It's settled: Medical evidence is not required for moral damages suffered by employees

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Cody Yorke

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In employment law, moral damages are awarded to compensate an employee for the employer's bad-faith manner of dismissal where it was reasonably foreseeable that such conduct would lead to the plaintiff's mental distress. The question of whether a plaintiff is required to adduce medical evidence in order to obtain moral damages has plagued litigators in this area. Canadian courts have rendered contradictory decisions, and counsel on both sides have been able to point to appellate authority that supports their clients' position.

It is time for Canadian courts to put an end to this debate by following the Supreme Court of Canada's lead in its recent decision, Saadati v. Moorhead, in which it pronounced the end to the requirement for medical evidence of a recognizable psychiatric illness to obtain damages for mental injury in the personal injury context. Applying this decision to the moral damages context would do away with an unnecessary and irrelevant requirement and give effect to the Supreme Court's original direction to focus on the employer's actions in a moral damages inquiry.

When the Supreme Court introduced damages for an employer's bad-faith conduct in the manner of dismissal in a 1997 decision, Wallace v. United Grain Growers, it made clear that the purpose was to provide protection for employees:

"The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. . . the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be equally devastating."

Moreover, neither Wallace nor the 2008 decision Honda v. Keays (in which the Supreme Court recast the damages established in Wallace as moral damages, awarded as a lump sum rather than an extension of the notice period, where mental distress is reasonably foreseeable) stated that medical evidence is required in order to support an award of these damages.

Nonetheless, lower courts have muddied the waters by issuing contradictory decisions, sometimes awarding moral damages without medical evidence and other times stating that medical evidence is required. Even the Ontario Court Appeal has released contradictory decisions on this: In Slepenkova v. Ivanov, released in June 2009, it upheld an award of moral damages on the basis of a finding that the employer had acted in bad faith by sending a disparaging message about the terminated employee to other employees' pagers, but in Brien v. Niagara Motors, released in November 2009, it overturned a moral damages award on the basis that the terminated employee had not sought any medical attention or professional assistance nor undergone any therapy for mental distress.

There are, of course, policy arguments on both sides of the debate. Natalie MacDonald's argument against the requirement for medical evidence in her book, Extraordinary Damages in Canadian Employment Law, is that it off-loads the court's fact-finding authority on to the medical profession, leading to "checkpoint medicals, where medical reports will be churned out based on the employee's self-reporting of their condition." She argues that this goes against the Supreme Court's direction to focus on the employer's conduct and ignores the fact that some employees will address their mental distress in other ways. On the other hand, proponents of the requirement argue that it provides an objective standard and prevents indeterminate liability.

Now, it appears that the Supreme Court's decision in Saadati may put to rest any notion that medical evidence is required to obtain moral damages, given that the requirements to prove moral damages have always been a lesser standard than for tort. In the unanimous decision, the Supreme Court rejected the status quo requirement for a plaintiff to adduce medical evidence of a recognizable psychiatric illness in favour of a more pragmatic approach in upholding the trial judge's award of damages for mental injury based solely upon the testimony of the plaintiff's family and friends about the changes in the plaintiff's personality.

Saadati is clear: ". . . while relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not a requirement as a matter of law." In reaching this decision, the Supreme Court considered the same policy arguments that have been made in regard to the debate over medical evidence in a moral damages claim and wholly rejected those in favour of the requirement, highlighting that the need to adduce medical evidence, which was developed by the lower courts, imports an arbitrary and legally irrelevant classification scheme into the law.

Similarly, the introduction of a requirement for medical evidence in lower court decisions has mischaracterized the Supreme Court's reasoning in establishing moral damages, and it needlessly complicated the matter by creating an arbitrary requirement for medical evidence that has no actual legal relevance to the issue of whether the plaintiff suffered mental distress as a result of the employer's conduct. This can be reasonably established on the basis of the plaintiff's own testimony or, as in Saadati, the testimony of the plaintiff's family and friends who observed the impact on the plaintiff.

Our law should not arbitrarily impose a higher evidentiary requirement on someone whose mental distress was caused by their employer's mistreatment of them than someone whose mental distress was caused by a motor vehicle accident or other tortious negligence, particularly given that the requirement to establish moral damages in contract is lower than for intentional infliction of mental suffering in tort. And, even in the context of intentional infliction of mental suffering, then-Justice Beverley McLaughlin (now chief justice) awarded damages for the tort in Rahemtulla v. Vanfed Credit Union "notwithstanding the absence of expert medical evidence."

It is only a matter of time before the Supreme Court of Canada releases a decision similar to Saadati in the moral damages context. In the meantime, lower courts would be wise to carefully consider Saadati's implications for moral damages.

