Bilingualism, reconciliation and the Supreme Court

It's time to do the necessary groundwork to ensure that the next Supreme Court appointee will be a bilingual Indigenous person.

The Gazette

Celine Cooper

January 1, 2018

In 2017, the historic opportunity to appoint the first Indigenous justice to the Supreme Court of Canada in conjunction with the nation's 150th anniversary came and went. As we move forward into a new year, it's incumbent upon the Trudeau government to ensure that when the time comes to appoint the next Supreme Court judge, the result will be different.

Back in November, Sheilah Martin, a bilingual anglo-Montrealer, Alberta judge and former dean of University of Calgary's law faculty, was nominated to the court to fill the vacancy left by Chief Justice Beverley McLachlin's retirement.

By most accounts, Martin is an excellent choice. However, when it came to the reconciliation file between Canada and First Nations, there was a sense that Canada had rounded out the year on a disappointing note. The appointment reignited a national debate — and exposed underlying tensions — around the Liberal government's criteria that Supreme Court of Canada justices be functionally bilingual in English and French, and whether this language requirement is hindering the appointment of an Indigenous person to the country's highest court.

The Liberal government has made significant promises to Indigenous peoples, including a commitment to implement all 94 recommendations from the 2015 Truth and Reconciliation Commission. Ahead of the nomination process, there had been a great deal of hope that the new appointee would be Indigenous. When she wasn't, Prime Minister Justin Trudeau faced significant criticism.

The failure to appoint a First Nations, Inuit or Métis person this time may not have been the government's fault. Reports indicate that none of the final three applicants on the shortlist put together by a screening committee chaired by former prime minister Kim Campbell was Indigenous.

It's unfortunate, but perhaps not surprising. The pool of highly qualified Indigenous candidates is still relatively small, and not all who are qualified would have been interested in throwing their hats into the ring. Only 1 per cent of all Canadian judges are Indigenous. A Maclean's article reports that of 997 applicants for judicial appointments made by Ottawa, between Fall 2016 and Fall 2017, just 36 were Indigenous. The fact that regional representation is an important factor in naming judges to the Supreme Court narrows the field further.

At the same time, Canada is — officially, at least — a bilingual country. In order to ensure the proper functioning of the judiciary, Supreme Court justices must be bilingual. As has been argued, removing the bilingualism requirement "would effectively be consecrating English as the sole language" of the country's highest court.

The Trudeau government would be well advised to develop a long-term vision for how to ensure that members of the up-and-coming generation of jurists, Indigenous and non-Indigenous, are bilingual. Addressing this challenge might include an intergovernmental approach to language learning among young students, given that educational policy is the responsibility of the provinces.

Increased efforts should be made to appoint more Indigenous judges to the lower courts — something that would be valuable for its own sake — and to provide them with additional language training so that they become fully bilingual in English and French.

Absent such strategies, the pool of potential Indigenous Supreme Court justices runs the risk of remaining limited, and linguistic duality will continue to be seen as an impediment to the reconciliation process.

In December, Raymond Théberge was appointed the new Official Languages Commissioner. The issue of language and indigeneity on the Supreme Court was raised during a parliamentary hearing for his confirmation process. Providing his nomination is confirmed by Parliament in the coming year, we can expect that this will be a key challenge during his mandate.

The current Supreme Court is a young body. The next appointment isn't expected to happen for some time. But as we move into 2018, Canada should begin laying the groundwork so that when the opportunity to appoint another justice comes around again, there will be a strong pool of bilingual Indigenous candidates.

Why It's A Great Time To Be A Lawyer
Forbes.com
Russ Alan Prince
January 2, 2018

Simply put… there is a tremendous manifest and latent need for just about ALL legal services. There are solid interrelated sociological and structural reasons for this including considerable societal divisiveness, meaningful changes in laws and regulations, and fast-paced disruptive technological innovations. At the same time, there are psychological factors that strongly prompt the need for various legal services such as hubris, arrogance, and Machiavellianism.

The opportunities, across a wide spectrum of law firm practice areas, have probably never been greater. Although there is a tremendous amount of untapped potential for legal services, there is one major obstacle to opening the spigot – lawyers.

From solo practices to mega-international law firms, many lawyers because of their inherent inclinations (e.g., risk aversion) reinforced by their education and firm experience are not going to take advantage of the incredible latent demand for legal services. As commoditization is rampant in the legal profession, the path to success is not just having "excellent knowledge of the law." Being technical proficient is table

stakes. Unfortunately, a large percentage of lawyers equate legal competence with the success of their practice, and the great majority is proven wrong.

What is also required of lawyers at all levels, in order to truly excel in today's legal environment, is a touch of entrepreneurialism coupled with some business savvy. The opportunities for lawyers are most everywhere from inside their own book of business to the clients of other lawyers in their firms to the many other types of professionals they know or can fairly easily get to know. The complication is that when it comes to the business development side of legal work, few lawyers have the expertise to create a steady stream of new work for their practices or their firms.

In extensively researching lawyers – across many fields of legal services – who are consistently earning $1 million or more annually just from their clientele, certain characteristics stand out. For example, these lawyers are often thought leaders within a particular sphere of authority. They are fairly adept at systematically connecting with other professionals – a process known as street-smart networking. They are able to frame conversations with clients and other professionals in a way that aligns everyone's enlightened self-interests.

Unless lawyers adopt these best practices, it is unlikely that they will be able to greatly benefit from all the tremendous pent up demand that exists for legal services. Conversely, for those lawyers who take a proactive and systemic approach to business development, their practices could easily grow exponentially.

Mandatory minimum sentencing should be Trudeau's first resolution
Amanda Carling, Emily Hill, Kent Roach and Jonathan Rudin
The Globe and Mail
January 2, 2018

It's been a bit more than two years since Prime Minister Justin Trudeau promised to "completely implement" the Truth and Reconciliation Commission's 94 calls to action. Many of these require joint action and spending. They take time.

The 32nd call to action, however, only requires a simple amendment to the Criminal Code.

It called "upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences." In other words, judges who have heard all of the facts about the case and the offender should decide the correct sentence. One size does not fit all.

The TRC made this recommendation as a way of addressing what the Supreme Court of Canada recognized in 1999 as a crisis of Indigenous over-representation in our prisons. The Supreme Court made this extraordinary statement at a time when Indigenous persons constituted 12 per cent of prisoners. Today, the figure is between 26 per cent and 27 per cent of all prisoners. What was a crisis has become much, much worse.

This simple amendment would help address the over-representation of Indigenous people in prisons across the country. Had it been enacted two years ago, the public could have saved hundreds of thousands of dollars spent by government and legal aid in every province and territory in challenging and defending the mandatory-minimum sentences that increased dramatically during the years of the Conservative Harper government. The public also could have saved money on prison sentences that judges thought were not necessary.

Mandatory-minimum sentences are a bad idea. Parliament cannot possibly know all of the varieties of offences and offenders caught by them. They are blind to whether offenders live in abject poverty, have intellectual disabilities or mental-health issues, have experienced racism and abuse in the past or have children who rely on them. The mandatory-minimum sentence does not allow a judge to decide if incarceration is necessary to deter, rehabilitate or punish the particular offender.

