Chief Justice Beverley McLachlin says judges should speak out about delays

Chief Justice Beverley McLachlin says fixing our country's trial system is a top priority

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Clare Hennig
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The longest serving Chief Justice at the Supreme court of Canada says fixing our country's trial system is a top priority.

For 17 years, Chief Justice Beverley McLachlin has presided over several major landmark decisions in Canadian courts.

McLachlin's rulings have shaped everything from assisted dying to prostitution laws to First Nations title and rights.

Now, she is fighting to reduce delays in court trials as more and more cases are stayed. She says more judges must speak out about the problems they encounter.

"We cannot have trials going on longer, violating constitutional rights in a systematic way, year after year," McLachlin told CBC's guest host of The Early Edition Laura Lynch.

Last summer, the Supreme Court set new rules for how quickly a case should be resolved. The R v Jordan ruling means that provincial court trials must be completed within 18 months and higher level court cases within 30 months. After those time limits the accused parties can apply to have their cases stayed.

"It's a constitutional right that everyone has in Canada to be tried within a reasonable time and that's what the Jordan decision said must be upheld," McLachlin said.

The dwindling number of judges is a big part of the problem, McLachlin explained, and highlighted the current 51 vacancies in courts across the country.

"If we don't have enough judges to hear these cases, then they get put over and delays occur," she said.

Seven criminal cases had to be stayed in British Columbia last year because of unacceptable delays, according to the province's justice minister. Most recently, the three men accused in the shooting death of gangster Jonathan Bacon in Kelowna applied to have the charges against them thrown out because of trial delays.

Bacon murder trial underway in Kelowna more than 4 years after arrests

McLachlin said steps are being taken to reduce delays but the problem cannot be solved overnight.

"We've got to be able to satisfy all of these demands to have a good justice system and it's a struggle to get all the pieces in place," she said. "You can't just do it on the turn of a dime."

Responsibility to speak out

There are limits on what a judge can publicly say, McLachlin said, in order to not enter the political fray or give the appearance of bias — but she said that shouldn't stop judges from speaking out.

"We have to be very careful what we say and how we say it," she said. "But we are part of the justice system and it's important that judges, chief justices particularly, speak out to address issues with that system when they see them."

McLachlin said she feels it is her personal responsibility to highlight problems in the judicial system and encourages other judges to do the same. She is in Vancouver this week presiding over the Order of Canada events.

SCC sets out national approach to bail provisions in Criminal Code
Lawyer's Daily
Cristin Schmitz
June 01, 2017

The Supreme Court of Canada has provided a consistent national roadmap for granting bail across the country in a 9-0 judgment that is expected to liberalize bail practices in some provinces like Ontario, which have been following a more restrictive route.

On June 1, the top court allowed the appeal of the federal Crown, and overturned the 2015 decision of the Ontario bail review judge below who struck down the limits on cash bail in s. 515(2)(e) of the Criminal Code on the basis that the provision infringes the Charter's s. 11(e) right not to be denied reasonable bail without just cause: R. v. Antic 2017 SCC 27.

The Supreme Court's ruling affirms that the code's cash bail restrictions remain constitutionally intact. However those provisions remain open to the same Charter attack in future as the court found it unnecessary to address the Antic constitutional challenge on its merits because the bail review judge in the case misapplied the bail provisions — and thus wrongly concluded that s. 515(2)(e) had the effect of denying bail to Kevin Antic, who was charged with firearms and drug offences.

The constitutional issue aside, Justice Richard Wagner's judgment was hailed by parties on all sides of the appeal because the court provided badly needed national guidance on how to approach bail, including 11 principles and guidelines that should be adhered to when applying the Criminal Code's bail provisions in a contested hearing (para. 67).

“I think we all won,” said Toronto defence counsel Vincenzo Rondinelli, who was appointed amicus curiae by the court (Antic himself did not participate in the appeal).