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Chief Justice Beverley McLachlin to retire from Supreme Court of Canada
McLachlin has led the country's top court for more than 17 years, in the process transforming it into a modern institution.
Toronto Star
Tonda MacCharles
June 12th 2017

OTTAWA—Supreme Court of Canada Chief Justice Beverley McLachlin is bringing down the gavel on a 36-year judicial career that spanned 28 years on the top court — 17 of them as the country's first female, and longest-serving, chief justice.

The legal trailblazer will retire effective Dec. 15, nine months before she reaches the mandatory retirement age of 75 although she may sign off on outstanding rulings for another six months after she leaves the bench.

It gives the government time to fill a seat traditionally reserved for a judge from British Columbia and to replace her as chief justice — a chance for Prime Minister Justin Trudeau to shape the court for generations to come.

By convention, the post has alternated between the most senior anglophone and francophone member of the bench — and it would ordinarily be the turn of Justice Richard Wagner, appointed by Stephen Harper.

But that convention was ditched by Pierre Elliot Trudeau in two of his Supreme Court appointments and may well be set aside by his son if the government opts to make a "major statement on its agenda of inclusion and diversity," said McGill University political science professor Chris Manfredi.

(Trudeau's Liberal government already sidestepped convention when it accepted applications from across Canada for what was supposed to be a seat reserved for Atlantic Canada, a move that caused an uproar in that region.)

McLachlin's departure leaves a huge gap at the top of the judicial branch of government. Her legacy includes seminal judgments on the country's constitutional framework, charter rights like free speech and security of the person, and Indigenous law.

In a written statement Trudeau thanked McLachlin for her long and dedicated service, and said her judicial accomplishments are “unparalleled in Canadian history” and “reach into every part of our law. Canadians owe her an immense debt.”

Justice Minister Jody Wilson-Raybould spoke to McLachlin Monday morning and told reporters she appreciated her as “a progressive force in terms of Indigenous peoples and advancement of reconciliation and recognition.”

“On the Supreme Court she has helped us as a country define and advance and develop the law and our Constitution, and has made so many seminal judgments that have further defined who we are as Canadians.”

McLachlin transformed the high court into a modern institution at a time when it was under huge political pressure after early charter rulings left conservative lawmakers with buyer’s remorse.

She became the target of Conservative critics for leading a judicially “activist” bench that thwarted the will of Parliament. McLachlin coolly rejected that label and countered it was elected legislators who tasked judges with breathing life into the Charter of Rights and Freedoms. The 1982 Constitution gave courts the ability to overturn laws that limited rights in an unreasonable and unjustifiable way.

Still, after a heady two decades of romps through charter law, a McLachlin-led court stepped carefully as it navigated the next phase of charter interpretation, emphasizing the need to balance rights and to respect the will of legislatures.

“I think she had the best sense of the strategic role of the chief justice of the Supreme Court of Canada . . . in calibrating the court’s decisions, keeping them in a range of public opinion that would ensure that the court never really became a target of public outrage of any kind,” said Manfredi.

Toronto criminal defence lawyer Frank Addario, a director of the Canadian Civil Liberties Association, said she is “the epitome of a balanced judge. She is the intellectual leader of a measured approach to civil liberties and compassion in relation to individuals.”

University of Ottawa constitutional law professor Sébastien Grammond said under McLachlin, the court adopted a vision of the constitution overall “that was perhaps more balanced than before.” He cited rulings in reference cases on the senate, the Supreme Court and the national securities regulator, and also her rulings that decriminalized assisted suicide and prostitution which further defined what the charter right to “security of the person” means in law.

Nevertheless McLachlin bore the wrath of Conservative prime minister Stephen Harper, who suggested McLachlin was guilty of improperly lobbying his justice minister against his pick of

Marc Nadon to the top court. It blew up in Harper's face when the legal community in Canada backed the propriety of McLachlin's actions in flagging a potential legal issue with the appointment.

McLachlin was appointed by former prime minister Progressive Conservative Brian Mulroney in 1989 and named chief justice by Liberal prime minister Jean Chrétien. She advanced collegial relations among Type A judges and lawyers where cliques had often formed, pushing for consensus and clearer statements of Canadian law. Under her administration, backlogs cleared, and the court made leaps in public outreach, with she and other judges travelling internationally, delivering speeches, doing interviews and joining social media.

Tough on litigators who prattle on, famously reserved in person, McLachlin has a plain-speaking, often wry style in court.

Yet those who know her speak of her easy laugh. McGill University law professor Daniel Jutras, who worked as her executive legal officer for three years, said McLachlin deals with stress by resorting to humour and was an impressive champion for the Canadian charter, Canadian judges and the independence of the judiciary abroad.

"She's very charismatic in that environment, which is very odd because she's a very shy person, she's very reserved and private."

McLachlin outlasted 19 of her judicial peers in her 28 years on the top court.

In the announcement of her retirement, McLachlin said, "It has been a great privilege to serve as a justice of the court, and later its chief justice, for so many years. I have had the good fortune of working with several generations of Canada's finest judges and best lawyers. I have enjoyed the work and the people I have worked with enormously."

