

procedure can lead to discrimination against potential jurors — and can deliver a jury that is biased or lacks an understanding of Indigenous culture and customs.

As part of a package of criminal justice reforms in Bill C-75, the government is planning to eliminate peremptory challenges.

Wilson-Raybould's spokesman Dave Taylor said the change will help make juries "more representative of the communities they serve." The legislation also aims to reduce the over-representation of Indigenous people and other marginalized groups in the prison system through reforms to bail and administration of justice offences.

Committed to change

Taylor said the government understands there are systemic issues and is committed to change.

"Too many Indigenous and marginalized people are victims of crime. Too many are in jail. Too few are serving on juries," he said.

Taylor noted that the decision not to appeal the verdict was taken by the Saskatchewan Provincial Crown and was entirely a matter under provincial jurisdiction.

In the wake of the verdict, the Civilian Review and Complaints Commission for the RCMP announced it would conduct a review of the RCMP's investigation of Boushie's death. A spokeswoman for the commission said the investigation is underway and could take a year or longer.

Meantime, a GoFundMe.com page in support of Stanley has collected $223,327 in donations to help him and his family "rebuild their lives."

Fundraisers for Stanley, Boushie families

The page says the fundraiser isn't meant to be a platform to promote or justify violence, racism or vigilantism, and was not intended to condone or glorify Stanley's actions that day.

"The events of August 9th impacted the Stanleys' lives forever. As a result of other people's actions and negative decisions, the family has suffered tremendous personal and financial losses, as well as intangible losses such as sleepless nights, stress, fear, and general upset," reads the page, which has been shared 16,000 times on Facebook.

Another page raising funds for Boushie's family — to "support them in their time of mourning and healing, for their legal costs, and on their continuing journey for justice" — has raised $203,645 to date.

"We believe that Indigenous youth deserve safety and the ability to travel freely on these lands without fear of racism or persecution. We are not trespassers," the page reads.

Some letters supported verdict

While the vast majority of those who wrote to Wilson-Raybould decried what they viewed as a miscarriage of justice motivated by racism, a small number suggested it was the unfortunate consequence of escalating frustration over stolen vehicles and home break-ins.

"Colten paid the ultimate price, due to his own, and his friends', poor choices. Agreeing with the verdict doesn't make me a racist. It makes me a realist," one person wrote.

Another warned against reforms that influence the composition of juries.

"Does this mean that when a Muslim, black or LGBT person is on trial then they will also be similarly accommodated? Be careful you do not open a can of worms here."

Other comments from the letters and emails:

"The justice system's failure of Colten Boushie is our collective disgrace."
"As a young adult, I don't think I have ever felt so disappointed to be a Canadian in my life."
"Let this be a precedent-setting case and pave a way for a real chance at truth and reconciliation because this verdict is unacceptable, and a loud and passionate jury of Canadian citizens, including myself, are saying this is not right."
"This was a national disgrace, a gross miscarriage of justice that sends the message that property is worth more than the lives of Indigenous youth, and that the state will uphold white supremacy through a justice system that systematically removes any hope for Indigenous peoples on both sides of the criminal/victim divide."

You might not care about striking lawyers – but you should
We are already seeing the dreadful effects of legal underfunding, as people are forced to defend themselves with only the vaguest idea of what they're doing
The Guardian
Gaby Hinsliff
May 11, 2018

There is a strike under way that you've probably barely heard about, although its implications are as grave as any that make the headlines. This one doesn't involve train drivers, enraging as those stoppages are for stranded commuters. It doesn't involve university lecturers, diverting as those have been for students, or even junior doctors. It involves criminal barristers from 100 chambers who, in protest against government reforms of legal aid fees, are refusing to take on new publicly funded cases – or in other words, defences of people who can't afford their own lawyers.
The courts haven't ground to a halt, so defendants are still ending up in the dock. It's just that more of them are now attempting to represent themselves, often with only the vaguest idea of what they're doing, on charges ranging all the way up to murder. The risk of miscarriages of justice is screamingly obvious, especially when it comes to disclosure of evidence – how are complete amateurs to know what useful material the prosecution could be hanging on to? – but defendants are not the only potential victims here. If it's hard enough for witnesses to relive distressing experiences with the accused glowering silently at them from the dock, then imagine what it's like when he or she's the one conducting the cross-examination.

This week the website BuzzFeed obtained a study of judicial views on unrepresented defendants, which was commissioned by the Ministry of Justice long before the current dispute, amid concerns about the

consequences of earlier cuts in legal aid entitlement. It offers a rough guide to what we can now expect. Unsurprisingly, the gist was that hearings both take longer and cost more when everyone has to keep stopping to explain things to the accused. Some "just sit there like a rabbit in the headlights and haven't got a clue what's going on", as one judge put it; others interrupt constantly even when it's not their turn to talk, or veer off at wild tangents. Either way it doesn't sound terribly conducive to getting at the facts.

The Law Society Gazette recently highlighted a troubling family court case in Middlesbrough involving a father accused of raping his ex-wife and assaulting her son from a previous relationship; neither parent was granted legal aid but neither could afford their own lawyer, so the judge ended up attempting to cross-examine them himself while court officials compiled makeshift bundles of evidence. When the distressed mother said she simply couldn't face going through it all again, the judge ended up finding most of her allegations unproven while noting in his judgment: "I am in little doubt that had one or both of these parents been represented, the fact-finding process and probably the outcome would have been very different." And on these impossibly shifting sands now rests a decision about whether the father should see their daughter. Yet all this has barely registered in the public consciousness, even though things are only likely to get worse later this month, when barristers are being urged to up the ante by instigating a policy of "no returns" (refusing to take on cases that another barrister has had to drop due to an unexpected diary clash).

The shadow justice secretary, Richard Burgon, led a debate on criminal legal aid in parliament this week, and stories are bubbling up from courtrooms via social media, too: the South Wales Evening Post's crime reporter, Jason Evans, tweeted earlier this week that in the space of just one morning in court he'd seen unrepresented defendants appear on charges ranging from fraud to GBH with intent and murder. But not many local papers have enough staff now to cover courts day in and day out. And, to be blunt, it's likely too few readers care.

Defendants are infinitely less sympathetic victims than maddened commuters, and lawyers aren't like junior doctors, whose action over weekend working drew widespread support from patients. Barristers tend not to have legions of grateful customers, proud to go public about that time they got off by the skin of their teeth, and the widespread presumption is that lawyers don't deserve pity; that they all earn a fortune anyway, that legal aid is just a gravy train and anyway it's too often awarded to the undeserving.

Yet even if that were true over a decade ago, when the Labour government first launched a crackdown on legal aid with tabloid-friendly stories about bumper payouts to fatcat QCs, it isn't so true now. The government's reforms to legal aid fees are meant to shift more money down to junior barristers, widely seen as struggling. (Those just starting out in criminal work can earn as little as £12,000 per year, less than the minimum wage, to which they're not entitled because they're deemed self-employed; the Tory MP Bob Stewart admitted during this week's debate that of the five junior barristers who had contacted him about the strike, none were earning enough even to start repaying their student debt.) But those reforms do so in some cases by taking money from those not all that far above them. There is an emerging consensus that however imaginatively it's distributed, there simply isn't enough money to go around, given the Ministry of Justice has taken some of the deepest budget cuts in government. Even the former Conservative justice minister Jonathan Djanogly, who defended the government's new fee

arrangement this week from the backbenches, admitted to"some sympathy with those who complain that the criminal justice system is creaking at the seams" even if his solutions would be radically different from Burgon's.

Meanwhile the fear is all this will hurt initiatives to get more working-class children to go into the law; even if their long-term earning prospects are good, it's tough for barristers just starting out in expensive cities such as London to survive if they can't be bailed out by their parents, when the fee for a short court appearance can be less than the train fare to reach it.

Something, in short, has gone very wrong. But it's gone wrong in a part of the public sector that, unlike schools or hospitals, we don't normally regard as public, that doesn't tug at the heartstrings, that for most of us remains completely invisible – all of which encourages ministers to think they can ride this one out. Few strikes are solved by giving one side everything it wants. But even fewer are solved by hoping nobody notices.

