Retired Supreme Court judges object to 50-year embargo on documents: 'Too long for any useful purpose'

The Globe and Mail
Sean Fine
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Two retired judges of the Supreme Court of Canada say 50 years is too long to seal internal court documents revealing the communications between judges on cases.

John Major of Alberta called the half-century embargo "too long for any useful purpose" and Louis LeBel of Quebec said the judges will be "a part of history" long before researchers gain access to the files.

"I have an interest in history," Mr. LeBel, who served from 2000 to 2015, told The Globe and Mail. "Speaking for myself, I would think that a period of 20 or 25 years might have been enough. ... when things have really become a part of history and when all the people involved are gone [from the court], and have really become themselves a part of history."

The court signed an agreement with Library and Archives Canada last June to transfer files relating to correspondence between judges as they deliberate after hearing a case, but before producing a public, written ruling. The files are not covered by federal access to information law. They are to become publicly accessible in 50 years. In the United States, Britain, Australia and in other Canadian jurisdictions, judges can decide what to do with such documents after retirement. At one time, Canadian Supreme Court judges had similar rights to their own files.

In announcing the agreement, which attracted little attention at the time, the court said it would "ensure that the case files of Canada's highest court will be preserved and accessible to future generations."

Chief Justice Richard Wagner has declined to publicly explain the rationale of the new policy and the court's executive legal officer, Gib van Ert, would only point to the joint news release from the court and the archives issued last June.

However, Frank Iacobucci, a member of the court from 1991 to 2004, explained the judges' concern: that full, candid exchanges, carried out in an expectation of confidentiality, are an essential part of the court's work.

"Look, it's a human process," he said in an interview with The Globe, "and there are very strong opinions on it. If that strength of opinion is taken out of its context it could be made more of than is there. People can be sensitive to having that [happen] – you want candour."

Mr. Iacobucci added: "I wouldn't say there should be censorship but 50 years, or 25 years, or some period of time thereafter, I won't get into the year-debate ... it seems to me it loses its sensitivity."

A spokesman for Justice Minister Jody Wilson-Raybould said it would be inappropriate for her to comment on the 50-year embargo. “This agreement is between the Supreme Court and the Library and Archives Canada. The Attorney-General respects the independence of the judiciary,” spokesman David Taylor said.

Murray Rankin, justice critic for the New Democratic Party, called the 50-year embargo “shocking.” He said he appreciates that the court is ensuring the transfer of documents and can understand waiting 20 years, but said access should be permitted to historians in a meaningful period.

“Historians are the keepers of our institutional memory of our nation,” he said in an interview.

Mr. Major said he doesn’t understand why the court chose 50 years.

“There’s no sense or reason,” he said by telephone from Calgary, adding, “unless they’re taking themselves too seriously.”

He served on the court from 1992 to 2005. In 2006, then-prime minister Stephen Harper appointed him to lead a federal inquiry into the 1985 bombing of Air India, Canada’s worst terrorism incident.

“I remember that a lot of judges would write to the author of the circulating judgment to say they agreed with this, didn’t agree with that, can you move this, is it better to say that.”

But he said he is hard pressed to remember anything of consequence in those communications.

“I don’t know why this 50-year ban. I can’t describe it. It’s just too long for any useful purpose.”

Jim Phillips, editor-in-chief of the Osgoode Society for Canadian Legal History, which has overseen the publication of several biographies of Supreme Court judges, also said he did not understand why the embargo had to be nearly so long.

“I could see a rule that said ‘nothing that referred to a sitting judge.’ But nothing like 50 years.”

John English, a historian and author of a biography of Pierre Trudeau, said that, decades ago, 50-year embargoes on access to government files gave way to 30 years and then 20. He said the documents disclosing Supreme Court deliberations is critical to understanding how the country’s most powerful judges dealt with major issues since the 1982 Charter of Rights and Freedoms took effect.

“You understand how institutions function, whether institutions function well, only if you can study them, if you have access to the materials that describe how they function, what their weaknesses are and what their strengths are,” he said in an interview.

Man accused in military centre stabbing acquitted of terror charges
CTV News
Peter Goffin
The Canadian Press
May 14, 2018

TORONTO -- A man with schizophrenia who attacked soldiers at a military recruitment centre in Toronto was acquitted of terror charges and found not criminally responsible for lesser offences on Monday as a judge ruled his actions didn't fit the intended scope of the country's terrorism laws.

Ayanle Hassan Ali's radical religious and ideological beliefs were largely the result of his mental illness, Judge Ian MacDonnell found as he ordered the 30-year-old to remain at a forensic psychiatry unit while plans for his care could be determined.

"While it is common ground that the defendant had become radicalized, there is no evidence of any connection between him and any other person or group in relation to the attack," MacDonnell said. "The intention of Parliament in enacting (the relevant terror legislation) was not to capture the kind of lone-wolf criminal behaviour engaged in by the defendant," he added.

Ali's attack was nonetheless a "deeply disturbing assault on one of the pillars of Canadian peace and security," MacDonnell said, as he found him not criminally responsible for attempted murder, assault and weapons offences.

At least two military personnel were left with minor injuries after Ali entered a recruitment centre in north Toronto in March 2016 and began slashing at people with a kitchen knife.

Ali had pleaded not guilty to three counts of attempted murder, three counts of assault with a weapon, two counts of assault causing bodily harm and one count of carrying a weapon for the purpose of committing an offence, all in association with, for the benefit, or at the direction of a terror organization.

His lawyers said their client should never have faced terror charges which, by definition, require that the accused commits an offence "for the benefit of, at the direction of or in association with" a terror group.

"This was a case where the Crown overreached," defence attorney Nader Hasan said outside court.

"They had someone who they thought looked the part of the terrorist when, in reality, they had someone who committed a terrible, terrible act who is mentally ill and they should have proceeded in that fashion, rather than overreaching for terrorism."

Hasan and his co-counsel Maureen Addie argued that because Ali committed his actions alone and had never been in contact with any terror groups, he should be found not guilty on the terror charges and ruled "not criminally responsible" for the lesser included offences. That designation acknowledges the

accused committed an offence but, as a result of a mental disorder, could not appreciate the consequences, legality or moral wrongness of their actions.

The prosecution argued at trial that Canadian terror laws could apply to Ali because he acted as a "terrorist group of one."

Hasan said he hopes Ali's case leads to a reexamination of Canadian terror laws and how they are applied.

"The definition of terrorism and terrorist activity in ... Canadian law is extremely broad and when laws are extremely broad the result is that it's left almost entirely up to the Crown to decide when they get used," Hasan said.

"The history of these terrorist provisions being used in Canada have been one where they happen to be used far more frequently when the individual accused is of Arab or African or Muslim descent (like Ali)."

Ali appeared in court in the same grey suit and white checked shirt he has worn on every day of the trial. Sitting in the accused's box, he kept his head bowed and his hands clasped together as MacDonnell delivered his decision.

MacDonnell said he agreed with two psychiatrists who testified at trial that Ali should be found not criminally responsible for his actions.

Defence witness Dr. Gary Chaimowitz, who has supervised Ali's care since 2016, and Crown witness Dr. Philip Klassen, who met with Ali for hours and reviewed his files, both told the court Ali had shown signs of schizophrenia, including delusions and paranoia, for several years before the attack.

Ali believed around the time of the attack that the government was listening to him, and that he was being possessed by spirits from Muslim mythology known as Jinns, the doctors told the court.

Ali became angry over Canadian military involvement in Muslim countries and came to feel that if he martyred himself all his sins would be forgiven in the afterlife, the doctors said.

MacDonnell ordered that Ali remain at a forensic psychiatry unit in Hamilton -- where he has been in custody for most of the past two years -- until the Ontario Review Board, comprised of mental health and legal specialists, can determine his course of care. The board has 45 days to hold an initial hearing in the case, in accordance with Ontario law.

EDITORIAL: Supreme Court document embargo is too long by half
The Globe and Mail
May 15th 2018

With its fur-trimmed robes and arcane terminology (puisne, headnote), the Supreme Court of Canada cultivates an air of pomp and mystery.

The pomp is its due, as the country's top court and Constitutional arbiter.

The mystery, on the other hand, is a problem. Canadians ought to be more informed about how the nation's most important legal body conducts itself, not less, as a recent decision suggests the Court would prefer.