The federal government is still studying the issue, but there is enough evidence to justify this simple amendment early in the new year when Parliament returns from its break.

The federal Department of Justice's own research documents a 103-per-cent increase in cases affected by mandatory-minimum sentences between 2000-01 and 2013-14, so that almost 4,000 people are sentenced each year under such one-size-fits-all penalties.

There is support for the TRC's call to action in the practice of other countries. Australia is not known as a country that is particularly soft on crime, but some of its states allow judges to justify departures from all mandatory sentences on the basis of either offender or offence characteristics.

England allows departures from mandatory sentences for firearms – something that accounts for about a quarter of all Canadian cases – in exceptional circumstances. Scotland allows departures from mandatory drug sentences for "special circumstances" related to the offence or offender. New Zealand has changed its mandatory sentence for life imprisonment into a presumptive one that can be departed from if the circumstances are "manifestly unjust." A few American states have even made some of their mandatory sentences presumptive only.

And finally, there is growing list of decisions by all levels of courts, including the Supreme Court, holding that mandatory-minimum sentences cannot be justified. They violate the Charter of Rights and they discriminate against Indigenous offenders.

Alas, this litigation proceeds slowly, at an enormous cost to taxpayers as each offence is defended by government lawyers. Parliament could more quickly and less expensively enact much more comprehensive reforms.

While many of the TRC's calls to action require resolutions from various levels of government, the 32nd requires federal action alone. Will Mr. Trudeau make this one of his New Year's resolutions, or will we continue wasting taxpayer money on unnecessary incarceration and litigation for another year?

Amanda Carling is president of the board of directors for Aboriginal Legal Services, Emily Hill is its interim legal-advocacy director and Jonathan Rudin is its program director. Kent Roach is a professor of law at the University of Toronto.

Ottawa's justice agenda in 2018
CBA National
Justin Ling
January 2, 2018

Well into the second half of its mandate, the Trudeau government has a lot of work left to do.

Ottawa's mandate letter tracker, an attempt by the government to grade its own success on the commitments it made after coming into office, reports that it has followed through on just three justice-related files: Adding gender identity as a protected grounds under the federal Human Rights Act and Criminal Code, coming up with a legislative response to the Carter v. Canada ruling by the Supreme Court of Canada regarding physician-assisted dying, and ensuring an appointment process for Supreme Court Justices that is "transparent, inclusive and accountable to Canadians." (Some lawyers would question whether that third point is really a victory for the government.)

As for the rest of the justice file, the government has its work cut out for it when Parliament returns in late January, and will need to put a rush on if it wants to finish up its priorities before the next election.

Here's a quick rundown of some items to watch for in 2018.

Sitting in the Senate

Weed fight? The government's much-scrutinized Cannabis Act, (C-45) and its sister bill, which imposes tough new penalties on driving-while-high (C-46), have cleared the House of Commons without significant change, but now face an emboldened Senate that has issued vague warnings that their study could take time. That could threaten to delay the bill's July 2018 implementation date.

Some further study may be warranted. Many have questioned whether the broad police powers envisioned by the bill, coupled with stiff criminal penalties for infractions, could face trouble in the courts. The Canadian Bar Association has raised concerns that a limited approach to legalization that continues to rely heavily on the criminal law carries risks that would see people move "from lawful activity to serious crimes with severe penalties with little factual difference between their respective situations." That could invite a constitutional challenge.

Criminal Code cleanup: The government's announcement that it would clean-up the Criminal Code was met with widespread approval in the legal community. As Robichaud Law associate Jordan Gold put it: Axing these so-called "zombie laws" is a "no-brainer."

But Ottawa's mission to clean up the Criminal Code has run into some resistance. Its first foray into the exercise (C-51) faced stiff criticism in committee, particularly as they relate to proposed amendments to Canada's sexual assault laws, namely around disclosure of evidence from the defence.

The Criminal Lawyers' Association came out aggressively against the bill, writing that it, as drafted, "is unconstitutional and ineffective. The CLA's position is that the law of sexual assault needs no update. The law, properly applied, already protects complainants and witnesses in criminal trials from illegal, myth-based conduct."

The bill imposes new requirements on defence counsel to share information on witnesses or complainants with the Crown, and limits which information can be used at trial. The bill made it through committee without major change, but has only just arrived in the Senate, which may find itself more interested in taking a scalpel to the bill.

Still in the House

The end of buggery: For more than a year now, the Liberal government has said it will repeal Section 159 of the Criminal Code, the antiquated the unconstitutional provision that originally criminalized anal sex and, until more recently, set a differential age of consent for gay men.

Though long found to be unconstitutional, the charge has nevertheless been applied to dozens of individuals across the country, some of them youth, according to an Egale report.

Repeal of the provision is taking time. As CBA National has previously reported, it originally tried by introducing Bill C-32 in November, 2016 (C-32) only to shelf it to make way for a broader Charter clean-up bill, which includes the repeal language, which it introduced in March with Bill C-39. That bill would also clean up Canada's antiquated abortion laws and takes aim at some truly anachronistic sections, including a ban on witchcraft.

Bill C-39, however, has been stuck at first reading. While a spokesperson in House Leader Bardish Chagger's office told CBA National that it remains a priority for the government, they could not provide a timeline for when the bill would become law, much less when it would finally come to a vote.

Fixing the bestiality law: While Ottawa has shown zero initiative in fixing Canada's bestiaility laws, following a Supreme Court decision that conclude the Criminal Code criminalized only penetrative sex with animals — thanks to the old English definition of buggery — the opposition has taken it upon themselves.

Conservative MP Michelle Rempel introduced legislation (Bill C-388) to fix that before the House of Commons rose last week. The bill is painfully straightforward, reading simply: "In this section, bestiality means any contact by a person, for a sexual purpose, with an animal."

Easing the tax on “broken souls”: CBA National has reported for years on the previous government’s injudicious attempts to expand the enhance the federal victim surcharge, and Wilson-Raybould may finally getting around to addressing the issue in 2018.

The bill (C-28) provides an exemption for the courts to waive the surcharge if the cost would be disproportionate or cause undue hardship. The bill, introduced in October, has yet to come to a vote.

National security overhaul: The Liberals’ much-anticipated national security legislation-slash-quash-repeal of C-51 was met with tepid support from the various players in the field when it was unveiled in June. The bill (C-59) vastly expands oversight, as promised, establishes broad new authorities for Canada’s signals intelligence agency, and peels back some of the elements of the Harper government's Terrorism Act changes.

But the government has indicated it is looking for help on improving the bill, having sent the legislation off to committee before it came to second reading in the House.

Conspicuously missing from that bill was a legislative fix for the issue of basic subscriber information. Ottawa was focused on the issue of how to let police obtain internet-users’ name and address quickly, but without skipping judicial oversight altogether. Evidently, they couldn’t find a way, and have opted to stick with the status quo for now — leavinga situation where police say they are having difficulty obtaining court orders to obtain that basic information. We could see legislation this year address this issue again.

Legislation not yet introduced

The Navigable Waters Protection….something?: Despite promising in their platform to "review these changes, restore lost protections, and incorporate more modern safeguards" for Canada’s waterways, as part of a general plan to improve environmental regulations that were drawn down under the previous government, it’s still unclear what the government actually intends to do.