More than 600K cases still pending in Phoenix pay system
Pay system still struggling despite nearly $1 billion to launch and troubleshoot it
CBC News
May 11, 2018

Problems with the federal government's Phoenix pay system continue to cause headaches for more than half of all federal public servants.

The Ministry of Public Services and Procurement revealed Thursday a total of 607,000 cases are still pending at the pay centre in Miramichi, N.B.

Despite investments now approaching $1 billion to launch it, then try to fix it, the situation is stagnating. As of May 2, approximately 372,000 cases that have immediate consequences on the salaries of civil servants were still pending.

The exact number of files changes daily and the pay centre estimates that more than half of all federal employees have a pay problem, regardless of whether they are clients of the centre.

Pending cases:
452,000 have financial implications for public servants.
101,000 have no financial impact.
14,000 are related to collective agreements.
40,000 must be closed.
The government's latest budget included $16 million to find a replacement for the pay system.
In the meantime, the government is changing the workflow of its Phoenix support workers in Miramichi to a "pay pod" model where trouble-shooters are assigned to specific departments.

In Pod We Trust: Where we're at with Phoenix
iPolitics
Kathryn May
May 11, 2018

With an extra $307 million to spend on Phoenix, this is the year the Trudeau government would like to put the pay crisis behind it.

Public Services Minister Carla Qualtrough certainly wasn't keen on setting a target date for stabilizing Phoenix when she testified at the government operations committee this week, but she expressed "optimism" that the troubled pay system may be turning a corner.

Her department, the federal paymaster, is managing the files that come in and chipping away at the queue which, at last count, has a massive backlog of 607,000 transactions at the Miramichi N.B. pay centre. The department's latest Phoenix update showed that backlog continues to drop, inching downward since January.

Phoenix is still erratically not paying people, but those numbers have dwindled to between 20 and 40 a month compared to hundreds a month in the months after the error-prone system was rolled out in February 2016.

The department has done enough fixes, revamped processes and trained employees that most transactions (about 90 per cent of them) sail through as long as they are filed on time. Phoenix is still finicky with retroactive pay and is likely to foul-up a transaction that involves retroactive payments, such as extra pay for an acting position.

This glimmer of hope couldn't come at a better time. Public servants are exasperated: more than half of the 300,000 paid by Phoenix have some kind of outstanding pay issue.

And the unions, feeling the backlash of their own members, are losing patience. They've vowed to 'escalate action' in the 18 months before the 2019 election to pressure the government to resolve Phoenix and pay damages to employees for more than two years of botched pay. In fact, the giant Public Services Alliance of Canada is threatening to campaign against the Liberals in the next election if public servants aren't paid properly by then.

This enthusiasm, however, will quickly be overshadowed by Auditor-General Michael Ferguson who is delivering his long-awaited probe into how Phoenix went off the rails on May 29.

So here's a Phoenix update provided by Qualtrough and her officials at government operations committee where they were called to explain and defend the department's spending plans:

"We will not keep Phoenix in perpetuity, but right now, we need to focus on stabilizing this system to get us to the point where, first of all, we're handing over clean data to any new system. And second of all, people are being paid in the meantime," Qualtrough said.

Where is the money going?

The budget gave Public Services and Procurement Canada (PSPC) $431 million to resolve Phoenix pay issues, but the specifics on how that money will be spent is unclear. The department is currently doing a Treasury Board submission on what it plans for the money. The largest piece — $307 million — will be spent this year to cover hiring more compensation advisers, human resource staff and improving systems. The main vendor is IBM, which built Phoenix under a contract that expires in 2019.

“Regarding the funding for Phoenix, we have been building capacity on the HR front and also working with the vendor on systems,” said Les Linklater, PSPC’s associate deputy minister who stickhandles efforts to stabilize Phoenix.

“These funds will allow us to continue to maintain that capacity and to augment it so that we can keep the compensation staff we’ve hired on strength, and to hire further.”

PSPC has been on a hiring spree for months to build a team of 1,500 compensation advisers. It has already hired more compensation than the 700 who were laid off by the Conservatives in the expectation that Phoenix would replace them.

Linklater said the department brought an additional 325 new hires in January; hired another 60 this month and is offering another 90 jobs to students at the Université de Moncton.

“We are still in the hiring mode. This will continue, just to ensure a good pool of employees who will be available to help us, and to help departments and agencies as well.”

Speaking of numbers: The backlog is shrinking.

PSPC released its latest Phoenix update this week and indications are the backlog is declining from its peak in January.

The transactions with a financial impact, which PSPC worries about the most, dipped by 5,000. The ones with no financial impact (such as queries from employees), however, increased as did those in the “waiting to be closed” category.

The pay centre handles pay operations for about 45 departments that employ about 70 per cent of the public service.

The 607,000 outstanding cases at the pay centre include 452,000 financial transactions; 101,000 general inquires or ‘non-financial’ transactions; 14,000 collective agreement transactions and 30,000 completed transactions waiting to be closed.

The pay centre can handle a normal monthly workload of about 80,000 cases: last month it had 372,000 beyond its capacity.

The pay centre received 131,000 pay requests between March 21 and May 2 and processed 136,000 of them. It also manually processed about 3,000 transactions created by new four-year collective agreements for employees.

The rest of the departments, which use Phoenix but process their own employees' pay, face a stockpile of about 35,000 cases — an increase of 3.4 per cent over the last monthly update. These transactions are either pay problems or unfinished transactions.

At the same time, the number of regular pay transactions — excluding collective agreement transactions — processed within the 30-day service standard slipped to 54 per cent – compared to 59 per cent in March.

In Pod We Trust….

Qualtrough is confident the pay pods the PSPC is rolling out across government by mid-2019 will further reduce the backlog — and rebuild the relationship between departments and the pay centre.

The pods were conceived by employees at the Miramichi pay centre. It began as a pilot project in three departments last December — Veterans Affairs, Innovation Science and Economic Development and the Federal Economic Development Agency for Southern Ontario — and was so encouraging that PSPC decided to ramp it up "exponentially."

The backlog was reduced by 24 per cent for the three departments; the number of people with outstanding pay problems fell by 11 per cent. About 88 per cent of the transactions were completed within PSPC's average 30-day service standard.

The pod teams will work directly with departments. They will become experts in the collective agreements and the unique pay rules to a department. In some cases, departments with similar pay regimes or work will be clustered and served by a pod.

It is also a "whole person approach," with teams resolving all the pay issues of an employee instead of tackling them by transaction, such as maternity leave or disability.

The transition to 'pay pods' begins with three new pods for 12 more departments by the end of May, followed by another wave in September.

MPs not as enthused

Some MPs on the government operation committee don't appear to share Qualtrough's optimism that Phoenix may be turning a corner.

NDP MP Randall Garrison said the pace of improvement touted by Qualtrough was so slow that public servants could wait between two to nine years for pay issues to be resolved.

“That’s just not acceptable,” he said.

“I’m going to present you with a different picture and that’s from my constituents,” Garrison told Qualtrough. I represent a riding where we have a thousand people with Phoenix pay cases. We have DND, we have the coast guard, we have Revenue Canada. I have a whole lot of people who don’t share your optimism.”

Qualtrough recently came up with a new mechanism to help MPs deal with the Phoenix complaints swamping their constituency office. (Most of Canada’s public servants work in regions outside the National Capital Region.)

PSPC received 590 cases in March; 400 in April. About 34 per cent of last month’s 400 cases were processed with notices sent to MP offices on the expected date of resolution. About 35 per cent of the cases dealt with retroactive payments or adjustments.

Garrison said the 13 cases he sent PSPC have yet to be dealt with and he has another 80 from National Defence firefighters who have all been underpaid.

“People base their family budgets and paying their bills on the pay that they’re entitled to get and when they don’t get it, it creates severe problems. I know you painted a somewhat rosy picture of the progress. I just don’t see it, but more importantly, the public servants in my riding don’t see it,” Garrison said.