“Despite the narrow [constitutional] issue in this case, what we all are in agreement on is that the bail system is broken,” said Rondinelli. “The sections in the Criminal Code are not being applied on a consistent basis across the country, and, in some provinces like Ontario, they are putting a heavy reliance on bail releases with sureties, whereas other provinces like Alberta are not,” he said. “I think the court is promoting what the spirit of the bail provisions were meant to achieve. ... It’s more of a liberal approach than it has been, at least in Ontario.”

Counsel for the intervener Canadian Civil Liberties Association (CCLA), Jonathan Shime of Toronto’s Cooper Sandler, said his client is “delighted” with the judgment.

“Today’s decision provides clear guidance to any lawyer or justice of the peace in a bail court as to how bail should be approached in the criminal justice system,” said Shime in a prepared statement. “It is indispensable reading for any lawyer who walks into any bail court across Canada.”

Rondinelli added, “I think this judgment emphasizes how important bail is, and that all the players in the system ... have to recalibrate their focus to the first principles of bail — and paragraph 67 is not only a very helpful, but much needed, roadmap for that,” he remarked. “I think it’s a really positive step to getting back to where the bail system should be.”

Rondinelli stressed “an almost immediate effect of the case should be that unnecessary [bail] conditions should fall by the wayside.”

John Norris, co-counsel with Chris Sewrattan of Toronto’s Simcoe Chambers for the intervener Criminal Lawyers’ Association, said the court has reminded Crowns and bail justices “of some principles that have been forgotten — and [of] the fundamental importance of bail and the equally fundamental importance of not imposing unnecessary terms of release. And that can include even whether or not to have a surety, because sureties have become almost the presumptive form of release now. And the Supreme Court says ‘no, you need to justify, in each and every case, why a surety is necessary.’“

In the wake of Antic, Norris said he expects more accused to be released on their own recognizance. “It returns us to a time where that ought to be considered a viable form of release in many cases,” he suggested.

Norris said Antic sends a message that “Crowns need to ensure that the ladder principle is respected — because it’s up to them to justify each step upwards” in bail conditions, even in negotiations with defence counsel.

“In clear and ringing terms the Supreme Court said this is critically important,” he said. “What we all see in bail courts is this almost inflationary effect, because the Crowns will often seek the most stringent terms of release that they can get and accused persons will naturally agree to the most stringent terms that they can satisfy because they want to get out. And so the bar keeps getting raised higher and higher and higher until what are meant to be exceptional terms start becoming the norm. And I think this is a real call to ... correct that tendency.”

Norris said he fully expects “some significant changes in bail practice.” He pointed, for example, to the court’s “very intriguing comment” in para. 67(j) that “terms of release imposed under s. 515(4) may ‘only be imposed to the extent that they are necessary’ to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person’s behaviour or to punish an accused person.”

Norris called the latter sentence “profoundly important” because bail conditions banning accused who are addicted to drugs or alcohol from consuming those substances are too often imposed. “I think what they are referring to there are ... these efforts to micromanage aspects of a person’s life where they may be dealing with intractable, or challenging, medical conditions or circumstances of addiction which then becomes a recipe for failure.”

Nick Devlin, co-counsel with Amber Pashuk for the appellant Public Prosecution Service of Canada, said Antic “may well be the defining decision on bail for many years to come. The Supreme Court has clearly said that a uniform and consistent approach to bail, applying s. 515(1) as Parliament intended in the 1972 Bail Reform Act, must be the practice across the country.”

Devlin said he sees the Supreme Court’s three central messages as: “the courts must not turn reflexively to stricter forms of release before considering whether cause exists to do so; cash is not better than a pledge in the form of a recognizance; and bail should be rigorously enforced when it is breached.”

Devlin remarked “each of these principles is already enshrined in s. 515 [of the code], and their universal application can only benefit the administration of justice.”

In setting out the approach to applying the code’s bail provisions, Justice Wagner stressed they are”federal law and must be applied consistently in all provinces and territories.”

His judgment reminds bail judges to “adhere strictly” to the ladder principle enshrined in s. 515(3) of the Code, which requires a justice or a judge to impose the least onerous form of release on an accused, unless the Crown shows why that should not be the case. “Release is favoured at the earliest reasonable opportunity and on the least onerous grounds,” declared Justice Wagner, who also wrote the leading decision on the tertiary ground for denying bail, R. v. St‑Cloud 2015 SCC 27.