The government undertook a review, with an expert panel, and a public consultation to inform its future plans for environmental regulation and the fate of the National Energy Board, but has yet to indicate what it intends to do with that information. The file is expected to see some movement in 2018.

In the interim, the NDP have introduced dozens of pieces of legislation that would place individual rivers and streams that are no longer under the watchful eye of the federal government, back under protection of the Navigable Waters Protection Act.

The CBA’s Maritime Law Section, which responded to the online consultation questions in December, said it does not believe additional protections are needed under the Act. However it recommended that it “continue to apply to all navigable waters with respect to obstructions and prohibited activities in order to effectively protect navigation safety in Canada’s waterways.”

Sentencing reform: From its days in opposition, the Liberal Party has been critical of the tough-on-crime mindset of the previous government, vowing it would not go down the same path of harsh mandatory sentences.

But despite being critical of the Conservatives' stiff sentencing rules for non-violent drug offences, the Liberals baked in some very harsh maximum sentences into its marijuana legalization bill — as was explored above — and have generally not touched the Criminal Code when it comes to its other drug provisions.

This past summer, Ottawa introduced a survey that asks Canadians to offer their perspectives on how the court should deal with sentencing in various cases — from a drug-addicted mother who sells narcotics to feed her kids to a brain-damaged offender — with an eye to incorporating those responses into legislation.

That legislation has failed to materialize yet, with many lawyers anxiously awaiting its eventual unveiling. 2018 may well be the year.

Unions want compensation for Phoenix failures
iPolitics
Kathryn May
January 2, 2018

There's a new wrinkle in the federal government's Phoenix pay crisis: growing demands from Canada's public servants for damages to compensate them for nearly two years of pay errors.

Robyn Benson, president of the Public Service Alliance of Canada (PSAC), said the government has an obligation to pay employees properly and the union wants compensation for its failure to do so since Phoenix first went live in February 2016.

It is now estimated that more than half of all public servants are facing some kind of pay problem.

"The government has an obligation to pay its employees and, if not, they have to make them whole," said Benson.

"There will be, in the end, some sort of damages paid to our members … I think the government will seriously look at how to compensate people for not paying them on time."

The writing has been on the wall for more than a year. Unions have filed various legal actions and grievances against the government seeking damages for employees.

Union and senior management officials also have held meetings to privately discuss damages, haggling over whether employees should be compensated in time, money or a combination of both — and who should be entitled to damages.

Benson said discussions have included a range of options, from a one-size-fits all approach to damages targeted at those who faced financial hardship or ruin.

She said the circumstances faced by employees vary wildly, with some people getting overpaid, underpaid or not at all over a wide range of time periods, from just a few paycheques to several months. As a result, Benson prefers damages tailored to employees' individual situations rather than a blanket settlement for everyone.

All damage costs would come on top of the more than $400 million the government has already spent on trying to fix Phoenix, the second phase of a $309 million overhaul of the federal pay system launched by the previous Conservative government.

"Quite frankly, taxpayers have to understand we deserve to get paid," Benson said.

"I don't know anyone, other than public servants, who go to work day in and day out without a paycheque. If this was any other company, members wouldn't go to work. I appreciate it costs taxpayers money and I am a taxpayer too, but the government made these errors, not my members."

The government is legally bound to pay people properly under the Financial Administration Act and the directive on terms and conditions of employment. Employees have staged lots of protests and marches over Phoenix but there have been no calls for job action, such as wildcat strikes. Public servants have dutifully gone to work, trusting that Phoenix would be fixed.

The government also has fully acknowledged its obligation to pay employees and has even apologized.

PSAC also is waging a battle for compensation on another front at the Federal Public Sector Labour Relations and Employment Board.

PSAC filed a complaint in June 2016 alleging Phoenix glitches amounted to unfair labour practices because they effectively changed the terms and conditions of employment for public servants during a period of collective bargaining.

The union sought various remedies — including an order that public servants should be paid accurately and on time and compensated for the damages they suffered because of Phoenix. The board has yet to release a decision.

Since then, however, PSAC and Treasury Board reached a contract settlement; the union has now filed another complaint with the board and is seeking damages because Phoenix was unable to implement the new collective agreements for more than 100,000 PSAC members by the agreed deadline.

The government has acknowledged it missed the November 2017 deadline to implement the raises and retroactive payments called for under the new contract. It has asked the labour board for an extension and a hearing on the matter because of the "significant complexities" in implementing the collective agreements.

The union, however, wants to settle and has asked for mediation to work out a solution.

The Professional Institute of the Public Service of Canada (PIPSC) also has filed policy grievances against Treasury Board for failing to implement new collective agreements within the promised deadlines and wants employees compensated for all “losses, financial or otherwise,” resulting from breaching the agreements.

PIPSC also is calling for its members to inundate the government with individual grievances over pay problems — which could be significant, given that the backlog has grown to more than 619,000 cases waiting to be processed.

A big problem in determining damages is that it’s not clear how long it will be before Phoenix is working properly. The closest the government came to setting a deadline was when Public Services Minister Carla Qualtrough said she is hopeful Phoenix can be stabilized by the end of 2018. A growing number of public servants don’t think it can be fixed by the end of 2018, if at all.

PIPSC President Debi Daviau says 2018 will be the “make-or-break-year” for the government’s credibility on Phoenix.

“That’s still too late, but it at least provides us with a date by when to expect fixes to some major problems,” she said.

“While I’m doubtful, based on their track record, that the government will meet this new deadline, we will continue to do everything we can to assist fixes, while at the same time demanding that a new system that works be built by our members. We’ll also continue to press the government to either hire more staff to assist our members facing Phoenix problems, or expect more grievances.”

Des dossiers à surveiller au fédéral en 2018
La Tribune
Mélanie Marquis
Vicky Fragasso-Marquis
La Presse canadienne
3 janvier 2018

L'année 2017 a été riche en rebondissements de toutes sortes sur la scène fédérale, et celle qui vient de s'amorcer promet d'être aussi peu reposante, alors que le gouvernement de Justin Trudeau doit s'attaquer à des dossiers d'une importance capitale. Voici un aperçu des enjeux à surveiller pour 2018.
- Les controverses du gouvernement Trudeau
L'année 2017 aura probablement été la plus difficile pour le gouvernement Trudeau, qui s'est emmaillé dans plusieurs controverses politiques et éthiques dont l'opposition risque de se souvenir en cette nouvelle année. Avant les Fêtes, le premier ministre est devenu le premier dirigeant du pays à se faire reprocher d'avoir violé la Loi sur les conflits d'intérêts relativement au voyage qu'il avait fait l'an dernier sur l'île privée de l'Aga Khan. D'ailleurs, le gouvernement n'en a pas fini avec le commissariat à l'éthique: le ministre Bill Morneau fait actuellement l'objet d'une enquête concernant un projet de loi sur les fonds

de pension qui, selon les partis d'opposition, aurait favorisé son entreprise familiale, Morneau Shepell.
D'après le politologue Réjean Pelletier, les libéraux devront accélérer le pas pour remplir leurs promesses, car leur bilan est bien mince pour l'instant. «Le gouvernement n'a pas fait grand-chose, il n'y a pas beaucoup de résultat concret», a-t-il soutenu, citant la réforme du mode de scrutin et celle des impôts, qui piétine en ce moment.