Judge can’t end a trial just because he has ‘heard enough,’ appeal court rules
“What happened here was a serious violation of natural justice,” Superior Court Justice Suhail Akhtar finds in case of provincial court judge who acquitted accused man without hearing his defence.
Jacques Gallant
May 11, 2018

When the Supreme Court said trial judges should do their part to reduce delay in the justice system, it wasn’t suggesting what Justice Richard Blouin did in a 2017 criminal case, an appeal court has ruled.

Blouin, a provincial court judge in Toronto, cut the case short and acquitted the accused after hearing from the Crown’s only witness, but before the defence was able to call its evidence, and before either side could make closing submissions.

“There is a provision in there talking about preventing delay,” Blouin said in his October 2017 ruling, referring to a Supreme Court decision in R v. Cody.

“And I just wanted to speak to that because I’m not going to ask the defence to call any evidence because in my view the Crown is not anywhere near proving his case beyond a reasonable doubt ...”

The Crown appealed the acquittal, and Superior Court Justice Suhail Akhtar ordered a new trial in a decision released this month.

“Whatever the ramifications of Cody and its comments encouraging judges to ‘control and manage’ a trial, the Supreme Court of Canada did not sanction the elimination of one of the fundamental tenets of a criminal trial: the right of a party to make submissions on the guilt or innocence of an accused person,” Akhtar said.

“What happened here was a serious violation of natural justice and the appeal must be allowed on this ground alone.”

The case involved a Toronto man, Brian Sibbert, who was charged with failure to comply with a probation order for allegedly contacting his neighbour, whom he had previously pleaded guilty to assaulting. The woman was the Crown’s sole witness.
Even the accused, who is now facing a second trial, agrees that Blouin made a mistake. “The judge erred, therefore the Crown appeal should stand and I agree with that ruling,” Sibbert told the Star.

“It wasn’t a murder case. It’s a monumental waste of time and money for the court, and a waste of my time and my money.”

After the Crown had filed its final exhibit, and after the defence confirmed that it intended to call Sibbert as a witness, Blouin spoke about the “new approach in these courts.”

“And we are asked to do things a little differently and expedite the process and try to come to some decisions without full-blown hearings,” he said.

He cited the Cody decision, which reiterates much of what the Supreme Court said in its landmark R v. Jordan decision in 2016. That ruling set strict timelines to complete criminal cases — 18 months in provincial court and 30 months in Superior Court — and said “trial judges should make reasonable efforts to control and manage the conduct of trials.”

Blouin then dismissed the case against Sibbert over concerns with the Crown witness’s reliability, but without hearing submissions from either side.

“And again we could have gone through this charade and it would have been, in my view — the defendant would have testified, and (the Crown) would have cross-examined based on a number of issues that would come up, and we could have spent another hour dealing with this matter,” Blouin said. He ended by saying: “And we need to be spending our time doing things that really matter ...”

Akhtar, the appeal court judge, took issue with much of what Blouin said in acquitting Sibbert, finding the judge had a reasonable apprehension of bias as his comments “strongly suggest that he had prejudged the matter.”

He said Blouin’s comments also “reflect a serious misunderstanding of the principles enunciated” in the Cody decision. By commenting on trial judges managing trials, the Supreme Court was referring to the streamlining of motions and applications before and during the trial to avoid delay, Akhtar said.

“The paragraph relied upon by the trial judge and the sentence he emphasized hardly signalled a system by which a trial judge could ‘short circuit’ a trial even though there was further evidence to be called, and submissions to be made, simply because he or she thought they had ‘heard enough,’ ” Akhtar wrote.

Toronto lawyer Megan Savard, who represented the Criminal Lawyers’ Association as an intervener in the Cody case before the Supreme Court, said there are many things judges can do to reduce delays, including imposing deadlines on themselves to make decisions, appointing lawyers to act for unrepresented accused persons, and setting timelines and working with the parties to narrow the issues.

“It is tempting to try to solve the delay problem by taking procedural fairness guarantees away from defendants. This case is a cautionary tale,” Savard said. “It illustrates the problem that arises when the courts pursue speedy justice at the expense of defendants’ rights.

“Here, the trial judge’s intervention made the trial more efficient but at an unacceptable cost: it undermined the defendant’s right to be heard.”

Court ruling settles little in continuing dispute over Kahnawake Mohawk membership law
The Globe and Mail
Robert Everett-Green
May 11, 2018

Skawennati Fragnito’s media art often involves playful, positive scenarios for the future of Indigenous peoples. Her text-based piece, Imagining Indians in the 25th Century, includes this entry for 2102: “Senate [of Canada] is reformed on the model of the Clan Mothers.”

Ms. Fragnito’s past and current relations with her Mohawk community at Kahnawake are more painful. She and several in her family aren’t considered members. According to the Mohawk Council of Kahnawake (MCK), that means they can’t live or be educated on the reserve near Montreal, or even be buried there.
Ms. Fragnito was one of 16 plaintiffs in a recent court challenge to a section of the Kahnawake Membership Law that denies residency and services to Mohawks living with non-Indigenous partners. Last week, Justice Thomas M. Davis of the Superior Court of Quebec ruled the provision discriminatory under the Canadian Charter of Rights and Freedoms.

The ruling was widely reported as a blow to the MCK’s attempts to regulate who can live on reserve. But the judge declined the plaintiffs’ request to order the council to put them on its membership list, saying “the MCK has a duty to govern on the reserve” and must be allowed to fix its own law.

It has been working on that for more than a decade, through a laborious process of community consultation. During that time, there has been no procedure for people to apply to be instated or reinstated.

Ms. Fragnito hasn't lived on the reserve since she was 3. Her mother, Brenda, another plaintiff in the case, left in 1972, after marrying a non-Indigenous man. Under the Indian Act at the time, the marriage erased her Indian status. That sexist provision was reversed in 1985, but Brenda Fragnito failed even to get a hearing about regaining a place on the MCK list.

Skawennati Fragnito has no doubt that she and her mother qualify under the current membership law. She believes the MCK is perpetuating a colonial tradition of defining aboriginal individuals out of their Indigeneity.

"They're doing exactly what the Indian Act was trying to do to us," said Ms. Fragnito, who lives in Montreal. "I still consider myself Mohawk, but I have to work at it. It's not like when you're growing up near your family on reserve, immersed in the culture."

Justice Davis's nod to the authority of the MCK looks like a judicial endorsement of Indigenous self-government. But the MCK isn't the only body at Kahnawake that claims the right to regulate the community.

The Mohawk Nation at Kahnawake, a more traditional organization, "will not recognize any legislation passed through the MCK Community Decision-Making Process," according to a statement on its website. "The MCK was born from Canada's Indian Act and remains an extension of this colonial power, whose only strength stems from Canadian recognition and funding."

Only about one-quarter of eligible Kahnawake voters participate in MCK elections. A recent community meeting on the membership law drew a dozen residents, which is apparently typical. Community-based decision-making sounds great, but how representative can it be when many people don't show up or vote, and others deny the legitimacy of the body in charge?

The root of the trouble is not ultimately among the people, but in the history and the land. Kahnawake has lost about half of its former territory. Its riverfront was traumatically expropriated in the late 1950s for the St Lawrence Seaway. Neighbouring municipalities constantly nibble at its boundaries. "We always feel under attack, that we're going to be squeezed out of our little postage stamp," MCK spokesman Joe Delaronde says. A 2011 survey asked residents: "Do you think if non-natives consistently become part of the community that over time this would give the federal government enough power to take away our land and Mohawk status?" Eighty-five per cent said yes.

Justice Miller rightly said that his court "should not interfere" in a matter rooted in cultural survival. He was also on point when he said "the resolution of the conflict is ultimately a task for the people of Kahnawake, all of them." That last bit will be the hardest, and the most important.

Federal judge approves $875 million '60s Scoop settlement after hearings
The Province
Canadian Press
May 11, 2018

SASKATOON — A federal judge has approved a multimillion-dollar settlement for Indigenous people who were taken from their families and placed in non-Indigenous foster homes in the so-called ’60s Scoop.