Canadian Supremes toil in obscurity, relative to their American counterparts. It's hard to imagine a big-budget documentary being made about former chief justice Beverley McLachlin, yet one is screening this week in Toronto about the U.S. Court's liberal rock star, Ruth Bader Ginsburg.

That low profile is partly down to the SCC's comparatively scanty pedigree. Only in recent decades, and especially since the introduction of the Charter, has our Supreme Court wielded clout commensurate with its name.

There's no excuse anymore, however. The Supreme Court is one of the most powerful institutions in the country, one that has not been shy about shaping Canada in dramatic ways on files as diverse as prostitution, assisted dying and aboriginal title.

The Court has made halting gestures toward opening up its vastly important work to the public. Chief Justice Richard Wagner came to his perch late last year and promptly vowed an era of transparency on the bench. He started well, instituting plain-language summaries of the Court's rulings to be posted online.

Before Justice Wagner took the post, however, in a move that only came to wide notice this week, the Court took a serious step backward in its stated goal of increasing public scrutiny of its work.

In June 2017, the Court agreed to give its "collegial documents" to Library and Archives Canada, where the public will be able to access them – but only 50 years after the relevant case has closed, and while reserving the right not to hand over any documents it doesn't want to.

Collegial documents are the correspondence between judges as they deliberate – memos, notes, drafts and so on that judges have sent each other about a case.

Until fairly recently, those records were the property of individual judges and rarely saw the light of day. When they did, however – as in the case of former chief justice Brian Dickson's trove – they could provide fascinating and important glimpses into how the Court operates.

Because of the documents' historical value and the judges' weak tradition of making them public – here, too, the U.S. trumps us, as fascinating American books have been written on the basis of such material – it is not a bad idea for the Court to take possession of collegial documents and allow federal archives to make them public over time. Done properly, it could have afforded a more reliable way of providing access for curious scholars and lawyers.

But access doesn't seem to be the objective here. If it were, the parties would have settled on a less onerous embargo period. With some exceptions, federal cabinet records are made public after 20 years. In the Court's case, 25 years seems reasonable. That would make it unlikely that any records by or about sitting judges would fall into public hands.

After all, there is a public interest in keeping judicial deliberations private for a length of time, in order to encourage candid exchanges between judges and to preserve the integrity of recent rulings.

Nor can we force judges to hand over fulsome collegial records. Cagey justices could always use shorthand, or the waste bin, to get around any such requirement.

But access to whatever records are available after a quarter century would strike a balance between the need for free exchange among judges and the public's interest in knowing how its most powerful court works. Under the 50-year rule, that balance is skewed too much toward secrecy.

At the very least, the Court should provide a frank explanation of how it arrived at its current policy. Bizarrely, representatives of the Court and the federal archives have refused to be interviewed on the subject.

When the 19th-century British journalist Walter Bagehot wrote, "We must not let in daylight upon magic," he was referring to the monarchy, not the judiciary. The Supreme Court shouldn't forget that there's a difference.

Serious Phoenix pay issues? Need a fast fix? Call the deputy minister, say public servants
CTV News
Terry Pedwell
The Canadian Press
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OTTAWA -- Federal civil servants suffering "severe" financial difficulties under the government's Phoenix pay system -- and some not so severe -- have been turning to the top for help, and with some success.

Hundreds of government employees have reached out directly to deputy minister Marie Lemay over the last 12 months, said Public Services and Procurement Canada, which oversees the problem-plagued system.

"Since April 2017, approximately 1,000 employees have reached out to the deputy minister's office regarding their pay issues," the department told The Canadian Press in an email.

However, the department dismissed the notion that requests from Lemay to fix certain pay issues have resulted in front-of-the-line treatment for some employees over others.

It said problem pay files are prioritized based on financial hardship, not on who makes the request for help.

"There is an escalation process in place where each case is examined and triaged based on the financial impact on the employee," the department said.

"Severe cases, where employees are experiencing financial hardship, are dealt with on a priority basis regardless of the source of the request."

The department added that it receives requests related to employees' pay files from various sources, including unions and members of Parliament.

The Public Service Alliance of Canada, which represents about 140,000 federal workers, said it had also referred urgent cases directly to Lemay's office.

Some workers have reported having their pay issues resolved within a couple of weeks of contacting Lemay, while others said their more complicated files have taken a little longer to resolve -- but that their pleas were heard.

A closed Facebook group dedicated to helping civil servants deal with their pay problems is filled with comments from government workers who said they got results after contacting Lemay when they got nothing but frustration from the pay centre in Miramichi, N.B., or their local MP.

One government employee from Innisfail, Alta., said she contacted her union and Lemay's office at the same time, but got her pay problems rectified by Lemay.

"I did both (contacted Lemay and filed a grievance)," said the woman, who did not want to be identified.

"The grievance is sitting in a black hole somewhere but through Ms. Lemay's office I received all my owed monies."

Those grievances number in the thousands, with more than 1,000 filed by PSAC members alone at their final arbitration stage as of last week, said the union's national president Chris Aylward.

Dozens of posts also contain the direct email address and office phone number for Lemay, who has until recently been the public face of government efforts to fix Phoenix.

The department did not directly respond to requests for an interview with Lemay about her involvement in advancing pay complaints.

More than two years after the electronic pay system was launched, there are approximately 607,000 problem pay cases yet to be resolved affecting more than half of the federal government's nearly 300,000 employees. The numbers are down slightly from the previous month, according to PSPC's Phoenix dashboard, and have been inching lower since January.

Of those cases, as of May 2, more than 450,000 involved situations where civil servants were improperly paid too much or too little, or were not paid at all.

The Liberal government's latest budget included $16 million to search out a replacement for Phoenix, which is estimated to have so far cost taxpayers more than $1 billion to build, implement and then attempt to stabilize.

The auditor general is scheduled to release a report May 29 detailing the Phoenix debacle, the watchdog's second such report.

Michael Ferguson's initial report last November predicted Phoenix could cost taxpayers over $1.2 billion and take more than three years to fix.

His latest report to Parliament is expected to take a deeper look into decisions that were made by the previous Conservative government to adopt the pay system, whether it was fully tested and how it was subsequently rolled out under the Liberals across dozens of departments, despite pay processing errors that were raised almost immediately after its initial phase-in period.

Supreme Court of Canada pulled files years before embargo deal was struck
The Globe and Mail
Sean Fine
May 16, 2018

The Supreme Court of Canada quietly took control of the case notes that pass between judges, ensuring the court's secret inner workings could not be revealed, more than a decade before it announced a 50-year embargo on public access to those notes.

The embargo was not announced until last June, but since 2005, the court has been claiming ownership of the written communications between judges and removing those communications from case files, thus guaranteeing that its members could no longer open their deliberative materials to researchers and other members of the public.

The practice began two years after the publication of a biography of the late chief justice Brian Dickson. Drawn partly from 200 boxes of his papers, which the authors described as a "rich and unusual resource," it produced revelations of a fatigued court, with one judge threatening to quit over perceived sexism, one leaving because of mental-health problems (Chief Justice Dickson would not let him return) and two judges accused of not pulling their weight.

The court did not reveal the practice until now – confirming it, and the date it began, for The Globe and Mail after retired justice Louis LeBel, who left the court 3 1/2 years ago, said in an interview that it had removed his communications with his colleagues from his files before he donated his papers to the archives.

Between 2005 and 2017, nine judges retired: John Major, Michel Bastarache, Louise Charron, Ian Binnie, Marie Deschamps, Morris Fish, Mr. LeBel, Marshall Rothstein and Thomas Cromwell. Their communications with their fellow judges will be transferred to the archives and subject to the embargo.

Last June, the 2005 practice became formalized in an agreement with Library and Archives Canada. It was announced in a joint news release but attracted little notice at the time.

The Dickson biography, while respectful and scholarly, showed a court "desperately worried about its eroding credibility," according to a review in The Globe at the time.

The book caused consternation at the court.

"There was a discussion. Because I think that was probably part of the reason [for discussing] should we have a policy on this," retired judge Frank Iacobucci said in an interview.

The biography displeased the chief justice of the time, Beverley McLachlin, according to legal historian DeLloyd Guth of the University of Manitoba. Prof. Guth was closely involved with the Dickson papers. He spent the summers of 1991 and 1992 helping Mr. Dickson organize the files from his career. In 1987-88, at Chief Justice Dickson's request, he worked for the court for a year organizing what he called its "piles of files."