- Des ministres vulnérables

Certains membres du cabinet Trudeau ont passé une année plus difficile que d'autres. C'est le cas, s'entendent pour dire la plupart des observateurs, des ministres Bill Morneau (attaqué sur son éthique), Mélanie Joly (blâmée pour l'entente Netflix), Kent Hehr (critiqué pour des commentaires douteux) et Diane Lebouthillier (malmenée pour sa gestion des dossiers fiscaux). Sont-ils en danger? Selon le politologue Thierry Giasson, le gouvernement, qui a procédé à deux importants remaniements en 2017, ne serait pas tenté de répéter l'exercice de sitôt. Et il croit que, pour des raisons stratégiques, le grand argentier du pays peut dormir en paix. «Si le premier ministre dégomme son numéro deux à mi-parcours, ça envoie une mauvaise impression dans la population, de son jugement à lui. Et depuis qu'il est arrivé à la tête de son parti, il se bat contre cette image-là», a signalé le professeur de l'Université Laval. Dans le cas de Kent Hehr, les libéraux «sont en train de regarder quels sont les appuis, et si on veut maintenir les gains en Alberta, peut-être que M. Hehr va sauter ou, au contraire, si on se rend compte que M. Hehr est très populaire dans sa circonscription et que ça va bien, on va peut-être le laisser là et peut-être juste l'amener à faire un acte de contrition, à s'expliquer, à s'excuser». Une source gouvernementale a indiqué à La Presse canadienne peu avant le congé des Fêtes qu'un remaniement n'était pas dans les cartons d'ici les prochains mois, et que l'on ne ressentait par ailleurs pas le besoin d'«appuyer sur le bouton "reset"».

- Les partis d'opposition se démarqueront-ils?

Le Parti conservateur d'Andrew Scheer semble gruger des votes aux libéraux dans les derniers sondages, surtout en Ontario. Reste à savoir s'il pourra maintenir ces appuis en 2018. Au Nouveau Parti démocratique (NPD), on n'a pas semblé profiter du nouvel élan qu'aurait pu apporter l'arrivée d'un nouveau chef. Sous la houlette de Jagmeet Singh, élu en octobre dernier, le parti de gauche semble éprouver beaucoup de difficulté. Cela s'explique notamment par le fait que M. Singh ne siège pas à la Chambre des communes, selon Réjean Pelletier. «Il n'est même pas député, de sorte qu'on ne parle pas de lui souvent et quand on en parle, c'est plutôt pour des anecdotes et non pas pour le fond de la politique lui-même», a-t-il expliqué. «C'est comme si le parti existait plus ou moins.»

Son collègue Thierry Giasson abonde dans le même sens concernant le leader néo-démocrate, qui n'a jamais signifié qu'il avait l'intention de briguer un siège aux Communes. «La période de questions, dans la médiatisation de la vie politique, c'est un moment important. Qu'un chef ne puisse pas se lever, poser des questions, c'est un manque dans sa capacité à communiquer son message. C'est un élément qui ne lui permet pas d'aller chercher une visibilité nationale un peu plus poussée», a-t-il soutenu.

Ce «décalage de visibilité» existe aussi pour la chef bloquiste Martine Ouellet qui, parce qu'«elle a un autre travail», celui de députée à l'Assemblée nationale, «n'est pas en train de sillonner le Québec dans une tournée pour rencontrer les Québécois», a fait remarquer le professeur spécialisé en communication politique.

- La légalisation du cannabis

Les libéraux martèlent depuis plusieurs mois que la légalisation du cannabis, prévue pour juillet prochain, ne sera pas repoussée, malgré les doléances des provinces et de certains intervenants du

milieu, qui souhaitent avoir plus de temps pour s'adapter. Mais les libéraux pourraient retrouver un obstacle sur leur chemin: le Sénat. Les sénateurs ont déjà annoncé qu'ils avaient l'intention de présenter des amendements au projet de loi. De son côté, le chef conservateur Andrew Scheer a averti que le caucus conservateur à la chambre haute allait tout mettre en oeuvre pour «bloquer» la légalisation - ce qui a toutefois été par la suite nié par l'influent sénateur conservateur Claude Carignan. Selon le politologue Réjean Pelletier, cela pourrait considérablement retarder les plans des libéraux. «Le Sénat peut proposer des amendements auquel cas, ça retournerait devant la Chambre des communes, qui les accepte ou qui les refuse, alors ça retourne au Sénat... Ça peut durer longtemps ce jeu-là», a-t-il expliqué. En entrevue au réseau TVA récemment, le premier ministre a laissé entendre qu'il pourrait se montrer plus flexible pour la date, affirmant que «c'est quelque chose (qu'ils allaient) faire l'été prochain».

- Blitz de négociations de l'ALÉNA

Les négociateurs du Canada, des États-Unis et du Mexique se réuniront une nouvelle fois fin janvier à Montréal pour tenter de sortir la renégociation de l'Accord de libre-échange nord-américain (ALÉNA) de l'impasse. L'année dernière, selon les informations qui ont filtré dans les médias, les discussions avaient avancé à pas de tortue, surtout sur les sujets les plus litigieux, dont le secteur automobile, l'agriculture ou encore le processus de règlement des différends. En cette nouvelle année, on peut s'attendre à ce que les négociations passent à la vitesse supérieure, notamment en raison des élections de mi-mandat aux États-Unis et de l'élection présidentielle au Mexique, qui se tiendront en 2018. D'après Réjean Pelletier, il se peut que le Canada doive faire des compromis pour au moins en arriver à une entente et ne pas tout perdre. «Ça pourrait arriver qu'il y ait beaucoup de concessions et que le Canada dise: "On n'a pas tout perdu malgré tout" et se satisfasse de ça».

- Justice pénale: réforme attendue

La réforme du système de justice pénale, en particulier des peines minimales obligatoires, est l'une des pierres angulaires du mandat qu'a confié Justin Trudeau à sa ministre de la Justice, Jody Wilson-Raybould. Et la ministre tarde à livrer la marchandise: en décembre 2016, elle disait espérer être en mesure de déposer un plan au printemps 2017. Cela ne s'est pas matérialisé, et vers la mi-décembre cette année, lorsque La Presse canadienne s'est enquise de la progression du dossier auprès du bureau de la ministre Wilson-Raybould, on a répondu qu'un projet de loi serait présenté en Chambre «au cours des prochains mois», un projet de loi «permettant de réduire les délais judiciaires et la surreprésentation, et d'assurer à toutes nos lois la capacité de promouvoir la sécurité publique et de respecter nos droits protégés par la Constitution». Il existe au total 72 peines minimales obligatoires, dont 39 ont été «modifiées ou promulguées depuis 2006 (l'année de l'élection de Stephen Harper)», selon le ministère de la Justice. Plusieurs d'entre elles ont été jugées inconstitutionnelles par la Cour suprême du Canada.