Justice Michel Shore made the ruling in Saskatoon after two days of hearings in which survivors spoke for and against the proposal.

The settlement includes $750 million for the survivors, $50 million for an Indigenous healing foundation and $75 million for legal fees.

Last October, the federal government said the proposed settlement was for about 20,000 survivors who were moved between 1951 and 1991.

Shore says he will issue his reasons for his ruling in a month or longer.
Lawyer Tony Merchant, whose firm represents some of the victims, says most of the people affected by the ’60s Scoop want to move on with their lives.

“It’s the right decision,” he said Friday.

“They wanted things to come to a conclusion and the people who wanted some change or said it could be better were overlooking the agony of the process, and the thousands of people with whom I’ve spoken over time — because this has been going on for nine years — say enough is enough.”

Coleen Rajotte is one of the survivors who isn’t happy with the settlement.

During the hearings, Rajotte argued that claimants will lose their right to sue the federal government if they accept the money.

She also said she doesn’t believe enough consultation was done prior to the proposal.

Rajotte wants the federal government to redo the process.
“I’d like to see meetings set up across the country where it’s well-advertised and adoptees could come out to public meetings,” Rajotte said.

“If they lived in remote communities, every chief and council should be written and full information packages should be dropped off at every band office across the country. Then, councillors could distribute it to adoptees and everyone should be informed in the best way possible.”

Anna Parent said she was taken from her home and adopted out in the 1950s.

She hoped to share her story at the hearings, but she said she wasn’t given adequate time to do so.

Shore noted during his opening remarks that the hearing was not the place to share stories, but rather an opportunity for victims to weigh in on the proposed settlement.

Merchant said it could be months before individual survivors can apply for compensation and the summer of 2019 before any money is paid out. (CTV Saskatoon, The Canadian Press)

'Justice was not served:' Sixties Scoop survivors unhappy after approval of $875M settlement
Hearing in Saskatoon saw more than 100 survivors testify
CBC News
Jason Warick
May 11, 2018

An $875-million settlement for survivors of the Sixties Scoop has been approved, following an emotional two-day hearing in Saskatoon.

Federal Court Judge Michel Shore said he had exhaustively studied submissions for the settlement for the past year, which includes $750 million for the estimated 20,000 survivors, $50 million for a foundation and $75 million for lawyers' fees.

"I'm very pleased.... I think it's the right direction for Canada," said lawyer Tony Merchant, who represents 5,000 survivors.

However, the decision didn't sit well with many survivors who had come from across North America to testify. They say the outcome seemed pre-determined.

They noted Shore made multiple references promoting the settlement and its foundation during the hearing. They railed against the three-minute time limit they were given to testify. And Shore's decision issued after only 60 minutes of deliberation was the final proof he wasn't listening to anyone at the hearing, they said.

"Was this just to shut us up? There is no integrity in this process. Justice was not served," said survivor Marlene Orgeron, a member of the Sapotaweyak Cree Nation in Manitoba who was adopted out to a family in New Orleans.
"I don't feel I was heard. Our words just fell from the air."
Survivor Sandra Relling from Alberta said the decision "came far too soon.

"I don't believe it was a fair hearing. I think it was biased. I'm tired of the leaders of this country telling me what's in my best interest. I feel victimized again."

The Saskatoon Federal Court hearing was to grant approval for the national settlement. An Ontario hearing scheduled for the end of this month regarding claimants in part of that province will also be required for full implementation.

Shore said the administrator of the funds must disseminate and communicate details of compensation and services.

Judge's remarks called 'inappropriate'
Earlier in the day, some survivors of the Sixties Scoop had questioned the fitness of Shore to oversee the hearing.

During his 16-minute opening remarks on Friday morning in a Saskatoon hotel ballroom, some survivors in the gallery shook their heads while others walked out.

"I was disgusted; I had to leave," said survivor Peter Van Name, from Mikisew Cree First Nation, Alta.

Van Name, Melissa Parkin and other survivors said Shore was supposed to be objective, but had made multiple references in favour of the settlement. On Friday morning, the second day of the hearing, he appeared to promote the benefits of a foundation proposed as part of the deal, saying that's the best way people can have their stories heard.
"You need a tailor-made solution for you. We hope the foundation can recognize that," Shore said.

Van Name, who grew up with an adopted family in New Jersey, said the statements were inappropriate.

"It doesn't matter what I think now," he said. "They've already made their decision."

From the late 1950s through the 1980s, thousands of First Nations and Métis children were apprehended by child welfare authorities and placed in non-Indigenous care in what has become known as the Sixties Scoop.

More than 100 survivors from across Canada, as well as dozens of lawyers, government officials and security officers, hoped to testify at the two-day hearing. It was moved from the courthouse to a hotel to accommodate the large crowds.

There were other comments from Shore on Friday that angered survivors.

Shore told the gallery non-Indigenous people were harmed more than Indigenous survivors by the Sixties Scoop and other historic events because they caused non-Indigenous people to lose their reverence for the land and nature.

Shore made references to "barbarians eating fruit in trees," Nelson Mandela, and compared himself to a heart surgeon.

At one point, he said he'd stop speaking because he knew survivors had to stick to a three-minute time limit, but then continued speaking for several minutes.

"I'm taking all this time for one reason — a judge is a human being, lawyers are human beings," said Shore, repeating several times he understands the pain survivors are feeling.

Shore took his seat, and the rest of Friday morning saw lawyers speaking about the legal details and their fees.

"He talked like that for how many minutes and we get three? We get nothing," Van Name said.

Other survivors who spoke Thursday and Friday were upset by the process and the time limits. They said it felt like they were being lectured.

'It's a sham'
"This is just furthering the injustice; why are we even here?" White Bear First Nation member Anna Parent told CBC News on Thursday evening, after the first day of hearings.

"Everyone is offended. It's a sham."

"We have said from the beginning that this is a significant step but not the last step," reads a statement from the Office of the Minister of Crown-Indigenous Relations.

"We know there are other claims that remain unresolved, including those of the Métis and non-status. We remain committed to working with all Indigenous peoples affected by the Sixties Scoop to resolve the remaining litigation through negotiation."

Survivors hope the money, the services and the acknowledgement of wrongdoing will help survivors and their families heal. Others say the deal is flawed but it's the best option available.
For those opposed to the proposed settlement, the maximum $50,000 payment per survivor is not nearly enough to address the profound damage caused. They also say the lawyers' fees are too high. Many also note First Nations and Inuit claimants were included, but Métis survivors were not.

Sixties Scoop survivors call for Sask. apology and for healing to begin
Why this Sixties Scoop survivor feels 're-victimized' by the court process
It now seems the process — rather than the agreement itself — is causing the most anger.

As the hearing progressed Thursday, survivors grew increasingly frustrated. From the start, some called the security "overkill," referring to multiple units of armed police, undercover officers and other security.

With survivors sitting in the gallery, many of them teary or clutching handwritten notes, two lawyers and Shore spoke until the lunch break on that first day.

'Your suffering is recognized'
Once the afternoon session began, survivors were asked to testify and Shore said they would all be heard and their voices mattered.

"Your suffering is recognized," Shore said to loud applause. He then said survivors would be restricted to a maximum of three minutes at the podium.

Many survivors and their lawyers objected. Saskatoon lawyer Doug Racine said his clients have been waiting years to tell their stories, and asked for 10 minutes for each survivor.

Shore rejected the request, saying repeatedly that this was a Federal Court hearing only about the settlement.

After a 15-minute break, Shore warned survivors that their stories will be heard only if the deal is approved and the foundation is created to collect them. If the deal is rejected, "it goes back to the courts for years," he said.

Parent, who now lives in Saskatoon, said she couldn't believe what she was hearing.

'We were all rushed'
"We had to sit and listen the whole morning listening to attorneys and we got three minutes?" she said.

"He interrupted our elders. We were all rushed. Many people were re-traumatized."

Other survivors, such as Perry Boyko, Robert Doucette and Leticia Racine, echoed the criticisms.