"She was not happy on this particular point," Prof. Guth said in an interview, referring to the use of internal communications. "She let Bob Sharpe know."

Robert Sharpe was a co-author of the book. He had been Chief Justice Dickson's executive legal officer at the court from 1988-90, before becoming the dean of law at the University of Toronto. Today he is a judge on Ontario's highest court, the Court of Appeal. His co-author was Kent Roach, a law professor at the University of Toronto.

Ms. McLachlin, now retired, declined to comment.

Both Justice Sharpe and Prof. Roach declined to comment when asked about the court's 50-year embargo, although Justice Sharpe did say in an e-mail that he was unaware of it. They did not reply to a subsequent request for comment on how the court reacted to their book.

In the preface to their book, the two discussed at length how they used the judicial notes and why they decided to disclose them. Mr. Dickson's case files, they said, were the "principal source" for the book. He had set a 25-year embargo on his files when he retired in 1990, but soon after granted Mr. Sharpe and whomever might work with him access to his papers. He died in 1998, leaving them to decide whether they should go public with the internal communications.

In his era, judges spoke in conference (the meeting shortly after an appeal hearing) from the most junior to senior, and Chief Justice Dickson made notes as they spoke. At the end of the day, he would have the notes typed up. His files also included memos between judges commenting on draft judgments, as well as draft judgments that he completely rewrote in response to suggestions.

The two authors acknowledged in their preface that confidentiality "provides judges with a zone of privacy within which they can engage in free and open discussion. If every comment or tentative

thought were exposed to public view and scrutiny, discussions among judges could be inhibited and judicial decision-making might be adversely affected."

As Mr. Dickson had personally gone through every case file and removed material he did not want to be made public, the authors chose to reveal the contents he had left behind. But they said they did not quote from any document involving a judge who was still sitting when they wrote the book. (Justice McLachlin was the only one.)

"As time passes, matters that required the protection of confidentiality have passed into history," they wrote.

Editorial: A call to all lawyers
The Suburban
May 16, 2018

Just two weeks ago in this space we praised Brian Mitchell, at the time Batonnier of the Bar of Montreal, and Paul-Matthieu Grondin, Batonnier of the Barreau du Quebec, for having the courage to stand up for the rule of law in this province. They had led their respective organizations in filing a motion for declaratory judgment in the Superior Court of Quebec that all of the province's laws, regulations and decrees be declared illegal because they were drafted, debated and passed in French only.

The Barreaus argue that this is in violation of sec.133 of Canada's Constitution — the BNA Act — which requires the Federal Parliament and the legislatures of Manitoba, Quebec and New Brunswick to legislate — at all stages and through all readings — in English and French. It is the broadest attack ever against Quebec's decades long violation of constitutionally protected minority language rights.

The importance of this action cannot be overstated. The legal community — overwhelmingly Francophone s— certainly cannot be dismissed as "angryphones." These are not vested interest group with axes to grind. The action was taken simply to assure the rule of law. And to make justice executory and understandable for all citizens of Quebec. One cannot but applaud the sheer audacity of this maneuver. It would affect everything including Revenue regulations and Bill 101.

The Bars make the point that brief states that the final English version of Quebec's laws are "not the work of the legislator but in reality that of the translators' interpretation of the will of the National Assembly." Precision is critical in any discipline, but particularly in the legal profession. There is a maxim that law detests generalities.

The Bars refer to a 2011 legal opinion by former Supreme Court of Canada Justice Michel Bastarache that Quebec was failing to respect Art. 133. The Bars contend they raised the issue with the Quebec government in 2013, but to no avail.The Barreau du Québec says it officially asked Justice Minister Vallée — who will not be running for reelection — in 2015 to hire lawyers fluent in English to help with the drafting of legislation.

Though the minister struck a committee to look at the issue, the bars contend she never followed up on its recommendation that the government should indeed hire two English-speaking lawyers. As recently as last month a meeting was held between representatives of the bar associations and the province's attorney general and assembly speaker but failed to produce any agreement on the issue.

It was after that meeting, which was held just days before the Quebec government tabled its annual budget — which ironically earmarked nearly $1 billion in new spending for projects that the president of the Quebec Bar had publicly pleaded for in early March — that the bars decided to mandate the Montreal law firm of Jeansonne Avocats to file the motion for declaratory judgment on the issue. Because nowhere in that billion dollars was there any money allocated for the committee's recommendations.

To no one's surprise, this action has been attacked by nationalist politicians and many in Francophone media. Curiously, anglophone media have been strangely silent. Even in the face of comments such as those from the Parti Québécois'Véronique Hivon, who called the motion "disgusting" and "an insult to Quebec parliamentarians." She called it "an insult to the French fact."

It is clearly not that. But if elements of our political elite believe constitutional civil rights protections for minorities are "insulting" and "disgusting" we can take from that the malaise of Quebec has not been cured. It is as if Quebec politicians do not understand what western democracies accept as foundational principles. Rule of law and adherence to constitutional protections must never be compromised for political expediency. Sadly, the latter has been the guiding principle for too long in Quebec.

And obviously the "French fact" has not been insulted or demeaned for most of the 22,000 overwhelmingly Francophone members of the Barreaus. Most understand that Rule of Law must supersede culture wars. For what's a culture worth if it does not respect the Rule of Law?

But certain nationalist elements within the Barreaus have banded together and managed to obtain the elements for a special emergency session of the Barreau du Quebec. They have demanded that the Barreau du Québec abandon its participation in the motion and indeed any participation on this issue. This meeting will be held on May 24th at 5.30 pm at the Theatre Symposia in the Centre Mont-Royal 2200 Mansfield St. in Montreal. We urge all lawyers to make the time to show up and show your support for the rule of law. Don't let the opponents get 50% + 1. Do not allow this historic endeavour to be turned back. Stand up for the dignity of all Quebecers and vote for the continuation of this motion.

Poursuite des barreaux : une AG extraordinaire organisée
L'assemblée donnera la possibilité aux membres de voter sur 3 résolutions entourant la poursuite des barreaux contre Québec
Droit Inc
Delphine Jung
16 mai 2018

L'Assemblée générale extraordinaire (AGE) des membres du Barreau du Québec, se tiendra jeudi 24 mai, à 17h30, au Centre Mont-Royal, Théâtre Symposia, au 2200 rue Mansfield, à Montréal.

Les invitations ont été envoyées par le Barreau du Québec lundi.

Elle a pour but de « discuter et de débattre de la mission et du rôle du Barreau », dit Me Félix Martineau, l'un des avocats à l'origine de cette demande et l'un des instigateurs d'une pétition qui voulait faire reculer les barreaux dans leur démarche.

L'objectif est de pousser le Barreau à abandonner sa poursuite entamée contre le gouvernement du Québec et de l'obliger à consulter ses membres lorsqu'il souhaite entamer de telles procédures.

Les barreaux du Québec et de Montréal estiment que le processus d'adoption des lois par le législateur québécois n'est pas conforme à la Constitution canadienne.

« Cette demande vient d'une dizaine d'avocats qui ont réussi, grâce à 100 signatures, à pousser le Barreau à organiser une assemblée générale extraordinaire dans les 30 jours comme le prévoit le code des professions », précise Me Martineau.

L'AGE sera présidée par l'ancien juge de la Cour d'appel, Pierre J. Dalphond.

La période de questions, insuffisante
Il y a peu, le Barreau avait annoncé qu'une période de questions serait ajoutée à l'ordre du jour de la prochaine assemblée générale qui aura lieu le 14 juin. Insuffisant pour les frondeurs semble-t-il. « Nous voulions une journée spécialement dédiée à cette question, pas que ce soit un simple point dans l'ordre du jour ».

« Nous espérions également que les membres des autres barreaux puissent prendre part à l'assemblée par vidéoconférence, mais avant même d'en avoir fait la demande officielle, le Barreau du Québec nous a dit ne pas disposer des moyens techniques nécessaires. Nous sommes déçus, une vidéoconférence aurait permis une meilleure démocratie professionnelle », explique Me François Côté, l'un de ceux qui ont plaidé pour la tenue de cette AGE.