- Le G7 dans Charlevoix

C'est au tour du Canada d'assurer la présidence tournante du G7 en 2018, fonction qu'il assume depuis le 1er janvier et qui culminera avec le sommet des dirigeants du Groupe des sept, les 8 et 9 juin, dans la région de Charlevoix, au Québec. Le premier ministre Justin Trudeau a signalé que cinq grands thèmes orienteraient les discussions durant la présidence canadienne: la croissance économique, les emplois du futur, l'égalité des sexes, les changements climatiques et l'environnement, ainsi que la paix et la sécurité. Le choix de tenir la rencontre internationale à La Malbaie est «beaucoup plus logique, beaucoup plus intelligent» que celui de le faire à Toronto, ville hôte du sommet du G20 en 2010, selon ce qu'a déclaré en mai dernier l'expert en sécurité nationale Michel Juneau-Katsuya.

Cybersecurity In Canada: What to Expect in 2018

Miller Thompson LLP
Imran Ahmad
January 3, 2018

Globally, 2017 saw a year-over-year increase from 2016 in the number cyberattacks and data breaches that were reported in the media and to various regulators. Canadian organizations (public and private) were no exception to this global trend. Interestingly, attackers did not discriminate who they targeted – victims included financial institutions, manufacturers, retailers, universities, hospitals, and government agencies. The techniques used were both sophisticated and varied, ranging from ransomware attacks (malware that encrypts data until the victim pays a ransom) to advanced persistent threats (deliberate attempts to break into a particular organization's network). Unfortunately, 2018 is shaping up to be another busy year for attackers who show no signs of slowing down.

The following five key cybersecurity trends in 2018 should be on every general counsel's and risk manager's radar.

Mandatory Data Breach Notification Finally Coming?

On June 18, 2015, the federal government passed Bill S-4 – The Digital Privacy Act, which introduced several key changes to Canada's privacy law, the Personal Information Protection and Electronic Documents Act ("PIPEDA"). Some of the changes anticipated to come into force later this year include mandatory data breach notification and mandatory record keeping for all breaches.

The mandatory data breach notification will require organizations to notify affected individuals, certain other organizations and the Office of the Privacy Commissioner of Canada (the "Commissioner") of any data breach (referred to in PIPEDA as "a breach in security safeguards"), that is reasonably believed to create a "real risk of significant harm to the individual." The new breach notification model will align the Canadian approach with those of our American and European counterparts.

Despite several delays, the federal government completed its consultation process regarding the Breach of Security Safeguards Regulations this past fall. It is therefore anticipated that these provisions will come into force in the first half of 2018 and are likely to increase an organization's litigation exposure as a result of a major breach.

The Breach of Security Safeguards Regulations will also require organizations to maintain a record of every data breach for a minimum of 24 months after it has determined that a breach has occurred. These records should be sufficiently detailed and include, among other things, the methodology used and factors considered in determining whether a particular breach met the threshold of "real risk of significant harm." These records will be used by the Commissioner as a means to verify compliance and inform further enforcement action, if required.

For detailed information about what will be required under the Breach of Security Safeguards Regulations, please see our commentary here.

Rise in Complex Ransomware Attacks

Ransomware attacks – malware that encrypts data pending an extortion payment – will continue to increase both in frequency and complexity in 2018.

Traditional ransomware attacks that simply encrypt data on a computer and demand the payment of a ransom will evolve into a more complex form of cyber threat, one which will target an organization's critical data, disrupt key business operations and demand larger payment amounts as a result.

2017 saw an alarming growth in the development of new ransomware variants. What is new is that attackers are investing significant resources to modify the code of existing ransomwares, so that it can slip past antivirus programs unrecognized and undetected. What is more concerning is that newer variants are not only encrypting data, but also deleting or corrupting it when the ransom is not paid. This is particularly significant given that reliance on backups is not a perfect solution – studies show that close to 60% of organizations that relied on their backups were not able to fully recover everything.

Also, there has been a marked increase in ransom amounts. Following the "success" of the WannaCry and NotPetya ransomware campaigns, attackers have upped the ante and are now demanding ransoms of several hundreds of thousands of dollars. This trend is likely to continue in 2018.

Recognizing that (i) ransomware attacks usually rely on human error, (ii) attackers are now targeting critical data that can cripple an organization's day-to-day operations, and (iii) the ransom amounts have increased significantly, it is safe to say that not only will ransomware attacks continue but that their impact on organizations will be much more significant.

Europe's General Data Protection Regulations

In May 2018, the European Union's General Data Protection Regulation ("GDPR") will come into force. The GDPR's stated aim is to reinforce data protection rights of European Union ("EU") residents (commonly referred as "data subjects"), facilitate the free flow of personal data in the digital single market and reduce administrative burden.

One of the key features of the GDPR is that it applies to all companies processing personal information of data subjects residing in the EU, regardless of the company's location. Additionally, the scope of the GDPR is not limited to organizations that are actively targeting customers or users located within the EU. The GDPR will apply to all businesses that are processing personal information of EU data subjects, and where the processing activities are related to: (i) offering goods or services to an EU data subject (including goods and services offered at no charge); or (ii) monitoring (e.g., internet tracking and profiling) the behaviour of EU data subjects.

The GDPR is comprehensive when it comes to specific requirements that organizations must meet to ensure compliance. Some of the key elements include:

- Imposing obligations on data controllers and processors;
- Strengthening consent requirements; and

- Introducing or enhancing data subject rights relating to:
- Breach notification,
- Right to access,
- Right to be forgotten,
- Data portability,
- Privacy by design, and
- Data Protection Officers.

To ensure compliance, the GDPR provides EU regulators with enforcement tools that include the imposition of significant monetary penalties (i.e., up to 4% of an organization's annual revenues or €20 million – whichever is greater).

Given the severity of potential sanctions under the GDPR, Canadian organizations should conduct a compliance assessment of their current policies and practices in order to (i) determine whether the GDPR applies to them and, if so, (ii) identify gaps in relation to the GDPR. Upon identifying these gaps, different strategies can be efficiently developed along with a compliance plan with a clear implementation timeline.

In the event of any enforcement action by the EU, such an assessment can serve Canadian organizations in demonstrating the steps taken to comply and allow for a successful defence or, at the very least, demonstrate good corporate governance that may result in a reduction of fines or enforcement action.

For more information about what the GDPR means for Canadian organizations, please see our commentary here.

Mobility and Increased Use of Cloud Services

The use of mobile devices (whether personal or company owned) and cloud services is expected to continue at an accelerated pace in 2018.

Broadly speaking, mobile devices are heterogeneous, change rapidly and often necessitate the use of external cloud services. This adds to the demand by organizations to use software- and infrastructure-as-a-service ("Saas" and "IaaS") offerings to reduce time to market and capital expense costs. Every use of SaaS is like using a new unique software application, and every use of IaaS is like adding a new data centre. Therefore, the risk for organizations relying on cloud services is that traditional IT departments will often not be able to manage such things as version control, patch frequency and code reviews. As a result, traditional IT departments will need to adapt their development, quality assurance, administration and operation processes.

As transition to the cloud accelerates, organizations should ensure they are effectively managing security risks by implementing processes for continuous cloud monitoring, vulnerability management, and compliance monitoring. Some of the best practices in this regard include:

Ensuring that security teams participate in the cloud service selection process and that security requirements are highly weighted in this process;

Emphasizing configuration and application vulnerability assessment and mitigation as part of the development process, as well as final quality assurance before applications are approved for deployment onto cloud services;
Integrating continuous monitoring for security vulnerabilities and changes into updated IT administration and operations processes, as IaaS and hybrid cloud use grows; and
Merging the monitored data from cloud services with that from applications hosted in the organization's data center (if applicable).
The goal should not be to halt the adoption of cloud services, but rather to have a process in place to effectively manage (and mitigate) security risks associated with the increased adoption of mobile devices, Saas and Iaas offerings.