The woman who still taps her roots in Pincher Creek, Alta., as inspiration in speeches, interviews and the art on her office walls, is an avid reader and cook. She lost her first husband to cancer, and later married Frank McArdle, an Ottawa lawyer who proposed to her over an airplane intercom. She has an adult son who is a musician.

NDP Leader Thomas Mulcair praised Mclachlin's leadership, saying "She's left her mark on the legal culture of our country for a full generation, but that will echo for generations to come."

She also chaired the Canadian Judicial Council of chief trial and appellate judges, which oversees discipline of judges in Canada; chaired the National Judicial Institute, which oversees judicial training; and chaired the Advisory Council of the Order of Canada, which decides who gets the prestigious national honour.

She stepped aside when the council weighed whether to strip Conrad Black of his Order of Canada medal and pin. Black gave up his Canadian citizenship to accept a British peerage, and then fought to retain his distinction, but was removed from the Order of Canada rolls after his conviction in a U.S. court.

Last fall, in an exclusive interview McLachlin told the Star she still had work to do to integrate an incoming new judge, who turned out to be Trudeau's first appointment, Malcolm Rowe.

Trudeau kicks off public service week promising to fix Phoenix
But union boycotts and demands 'day's pay for a day's work'
iPolitics
Kathryn May
June 12th, 2017

Prime Minister Justin Trudeau kicked off National Public Service Week thanking federal workers for going "above and beyond," while promising to work "tirelessly" to fix the Phoenix pay system to ensure they're paid.

"Public servants have experienced many hardships caused by the implementation of the Phoenix pay system," he said in a statement. "This problem is unacceptable and we are working tirelessly to make sure every employee gets the pay they are owed."

After a year of Phoenix foul-ups, Trudeau appointed a working group of cabinet ministers, led by senior minister and Public Safety Minister Ralph Goodale, to come up with a government-wide fix for the system. The group recently announced the government was pumping another $142 million into Phoenix fixes to hire more staff and introduce a case management system.

As Trudeau issued his statement, the Public Service Alliance of Canada continued to marshal a boycott of the week's events over the Phoenix fiasco. Today it launched radio ads calling for the plagued pay system to be fixed "once and for all" so public servants know a "day's work will mean a day's pay."

The ads, which are posted online, are only running in the National Capital Region where most departments are headquartered.

National Public Service Week, which began in 1992 to honour the work of Canada's public servants, runs from June 11 to 17.

Trudeau patted public servants on the back for "rising to the occasion" over the past year – negotiating international trade agreements, responding to flooding in many communities and the Fort McMurray wildfire and helping to settle Syrian refugees.

“To federal public servants, I say thank you. You play an integral role in our society and your hard work and dedication benefit us all. I look forward to continuing to work with you to strengthen the middle class and build a Canada where everyone has a chance to succeed,” he said.

But for many public servants, the year was overshadowed by Phoenix foul-ups as thousands were overpaid, underpaid or not paid at all. The botched system has dominated internal government operations and become a management black eye for the public service.

“It seems hollow for this government to say that it recognizes public service workers while it can’t pay their workers correctly and on time for the vital work they do,” said PSAC President Robyn Benson.

PSAC led the charge among federal unions calling for the Liberals to delay the rollout of Phoenix in February 2016 and again in April of last year. So far it is the only major union to boycott the week’s events. It’s urging members to instead attend the events and activities the union has planned to mark the occasion.

The union first boycotted Public Week Service in 2012 when the Harper government began its downsizing and it continued in the Tory years over job cuts, collective bargaining and attempts to reform sick leave.

The public service employs about 260,000 workers across the country. Many departments will be hosting events and other activities to mark the week. This year’s theme is “Proudly Serving Canadians for 150 years” in recognition of the anniversary of Confederation.

“National Public Service Week, on Canada’s 150th birthday, is a perfect time to share my respect and appreciation for this country’s dedicated public servants,” said Treasury Board President Scott Brison. “They include some of the brightest and most creative minds in the country, and my mandate is to give them the resources, incentives and confidence to make the leap to providing 21st century services for Canadians.”

PSAC members boycott Public Service Workers Week because of pay system
Journal Pioneer
Millicent McKay
June 13th 2017

Ginger Cole doesn’t like saying she’s received phone calls from crying federal employees. But over the last few months, the calls have become frequent.

“The problem federal employees have been facing because of the Phoenix pay system aren’t anything new. But it’s gone on so long, this is what it has come to.”

Cole is the president of the local 90006 union of taxation employees.

She has encountered people who can't afford to put food on the table, had their cars repossessed, and served eviction notices.

Phoenix has been in place for two years and needs to be dealt with, she said.

"We have a high number of term employees at the P.E.I. Tax Centre. A lot of them are not receiving their record of employment in time when there term is over which means they can't apply for unemployment. People are getting to the point where they've borrowed all they can borrow."