Les membres seront appelés à voter sur trois résolutions. L'une pour que le Barreau du Québec se désiste en totalité de sa demande en justice contre Jacques Chagnon, en sa qualité de Président de l'Assemblée nationale du Québec, et Stéphanie Vallée, la Procureure générale du Québec, l'une pour qu'il s'abstienne et renonce à introduire une demande en justice dans ce sens et enfin, une dernière pour que le Barreau s'abstienne d'introduire tout recours ayant une incidence politique quelle qu'elle soit sans préalablement avoir obtenu l'aval de la majorité de ses membres s'étant exprimés lors d'une consultation électronique directe.

Sur l'événement Facebook, une cinquantaine de personnes mentionnent qu'ils viendront et 80 autres se disent "intéressés".

Supreme Court declines to hear case of Mohamed Mahjoub, who's accused of having terror ties
Toronto Star/Ottawa Citizen/CTV News
The Canadian Press
May 17, 2018

OTTAWA—A Egyptian man accused being a member of a terrorist organization has one less legal avenue to try to stave off deportation after the Supreme Court of Canada refused to hear his appeal.

The federal government is trying to remove Mohamed Mahjoub, 58, using a national security certificate, claiming he was a high-ranking member of an Islamic terrorist organization.

The Supreme Court decision, handed down Thursday without explanation, is the latest setback for Mahjoub in a case that stretches back almost two decades.

Counsel for Mahjoub had no comment and it was not immediately clear what would happen next.

The Egyptian-born man, married with three children, came to Canada in 1995 and attained refugee status.

He once worked as deputy general manager of a farm project in Sudan run by Osama bin Laden, who would later spearhead the Sept. 11, 2001, attacks on the United States.

Mahjoub was arrested in June 2000 after being interviewed by Canada's spy agency on six occasions between August 1997 and March 1999, each time denying any involvement in Islamic extremism.

He was arrested in June 2000 under a security certificate — a rarely used immigration tool for deporting non-Canadians considered a risk to the country.

The Supreme Court ruled the certificate process unconstitutional in 2007 and the government subsequently revamped the law, issuing a fresh certificate against Mahjoub the following year.

In 2009, Mahjoub was released from prison on strict conditions, which have since been relaxed.

The Federal Court found the security certificate to be reasonable, a conclusion upheld last year by the Federal Court of Appeal. The appeal court also agreed with the lower court's refusal to stay the proceedings permanently on account of abuse of process.

Among other things, Mahjoub's counsel had claimed the case was gravely tainted by use of hearsay evidence and unsourced intelligence evidence, information derived from torture, breaches of solicitor-client privilege and the interception of privileged phone calls.

At one point, several federal lawyers and assistants were ordered to quit the case because the government inadvertently walked off with Mahjoub's confidential legal files.

In its decision, the appeal court said that "these particular security certificate proceedings can only be seen as fundamentally fair in their execution."

"True, occasionally mistakes and faults happened and often remedies were needed to redress them. But individually or collectively, there is no factual and legal basis upon which the Federal Court could have permanently stayed these proceedings. They properly ran their course to a final decision on the merits."

OPINION: The Supreme Court is being unjustifiably secretive about its internal deliberations
Someone not familiar with the work of the court might be justified in wondering what, exactly, it has to hide
CBC News
Emmett Macfarlan
May 18, 2018

How often do Supreme Court of Canada judges change their minds while deliberating? On what points of law (or policy) do they compromise in the course of drafting a collective set of reasons? And what non-legal factors — such as public opinion, potential future cases, government reaction and so forth — might have entered into their calculus?

The answers will be available to you in roughly five decade's time.

Earlier this week, the Globe and Mail reported on a restriction that actually took effect last June, whereby the Supreme Court of Canada decided to impose a 50-year embargo on all internal documents revealing details of judicial deliberations. Prior to the court asserting this new policy, individual justices who donated material to Library and Archives Canada generally did so with an embargo period of 25 years.

Compounding that news is a report that the court seized and claimed ownership over internal communications between justices back in 2005 to prevent their release, not long after the publication of a biography of former Chief Justice Brian Dickson that relied, in part, on his personal papers to uncover stories about the inner workings of the court.

Someone not familiar with the work of the court might be justified in wondering what, exactly, it has to hide. Defenders of the policy argue that justices need to be free to deliberate with each other in an open and unhindered manner. Knowing that their internal deliberations may one day be exposed to open viewing by the public might inhibit their ability to apply the law in a manner unencumbered by the pressures of popular opinion.

This is a legitimate argument for an embargo period of some sort, but not for one so long as to ensure everyone involved in these cases are long dead before the truth sees the light of day. Even cabinet documents are released for public consumption after 20 years, barring national security issues.

So why the secrecy? The answer is, quite simply, that the court benefits from being a black box that spits out seemingly authoritative rulings on the most difficult legal questions of the day.

But our collective ignorance of, and deference to, the court's work obscures this truth: the cases the Supreme Court deals with do not merely involve narrow or technical questions of law; they involve some of the most complex policy, social and moral issues in our society – ranging from questions of equality and human dignity, like the right to die, to the treatment of the criminally accused or of sex workers, or even the design of the health care system.
My own book, Governing from the Bench, notes that judging is not just ideology run rampant: judges are constrained by both the law and, more importantly, how they see and act on their role as judges. But the book also reveals that politics and values are nonetheless inherent components of judicial decision-making.

In other words, the court is a political institution that deals with political questions on a routine basis, and even within the context of legal rules, precedent and the interpretation of the written (and unwritten) constitutional text, reasonable people can reasonably disagree about the conclusions the justices reach.

Supreme Court's 'free-the-beer' decision privileges one part of the Constitution over another
Indigenous residential school records can be destroyed, Supreme Court rules

In the realm of the Charter of Rights and Freedoms especially, the law sometimes provides scant guidance on the difficult cases with which the court is confronted. In many of these cases, the deciding factor for judges is ultimately their personal conception of justice.

Where researchers in the United States benefit from access to the judicial papers of their Supreme Court (U.S. justices have individual control over the conditions of release for their personal papers), the Canadian court has not had a similar culture of transparency. Canadian scholars like myself have had to rely largely on interviews with justices and former law clerks and analysis of the final cases. I have always felt that people who read my book will come away more confident — rather than less confident — about the court's role in our system. The court's unjustifiable secrecy on its internal machinations should leave us all less certain.

A peek behind the curtain
Getting a peek inside the court is not simply a matter of academic interest. Revealing how the court decides might awaken the public to the political nature of the court's role. The public would see that judicial decision-making at the Supreme Court level is sometimes the product of very human compromise, negotiation and horse-trading. This isn't to say that the justices do not generally strive to make good legal decisions, but there is sometimes strategy, and yes, ideology at play too.

And given that there is no substantive way to hold the court's justices accountable for their decisions – we rightly secure judicial independence and tenure because we do not want the court beholden to ordinary politics – transparency and knowledge of the work of a key governing institution is fundamental in a democratic society.

What the embargo reflects is the court's attempt to maintain its status as oracle of "the law" as a distinct and precious object of its expertise — something that is perceived, incorrectly and by too many,

as a thing separate from politics, a result of the very institutional secrecy that helps to preserve this myth. The truth – and what the justices and many in the legal community fear – is that a little knowledge of how the sausage is made might cause more people to question the ingredients, and whether they want to continue eating the results the court sends out.

Emmett Macfarlane is an associate professor of political science at the University of Waterloo. His research focuses on the impact of the constitution and the courts on Canadian public policy.

Le nouveau bâtonnier des Montréalais
Virage techno, jeunes avocats et perte de confiance envers les professionnels font partie des défis de son mandat.
Droit Inc
Delphine Jung
17 mai 2018

Le 9 mai, le Barreau de Montréal s'est doté d'un nouveau bâtonnier : Me Michel P. Synnott, un avocat qui exerce depuis 2003 à la Commission de la construction du Québec (CCQ). Il succède à Me Brian Mitchell.

Barreau 1986, Me Synnott détient un bac en droit de l'Université de Montréal, ainsi qu'une maîtrise en droit de la santé de l'Université de Sherbrooke. Depuis, il exerce en litige civil et commercial.

Après avoir débuté sa carrière dans des petits cabinets de litige, il s'est lancé à son compte pour arriver ensuite à la CCQ. Celui qui se dit un plaideur-né a toujours voulu
représenter des individus mais aussi des PME, « car je trouve qu'au Québec, les gens sont foncièrement des entrepreneurs qui ont des projets ; je voulais les soutenir ».