“It is time to ensure that the bail provisions are applied consistently and fairly,” admonished Justice Wagner. “The stakes are too high for anything less.” Citing an influential CCLA report on bail, he emphasized “an accused is presumed innocent, and must not find it necessary to plead guilty solely to secure his or her release, nor must an accused needlessly suffer on being released.”

“Courts must respect the presumption of innocence, ‘a hallowed principle lying at the very heart of criminal law ... [that] confirms our faith in humankind,'” he remarked.

The Ontario Superior Court judge below found that Antic had a Charter right to use cash to help him make bail, and struck down, and severed, language in s. 515(2)(e) restricting the availability of cash bail to two very limited circumstances. The effect was to create an entitlement to cash bail in all circumstances. However cash bail was eliminated in 1972 because it was seen to disadvantage those with less money.

The bail review judge was concerned that Antic — a dual American-Canadian citizen who was arrested in Windsor, Ont., and had no assets in Canada — might flee, if he was let out on bail with only a surety. But the judge indicated he would have released Antic on bail if he could have required both a surety and a cash deposit. However, s. 515(2)(e) of the code permits both a cash deposit and surety supervision only if the accused is from out of the province, or does not ordinarily reside within 200 kilometres of the place in which he or she is in custody. As an Ontario resident living within 200 km of the place in which he was detained, Antic did not meet those criteria.

Antic then challenged the constitutionality of s. 515(2) (e). The bail review judge found that since the provision’s geographical limitation prevented him from granting bail on the terms that he deemed appropriate, the provision violated the Charter right not to be denied reasonable bail without just cause. He severed, and struck down, the geographical limitation in s. 515(2) (e), and ordered the accused’s release with a surety and a cash deposit of $100,000.

However, Justice Wagner held that if the judge had applied the Criminal Code’s bail provisions correctly, Antic would not have been denied reasonable bail.

The bail review judge made two errors in devising Antic’s release order. “First, by requiring a cash deposit with a surety, one of the most onerous forms of release, he failed to adhere to the ladder principle,” Justice Wagner explained. “Even though Antic had offered a surety with a monetary pledge, the bail review judge was fixated on, and insisted on, a cash deposit because he believed the erroneous assumption that cash is more coercive than a pledge.”

The bail review judge also erred in deciding on the basis of speculation as to whether Antic might believe that forfeiture proceedings would not be taken by the Crown against his elderly grandmother, who was his surety, if he breached his bail terms. “A judge cannot impose a more onerous form of release solely because he or she speculates that the accused will not believe in

the enforceability of a surety or a pledge," said Justice Wagner. "Parliament expressly authorized the possibility of an accused being released on entering into a recognizance with sureties in the place of cash bail, and judges should not undermine the bail scheme by speculating, contrary to any evidence and to Parliament's intent, that requiring cash will be more effective."

Justice Wagner said cash bail should be relied on only in "exceptional circumstances" in which release on a recognizance with sureties is unavailable. When cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should be no higher than necessary to satisfy the concern that would otherwise warrant detention, and proportionate to the means of the accused and the circumstances of the case, he stipulated. The judge is under a positive obligation to inquire into the ability of the accused to pay.

Justice Wagner called the ladder principle, and the authorized forms of release in ss. 515(1),(2) and (3) of the code, "central" to the law of bail. "Save for exceptions, an unconditional release on an undertaking is the default position when granting release," he stressed. "Alternative forms of release are to be imposed in accordance with the ladder principle, which must be adhered to strictly: release is favoured at the earliest reasonable opportunity and on the least onerous grounds. If the Crown proposes an alternate form of release, it must show why this form is necessary for a more restrictive form of release to be imposed. Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a judge to order a more restrictive form without justifying the decision to reject the less onerous forms. A recognizance with sureties is one of the most onerous forms of release, and should not be imposed unless all the less onerous forms have been considered and rejected as inappropriate."