National level change is needed, Cole added.

"Locally we are trying to do all we can to support the federal employees, but Phoenix is causing a problem across the country. We need action."

Cole said scrapping the Phoenix program is not an option.

"They want to fix the problems.

"I just want people to be paid. I don't care how it's done. Just pay them and pay them right."

On Tuesday, local members of the Public Service Alliance Canada and federal government employees had a barbecue at Green Shore in Summerside to raise awareness of the Phoenix system problems and to serve notice that they are boycotting National Public Service Week.

"National Public Service Week should be about celebrating the work of public service workers, but instead we're here fighting to get paid," said Jeannie Baldwin, the regional executive vice-president for PSAC.

Before Phoenix was rolled out by the Conservative government of the time, PSAC employees cried out in opposition, said Baldwin.

"They didn't do the research and they didn't listen to us. If they had, they would have known that the system didn't work. It's cost them millions of dollar to fix the problem and there is no end in sight."

There are employees who are afraid that any disruptions in their work schedules could damage their pay.

“People are using their vacation because they’re worried if they take another form that their pay will be stopped or will go wrong,” said Baldwin.

There are people who have checked their bank accounts and had $0 as their pay because of Phoenix, she added.

Heather Ford, spokesperson for the Island PSAC chapter, said even after two years many employees are still facing uncertainty.

“Some are forced to rely on their lines of credit, credit cards and family loans because they are going without pay, under payment or over payment which they have to pay back and may not be able to.”

She added, “We’re tired of sending emails to MPs. We just want people to get paid. The premise of going to work every day is simple. I work for you and you will pay me.”

Chief Justice McLachlin: The Supreme Court’s steady hand
David Butt
National Post
June 13th 2017

David Butt is a Toronto-based criminal lawyer who has argued multiple cases before the Supreme Court.

The Supreme Court of Canada homepage opens with, “Canadians are privileged to live in a peaceful country.” With Chief Justice Beverley McLachlin retiring in December, that homepage opener is too modest. It should read, “Canadians are privileged to live in a country with an outstanding chief justice.” History will cast an approving gaze on the McLachlin court, for four reasons.

First, Chief Justice McLachlin guided the Supreme Court with a steady hand through long periods of both Liberal and Conservative government. Sound judicial equilibrium during political ebb and flow is an under-appreciated imperative whose value to the country is enormous.

People initially come to court because they are in a fighting mood, and cannot make peace among themselves. People make it all the way to the Supreme Court because their fights also raise far-reaching questions of national importance, often ideologically or politically charged. Thus the peace-making role of the Supreme Court is not limited to deciding for or against one of the litigants before it. The court’s decisions must also build consensus on large social or legal issues for the entire country.

The Supreme Court's work is nothing short of nation-building through the law. Its work must not be buffeted by changing political winds. It must always chart a course based on enduring values that will continue to unite us as governments come and go. In accomplishing this difficult but essential task, Chief Justice McLachlin's guidance has been deft and perceptive. Throughout her tenure, judges have been appointed by both Liberal and Conservative governments, to decide many controversial cases. Despite the potential for divisiveness, we witnessed virtually no ideological posturing that devalues the work of the United States Supreme Court. Instead, the McLachlin court has been prudent, and although sometimes underwhelming, always carefully reasoned and reasonable. The McLachlin court built out solid legal foundations for social cohesion. In its understated but strong approach to the law, the McLachlin court was prototypically Canadian and Canada is stronger for her court's work.

Second, the McLachlin court laid crucial groundwork for the core Charter of Rights and Freedoms challenge for the 21st century: reconciling competing rights. Shortly after our Charter arrived in 1982, the Supreme Court led by then-chief justice Brian Dickson had to give the new document meaning and substance. Chief justice Dickson, another Canadian legal giant, rose to the task. His court made our Charter both vigorous and flexible.

But by giving such commendably expansive content to Charter rights and freedoms, the Dickson Court created an imposing second-generation challenge: What to do when two or more of those wide-reaching rights or freedoms clash? It fell largely to the McLachlin court to start wrestling with that challenge, and the McLachlin court responded admirably. Her court rejected the simplicity of an either/or approach to conflicting rights, and instead embraced a much richer, more nuanced perspective that interprets competing rights with great sensitivity to how they actually impact the real lives of the people affected and, most importantly, gives each competing right as much scope as possible. The McLachlin message on competing rights is one of maximum generosity and maximum accommodation. Her Court has left our approach to rights and freedoms imbued with compassion, common sense, inclusivity, balance and breadth. Those are praiseworthy guiding principles with enormous promise.

Third, as our first female chief justice, she shattered the glass ceiling so forcefully yet so elegantly that not a shard remains protruding to deter any woman from aspiring to rise as high. With seeming effortlessness that was really a winning combination of grace and acuity, she made gender in high office a non-issue in the best possible sense. This is no small accomplishment in the legal profession, whose thought patterns and practitioners often remain far too deeply traditionalist and stubbornly retrograde.