Me Synnott est engagé au sein du Barreau de Montréal depuis 2002, faisant sa place dans de nombreux comités. « Je me suis toujours impliqué dans une activité communautaire parallèle à ma carrière et je trouvais important d'essayer de contribuer à améliorer le système de justice. »

Droit-inc l'a rencontré alors qu'il débute tout juste son mandat.

Quand vous est venue l'envie de briguer le rôle de bâtonnier ?

Après quelques années au conseil, j'ai pris de l'expérience et j'ai voulu la mettre au service de la profession. J'estime avoir une connaissance assez large des réalités de la profession.

À quoi ressemblera votre mandat ?

Mon mandat a pour thème « Pour un Barreau d'avant-garde ». Au cour des dernière années, j'ai assisté à diverses conférences concernant les évolutions technologiques qui transforment la façon de pratiquer. Nous devons faire face au changement et nous adapter, même si la profession d'avocat est plutôt conservatrice. Il faut tenter de contribuer à favoriser le changement et l'innovation avant que le

changement nous rattrape. Je préfère qu'on soit pro actif pour être capable de décider quels sont les défis à relever et de quelles manière. Je ne veux pas attendre que l'avocat soit au service de la technologie, mais plutôt que la technologie soit au service de l'avocat.

Quelles grandes questions technologiques se posent?

Tout ce qui est IA se développe d'une manière très rapide. Un des impacts directs est celui sur le modèle traditionnel de facturation. Il risque de devenir désuet. Alors comment s'adapter à cette nouvelle réalité ?

Il y a aussi un décrochage judiciaire, dans la mesure ou le simple citoyen considère qu'il n'a plus les moyens de se payer les services d'un avocat et se représente seul. Grâce à internet il va faire des recherches et va penser être capable de se représenter seul. Que faire par rapport à cela, et pour montrer quelle est la plus-value que peuvent apporter les avocats ?

Y a-t-il des projets en particuliers pour cette année ?

Je veux faire une exercice de réflexion stratégique. Je considère que la fonction de bâtonnier est plus une course à relais. Nous allons donc faire un plan d'action triennal pour savoir quels sont les principaux enjeux sur lesquels on veut travailler et quels sont nos principaux objectifs pour les trois prochaines années. Dans ce cadre-là, je vais inviter les membres du CA à réfléchir à quatre grands thèmes que j'ai appelé les « quatre J »: justiciables, juristes, jeunes et monde judiciaire.

J'ai également eu un échange avec le bâtonnier Paul-Matthieu Grondin concernant l'éventuelle mise sur pied d'une Fondation du droit qui récolterait des fonds. Ceux-ci seront ensuite redistribués aux organismes périphériques du Barreau comme Éducaloi, le PAMBA, Juripop ou encore Pro Bono Québec.

Concernant tous ces enjeux technologiques… On parle beaucoup, mais on agit peu, pensez-vous que vous allez agir?

C'est pour ça que je souhaite tenir une séance de réflexion stratégique. Je veux dégager un temps de réflexion juste pour ça et organiser des réunions en dehors de celles du CA spécifiquement dédiées à échanger et réfléchir sur ces questions. Il faut pouvoir bénéficier de l'expertise de tous les membres du CA. Je ne veux pas qu'on fasse simplement une veille, je veux qu'on passe à la réalisation et aussi, agir en collaboration

Quels sont vos plans pour les jeunes par exemple ?

Je voudrais travailler sur l'idée de donner des cours de gestion aux avocats. La plupart vont travailler dans un cabinet de 10 avocats ou moins, ils seront donc appelés à s'impliquer dans la gestion. C'est une mesure qu'on peut facilement mettre en œuvre et à faible coût.

Allez-vous soutenir le Jeune Barreau de Montréal qui veut faire en sorte que le Barreau ne tolère plus aucun stage non payé ?

La question est comment se fait-il qu'il y a près de 15 000 avocats à Montréal et que les jeunes ont tant de difficulté à trouver un stage de six mois ? C'est très préoccupant. Il faut investiguer davantage cette question.

Faudrait-il contingenter ?

Je ne veux pas m'avancer en préconisant des solutions, car je veux qu'on réfléchisse à la solution. J'ai l'impression tout de même que les facultés de droit n'admettent pas d'avantage d'étudiants qu'à mon époque.

Serez-vous présent le 24 mai pour l'Assemblée générale extraordinaire ?

Définitivement. Le bâtonnier de Montréal se doit d'être présent aux diverses assemblées. Ce n'est pas nous qui avons convoqué cette assemblée, mais le Barreau du Québec, alors j'y serai comme membre. Nous allons écouter ce qui se dira et on évaluera au fur et à mesure.

Allez-vous continuer à exercer au sein de la Commission de la construction du Québec ?

Je vais avoir un deux emplois à temps plein, un de jour et un de soir. Le travail de bâtonnier requiert deux à trois soirs par semaine et une fin de semaine sur deux.

B.C. government perpetuating colonial-style justice
Vancouver Sun
Ian Mulgrew
May 17, 2018

B.C.'s justice minister and attorney general is breaching the Constitution and ignoring two Supreme Court of Canada rulings aimed at cutting the number of First Nations people behind bars, claims a court challenge to the policy.

Prosecutors, however, have tried to derail the application for a stay of proceedings by offender Barry Dick over the Crown's refusal to provide a so-called Gladue report, which provides context about an Indigenous offender's circumstances, the effects of systemic discrimination and culturally appropriate alternatives to prison.

The situation isn't unique, insisted Dick's lawyer, Tim Russell, of Victoria's McCullough Gustafson Watt — it's common Crown practice.

Russell said in a written submission to support the stay application that the conduct is an abuse of process and violation of Section 7 and 15 rights guaranteed by the Charter.

The failure to provide a Gladue report leaves the court without the necessary information to properly sentence Indigenous offenders and renders the proceedings unfair, he added.

“Further, the only explanation known for the failure of the probation office (which provides the usual pre-sentence reports) is the unwillingness of the minister of justice to expend public funds on court-ordered Gladue reports,” Russell argued.

“Such deliberate non-compliance with court orders would shock the conscience of any reasonable, informed and right-thinking member of society … The abuse of process in this case is particularly aggravated because the refusal of the probation office to comply with the order is taken in almost every case across the province which serves only to perpetuate the systemic discrimination of Aboriginals in the justice system, which is the very evil that the order was intended to alleviate in the first place.”

Attorney General David Eby has continued the government’s long-standing policy of only reluctantly providing these crucial submissions while providing a pittance to the Legal Services Society (LSS) to have them produce a minuscule number.

“This is just plain wrong,” Russell said.

The Supreme Court of Canada concluded in a landmark 1999 ruling, known as Gladue, that steps had to be taken to reduce the disproportionate number of First Nations behind bars that was a legacy of colonialism. The decision involved a First Nations woman from B.C., Jamie Tanis Gladue.

The top bench said the situation was a crisis.

In spite of that, B.C. NDP and Liberal governments dragged their feet. The LSS only started a pilot program providing Gladue reports using private donations in 2011.

The Supreme Court issued another ruling in 2012, called Ipeelee, that reinforced the message of Gladue and darkly pointed out that the situation had gotten much worse.

In the mid-1990s, Indigenous people made up 16 per cent of those in custody; by 2012, it was topping 24 per cent and climbing, even though First Nations constituted only four per cent of the population. The number of Aboriginal women imprisoned was even more disproportionate: 36 per cent. On the Prairies, more than half of those incarcerated were Indigenous.

In this case, Dick pleaded guilty Oct. 13 and a Gladue report was ordered by the judge for Nov. 18. No report was filed, and the order was reconfirmed. There were appearances on Nov. 20, 27; Dec. 4, 7, 13; Jan. 8, 15, 29; and Feb. 19.

Sentencing was set for March 2, but a Gladue report still wasn’t filed.

The Crown refused to comply with the order and on March 12 told Dick he should seek funding from other sources to pay for a report. That’s when Dick applied for the stay and demanded disclosure of any policy concerning how Gladue court orders are handled.

Faced with exposure of what some might consider a colonial approach to providing proper pre-sentence reports, six months after the original order, on April 12, Russell said the Crown told Dick it would pay for a Gladue report on an expedited basis in the expectation that he would withdraw his Charter application.