Parent was taken from her mother in 1959 and raised in a white family in southern Saskatchewan.

"They hated Indians, so I hated myself. That was the attitude at the time, though," she said.

Parent finally met her grandmother at age 18, but didn't meet her birth mother until 2003 at 45. According to Parent, she was seized by government officials from her grandparents' care while her mother had gone off to take job training.

Other survivors had similar stories. They said they hoped testifying would honour their family and help them heal, but said the opposite has occurred.

5 erreurs que font les jeunes avocats sur les médias sociaux
Comment les jeunes juristes peuvent-ils continuer à poster, liker et tweeter sans se mettre dans l'eau chaude et compromettre leur pratique?
Droit Inc.
Céline Gobert
11 mai 2018

Quand la conseillère juridique de CBS Hayley Geftman-Gold a commenté un statut Facebook sur la tuerie de Las Vegas l'an dernier, elle pensait certainement que seuls ses « amis » sur le réseau pourraient lire sa prose.

Pourtant, son commentaire - « Je n'ai même aucune sympathie pour les fans de musique country qui sont souvent des tireurs républicains » - n'a pas seulement été lu par ses amis Facebook mais également par les hauts dirigeants de CBS qui l'ont, comme le raconte Law360, licenciée quelques heures plus tard.

Cette malencontreuse mésaventure virtuelle est un exemple éloquent sur la façon dont un avocat peut briser sa carrière en un seul clic.

Bien que tous les juristes soient susceptibles de déraper un jour en ligne, les avocats issus de la génération des milléniaux sont tout particulièrement concernés, ayant été immergés dans les médias sociaux très tôt dans leur vie. « La transition vers une utilisation professionnelle peut donc comporter certains pièges », estime la professeur spécialiste en éthique juridique Renee N. Knake.

Selon John Browning du cabinet Passman & Jones, ils ne seraient même pas toujours conscients du fait que les règles éthiques qui s'appliquent aux communications sur les plateformes de médias sociaux sont les mêmes que celles qui s'appliquent aux voies de communication plus traditionnelles.

Voici cinq erreurs que les avocats milléniaux commettent sur les médias sociaux, et la meilleure façon de les éviter.

1- Critiquer des juges, des clients, ou un confrère

Se lâcher en ligne sur les décisions d'un juge n'est pas une bonne idée. Bien qu'il ne soit pas rare que les avocats se confient sur leur journée à leurs amis ou famille, c'est quand « ces conversations transitent d'un comptoir de bar à un échange sur les réseaux que ça devient un problème », explique Knake.

Pour elle, un même contenu, avec une même intention, prendra une toute autre dimension en ligne et sera plus susceptible d'être sanctionné.

C'est ce qui est arrivé à une ancienne avocate de Louisiane, Joyce Nanine McCool, qui ne s'est pas gênée à se montrer très critique à l'égard de deux juges présidant des affaires de garde d'enfants. Elle n'était pas d'accord avec leur décision et a donc lancé une pétition en ligne, en plus de publier des articles de blog et des messages Twitter.

Le tribunal a statué qu'elle s'était livrée à une campagne virale pour influencer et intimider le pouvoir judiciaire, et qu'elle violait la règle d'éthique interdisant les communications ex parte. Elle a été radiée.

2- Divulguer des informations confidentielles

L'omniprésence des médias sociaux a rendu la plupart des milléniaux très enclins à commenter les événements de leur vie quotidienne en ligne. Mais pour les avocats, ces commentaires peuvent par inadvertance contenir des détails sur leurs clients ou des affaires qui sont confidentiels.

Pourtant, les jeunes juristes doivent impérativement se rappeler que leurs communications sur les médias sociaux sont toujours susceptibles d'être soumises à une surveillance judiciaire et éthique.

Selon le professeur Stephen Gillers, spécialisé en réglementations entourant la profession juridique, aucun avocat ne devrait poster quoi que ce soit sur un client, une firme, un enjeu concernant un avocat

ou bien une affaire. « Et s'ils veulent commenter la décision d'une cour, ils devraient s'assurer qu'aucun client de leur firme, ou leur firme elle-même, n'y soit impliquée.»

3- Communiquer avec des tiers non représentés

Le procureur adjoint Aaron Brockler, de Cuyahoga County dans l'Ohio, a été renvoyé en 2013 après avoir créé un faux profil sur Facebook afin de communiquer avec des témoins de la défense. Il voulait détruire leur alibi dans une affaire de meurtre sur laquelle il travaillait.

Il n'est d'ailleurs pas le seul à avoir eu l'idée puisque qu'une ex-procureure en Pennsylvanie, Stacy Parks Miller, a aussi créé un faux profil sous le pseudonyme de Brittney Bella pour espionner des témoins et des accusés.

Définitivement à éviter!

4- Créer des conflits d'intérêt

C'est le Comité d'éthique juridique du District de Columbia qui a abordé pour la première fois la question des conflits d'intérêts. Les avocats peuvent en créer s'ils expriment une position sur une question en ligne, mais que cette position est contraire aux intérêts d'un client.

L'article cite le cas de Paul Mirengoff, avocat chez Akin Gump Strauss Hauer & Feld, qui a rédigé un article de blogue peu flatteur et critique d'une prière amérindienne qui a eu lieu lors d'un mémorial pour les victimes d'une tuerie en Arizona. Pourtant, sa firme a un groupe de pratique amérindien et représente un certain nombre de nations tribales…

Les deux se sont excusés par la suite dans les médias mais trop tard, le mal était fait.

5- Poster des choses embarrassantes

Ne pas poster de photos ou de commentaires potentiellement embarrassants peut sembler une évidence. Pourtant, Facebook et Instagram sont gorgés d'images de personnes qui boivent ou portent beaucoup moins de vêtements qu'elles ne le feraient au bureau.

Il faut également éviter l'humour un peu trop limite, comme l'a appris à la dure Julie Jones, une jeune avocate de Pennsylvanie qui a posté une photographie d'elle-même, aux côtés d'un policier, chacun tenant dans ses mains un fusil qui avait servi de preuve dans une affaire sur laquelle ils avaient collaboré.

Loin de trouver ça drôle, le bureau du procureur de district a condamné son geste le qualifiant « contraire au protocole de bureau en ce qui concerne le traitement des preuves. »

Comme tout le monde, les avocats se doivent donc de garder à l'esprit que, le plus souvent, il n'y a pas que leurs amis qui peuvent voir ces images…

Work still needed years after landmark ruling on Indigenous sentencing: lawyers
National Post
The Canadian Press
Gemma Karstens-Smith
May 13, 2018

VANCOUVER — Nearly two decades after a landmark court decision on sentencing Indigenous offenders, lawyers say there are no national standards for implementing the ruling and too many Aboriginal people are still behind bars.

The Supreme Court of Canada's Gladue decision in 1999 said judges must take note of systemic or background factors when determining a sentence for Indigenous offenders in order to address their "serious overrepresentation" in prison.

Indigenous people often feel removed from the justice system, said Mitch Walker, vice-president of the Gladue Writers Society of British Columbia, which promotes the best practices for writing Gladue reports that lay out the Indigenous background of an accused in pre-sentencing.

"For First Nations people, justice just kind of happens to them. It doesn't happen with them, it doesn't happen for them, it doesn't happen for their benefit," he said. "And their interactions with the justice system have historically and contemporaneously been so negative that there's a lot of fear."

That may change if a Gladue report is written in their case, which requires getting in touch with an offender, their family and community, Walker said.

"It's a very delicate and awkward conversation to phone somebody and introduce yourself â¦ and then proceed with some very, very personal questions, questions that they wouldn't discuss with their closest friends and family members," he said.
The accused is also interviewed and it's often the first time they think deeply about how they ended up in trouble, Walker said.

"Gladue report writers are sometimes the first contact that these individuals have with the criminal justice system who aren't immediately making them feel as though they are a criminal, making them feel as though they're being listened to."

But some in the justice system say the reports have been underutilized.