Moreover, Justice Wagner explained "it is not necessary to impose cash bail on accused persons if they, or their sureties, have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court. A recognizance is functionally equivalent to cash bail and has the same coercive effect."

Summer hires, new contracts stall Phoenix fix
Backlog now sits at 265,000, but new cases could add to glut
CBC News
Andrew Foote
June 2nd, 2017

Problems with the federal government's Phoenix pay system for public servants were "stabilized" in March and April, but new collective agreements coupled with the recent surge of summer hires have stalled the repair job, according to Friday's government update, the first in two months.

The backlog of transactions that need to be resolved now sits at 265,000, down from the 284,000 cases that clogged the system in early April.

Marie Lemay, deputy minister in charge of the pay system, told a teleconference update that the government has hired about 5,000 seasonal workers to fill summer jobs, and about 24,000 federal employees are covered by new or recently ratified collective agreements.

Lemay said it could take until August to process the new data, raising the possibility of fresh pay problems for those employees.

Last week, the government announced it's spending $142 million to hire more workers to process Phoenix cases, which Lemay said will be a big help.

Tens of thousands of government workers representing more than one-third of its workforce have had pay problems since Phoenix launched in February 2016.

It will cost more to fix Phoenix — $402 million and counting — than the $309.5 million it took to launch the troubled pay system.

La légalisation du pot interdite par trois traités signés par le Canada
La Presse Canadienne
2 juin 2017

Le Canada devrait se retirer de ces accords, car il « encourage indirectement d'autres pays à ne pas tenir compte des lois internationales »...

Des experts en droit international et les partis de l'opposition exhortent le gouvernement de Justin Trudeau à faire part de ses intentions quant à trois traités des Nations unies qui entrent en conflit avec son plan de légaliser la marijuana récréative d'ici l'été prochain.

Le porte-parole conservateur en matière d'affaires étrangères soutient que la réputation du pays sur la scène internationale est en jeu. Peter Kent estime qu'Ottawa devrait se retirer de ces ententes avant de les enfreindre et ainsi en « respecter les signataires ».

Celui qui était ministre de l'Environnement au moment du retrait du protocole de Kyoto martèle que les libéraux devraient agir « par principe » dans le cadre de tous ses rapports avec des organisations internationales.

Le Canada figure actuellement parmi les quelque 185 pays ayant ratifié ces trois accords de lutte antidrogue: la convention unique sur les stupéfiants de 1961, la convention sur les substances psychotropes de 1971, de même que la convention contre le trafic illicite de ces derniers de 1988. Toutes exigent la criminalisation de la possession, de même que de la production de cannabis.

Le directeur du Labo de stratégie mondiale de l'Université d'Ottawa, Steven Hoffman, croit également que le Canada devrait se désister de ces traités et du même coup, envoyer un message fort quant à son progressisme en matière de drogues. Le professeur affirme que sinon, Ottawa « encourage indirectement d'autres pays à ne pas tenir compte des lois internationales ».

Le porte-parole néo-démocrate en matière de justice, Alistair MacGregor, signale pour sa part que si le gouvernement compte bien légaliser la marijuana avant juillet 2018, il doit aviser l'ONU d'ici le mois prochain.

Un porte-parole de la ministre des Affaires étrangères, Chrystia Freeland, a refusé de préciser ses intentions, déclarant seulement que le Canada se conforme actuellement à ses obligations sur le plan international.

Homeowner begs for leniency after BMO threatens foreclosure following Phoenix pay problems

Bank reverses its decision after Go Public's inquiries

CBC News

Rosa Marchitelli

June 5th, 2017

A federal government employee says she spent three months fearing she would lose her home after missing a $750 payment as a result of a massive government mess-up.

Problems with the federal government's Phoenix pay system left Jacqueline Cordova without an income for more than nine months.

Unable to meet her financial obligations, she says she missed a payment on a Bank of Montreal credit line linked to her mortgage, which, combined with previous issues, led to the threat of foreclosure.

"You have the government apologizing for an error and you still have the banks saying, 'No, sorry, we don't care that you're facing these hardships. We just want our money,'" her daughter, Jimena Cordova, told Go Public.