He refused, and his lawyer said this tactic is part of the government's standard strategy. In most cases, Russell explained, the Crown delays arguments about the Gladue report until sentencing when the offender acquiesces to being sentenced without the report, "tired of months of delay and seeking closure."

He said the Crown has offered no explanation for not paying for the court-ordered reports, as it does all other pre-sentence reports by psychiatrists, psychologists, social workers, bail supervisors and others.

"Unless, as here," he added, "it is in a corner and facing imminent litigation of the issue. This is not conduct that is isolated to this case. There is a deliberate and systematic effort on the part of the Crown to avoid compliance with all such court orders. Further, there is a more generalized effort by the Crown to delay litigation of any challenge to what is a meritless position."

Mostly, however, the strategy has successfully saved money, Russell noted.

Legal Aid, which has called for dedicated Gladue funding, provided only 131 reports in fiscal 2017-18 and, with increased government funding for them, some 300 of nearly 6,000 Indigenous offenders who qualify for legal aid will receive a report in fiscal 2018-19. That's right: 300, or five per cent.

When you consider the average cost is about $1,500, to provide one for all LSS Aboriginal offenders would cost roughly $9 million, plus disbursements and administration expenses. Though that's just the Indigenous offenders who qualify for legal aid: There are many others.

While recognizing the situation, Eby shrugs it off by saying there is work to be done: "The discussion is around limited government resources. So if you have someone who has committed a criminal offence and there is a criminal report that will assist the judge in understanding why there should be a smaller sentence for that individual given their individual circumstances, I think there is a reasonable discussion about whether that person should be paying for it themselves."

This continuing ingrained, systemic discrimination violates the Constitution, wilfully ignores the Supreme Court and must be addressed.

A hearing is set for May 30 in Campbell River.

The Supreme Court's failure to connect
The Globe and Mail
Philip Slayton
May 18, 2018

Philip Slayton's latest book is How To Be Good: The Struggle Between Law and Ethics.

There's been a tempest in a teapot over access to Supreme Court of Canada documents. The Globe recently reported that last year the court placed a 50-year embargo on files that reveal judges' deliberations. A front-page story trumpeted, "Historians, lawyers and political scientists react to embargo with shock, bafflement, resigned acceptance." Subsequent articles revealed Court attempts since 2005 to edit judges' files, and reported querulous comments on the issue by a handful of retired SCC judges. An editorial accused the Supreme Court of "hiding from history" and cultivating "an air of pomp and mystery." Shock, bafflement, and resigned acceptance exist (in some quarters) apparently because the embargo is believed to hinder understanding of the Court's "secret inner workings."

But apart from a few "historians, lawyers and political scientists" with specialized interests, why would anyone care about the embargo? It won't interfere in a significant way with public understanding of what's happening at the Supreme Court. Three other things do that: a judicial culture that values detachment from the wider world; failure of the media to report comprehensively on the court's work; and a Canadian tradition of excessive deference to authority.

In the United States, judges of the Supreme Court are public personalities. Some are household names. They go on television and even the stage (Justice Ruth Bader Ginsburg appeared in a 2016 production of the Washington National Opera). Most of all, they write books. In 2012, the authoritative SCOTUSblog listed 353 books written by SCOTUS justices, living and dead. The literary output of judges of the Canadian Supreme Court (living and dead) is almost non-existent (here I have to mention former Chief Justice Beverley McLachlin's just-published mystery novel, Full Disclosure). Whether this is from lack of interest, excessive reticence or stems from some deep-seated feeling about an elusive but sacred constitutional principle, I cannot say, but it's not a good thing. It's part of that detachment from the wider world. It's a failure to connect.

Official law reports, televised court proceedings on CPAC and plain-language summaries of rulings don't fill the void. These mean nothing to the ordinary citizen. Five years ago, in March, 2013, The Globe editorialized: "The late Supreme Court judge John Sopinka said judges don't need to be monks. Heck, even monks write books… As public officials, they have a great deal to contribute to demystifying the court and the law. Whatever the reasons for reticence on the Supreme Court, the silence comes at an enormous cost." Nothing has changed.

Don't look to the media to break that costly silence. Considerable and rare skill is required to understand difficult legal concepts and decisions and report on them in a way that is intelligible and interesting to laypeople. Media outlets will not commit ever-scarcer resources to this work.

It doesn't have to be that way. The United States Supreme Court is followed intensely, even obsessively, and skillfully, by the American media. The same is true of the coverage of final courts of appeal in several smaller countries, for example, the British Supreme Court, the Supreme Court of Israel and the Constitutional Court of South Africa.

And then there's the Canadian public, comfortably complacent about being kept in the dark. Canadians are preternaturally respectful of those with position and power. We are content to hold Supreme Court justices in awe from a distance, even if we're not quite sure what they're up to. After all, they're judges of the Supreme Court of Canada and sometimes wear robes trimmed with ermine.

In 1980, Edgar Z. Friedenberg, an American teaching at Dalhousie University in Halifax, published a prescient book called Deference to Authority: The Case of Canada. Canadians, he noted, have no tradition of identifying government as the source of oppression. The enjoyment of conflict is not a part of the Canadian tradition. The habit of deference is ingrained. Perhaps that helps make our kingdom peaceable. But it's not always a good thing.

It's not the embargo we have to fear. What we need to worry about are Supreme Court judges who won't connect, inadequate media coverage of what they do, and a public that couldn't care less.

Law Society runaround
Vancouver Sun
Ian Mulgrew
May 18, 2018

When you are facing a significant problem, chances are you seek the services of a lawyer. But what happens when you have a problem with a lawyer? Who ya gonna call? Bar-busters?

B.C. entrepreneur Wesley Richards has a beef with Ontario lawyer Colin Pendrith over allegedly threatening and belligerent conduct during November 2016 B.C. proceedings in acrimonious litigation with Dairy Queen Canada Inc. now before the Supreme Court of Canada.

He said he called the Law Society of B.C. (LSBC) and was told to file his complaint with the authority where Pendrith was licenced — the Law Society of Upper Canada, the profession's self-regulatory agency in that province.

Acting on that advice, on Feb. 21, Richards filed his complaint.

On March 5, David Cass, the Ontario society's Intake and Resolution Counsel, replied, explaining that Richards was misinformed.

In 2013, the members of the Federation of Law Societies of Canada reached a National Mobility Agreement that said lawyers from one province are entitled to practise in other provinces.

That agreement stated: “When providing legal services in a host jurisdiction with respect to the law of a host jurisdiction, all lawyers will be required to comply with the applicable legislation, regulations, rules and standards of professional conduct of the host jurisdiction.”

Cass emphasized: “Lawyers practising law in B.C. are subject to the rules and regulations established by the LSBC, regardless of where they are licensed.”

He insisted that “while practicing law in British Columbia, Mr. Pendrith is subject to the Code of Professional Conduct of the LSBC and any complaints about his conduct while doing so must be made to the LSBC and not the (Law Society of Upper Canada).”

The Ontario official said that he reviewed all Richards’ materials and supporting documents before concluding no further investigation was necessary.

Richards went back to the B.C. Law Society.

This time, on March 13, Lynne Knights, the society’s “intake officer, professional conduct,” reiterated in a letter what he had been previously told on the phone: “We are the governing body for B.C. lawyers only.”

“If you have a complaint about a Canadian lawyer outside of B.C., you will have to contact the Law Society which governs lawyers for the province in which the lawyer in question practices,” Knights maintained.

She enclosed a brochure describing the society’s complaints process — Concerned About The Conduct of a Lawyer?

He was, but the 57-year-old accountant was also confused.

Richards went back to the Ontario society for clarification and Cass reiterated on March 14 that the Ontario watchdog had no jurisdiction over conduct in B.C.

“The file was closed because of, to use your expression, ‘purely jurisdictional issues,’” he wrote.

Richards felt like pulling his hair out.

This kind of runaround is unfair to the public and professionals involved.

“The allegations are simply untrue,” Pendrith, of Cassels Brock in Toronto, told me. “Mr. Richards only made these false allegations, for the first time, when he brought his appeal after the summary trial decision was released in March 2017. That decision granted judgment to our client and dismissed the counterclaim of Mr. Richards and the other defendants.”

Without judging the merit of his complaint, Richards' credibility in the litigation was shredded by trial and appellate judges.