Signa Daum Shanks, a lawyer and director of Indigenous outreach at Osgoode Hall law school in Toronto, said Gladue principles should be applied whenever an accused has Indigenous heritage, but it's "stunning" how often lawyers decide the background information isn't relevant to a particular case.

Courts are consistently provided with context about an accused, she said, such as if someone is struggling with English. But that doesn't always happen with Indigenous people, despite the Supreme Court ruling, Daum Shanks said.

It's "gut-wrenching" that the data in those reports isn't making its way into courtrooms, where judges could use it to tailor sentences that could help prevent crimes from happening again, she said.

Gladue principles are not intended to add an element of sympathy in sentencing an Indigenous person.

"It's about making sure some things don't happen again."

There are still significant misconceptions about what Gladue principles are, even among people working in the criminal justice system, said lawyer Michelle Brass.

"It's not a get-out-of-jail-free card, for example. It's not a creation of a second justice system," she said.

Brass is working with the Native Law Centre at the University of Saskatchewan to research how and when the reports are used by looking at about 250 cases across that province. Part of the project's aim is dispelling misunderstandings by providing education for those in the justice system.

At stake, Brass said, is the continued overrepresentation of Indigenous people in jails and prisons.

Data from Correctional Service Canada shows Aboriginal people made up about 18 per cent of all federal inmates in 2001, but accounted for less than three per cent of the country's total population.

Indigenous offenders made up 23 per cent of the total offender population last year. About five per cent of people across the country identified as being Aboriginal in the 2016 census.

For years, there's been a substantial need for more Gladue reports across B.C., said Mark Benton, executive director of the Legal Services Society, the province's legal aid office.

The society traditionally used non-governmental funding for the reports and, with each report costing about $1,740 and taking about eight weeks to complete, there was only enough money for about 80 per year.

Funding was dedicated to writing Gladue reports last year by the province, Benton said.

In 2017, there were 131 Gladue reports written in B.C. and about 400 will be produced this year.

Benton said he was concerned about the system a year ago, but now there's real progress being made in B.C.

"I believe that we're headed in the right direction now and I believe there are people who are in a position to make the needed changes who are committed to doing that," he said.
Some other jurisdictions are focusing on better utilizing Gladue reports, too.

Earlier this year, Yukon set aside $530,000 for a pilot project to train writers based in the territory to produce standardized reports and cover the costs of writing them.

Reports had previously been written by untrained personnel, which led to uneven quality and some reports were tossed from court, causing delays in the justice system, the government said.

“Yukon First Nations are over represented in the criminal justice system and it is our hope that a Gladue report program will assist in raising awareness and understanding about the unique systemic factors faced by First Nations, while recommending restorative and healing options,” Grand Chief Peter Johnston of the Council of Yukon First Nations said in a statement.

But there’s still work to be done when it comes to implementing the Gladue decision, Benton said, including the lack of national standards for the reports.

The ruling affects all of Canada, he said, so there’s an expectation for a common approach across the country.

The federal Justice Department said it’s up to each jurisdiction to determine how to implement the Gladue principles in the Supreme Court decision.

The department runs the Indigenous justice program, which includes projects that raise awareness about the Gladue decision.

Many details in Gladue reports could be standardized, Benton said, including what they should include, who’s qualified to write them and how long they should take to prepare.

“As always in Canada, there is some benefit to a diversity of approaches when it comes to how justice works,” he said. “But I think after basically 20 years since the Gladue decision, it would be timely for a consolidation of the best practices to come together. And I think many of us are hoping that the federal government will take that on.”

Five things to know about the Gladue decision
The Chronicle Herald
The Canadian Press
May 13, 2018

VANCOUVER — It's been nearly two decades since Canada's highest court handed down its landmark Gladue decision on sentencing Indigenous offenders. Here are five things to know about the case:

THE CRIME: Jamie Gladue fatally stabbed her common-law husband outside their townhouse in Nanaimo, B.C., in 1995 after celebrating her 19th birthday. She pleaded guilty in 1997 to manslaughter and was sentenced to three years in prison. She appealed the sentence, but the case was dismissed by the B.C. Court of Appeal.

SUPREME COURT CHALLENGE: Gladue argued that neither the sentencing judge nor the B.C. Court of Appeal had followed a provision in the Criminal Code that requires courts to consider punishments other than prison time, "with particular attention to the circumstances of Aboriginal offenders." The Supreme

Court dismissed the appeal in 1999, but agreed that the lower courts had erred and ruled that an Indigenous offender's history must be taken into account during sentencing.

OVERREPRESENTATION: The court's decision said there was a "drastic overrepresentation" of Indigenous people in Canada's prisons and jails, revealing a "sad and pressing social problem." The ruling said Indigenous offenders faced different circumstances than the rest of the population, including systemic and direct discrimination, a legacy of dislocation, and poor social and economic conditions.

A JUDGE'S RESPONSIBILITY: The Gladue decision said a judge sentencing an Indigenous offender "must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts." The judge should impose a sentence that denounces crime and is meaningful to the community, which could include restorative justice.

GLADUE'S SENTENCE: By the time the Supreme Court's decision was handed down, Gladue had already been granted full parole, so the high court said it didn't think a new sentencing hearing would be "in the interests of justice."

Federal government signs $500M contract with IBM without seeking bids
Domestic firms criticize lack of bidding on largest sole-source contract ever signed by Shared Services Canada
CBC News
Dean Beeby
May 13, 2018

The Liberal government has signed a $500-million deal with IBM Canada Ltd. without any competitive bidding — a move being slammed by Canada's home-grown technology firms.

"This is yet another example of how the government's procurement process favours large, multinational companies and doesn't give highly qualified companies even a fair shot to bid for these projects," said Benjamin Bergen, executive director of the Council of Canadian Innovators.

The massive deal with IBM, signed in November and extending until 2021, includes $289 million in optional additional spending, putting the potential total cost at almost $790 million.

It's the largest sole-source deal ever signed by Shared Services Canada. It may be the largest non-competitive contract in federal procurement history.

The deal follows more than a year of controversy over the dysfunctional Phoenix payroll system, created through a separate contract with IBM Canada. The system has been criticized for paying some civil servants too much, some too little and others not at all, as well as mishandling vacation and retirement rolls. The original Phoenix deal has been amended 44 times, and increased in value this year by $36.5 million to $277 million.

The latest contract is unrelated to Phoenix. It tasks IBM with delivering 16 new mainframes, along with maintenance and support for existing hardware and software, to at least six federal departments. The $500-million deal consolidates four contracts that were to expire in 2017 and 2018.

"Owing to intellectual property issues relating to proprietary hardware and software, IBM is the only supplier capable of performing the work," says a November 2017 memo to Ron Parker, president of Shared Services Canada (SSC).

"The proposed contract is a legacy sustainment contract servicing existing infrastructure. SSC anticipates continued use of these products and services for the foreseeable future."

Deal called 'disappointing'
CBC News obtained the heavily censored memo under the Access to Information Act.

"It's definitely disappointing, even after all the issues with the Phoenix pay system, that the Canadian government opts to go with a foreign vendor," said Bergen, whose group represents the CEOs of dozens of Canadian technology firms.

The federal Chief Information Officer Alex Benay has suggested in the past that Ottawa's "IT procurement processes favour incumbents and don't foster enough new entrants into the process."

A study Benay ordered last summer found that IBM Canada was Ottawa's top vendor, with contracts valued at $3.1 billion in the 2016-2017 fiscal year.

"From the Top IT Vendors report, we see there is a large concentration (almost $10 billion) across a small number of large international IT companies," Benay said last August in a memo, also obtained under access to information.

A spokesperson for SSC, Frederica Dupuis, defended the giant IBM contract, saying the agency "was able to stabilize pricing, avoid annual price increases and simplify contract management."

"These mainframes are super computers that process millions of transactions per minute which provide a reliable computing platform for Government of Canada mission critical applications and services," such as the Old Age Security (OAS) and Employment Insurance and Canada Child Benefit programs, she said.