Internet of Things

Broadly speaking, an Internet of Things ("IoT") device is defined as one that can be connected to the internet. This can include everything from smartphones and wearable devices to industrial devices used in advanced manufacturing. It is estimated that over 26 billion IoT devices will be connected to the internet by 2020.

Most IoT devices are manufactured with little or no oversight or regulatory control, are typically Wi-Fi and Bluetooth enabled, and designed for immediate connectivity. Moreover, security is often a secondary concern for the manufacturers of these devices who are rushing to get them to market as quickly as possible. As a result, these IoT devices can be easily "hacked" by attackers. This is particularly problematic when IoT devices are incorporated into legacy systems' controls (referred to as supervisory control and data acquisition (SCADA) controls), such as those for train switches, power plans, energy grids, etc.

Given the risk that an attacker can potentially gain access to an IoT device (or a suite of IoT devices), some of the practical concerns relate to business interruption, theft of data (including personal and confidential data), and physical harm to individuals using these devices. Before introducing IoT devices into the workplace, organizations should, among other things, (i) ensure they are aware of the security standards embedded in the IoT device, (ii) ensure the associated contract has been appropriately scrutinized (especially with respect to product liability), and (iii) have appropriate protocols and policies to manage IoT devices being introduced into its environment.

Conclusion

Cyber threats will continue to dominate the agenda of Board members, senior leadership teams and risk managers in 2018. As Canadian organizations continue to collect large quantities of data, roll-out new mobile applications, incorporate internet-enabled devices and generally incorporate new technologies to streamline operations and find new efficiencies, they will need to ensure that they are carefully vetting vendor agreements, have clear protocols and processes in place that can be deployed in the case of a successful cyberattack.

Public servants have until end of month to deal with 2017 Phoenix overpayments

Employees who were overpaid have until Jan. 31 to avoid having to return gross pay

CBC News
Matthew Kupfer
January 3, 2018

The federal government says public servants who have been overpaid by the Phoenix pay system have until Jan. 31 to have their 2017 issues processed to avoid having to return their gross pay.

A spokesperson for Public Service and Procurement Canada, the department which oversees Phoenix, said employees whose issues are processed by the end of the month will only have to pay back the net difference between their salary and the system error — in effect, only the money they've actually received.

The spokesperson said if overpayments are not processed by the end of the month, employees will have to return "the gross amount of the overpayment (the amount prior to deductions)" because of federal tax law.

The Public Service Alliance of Canada, the biggest public sector union in Canada, has published advice on its website telling employees to report overpayments by Jan. 15 to avoid getting stuck with having to repay the gross amounts.

'Employees simply don't trust the system': union

"The problem is they can't process those overpayments even when the employees call the pay centre and have their overpayment recorded," said Chris Aylward, the union's national executive vice president.

Aylward said this is enough time for the government to sort out some T4 slips by the February deadline, but employees don't necessarily believe their issues will be resolved by tax time.

"It's OK for the government to say, 'Just get it done by the end of the month and everything will be OK.' The employees simply don't trust the system, they don't trust what the government is saying," Aylward said.

"When they know they can't get a proper paycheck every two weeks, it's difficult to trust that your taxes will be correct as well."

Susan Skaarup, an employee at the Department of National Defence, is trying to clear up a $28,000 overpayment issue and is uncertain whether the January deadline will help her.

"I don't have a lot of faith in them being able to fix this in time for the 2017 tax year. It's my 2016 and 2017 tax years that have been compromised," she said.

She said someone has started working on her file both at the pay centre and in her department after she contacted her MP and CBC News.

PSAC is calling for the government to only try to recover the net pay difference from employees affected by Phoenix, instead of gross pay — exempting them from existing rules given the size of the Phoenix issue.

Only applies to 2017 tax year
At the end of November 2017, the government reported the total number of outstanding financial and non-financial Phoenix claims had reached 551,000 — affecting approximately 156,000 government workers, more than half the public service workforce.

The federal government has set up a web page and infographics to answer Phoenix tax questions.

The January processing date only applies to overpayments during 2017.

Public Service and Procurement Canada said people who have outstanding issues after Jan. 31 will not need to begin repayments until after tax authorities have reassessed their file to credit their account "an amount equal to the excess withholdings on the gross overpayment."

The department said it would follow up with employees in the summer of 2018 to establish flexible repayment plans.

OPINION
Will Canada finally deal with its Afghan war skeletons?
The Globe and Mail
Erna Paris
January 5th 2017

Erna Paris is the author of The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice.

Eugene Ionesco's comic play, Amédée, featuring a "corpse" in a closet that extends grotesque members during an urbane dinner party, was almost certainly intended to spoof the blindness of the French to their wartime collaboration with the Nazis; but the playwright's metaphor can be extended to other willful hidings, including one now facing the government of Canada.

Canada's unexamined role in transferring captured Afghans to notorious prisons where they were certain to be tortured is another stubborn entity that keeps popping out of the cupboard. Both former prime minister Stephen Harper and current PM Justin Trudeau have tried to ignore the unwelcome visitor, but it will not be snubbed.

Torture is a war crime, and you don't have to be the torturer to be culpable. A state that intentionally transfers a detainee to torture is guilty under international law, including the Geneva Conventions, which state "the Detaining Power is responsible for the treatment given to prisoners of war."

In November, Craig Scott, a former NDP MP and a professor of law at Osgoode Hall, sent a 90-page brief to the International Criminal Court in The Hague in which he argued that Canada has abdicated its legal obligation under the Rome Statute, the ICC's underlying charter, to investigate long-standing reports of having handed prisoners over to torture. His timing is propitious: Earlier that same month, prosecutor Fatou Bensouda opened an investigation into alleged war crimes and crimes against humanity in Afghanistan involving Afghan forces and the Taliban – and American troops. Mr. Scott believes there is enough evidence to warrant adding Canada to this list; he claims that there are "multiple persons" who know much, but who will come forward only if there is an official ICC probe.

He hasn't had to look far for evidence. In 2007, Graeme Smith researched an investigative feature for The Globe and Mail in which he interviewed 30 men who'd been transferred by Canadian soldiers to Afghan jails. They spoke of being whipped, starved, frozen and choked. They did not accuse Canadians of inflicting the abuse; they did say that the soldiers were aware of these events.

Although Mr. Smith's reporting exploded like a bombshell (and is raised by Mr. Scott), the determined denizen of the closet also made other appearances. After a similar article appeared in La Presse, two Canadian international law experts, William Schabas and Michael Byers, wrote to the ICC requesting a preliminary investigation.