A unanimous division of the province's top bench ruled against him and said his assertions in that court were inconsistent with his sworn testimony, a substantial documentary record and "not reasonably capable of belief."

"As the respondent put it, this is more than simply new evidence, this is a reversal of the entire case that Mr. Richards took to trial," Justice John Hunter said.

He lost everything — living for a while in a trailer with his wife, 82-year-old mother-in-law, and 15-year-old son — and was obviously angry. However, B.C. Supreme Court Justice Sharon Matthews last month ruled one of his recent moves in the litigation was an abuse of process:

"In my view, although the financial devastation to Mr. Richards and his family is profound, they have not been deprived of fairness in the proceedings before this Court or the Court of Appeal. Fairness does not dictate the outcome Mr. Richards seeks. Fairness dictates an end to this litigation."

The Supreme Court of Canada will do that, but shouldn't his conduct complaint have been handled better — even if it meant him being told he was dead wrong and vexatious?

When contacted by Postmedia, the Law Society of B.C. acknowledged it is responsible for complaints about out-of-province lawyers covered by the mobility agreement.

Asked about Richards' complaint, the society spokesman said in an email: "In this instance, we received an inquiry about how to make a complaint about an Ontario lawyer, without mentioning that the issue may have been in relation to services here in B.C. Based on the limited information we were provided, we connected the person to what we understood they needed in order to make their complaint."

RIchards scoffed, saying he sent all the information in a March letter that reads: "I originally filed my complaint with the Law Society of Upper Canada, which responded … that it does not have the jurisdiction to investigate this issue because the actions took place in B.C."

Who ya gonna call?

Government vows better, faster service with revamped Phoenix client centres
iPolitics
Kathryn May
May 18, 2018

After more than two years, Canada's public servants can finally call a Phoenix client centre and talk to colleagues who can help sort out their botched cheques and other pay questions.
Public Service and Procurement Canada (PSPC) is replacing contract employees at two call centres with 200 permanent employees who have been trained in Phoenix and the federal pay regime.

Employees at these revamped ‘client contact centres’ have access to the Phoenix system and will be able to retrieve the pay records of calls for help, to report an underpayment or overpayment or just to make sense of their pay stubs.

“This is a big leap forward — and we are meeting the service standards. People are waiting much less time on the phone with an average time of 44 seconds,” said Steven MacKinnon, parliamentary secretary for the PSPC minister.

The centres are in Toronto and Gatineau. The exact locations are not revealed for security reasons. MacKinnon was speaking after he and Hull-Aylmer Liberal MP Greg Fergus visited the Gatineau operation as part of the official launch of the new approach.

Staff can now access employee files and track transactions but fixing financial transactions will be left to the pay centre. MacKinnon said the typical transaction is taking about 11 minutes.

He added that the department began the approach last fall and so far, he says, the service is better, faster and public servants are report being satisfied.

The centre has answered about 32,000 calls. Over the past six months, 77 per cent of callers said their inquiry was answered and 83 per cent said they were “satisfied with the overall experience.”

He said the department is looking at expanding services to handle minor transactions, such as updating personal information, or routine actions such as sending copies of T4 slips. That would take further pressure off the non-financial transactions that clog the system.

The department is confident that the new call centre, coupled with the pay pods being rolled out across government by mid-2019, will help resolve pay issues faster and chip away at the massive backlog of transactions sitting in the queue at Miramichi pay centre.

The call centres have been a big source of friction between the government and unions who argued Phoenix problems should be resolved by public servants and not outsourced. The Public Service Alliance of Canada made hiring more and “permanent” staff for the centre a key demand of a sweeping resolution it recently passed at its triennial convention.

The government created the call centre in the summer of 2016 as Phoenix’s errors escalated into a full crisis with thousands of public servants overpaid, overpaid or not paid at all.

Public servants complained the centre couldn’t handle the barrage of calls and staff were ill-equipped to even answer basic questions. The most they could do was answer the phone; record the complaint or query and pass it on. That for the calls that got through. As many or more were dropped; left on hold or faced incessant busy signals.

The lack of confidence in the centres came to a head in January when they were swamped with calls from public servants racing to report their overpayments for a tax deadline.

MacKinnon acknowledged that the biggest complaint MPs get from the federal employees in their ridings was about the centre … how questions went unanswered and how they were left in the dark.

MacKinnon said the the centres' revamp and new hires will be covered by the $431 million PSPC received in the 2018 budget to stabilize Phoenix. 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.

The pod teams at Miramichi 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.

Canada needs more space for indigenous people in academia
The Washington Post
Rebecca Thomas
May 19, 2018

Rebecca Thomas is a Mi'kmaw woman living in Mi'kma'ki (Nova Scotia) and was Halifax's poet laureate, the first indigenous person to hold the title, from 2016 to 2018. She works as a college student adviser.

HALIFAX, Nova Scotia — Last week, Mount Saint Vincent University in Halifax came under fire for assigning a white professor a course about the residential school system that housed indigenous children for forced assimilation. The university picked a knowledgeable and well-meaning ally. And I am not here to discredit her.

But I have long been a proponent of indigenous peoples telling our stories. We've always served as background characters in our own history.

I am l'nu of the Mi'kmaq Nation of Mi'kma'ki. We have the dubious honor of being among the first indigenous peoples contacted by European colonizers. For 500 years we had to work with, be oppressed by and share land with the British and French. The Peace and Friendship Treaties signed by my ancestors led to precedent-setting landmark decisions for Indigenous rights at the Supreme Court of Canada. However, that doesn't mean we've avoided the pitfalls of colonization.

For more than 100 years, 150,000 indigenous children were forced to attend the residential schools where their culture, language and spirit were violently removed from them in an attempt to "save" the child and kill the Indian. Thousands of children died in the system. The schools were active until the last one closed in 1996. My father is the product of this system, which took him away when he was 5 years

old. It took him decades before he was able to talk about what happened to him. The legacy of residential schools has left indigenous peoples over-represented in the criminal-justice system and the foster-care system. We have higher morbidity and mortality rates than non-indigenous Canadians, along with suicide rates up to 11 times that of the rest of the population.

I believe that the university course should be taught by an indigenous person. But we, as indigenous peoples, cannot be solely responsible for the decolonization of institutions.

I've worked in postsecondary institutions for the entirety of my career. I've been the sole indigenous voice at the table far more often than I've been surrounded by my peers. I am often the one-stop shop for knowledge on indigenous history, law, culture, social structure and language.

I try to help faculty members who don't quite understand why their teaching approach can be exclusionary or isolating for indigenous students. I've spoken with the president about what it's like being the child of a residential school survivor. I have been asked to be on every diversity and inclusion committee. If there is anything remotely related to indigenous peoples, I get asked and am expected to take the lead on it. I do so willingly but at a cost.

I am exhausted.

I feel a tremendous obligation to my community. On days when I simply cannot muster the energy to step up, I feel an overwhelming sense of guilt that I am letting my people down.

Organizations can't be allowed to simply throw their hands up and say they tried their best after their token minority member decided not be the mascot for their reconciliation attempts because they were tired or had other interests. After all, we are a part of the people they are trying to reconcile with, a fact often forgotten.

It's important that you understand that I don't tell my family's story to get attention. It's not fun to bring up painful memories. I tell them so people understand where I and so many other indigenous people are coming from. They are important stories that give context. But no mistake, they are my stories to tell.

I'm often asked whether I believe only indigenous peoples can teach indigenous subjects. I say yes. That often leads to the all-or-nothing argument that if that's the case, then only women can teach women's studies and only black professors can teach African studies.

If we lived in a world where all things were equal, then yes, white professors could teach indigenous courses. However, we do not live in an equal world. We live in a world where I have to apply for my ethnicity to be validated by the government every 10 years. We live in a world where we have to beg and plead for empathy when our girls and our women go missing. We live in a world where an unarmed 22-year-old Native Canadian man can be shot point-blank in the back of the head and his killer walks free. We live in a world where I have to reopen my scars over and over so individuals and organizations can feel good about giving me bandages.

I do this so those who come after me hopefully won't be asked to. I take up space, not always because I want to but because I have to.

La justice doit s'adapter aux nouvelles technologies, dit le juge Wagner
« Il faut être prêt à oser et à changer », dit le juge en chef, qui estime que l'arrêt Jordan a été un signal d'alarme
Radio-Canada
19 mai 2018

Face à tous les bouleversements technologiques, la justice doit s'adapter et « entreprendre de nouvelles façons de faire les choses », clame Richard Wagner, le nouveau juge en chef de la Cour suprême du Canada.