An IBM spokesperson declined to comment on the latest deal with SSC and defended the firm's Phoenix work. "As the Canadian government has repeatedly acknowledged, IBM is fulfilling its obligations on the Phoenix contract and the software is functioning as specified by the government," said Carrie Bendzsa. She added that IBM Canada has invested more than $10 billion in Canadian research and development over the last decade.

"For the past 101 years, IBM Canada has been a deep part of the social and economic fabric of this country," said Bendzsa.

Sole-sourcing is rare
Ottawa has signed a few contracts larger than the latest IBM deal — typically for shipbuilding and defence — but only following competitive processes designed to get the best value.

Large, sole-source federal contracts — such as the current $296-million deal with Macdonald Dettwiler and Associates to provide engineering support for the mobile servicing system on the International Space Station — are rare.

Shared Services Canada also has a sole-source deal with Microsoft Corp. for licences for proprietary software and maintenance, currently valued at $343 million.

Akwesasne : qu'en est-il de l'expérience de justice réparatrice?
Le premier système de justice autochtone du Canada mise sur la réparation plutôt que sur la punition
Radio-Canada
14 mai 2018

Les actions des individus ont un effet sur la communauté. C'est en se basant sur ce principe que chaque deuxième mercredi du mois, la cour mohawk d'Akwesasne entend des affaires civiles. Le premier système de justice autochtone du Canada élaboré indépendamment d'Ottawa mise sur la réparation plutôt que sur la punition. Et ici, le prévenu fait partie de la solution.

Il n'est pas 18 h et la cour commence à se remplir. Autour d'une table grise, six chaises sont disposées. Pas question de siéger en hauteur ni de porter des robes de magistrat pour les membres de la cour.

L'avocat porte une veste marron, la juge un haut blanc à pois noirs, la procureure une veste rose vif. Timidement, une femme vient s'asseoir sur le bout de la chaise en face de la juge de paix, Shannon Hall, pour exposer sa cause.

Depuis le 2 octobre 2016, le système de justice d'Akwesasne fonctionne en dehors du cadre fédéral grâce à une combinaison du système actuel et du système traditionnel.

Historique

Dans les faits, cette cour a commencé dans les années 1960, mais elle appliquait des règlements, des mesures liées à la Loi sur les Indiens. « On l'a laissé tomber et (on a) obtenu l'autorité de la communauté pour en arriver au point où nous en sommes », explique Gilbert Terrance, l'administrateur de cette cour.

Si auparavant elle se tenait dans un bâtiment communautaire avec des réunions en cercle, la cour a pris place dans un bâtiment officiel et elle ressemble beaucoup plus à une cour de justice provinciale.

« Pour que l'on soit plus crédible », explique avec un petit sourire Gilbert Terrance. « Les gens regardent beaucoup les séries télévisées! ».

Les comparaisons s'arrêtent là : de la manière d'entendre une cause aux membres de la Cour, qui n'ont pas forcément d'études en droit, mais une bonne réputation et une bonne crédibilité, en passant par les décisions rendues et aux objets pour prêter serment, tout diffère.
Une bible est mise à disposition, mais la plume d'aigle est généralement choisie pour dire la vérité, toute la vérité. Et les termes « coupable » ou « non coupable » ne seront jamais prononcés de la soirée.

Sken:nen – paix, Kasatstensera – force et Kanikonri:io – bon esprit

Ce soir, une trentaine de personnes sont attendues. Plusieurs se présentent avec leurs enfants, attendent leur tour patiemment. Un homme s'approche. La juge Shannon Hall le salue, petit sourire, mais visage fermé.

Elle l'écoute puis lui demande s'il travaille, s'il va à l'école. À temps plein ou à temps partiel? Et lui dit qu'elle apprécie son « attention à corriger sa situation ». Il doit 7000 dollars en contraventions.

Venancette Cook demande à intervenir. La responsable du programme de déjudiciarisation suggère de prendre une partie de la somme et de l'échanger contre des services communautaires : « Ainsi pourra-t-on voir sa bonne volonté », précise-t-elle.

Shannon Hall regarde l'homme et lui demande : « Monsieur, combien d'heures êtes-vous motivé à faire? » Après discussion, il devra faire 600 heures en une année et payer une partie du montant de la somme due.

Le mot d'ordre de la cour est de rétablir l'équilibre dans la communauté. Pour cela, elle entend les causes en tenant compte des principes de paix, de force, de bon esprit, de respect et de justice.
Le père de famille plein de bonne volonté évitera ainsi de passer par la case prison, restera avec ses enfants et, idéalement, se reprendra en main.

« Êtes-vous content? », demande la juge avec un grand sourire. « Oh oui », répond l'homme qui se voit offrir une seconde chance.

Une nécessité

Sur un grand panneau de feuilles blanches, dans son bureau sans fenêtre, l'administrateur Gilbert Terrance dessine le processus de justice actuel. Il en énumère les éléments à voix haute puis, avec son feutre, dessine un grand trait qui revient au début.

« Nous constatons que les gens reviennent (après la prison) et font la même chose, encore et encore. Avant que cela arrive au procureur de la Couronne, avant d'aller en prison, nous voulons arrêter le processus là! Nous voulons tendre l'oreille, donner une chance d'éviter la prison. »

Si les rapports Gladue (demandés par les juges pour établir une peine qui tient compte du passé de la personne autochtone) permettent de réduire les peines, la surreprésentation autochtone en milieu carcéral reste problématique.

La proportion d'adultes autochtones en détention au Canada est environ neuf fois plus élevée que leur représentation dans la population : ils constituent plus de 26 % des détenus dans les prisons fédérales.

« Tant que les Autochtones n'auront pas leurs propres cours, nous aurons beaucoup de problèmes, lance Franck Horn parce que les autres cours ne nous comprennent pas et par conséquent ne savent pas quoi faire. »

Franck Horn sait de quoi il parle. Avocat originaire de Kahnawake, il travaille autant à la cour d'Akwesasne qu'au tribunal de Cornwall. Souvent, raconte-t-il, ses clients lui confient qu'ils savent, avant même l'audience, qu'ils vont être déclarés coupables.

Même s'il existe des services adaptés dans certaines cours, la meilleure réponse, selon lui, est celle-ci : une cour faite par et pour les Autochtones, avec leurs propres membres qui les jugent et qui, au final, travaillent pour que la personne soit aidée.

Défis

Un tel système ne vient pas sans ses défis. « C'est dur parfois », soupire Shannon Hall. « Les gens sont habitués au processus de l'extérieur qui est plus punitif et qui concerne davantage les droits individuels, alors que nous favorisons plutôt une approche collective et réparatrice. »

À preuve, cet homme qui ne veut rien entendre de cette cour et préfère passer devant le tribunal de Valleyfield en espérant obtenir « la pitié du juge » ou sa peine rapidement, plutôt que de s'engager pour la communauté et pour sa réhabilitation. Après en avoir discuté avec la juge de paix, il s'intéresse peu à peu au programme de déjudiciarisation. Il va y réfléchir et revenir.
Il y a aussi ceux qui ne se présentent pas et qui sont quelque part, côté canadien ou américain, dans la communauté et qui sont difficiles à retracer.

Top prosecutor weighs in on criminal cases tossed by judge
Saskatchewan's top public prosecutor Anthony Gerein says the small number of cases thrown out because of delays indicates the system is working 'very, very well.'
Saskatoon StarPhoenix
Alex MacPherson
May 14, 2018

Saskatchewan's top public prosecutor says his department is doing all it can to ensure more criminal cases aren't thrown out of court because of unreasonable delays in getting to trial.

Anthony Gerein, the province's assistant deputy attorney general, acknowledged that perfection may not be achievable in a "human system" where prosecutors deal with more than 40,000 files each year.

At the same time, the comparatively small number of criminal charges stayed in Saskatchewan suggests the criminal justice system is working "very, very well," he said in an interview.

“What we have to do — and what we’re doing — is everything possible to expedite assessing cases, getting them before the courts, and getting them heard.”

Last month, a Meadow Lake provincial court judge stayed charges — including assault with a weapon — in two separate criminal cases after both were delayed by almost two years.