In 2009, Richard Colvin, a high-ranking diplomat in Afghanistan, testified that as far back as May, 2006, he had informed his superiors in Ottawa about torture in Afghan prisons. His reports, he said, were ignored. He was ordered to stop putting them in writing. Worse still, he received a warning missive: "We trust that you will conduct yourself according to the interpretation of the Government of Canada" – and a second notice informing him that the Justice Department would take legal action if he filed documents. In other words, he might end up in jail. Mr. Colvin was ridiculed. General Rick Hillier dismissed his claims as "ludicrous." Peter MacKay, then defence minister, said "Let us get beyond the rhetorical flourishes."

They were rightly scared; the implications of Mr. Colvin's revelations were potentially ruinous. Canada's governing party – the keeper of our country's vaunted commitment to the rule of law and human rights – stood accused of ignoring criminal behaviour. At the time, the Liberal opposition was outraged by the presumed cover-up.

With the recent announcement that an investigation will be opened – and that the United States will also come under scrutiny – Mr. Scott's brief to the prosecutor has a strong chance of success. The Trudeau government has acknowledged that, like the Conservatives, it has never addressed the issue. Because both Canadian parties failed to do so when in power, it now falls to the ICC prosecutor to pursue the case.

How ironic that Canada, whose current leader has fashioned his mandate on human rights and the rule of law, may be subject to an international investigation for having failed to respect the rules of the world's first court to prosecute war crimes and crimes against humanity – the very tribunal this country worked so hard to create.

Only a full investigation will serve the interests of justice. Canada's reputation in the world may soon depend upon its willing compliance.

GUEST COLUMN: Paralegals in family court
Toronto Sun
Marshall Yarmus
January 6, 2018

It only took seven years of fighting with the Law Society of Upper Canada to get it to take the first steps towards allowing paralegals to offer some family law services.

The Law Society is the regulator of lawyers and paralegals in Ontario.

It is required to regulate in the public interest and to facilitate access to justice.

Most people wouldn't pick a fight with their regulator; an organization that has the ability to suspend or revoke their licence.

I am not like most people.

On Dec. 1, 2017, the Law Society's board of directors approved an action plan which included developing a specialized licence for paralegals with appropriate training to offer some family law services.

This licence will support training in such areas as navigating the court process, form completion, investigating forms, motions to change, uncontested divorces and possibly other areas outside the courtroom context.

At the same time, the Law Society will assess what additional family law services paralegals can offer, including advocacy inside the courtroom, and consider how to develop a further expanded licence.

What led to this announcement?

I and other paralegals were receiving calls from people who had family law disputes, but did not have the money to hire a lawyer.

In 2010, I scheduled a motion to be heard at the Law Society's annual general meeting.

It asked the Law Society to study the barriers to allowing paralegals to offer some family law services.

I debated family law lawyers on this issue on radio and television.

Ultimately, the motion was withdrawn prior to being heard based on a commitment to study the issue.

In February, 2011 the elected leader of the Law Society announced she would undertake a study to determine if paralegals should be allowed to do family law work.

Only one report was released before the initiative was abandoned.

In 2013, I again led a group of paralegals who scheduled a motion to be heard at the Law Society's annual general meeting.

Hundreds of lawyers showed up to oppose this non-binding vote, only to find the motion had been withdrawn hours earlier.

Since 2013, I have written a number of newspapers articles criticizing the Law Society for failing to address this issue.

Some family lawyers argued family law was too complicated for paralegals to handle.

They said paralegals could handle small claims court, landlord and tenant board and provincial offences cases, and represent people in other courts and tribunals, but not family law where the stakes were too high.

In 2016, the Attorney General and the Law Society appointed Justice Annemarie Bonkalo to study the issue and write a report.

Justice Bonkolo made 31 recommendations to improve the family court system, including having paralegals with a special licence being allowed to prepare forms and do some family court advocacy work.

Following Justice Bonkalo's report the Law Society and the Attorney General began to develop an action plan.

The Dec. 1, 2017 approval of this action plan marked the beginning of the path towards the public having an option of legal providers for family law matters.

It will take time to develop the curriculum and train paralegals in family law.

However, I am proud to have been one of the main motivators for the Law Society to address this lack of access to justice issue.

Yarmus is a licensed Toronto paralegal at the firm Civil Litigations.

New law ends threat of jailing census resisters

The Globe and Mail
Chris Hannay
January 7, 2018

Canadians can no longer be thrown in jail for not completing the twice-a-decade census, though warrants are still out for some who have flouted the survey.

Parliament quietly passed a bill last month to give Statistics Canada more independence in how it conducts its research, and also changed the punishment for refusing to fill out the census or for providing false information. Canadians will no longer be threatened with up to three months of jail time, but they could still receive fines of up to $500.

"There is general consensus within Canada that imprisonment for not completing mandatory surveys, including the census, is inappropriate and disproportionate to the offence," Statistics Canada said in a statement.

The Public Prosecution Service of Canada (PPSC) said there are currently 19 cases before the courts of people who refused to respond to the census or gave false information. In addition, there are two outstanding arrest warrants connected to the 2011 survey.

PPSC would not provide any information about those cases. Neither PPSC or Statistics Canada could say how many Canadians had been punished for refusing to fill out the census.

After the 2011 survey, a 79-year-old Toronto woman was sentenced to 50 hours of community service and an 89-year-old woman was found not guilty. Following the 2006 survey, a Kingston man was fined $300 and a Saskatchewan woman was found guilty – and handed an absolute discharge.

The census, which is conducted every five years, has two components: a short-form survey sent to every household that asks a few basic questions, and a more detailed long-form questionnaire that is sent to a quarter of households.

Statistics Canada says it is looking into ending the short-form survey by 2026 and relying on information from other government databases instead.

One of the Liberal government's first acts after winning the 2015 election was to reverse a policy from the previous Conservative government that made the long-form survey voluntary. In 2010, the Conservatives said they were protecting Canadians who did not want to divulge private information to a government agency. At the time, the head of Statistics Canada, Munir Sheikh, resigned and said the move threatened the integrity of the data gathering because fewer Canadians would respond.

The response rate of the 2011 voluntary survey was 77 per cent, Statistics Canada reported, while the response rate for the 2016 mandatory long form was 98 per cent.

Statistics Canada would not say whether removing the threat of imprisonment could make Canadians less likely to fill out the census in the future, instead pointing out that its questionnaires generally have high response rates.

"Canadians understand the importance and value of participating in surveys as well as in the census," the agency said in a statement. "We will continue to rely on the goodwill and co-operation of Canadians in the execution of our mandate."

Among other things, the new legislation gives the chief of Statistics Canada a renewable term that can only be terminated with cause, and creates an advisory council to report annually on the state of the nation's data.

The bill received hearings at House and Senate committees, but sailed through both chambers on voice votes – meaning that no yeas or nays were ever formally recorded.

Opinon: Ensure Charter rights do not favour criminals
Toronto Sun
Hon. Peter MacKay
January 7, 2018

The 1982 Canadian Charter of Rights and Freedoms is an interpretative framework for judges.

In the recent Regina vs. Marakeh, the Supreme Court of Canada arguably interpreted the Charter in a way that will swamp our over-burdened court system by disadvantaging law enforcement officials and further clogging the courts with procedural wrangling .

It was a nasty pre-Christmas lump of coal for our law enforcement community.

Marakeh places limits on how, why and when police may recover data from cellphones based upon “reasonable expectation of privacy” when sending a text. According to the Supreme Court, texts received by third parties enjoy this privacy protection.