Next Supreme Court pick should come from Western Canada, committee urges
Sean Fine
The Globe and Mail
June 14th, 2017

The Liberal government is being urged to appoint the next Supreme Court justice from Western Canada, and not to let the search for a minority appointee trump the tradition of regional representation on the country's most powerful court.

The government opened the appointment process last summer to applicants from the entire country, in what legal observers said was an attempt to make the Supreme Court more diverse. (It is now five white males and four white females. Two are Jewish, one has Greek heritage and one has an Italian background.)

But with a new spot coming open next December, when Chief Justice Beverley McLachlin retires, the chair of the Commons justice committee said that the government's wide-open approach amounted to a form of exclusion.

Regional representation is "not something that should be secondary," Anthony Housefather, a Montreal Liberal MP who heads the Commons justice committee, told The Globe on Tuesday.

The questionnaire that applicants must fill out reflects a search for "people of different language groups, different cultures, different colours, to make all Canadians feel that they're part of the court," he said. In the same way, "the regionality of Canada is also a part of what distinguishes different Canadians. Not having someone from the Atlantic provinces is not something that would make Atlantic Canadians feel part of the court."

A spokesman for Justice Minister Jody Wilson-Raybould said she will respond later this week to a recommendation from the justice committee that it stress the importance of regional representation in Supreme Court appointments.

By law, the court must have three judges from Quebec, in recognition of that province's unique civil code. But outside Quebec, the convention of representation from across Canada has no binding legal force. It is a tradition or a custom that Western Canada has two judges on the court. Currently, one is from Alberta – Justice Russell Brown. The other, Chief Justice McLachlin, born and raised in Alberta, was appointed from British Columbia, where she had been a judge and a law professor.

"Conventions are ethical rules about the proper use of legal powers," Peter Russell, a political science professor emeritus at the University of Toronto, said in an interview.

"And like a lot of ethical rules, they're not watertight, they're not like traffic regulations. They're not precise. And whether or not you go with them has a lot to do with politics. They're an attempt to use the powers the way you think people in the country want the powers used. But they're not written in stone."

The government revamped the appointment process after the retirement of Justice Thomas Cromwell of Nova Scotia. It created a self-nomination process in which anyone, anywhere in the

country, could apply for the opening, as long as they had been a lawyer for 10 years and met other qualifications. It also created an independent advisory board to review the applications and create a shortlist of candidates from which the prime minister would pick his nominee. Regional representation was mentioned as a factor to consider, but nothing more. Atlantic Canada is not deep in qualified minority candidates, and the government reduced the pool even further by insisting on functional bilingualism, which is tested by a federal agency.

The dropping of the regional convention led to a storm of protest from within the government's Atlantic caucus, and the Atlantic Provinces Trial Lawyers Association filed a legal challenge. The Commons ultimately voted 270-0 to ask the government to respect regional representation, and Mr. Trudeau voted in favour of it.

There was talk at the time that the government had approached Mary Ellen Turpel-Lafond, who has an Indigenous background. Those who know her, including judges who had worked alongside her in Saskatchewan, told The Globe that the Harvard-trained lawyer and judge, who spent 10 years as British Columbia's Representative of Children and Youth, would be a natural for the court.

But Ms. Turpel-Lafond told The Globe then that she would not take an appointment where she was not wanted, and she said no one in Atlantic Canada had reached out to her and encouraged her to stand for the position.

The Globe attempted to contact Ms. Turpel-Lafond through an intermediary on Tuesday. The intermediary reported back that she was not available to talk.

'Action is desperately needed': Senate to report on Canada's clogged court system
Committee says accused killers and child molesters are on the loose due to court delays
CBC News
Kathleen Harris
June 14, 2017

A Senate committee is set to deliver a potentially damning report today on what's causing delays in Canadian courts and how to fix the system.

"Action is desperately needed," reads a news release from the committee. "This crisis must be addressed urgently to maintain trust in the justice system, to give victims and their family the justice they deserve and to keep all Canadians safe."

Senators Bob Runciman, George Baker and Pierre-Hugues Boisvenu, from the legal and constitutional affairs committee, will hold a news conference in Ottawa at 11 a.m. ET and CBCNews.ca will carry it live.

The release said the report will recommend ways to "put an end to the culture of complacency of our court system and provide concrete, practical measures to transform our courts system into a justice system."

"People accused of murder and child sexual assault roam our streets as a direct result of court delays — a fixable problem — that are crippling the justice system," it reads.

The statement said last year's Supreme Court decision that set time limits for trials "brought this crisis to a head."

That landmark ruling, known as R. vs. Jordan, imposed a deadline of 18 months for provincial court cases, or 30 months in a Superior Court, to uphold an accused person's charter right to a trial without unreasonable delays.