Including those decisions, Saskatchewan judges have tossed seven criminal cases since the Supreme Court of Canada issued a landmark ruling that redefined “unreasonable delay” in July 2016.

Another 10 applications for charges to be stayed have been rejected.

By comparison, R. v. Jordan has resulted in hundreds of cases being dismissed nationwide. More than 200, including alleged murders and sexual assaults, were tossed in the first 12 months alone.

Under R. v. Jordan, the time between charges being laid and a trial concluding must not exceed 18 months for provincial court cases and 30 months for cases in superior courts.

The Supreme Court ruling also shifted the onus to the Crown to demonstrate that any delays beyond the “presumptive ceiling” can be chalked up to exceptional circumstances.

Gerein said while he does not believe Jordan applications in Saskatchewan are the result of systemic issues, prosecutors are nevertheless working to speed up the province’s court system.
That work includes resolving some cases immediately through “Crown cautions” — effectively warnings — and limiting the number of preliminary inquiries by proceeding through direct indictment, he said.
Nicholas Stooshinoff, president of the Saskatchewan Trial Lawyers Association, said last week that complying with the Jordan decision will require governments to spend more.

Gerein disagreed. Citing the initiatives underway, he said: “It isn’t always a matter of necessarily throwing more resources at it; it’s how you use those resources.”

One of the cases thrown out in a Dillon, Sask. courtroom last month involved Ritchie Noltcho, who was facing two sets of charges including driving after smoking marijuana and assault with a weapon.

Judge Miguel Martinez stayed both sets — which had been on the books for 15 months and 21 months — after finding the delays were not caused by “exceptional circumstances” or the defence.

Blaine Beaven, the Saskatoon-based defence lawyer who represented Noltcho, said just four of the thousands of criminal cases he’s handled over the last eight years have resulted in delay applications.

While it’s not possible to identify a single cause for delays, issues with the weather and facilities in northern Saskatchewan can often impede cases working their way through the system, Beaven said.

Gerein acknowledged that it isn't always possible for prosecutors, witnesses and others involved in a case to travel in northern Saskatchewan, but said — as Beaven did — that delays are "very case-specific."

But that doesn't mean there aren't ways to reduce the number of delays. Beaven said ensuring more senior prosecutors and Legal Aid lawyers are available would smooth cases' passage through the system.

It is also important to fund addictions treatment, mental health services and other things that keep people out of the criminal justice system — resulting in fewer cases going to court, he said.

"In reality, what would make less delay applications is if there was less crime. And what would make less crime is if we paid more heed to the social issues that people face."

Supreme Court of Canada to keep records of deliberations secret for at least 50 years
The Globe and Mail
Sean Fine
May 14, 2018

The judges of the Supreme Court of Canada have ensured that documents disclosing their secret inner workings will not be revealed during their lifetime – and possibly ever.

The court has placed a 50-year embargo on public access to files related to the deliberations of the judges, from the time they rule on a case.

The restriction took effect last June when the court and Library and Archives Canada announced it as part of an agreement to "ensure that the case files of Canada's highest court will be preserved and accessible to future generations." (The announcement went largely unnoticed at the time.)

What the court and the archives did not say, but the agreement makes clear, is that the Supreme Court can withdraw the files at any time, and keep the documents secret forever, without providing a justification.

The agreement means that while the Supreme Court enjoys huge influence over Canadian life and politics – through rulings on such cases on gay marriage, assisted dying and even the possible breakup of Canada itself − those seeking to understand how it went about exercising its power will lose the possibility of access to a major source of documentary evidence.

The Globe and Mail obtained the agreement this month after requesting it from the court.

It applies to the notes and correspondence between judges as they deliberate on a case, mark up one another's draft rulings or communicate through their clerks.

These documents were once the property of individual judges who could make them available to researchers on request, when and if they wished, after their retirement. Now, those documents are owned by the court and subject to its 50-year rule.

Federal Access to Information law does not currently apply to the Supreme Court. (A bill is now before the Senate that would make certain Supreme Court records, such as expenses, public.)

The agreement gives the Supreme Court more protection from scrutiny than the federal cabinet, whose records are accessible after 20 years, with some exceptions, such as national security. The terms are also stricter than those in other jurisdictions. Supreme courts in the United States, Britain and Australia, for example, allow their judges to decide what to do with such information. In lawyer and journalist Jeffrey Toobin's 2007 work The Nine: Inside the Secret World of the Supreme Court, based in part on the "priceless trove" of retired U.S. justice Harry Blackmun, he shows the court's internal machinations when abortion rights hung in the balance in a major 1993 case.

Other Canadian courts also let judges choose. And a 2003 biography of former Supreme Court chief justice Brian Dickson contained revelations from his files – such as that the first female justice, Bertha Wilson, considering resigning over perceived sexism within the court. Or that he insisted a judge with mental-health problems, Gerald Le Dain, leave the court permanently.

Reaction from historians, lawyers and political scientists when told by The Globe of the 50-year embargo ranged from shock to bafflement to resigned acceptance.

"Fifty! Five-zero!" said Peter Russell, the dean of Canada's political scientists and an authority on the Supreme Court. "I don't know any other constitutional democracy that puts the lid on it for so long."

Similar documents have been essential reading in the United States, where not only academic books but bestsellers have taken people behind the curtain.

"Without those judicial papers, Americans would be very much in the dark about what makes the Supreme Court tick," Prof. Russell said.

Eugene Meehan, whose Ottawa law firm Supreme Advocacy publishes a weekly newsletter on the court, said he eagerly awaits the end of the embargo period.

"I will be 115 as I look forward to the release of those papers," he said, adding: "Having access in 15 or 30 years would be better, but it's a start."

Legal historian Philip Girard, who had been told of the embargo weeks before it was announced, said the agreement preserves records that might otherwise be lost, but added that "the length of time does seem on the long side."

Chief Justice Richard Wagner, who succeeded Beverley McLachlin in December, took up his post by announcing that he intended to make the court more understood and transparent to ordinary

Canadians. The court has since begun issuing plain-language summaries of rulings. Chief Justice Wagner declined an interview for this article.

A court spokesman, executive legal officer Gib van Ert, declined to answer questions for the record about the policy, such as why 50 years was deemed an appropriate period.

National archivist Guy Berthiaume also would not be interviewed about the agreement.

The youngest judge on the current court, Justice Russell Brown, heard his first case at 50 and would have to reach 100 to outlive the embargo. The agreement appears to bind future judges of the court.

It creates no guarantee of access even after 50 years. “The Court … reserves the right, exercisable in its sole discretion, to terminate its deposit of Collegial Documents with LAC [Library and Archives Canada],” the agreement says.

The agreement also distinguishes “Collegial Documents” from “Chambers Documents.” The chambers documents are a judge’s drafts of a decision or notes or communications with law clerks on a case. These remain their personal property. They do not need to donate them to the national archives, or any archives. (If they donate them, they are appraised and the judges receive a charitable tax receipt. The collegial files are treated as court property and therefore not deemed a charitable donation.)
The lockdown of collegial files is so tight that even judges who wish access to them must seek the chief justice’s permission in writing.
The Supreme Court of Canada did, however, leave itself room to move the 50-year embargo period, up or down. The agreement provides for a review every seven years or less, “to determine whether any adjustments need to be made.”
Ryan Reft, a historian who oversees the legal collections in the U.S. Library of Congress manuscript division, told The Globe that U.S. judicial files range from open to restricted. The files of former judges Mr. Blackmun, Thurgood Marshall and William O. Douglas are open. Ruth Bader Ginsburg, on the other hand, stipulated that case files be made accessible only after her death, and the deaths of all her colleagues who sat on the case. Others make the files accessible when all the justices from a case are retired.

The papers of Supreme Court justices “are among our most used collections,” Mr. Reft said.

In a foretaste of what Canadians in 2068 might think of the availability of today’s case files, the court’s news release announcing the agreement pointed to cases now available at the archives, such as Roncarelli v Duplessis, from 1959, and the Margarine Reference from 1949. These cases appear to be of interest only to the most specialized audiences.