The facts bear scrutiny. Marakeh was convicted and sentenced for trafficking in firearms. The Supreme Court found that the conviction was premised upon the accused’s text found on another’s co-accused’s phone. The argument that migration of control of the text did not vitiate expectation of privacy despite the evidence of criminality.

The most adjudicated word in law is reasonable.

Here, the court’s distillation of reasonable expectation of privacy is arguably dangerously broad. The recipient of the texts consented to their discovery by the police.

Justice Michael Moldaver, the supreme court's foremost expert in criminal law, issued a stinging dissenting opinion which is compelling: The majority failed to apply rules of admissibility used for all other types of evidence, thereby giving special status to texts.

Simply put, texts do not deserve special status when residing with the recipient when there is otherwise compelling proof of criminal intent and purpose. The "privilege" of the sender should not preempt the legal attainment of evidence from a third party as found here.

Moldaver on the danger in this expanding of Charter privacy challenges: "This carries with it a host of foreseeable consequences that will add to the complexity and length of criminal trial proceedings and place even greater strains on a criminal justice system that is already overburdened. Worse yet, expanding the scope of persons who can bring a Section 8 challenge risks disrupting the delicate balance that strives to achieve between privacy and law enforcement interests, particularly in respect of offences that target the most vulnerable members of our society, including children, the elderly, and people with mental disabilities. In my view, the logic of the Chief Justice's approach leads inexorably to the conclusion that a sexual predator who sends sexually explicit text messages to a child, or an abusive partner who sends threatening text messages to his or her spouse, has a reasonable expectation of privacy in those messages on that child or spouse's phone."

"Delicate balance" indeed, impacting "the most vulnerable members of our society" predictably and appreciably. "Inexorable conclusion that a sexual predator … has a reasonable expectation of privacy in those sexually explicit texts to a child or abusive partner to a spouse," at a time and era when newfound recognition of the epidemic militates in favour of expansion of protections available to victims not criminals. Cybercrime, via technology, is exploding: Child porn, bank fraud, computer hacking. Smartphones are the medium of such cyber-communications. As with the U.S. Constitution, our Charter is intended to bend to new developments but not break. No one envisaged the mercurial technological change upon us rendering communication instantaneous.

The world at our finger tips. Billions of communications for trillions of dollars. Mostly for good, but much of it for illegal purpose of the nefarious kind — terrorism, human trafficking and attacks on critical infrastructure. If a decision of the Court results in criminal advantage, we are in danger of the Charter enabling the worst society has to offer, and victims left even more exposed. In a world communicatively operating at the speed of light, surely hitting "Send" releases a text communication unto the recipient with the corresponding waiver of privacy, as in the sending of a letter opened by the addressee.

From time to time, courts have intervened and said democratically elected lawmakers did not strike the right balance. Some would also argue that in some cases the courts have gone too far. Courts and Parliament sometimes get it wrong or fail to consider the impact on Canadians in their everyday lives . The not so common, common sense test . Of course, the Charter in its entirety includes the not withstanding clause, inserted by none other than former primer minister Pierre Trudeau. Perhaps, it is time for his son to follow the wisdom of his father and consider its use to protect the most vulnerable — that would be a truly progressive thing to do.

As we further tax the criminal law system, we risk creating a situation where criminals are collectively rewarded by overburdening the criminal system, and slackening the rules of admissible evidence so that it can no longer function properly to hold criminals accountable and protect the public. Electronic communication has now been given a special status in our legal system, a status accorded to no other evidence other than perhaps solicitor-client communications. The approach gives criminals yet another strategic advantage in limiting police use of evidence they may obtain through perfectly legal searches using either warrants or obtained with the consent of recipients.

The more complex the criminal trial, the more it costs to maintain the security of this country. The ever increasing use of technology in crime creates new challenges of admissibility and delay as does the requirement that cases proceed with in a relatively quick time frame, or be dismissed. Criminals are well on their way to gaining the

The supreme court's legacy is deservedly strong and formidable and one does not argue with the imperative of protecting Canadians through a prophylactic Charter approach to privacy. But where the unnecessary extension of those rights ironically diminishes the protection of everyday Canadians — and those "most vulnerable" amongst us by undermining evidentiary tools available to law enforcement — it should give all of us pause.

Les procès chauds attendus en 2018
Radio-Canada
8 janvier 2018

Un ex-vice-première ministre du Québec, le terroriste de Québec et un célèbre homme d'affaires passeront devant les tribunaux cette année...

Nathalie Normandeau

Nathalie Normandeau, ex-vice-première ministre du Québec Cette affaire judiciaire est aussi politique : l'ex-vice-première ministre du Québec Nathalie Normandeau a été arrêtée par l'Unité permanente anticorruption (UPAC) en mars 2016.

L'ancienne ministre dans le gouvernement libéral de Jean Charest a été accusée de corruption, de fraude envers le gouvernement et d'abus de confiance dans une affaire de financement politique illégal et d'octroi de contrats publics.
Le procès de Mme Normandeau et de cinq coaccusés doit débuter le 9 avril.
Elle a présenté deux requêtes afin de faire arrêter les procédures criminelles intentées contre elle. Elles doivent être entendues en janvier.

Le tireur de la mosquée de Québec

En janvier dernier, un tireur est entré dans la grande mosquée de Québec, a abattu six fidèles et en a blessé d'autres.

Alexandre Bissonnette, le tireur de la mosquée de Québec Alexandre Bissonnette, un étudiant en sciences politiques âgé de 27 ans, a été accusé de six chefs de meurtre prémédité, de cinq chefs de tentative de meurtre et d'un chef de tentative de meurtre avec usage d'une arme à autorisation restreinte.

Ce dernier chef vise 35 victimes, dont quatre enfants, qui étaient présentes dans la mosquée lors de la fusillade.

Son procès devant jury débutera à la fin mars et durera environ 2 mois. Une centaine de témoins pourraient être entendus.

Tony Accurso

L'homme d'affaires Tony Accurso Le second procès de l'homme d'affaires Tony Accurso doit débuter le 17 janvier.

Amor Ftouhi

Amor Ftouhi va subir son procès en juillet 2018 au Michigan, aux États-Unis. En juin dernier, les projecteurs ont été braqués sur ce résident de Montréal accusé d'avoir poignardé un policier à l'aéroport de Flint, au Michigan, en criant « Allahou Akbar » durant l'attaque. Le lieutenant Jeff Neville a été poignardé au cou au moyen d'un couteau, mais il a survécu à l'attaque.

Les circonstances de cette affaire sont nébuleuses : l'accusé, un père de famille sans histoire, s'était rendu aux États-Unis sans raison apparente, ou non encore dévoilée par les autorités américaines, et avait tenté de s'acheter une arme à feu avant son attaque au couteau. Son crime est passible de 20 ans de prison.

Guy Turcotte

L'ex-cardiologue Guy Turcotte L'ex-cardiologue Guy Turcotte, reconnu coupable du meurtre non prémédité de ses deux enfants, a été condamné à la prison à vie, sans possibilité d'être libéré avant 17 ans. En mars prochain, ses avocats demanderont à la Cour d'appel de réduire la durée de sa détention avant de pouvoir obtenir une libération conditionnelle.