The decision caused much confusion over interpretation, and triggered hundreds of requests for a stay of criminal proceedings.

Today's Senate report comes just two days before the Supreme Court is set to rule on another case about court delays, which justices heard in April.

Some legal experts said the Cody ruling could ultimately fine-tune the Jordan decision.

Representatives from British Columbia, Alberta, Manitoba, Ontario and Quebec made arguments for greater flexibility with timelines to deal with unforeseen circumstances and complexity to ensure each case is given due diligence.

The Senate committee's news release pointed to two cases where the justice system had let down victims, including one case where a Quebec woman accused her stepfather of sexual abuse and waited four years for a trial only to have the accused granted a stay of proceedings.

Judicial vacancies

In another case, a man accused of killing a Montreal man with a machete had his charges stayed due to the Jordan ruling.

The committee tabled an interim report last August, calling on the government to immediately fill vacant judicial seats.

As of June 1, 2017, there were 53 vacancies, according to the website for the Office of the Commissioner for Federal Judicial Affairs Canada. With more appointments this month, the total number of vacancies is now at 48.

There were 41 when the committee released its interim report.

The report also recommended that the federal government work with the provinces and territories to implement restorative justice, alternative courts and shadow courts. It also called for investments in technology to modernize and make more efficient criminal proceedings.

Government of Canada announces judicial appointment in the province of Ontario
CNW
June 14, 2017

OTTAWA, June 14, 2017 /CNW/ - The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, today announced the following appointment under the new judicial application process announced on October 20, 2016. The new process emphasizes transparency, merit, and diversity, and will continue to ensure the appointment of jurists who meet the highest standards of excellence and integrity.

Chris de Sa, Crown counsel with the Public Prosecution Service of Canada, is appointed a judge of the Superior Court of Justice in and for the Province of Ontario in Newmarket. He replaces Madam Justice C. Gilmore (Newmarket), who has been transferred by the Chief Justice to Toronto to replace Mr. Justice K. Whitaker, who retired effective May 13, 2016. The vacancy is therefore located in Newmarket.

Biography

Justice Chris de Sa received his B.A. from York University and his LL.B. and M.B.A. from the University of Toronto. While in law school, he was a research assistant to Professor Kent Roach, one of Canada's foremost experts in criminal and constitutional law. Justice de Sa articled and practised civil litigation at two large firms before joining the Department of Justice Canada as extradition counsel in 2002. In 2004, he became Crown counsel with the Public Prosecution Service of Canada. His work has included large-scale investigations and prosecutions, as well as criminal appeals before the Ontario Court of Appeal. In addition, he has published academic papers on issues related to evidence and criminal law, including entrapment and informant privilege.

Justice de Sa was born and raised in Scarborough. His parents, both of South Asian descent, immigrated to Canada from Kenya and both worked in the justice sector. From them, Justice de Sa inherited a deep-seated commitment to hard work, public service, fairness, and compassion. He lives with his young family outside of Toronto, where he coaches youth soccer and volunteers at his church on a weekly basis.

Excerpts from Justice de Sa's judicial application will be made available shortly.

Time for an Indigenous judge on the Supreme Court: Editorial

It's time for the federal government to appoint an Indigenous judge to the Supreme Court of Canada – or explain why not.

Toronto Star
Star Editorial board
June 14, 2017

It's time for the federal government to appoint an Indigenous judge to the Supreme Court of Canada – or explain why not.

Beverley McLachlin has just announced she will step down as chief justice in December. That will open up a vacancy and hand the Trudeau government another opportunity to shape the top court and Canadian law for many years to come.

The government should make it a priority to find the best-qualified Indigenous jurist to fill this crucial position. In 2017, as Canada marks the 150th anniversary of Confederation, it would be hugely symbolic for First Nations people finally to see one of their own on the high court.

The importance of this goes beyond symbolism, however. It has long been accepted that diversity on the bench improves the quality of justice by widening the range of perspectives brought to judicial decision-making.

It also increases public confidence in the court system. No less an authority than McLachlin herself has said that "many people, particularly women and visible minorities, may have less than complete trust in a system composed exclusively or predominantly of middle-aged white men in pinstriped trousers."

This is especially important for Indigenous people, who are hugely over-represented in the justice system. As Justice Minister Jody Wilson-Raybould pointed out last year, while they form about 4.3 per cent of Canada's population, they make up more than a quarter of prison inmates. In some parts of the country, Indigenous people are up to 33 times more likely to end up behind bars.

At the same time, Canada's judiciary has been slow to change, although the pace has picked up under the Trudeau government. A survey last year showed that a scant 1 per cent of judges in provincial superior and lower courts are Indigenous (indeed, only 3 per cent are from visible minorities). The courts simply don't reflect the country's population.