En entrevue avec la journaliste judiciaire et animatrice Isabelle Richer, le juge Wagner a reconnu que les nouvelles technologies mettent de la pression sur le système judiciaire.

« Je pense qu'avec les nouveaux algorithmes, et une migration vers le numérique, dans la pratique du droit et dans la pratique des juges, ça va être un grand défi au cours des prochaines années », a-t-il dit.

Richard Wagner, qui a été juge à la Cour supérieure du Québec, à la Cour d'appel et à la Cour suprême, reconnaît que, par définition, la magistrature a « tendance à se réconforter dans les précédents, dans ce qui est connu ». La profession devra garder l'esprit ouvert et « ne pas hésiter à entreprendre de nouvelles façons de faire les choses », ajoute-t-il.

Lors de son arrivée en poste, le juge Wagner a demandé une grande révision des règles de pratique, « pour les mettre à niveau, en prévision du numérique, comme les dépôts des procédures informatiques ».

Une profession chamboulée par l'arrêt Jordan

Une autre pression sur les juges et sur l'ensemble du système judiciaire vient de l'arrêt Jordan, rappelle Richard Wagner.

« L'arrêt Jordan a été le signal d'alarme pour changer les choses », affirme-t-il. En juillet 2016, la Cour suprême rendait en effet un jugement qui invalidait les condamnations de Barrett Richard Jordan, accusé de trafic de drogue, parce que les procédures judiciaires avaient été trop longues.

« La justice a été le parent pauvre des administrations publiques, explique Richard Wagner. Les gouvernements ont mis les budgets dans l'éducation et surtout la santé, avec raison d'ailleurs, mais la justice a écopé. »

Depuis, les gouvernements des différentes provinces tentent de juguler les retards dans les palais de justice. Au Québec, la ministre de la Justice a annoncé en décembre 2016 l'embauche d'un plus grand nombre de juges et un investissement de 175 millions de dollars.

Dans son dernier budget, Québec a par ailleurs réservé 500 millions de dollars d'ici cinq ans pour moderniser l'appareil judiciaire. Ainsi, 139 millions seront investis pour standardiser les méthodes de travail dans les 400 salles d'audience de la province et 289 millions seront utilisés pour opérer un virage technologique.

« Ça concerne les gouvernements, pour injecter de nouveaux fonds, mais ça concerne également les avocats, pour changer leur manière de penser et ça concerne aussi les tribunaux, pour changer leur règles de pratique », dit le juge Wagner.

How Google-happy jurors are derailing Ontario trials
The Toronto Star
Betsy Powell
May 21, 2018

Three recent trials in Ontario have been rocked by juror misconduct connected to the internet, reviving concerns about the challenges of ensuring a fair trial in the digital age.

Jurors in Toronto, Barrie and Ottawa were discovered conducting their own independent research, despite strict instructions from judges that they were "not to use the internet or any electronic device in connection with the case in any way."

Because of Canadian jury privacy laws, it's impossible to determine if these cases are the exception and whether juries are, as required by law, reaching verdicts based only on the evidence presented in court.

But the cases have justice insiders wondering if it is a more widespread phenomenon and if anything can be done, as Ontario's top court put it in 2015, to "curb the appetite" of jurors seeking online material where there is "little quality control over content."

In Ottawa, at a just-completed motor vehicle personal injury trial, the plaintiffs raised concerns about "extrinsic" and erroneous information that made its way into the jury room.

"How can justice be done between the parties when Google is the judge and the jury," the plaintiffs' lawyers, led by Tom Connolly, wrote in a factum filed in court arguing for a mistrial.

After eight weeks of evidence, jurors — who were not sequestered while deliberating — sent a note to the judge asking about a regulation under the Insurance Act, which wasn't introduced during the trial. The foreman, when questioned, admitted he had consulted the internet, and in so doing, "brought the wrong law to the attention of the jury," the factum states. The only remedy should be a mistrial, argued the plaintiff.

Superior Court Justice Charles Hackland disagreed. In his May 14 written decision, Hackland said that although he shared the plaintiff's concern about the juror engaging in internet research, "contrary to my express instructions," he felt his "correcting charge" was sufficient.

“To my observation this was a very engaged and diligent jury on the whole and the verdict rendered at the conclusion of this lengthy trial is well supported by the evidence,” Hackland wrote.

In the two other recent cases, however, mistrials were declared.

A Toronto murder trial had to start over after a juror did some online research. Details about the nature of the research remain covered under a publication ban until the conclusion of the followup trial.

And a lengthy manslaughter and assault case in Barrie was derailed this month after a juror shared his computer-made crime scene map with fellow jurors and sought information about the trial judge, one of the defence lawyers and the date of surrender of one of the four accused. A retrial in the death of James McCallen, who died after a fight in Bradford, is scheduled for next year.

“Six weeks down the tubes,” said Leo Kinahan, a veteran Newmarket-based defence lawyer who was the subject of the Barrie juror’s curiosity. The juror learned Kinahan used to be a cop and shared the information with his fellow jurors, one of whom sent a note informing the judge.

Superior Court Justice Guy Di Tomaso didn’t pull the plug on the trial because of online searches, finding them “relatively innocuous” and not enough to give rise to trial unfairness.

Instead it was the fact the same juror also visited the crime scene in Bradford and created a map at home on his computer, containing the dimensions and layout of the area and marking in blue lines what he believed to be surveillance camera sight lines.

How often jurors conduct their own online searches is impossible to know because, unlike in the U.S., Canadian jurors are prohibited by the Criminal Code from disclosing their deliberations to anyone.

“I think it’s still possible for juries to follow the instructions,” said Lisa Dufraimont, an associate professor at York University’s Osgoode Hall Law School. “It’s just more difficult for people who are used to being connected all the time to actually cut themselves off in that way and not google things as they might normally google.”

Kinahan isn’t sure anything can be done to stop jurors from conducting independent research into a case. He notes Di Tomaso “gave a very stern warning to the jury not to do it.”

“If we do come up with a way to police it, I don’t think it’s a country that I would want to live in because it means Big Brother has access to every conceivable thing you do on the internet,” he said.

“Do you want a system where, if they become a jury member, (they) give their passwords to somebody?”

Nor does he think jurors should be prosecuted for failing to comply with judicial instructions. Di Tomaso told the offending juror his misconduct was “condemned by this court,” but that was it.

Some jurisdictions have gone further.

In the United Kingdom, the Juries Act was amended a few years ago to make it an offence for a juror to intentionally seek information relevant to a case. In 2012, a psychology professor who served on a jury in England was found guilty of contempt of court and jailed after conducting research about an accused person.

In Australia, some states have enacted legislation prohibiting juror research. But it's not something the Ontario government is considering.

"The presiding judge has full supervisory authority over trial proceedings, including jury trials. If there is an issue with a juror, it is up to the judge to determine next steps," a spokesperson for Ontario's Ministry of the Attorney General wrote in an email to the Star.

In 2015, the Ontario Court of Appeal released a decision containing a suggestion on how trial judges can "stop the curious from doing research" when the jury is not in the courtroom.

Judges can add specific examples in the instruction against research, such as telling jurors not to access legal databases. To "underscore the point," Justice David Watt wrote that judges could also remind jurors they could potentially be found in contempt of court if they ignore explicit instructions.

Osgoode's Dufraimont agrees that instructions to jurors "might benefit from highlighting more what they're not allowed to do," while reminding them their focus must be on the evidence brought out in court.

She is unaware of any Canadian examples of a juror charged with contempt of court. And contempt prosecutions, in general, are rare, she said.

"The threat of contempt is much more useful on a systemic basis than actual prosecutions for contempt. To tell the jurors that it would be contempt of court for them to do the research might have value, even if no prosecutions actually occur."

Still, the professor can appreciate the reluctance of courts to appear "heavy-handed" with people who are performing their "civic duty" by sitting on a jury.

"Nobody wants to make criminal prosecutions of jurors who do the wrong thing a regular feature of the criminal justice system," Dufraimont said. "That would be a disaster."

That's why "beefing up the instructions," in the way cited by the Court of Appeal, might be helpful, she said, "without crossing the line of making jurors feel that they're being punished for participating in the process."