While the Phoenix pay problems brought things to a head, Jacqueline Cordova says her problems with the bank started three years ago.

When her husband died from a heart attack in 2014, the mortgage was under his name and there was a claim on the estate from a third party, leading to questions around property ownership.

BMO says those "discrepancies" were the main problem, telling Cordova in a June 1 letter, "the issue was never that you fell behind or missed payments."

BMO says it tried to work with Cordova over the years to resolve the issues with her late husband's estate — and with no resolution by the time her Phoenix pay problems started, it had no choice but to foreclose.

That came as a surprise to Cordova, who says the bank gave her no indication that there was a serious issue with her accounts until her government pay problems began.

'Business as usual' for bank

The federal government rolled out the Phoenix pay system in February 2016, and problems paying its more than 300,000 employees started soon after. Some were underpaid, overpaid or not paid at all.

In Cordova's case, she failed to receive her record of employment, which she needed to collect sick pay after undergoing eye surgery while on leave from her job with the Defence Department at Canadian Forces Base Edmonton.

"It all seems to have a domino effect … the government walking away doing nothing and the bank proceeding with business as usual. There needs to be some give and take," she says.

For months, her 27-year-old daughter supported the pair, taking a leave from her post-secondary studies so she could work three jobs to pay the bills.

"We've cut out a lot of things out of our budget," Jimena Cordova says. "We've cancelled cable, we've cancelled our home [phone] line, we're using one car between the two of us or busing, and we stopped eating meat.

"We already cut so much out, but it's still not enough to keep us afloat."

Bank won't budge

Last November, after she missed the $750 payment, BMO filed a court claim and demanded Cordova pay out the full amount remaining on the mortgage: $272,413.

A few weeks later, it served Cordova with foreclosure documents.

Cordova asked the Treasury Board of Canada for help. It sent a formal letter to the bank in mid-December, explaining that the woman's financial situation was the government's fault and asking "for flexibility and understanding" in BMO's dealings with her.

That same month, Cordova was finally issued her record of employment, applied for sick leave benefits, and caught up on her missed bank payment. She hoped the government letter would convince BMO to lift the foreclosure, giving her a chance to secure financing elsewhere.

"With a foreclosure hanging over our heads, no bank would touch us," her daughter says.

They were shocked when on Dec. 21, she received a notice from BMO that it still planned to foreclose on the house.

Bank backtracks

In February, with less than a week before the foreclosure date, the Cordovas contacted Go Public.

After Go Public's inquiries, the bank notified Cordova it would reverse its decision to foreclose and agreed to refinance her.

"From July 2014 through February 2017, we stood ready to work with Ms. Cordova and moved quickly to reach a positive outcome when a number of discrepancies surrounding the status of the estate were finally clarified in February," BMO spokesperson Ralph Marranca wrote in an email.

The vice-president of the union that represents government workers says he's disappointed it took media attention to get BMO to change its mind.

"From all corners of this country, I believe everyone has been made aware that there have been issues with pay for federal public-sector workers," says Chris Aylward, of the Public Service Alliance of Canada, who is also part of a committee dealing with Phoenix pay problems.

"It's very unfortunate that this particular institution wasn't a little more understanding," he says. "[BMO] should have done a little bit more exploration as to exactly why this individual wasn't able to make her mortgage payments."

The bank says it is "pleased that we could help Ms. Cordova."

Phoenix pay cost doubles

CBC News recently reported that the cost to fix the troubled Phoenix pay system is now more than the original amount spent to implement it.

Steve MacKinnon, parliamentary secretary to the Public Services minister, recently announced a $142-million investment to hire more people to help fix the ongoing issues. With that additional

money, the cost to fix Phoenix has risen to about $402 million — more than the $309.5 million it cost to initially implement.

Meanwhile, Canada's public servants are paying out-of-pocket for late charges and penalties incurred when they're unable to pay their bills due to pay problems. They then apply to the government to have their claims reimbursed.

According to the Treasury Board, as of May 12, the federal government has processed 755 reimbursement claims for those out-of-pocket expenses, totalling nearly $62,500.