Of course, many will argue that judges should be chosen strictly by merit, without regard for other factors. But it is beyond belief at this point that only white (and still mostly male) lawyers can meet the standards of professional skill, experience and integrity to qualify for appointment to the bench.

Editorial: It's a long road ahead, even with a good map, for fixing court delays
Ottawa Citizen
Ottawa Citizen Editorial Board
June 15, 2017

A Senate committee has laid out dozens of recommendations for how the federal and provincial governments can address serious court delays. If everyone agrees to follow them, the problem may be solved.

But not quickly. Nothing, short of a climbdown by the Supreme Court of Canada, will immediately stop some people who face serious criminal counts from walking free as charges against them are stayed due to the long delays they face in the justice system.

The Senate legal and constitution affairs committee's top suggestion is that the federal government legislate alternative remedies for trials that take too long, other than staying charges, then run these suggested remedies by the top court to ensure they're constitutional.

This is an interesting idea but a bit tricky: In 1987, the Supreme Court said that when a court delay violates the right to a swift trial, the only possible fix is to stay the charges. To allow a trial to proceed "would be to participate in a further violation of the Charter," the court wrote. Staying a charge means the accused walks free, even if the charge is something serious such as murder. Last summer, in a case called Jordan, the Supreme Court set firm limits on how long criminal trials can take. Above those limits, a violation of the accused's right to a speedy trial is presumed and the case is stayed.

Friday, the Supreme Court will rule on a different case, called Cody, based on a long trial delay for a man who faces drug-related charges. Its decision could clarify some of the rules around excessive trial delays.

It's possible – if unlikely – the court will assist in resolving some of the problems that arose after the Jordan ruling, which led to several abrupt stays of charges, including first-degree murder charges against Ottawa man Adam Picard.

But no one can count on the court to shift position. So the government should move on those reforms suggested by the Senate committee that will make an impact, such as actually appointing judges to the 53 federal judgeships that are vacant.

Meanwhile, there is a responsibility among governments, judges, court staff, Crowns, defence and police, to try to move trials – and reform – along. The federal, provincial and territorial justice ministers need a clear plan when they meet in September. More money is needed too: triaging and managing court cases adds costs. So do attempts to address many causes of crime, such as poverty and addiction.

There’s no quick fix. But the Senate has provided a map toward an eventual solution. Governments should follow it.

Justice delayed is justice denied
Toronto Sun
Ed Prutschi
June 14, 2017

In 1990 we called the crisis Askov. By 1992 the crisis went by the names of Morin or Sharma. Over the next decade and a half, the crisis adopted a dozen other aliases. Since 2016 it’s answered to the name, Jordan. Tomorrow, when the Supreme Court of Canada delivers its next ruling on the appalling delays in our criminal justice system, the crisis will have yet another name, Cody.

To paraphrase Shakespeare, a crisis by any other name, still plods along just as slowly.

In an attempt to finally break the cycle of simply renaming our immortal delay crisis, Canada’s Senate has released a comprehensive report detailing over fifty recommendations to address the intolerable “culture of complacency” so derided by the Supreme Court of Canada in the recent Jordan decision.

Some of the recommendations are so glaringly apparent, it is astounding governments – both federal and provincial – needed a formal committee to state the obvious. Speeding up the appointment of new judges to fill vacancies falls squarely into this category.

Judges don’t typically wake up one morning and, on a whim, cast off their robes sailing off into the sunset on a surprise retirement cruise. A judge’s exit is a planned and entirely predictable event. Why do we still find ourselves with dozens of judicial vacancies? Senator George Baker, a longstanding and influential member of the Legal and Constitutional Affairs Committee, suggests that judicial candidates be ‘head-hunted’ in advance ensuring that the search and vetting process would be completed before a departing judicial retirement allowing a smooth and uninterrupted transition to the next pre-approved candidate on the qualified list.

The report also calls out the widespread practice of over-charging and over-reliance on the criminal justice system to prosecute cases that would be more equitably and efficiently dealt with through diversion or regulatory frameworks. Pick your battles cops and crowns. The system can no longer afford to entertain your every whim.

But one of the key recommendations demonstrates just how fatalistic our battle against the delay crisis has become. Currently, when a case crosses the threshold into an unconstitutionally long delay, the answer to that failure is to toss the charges out entirely – a remedy known as a stay of proceedings. This has ensured a steady diet of upsetting stories in which accused murderers, rapists and child abusers have been released without ever determining their guilt or innocence.

The Senate report now recommends that the stay of proceedings, always reserved for only the clearest and most egregious breaches of constitutional rights, be even more circumscribed. Take away the remedy of a stay in the most serious cases and instead substitute a reduced sentence for those found guilty after a delayed trial or pay out civil costs awards to the those acquitted after waiting too long for their day in court.

This recommendation, while attractive on its face, is a tacit admission that we are either unable or unwilling to fix the real problem. Delays will continue. The crisis will get a new name. All that will change is the price we pay. Canadians deserve better.

— Prutschi is a defence lawyer

Justice system 'in urgent need of reform': Senate committee
Recommendations to reduce trial delays come just ahead of important Supreme Court ruling
CBC News
Chris Hall,
June 15, 2017

The Supreme Court of Canada is known as the court of last resort because its decisions are final. There are no more appeals to make, no more arguments to be heard on a case.

But every so often the court of last resort gives itself a kind of do-over using a new case to clarify a previous decision.

That's what's expected to happen on Friday, when the court will rule on a Newfoundland and Labrador drug trafficking case that took more than five years to come to trial. That will give the court a chance to clear up confusion it created with a decision last July — confusion that's led to hundreds, if not thousands, of criminal cases being stopped simply because they took too long to come to trial.

The decision came to be known as "the Jordan ruling" after the court said Barrett Richard Jordan's charter rights had been violated due to an "unreasonable" 49-month wait for a trial. Drug charges against him were stayed.

Criminal courts scramble to meet Supreme Court's new trial timelines
Supreme Court sets new deadlines for completing trials
What's a reasonable time? The majority of judges decided in the 5-4 ruling that it's 18 months in provincial court or 30 months in superior court from time of charge to conclusion of trial.

Lower court judges soon began tossing out all sorts of cases — some of them involving charges of murder and sexual assault — on the grounds that they, too, had taken too long.

The decisions had widespread implications.

Victims and their families felt that they would never get the chance to see justice done.

For those accused of a crime, there would be no opportunity for a day in court — or, as one judge put it in stopping a murder case in Ottawa last year, "The accused himself may find this to be a hollow victory. A stay of proceedings is not the same as a verdict of not guilty."

'Urgent' need for reform

It's against that backdrop that the Senate committee on legal and constitutional affairs released its report Wednesday with a list of recommendations to reduce trial delays.

The 205-page report is as thorough as it is long.

But it starts with the premise that Canada's justice system is "in urgent need of reform."

Among the recommendations: that a stay of proceedings should not be the only remedy available to courts, including the court of last resort, in cases that have dragged through the system. Another recommendation is that courts have to do a better job of managing cases.

Perhaps most importantly, the report urges the federal justice minister to take the lead in changing the Criminal Code to reduce procedural and other barriers to a speedy trial, and to fill a judicial vacancy as soon as a judge retires.

Sex assault cases in Alberta collapse due to excessive delays
Man accused of murder has case stayed due to Jordan ruling
Everyone in the system is overworked, said the committee's deputy chair, Liberal Senator George Baker, as he discussed what the committee learned during its cross-country hearings that included interviews with 39 judges, with crown attorneys, defence lawyers and police.

"We saw courts lined with lawyers asking for a date to be set [in order] to set dates for trial," Baker said Wednesday, shaking his head at the absurdity of it all.

"Imagine that."

'The courts are sawing sawdust.'
- Senator George Baker
Baker said the committee learned that it takes between five and 10 times longer for criminal cases to be tried in Canada than in the UK, Australia and New Zealand. The delays are getting longer, and legal costs are going up here even as overall crime rates are dropping.

"The courts," Baker said, "are sawing sawdust."

In other words, too much time is being taken up on administrative issues. Too much time is being wasted because defence lawyers aren't getting advance disclosure of all the evidence so they can properly represent their clients, or because they're filing too many motions that clog up the works.

Emergency meeting

Lost amid all the manoeuvring, all the legal jousting, are the victims and the accused.

Federal Justice Minister Jody Wilson-Raybould held an emergency meeting with her provincial and territorial counterparts in April to discuss the Jordan ruling and what should be done, including changing the law to provide alternative remedies to staying a charge.

"It's something we have considered and will continue to consider to see if it can assist in contributing to relieving the delays," the minister said Wednesday.

She also defended her record of filling judicial vacancies — even though there are more today than when the senate committee released its interim report back in August.

The Supreme Court blamed the delays on what it called a "culture of complacency" in the criminal justice system.

Conservative Senator Bob Runciman likes the phrase, too. He chairs the legal and constitutional affairs committee and is a former Ontario solicitor general.

"You know, I used to be part of these federal-provincial conferences, and I'm not sure an awful lot came out of them," he said on the midweek podcast of CBC's The House. "When we talk about the culture of complacency, I think that applies to governments of all political stripes, provincially and federally."

Changing that culture, he added, begins with addressing the problems that contribute to the delays, and ensuring the concept of justice is restored to the criminal justice system.

Christie Blatchford: Senate report on court delays gets at big truths about criminal justice system
National Post
Christie Blatchford
June 14, 2017

Earlier this week, in a grovelling exercise that is the norm for journalists wanting copies of court exhibits in most parts of this country, I found myself in line at the clerk’s counter at the main courthouse in downtown Toronto.

I was already beside myself with indignation, having spent the morning trying to hear the lawyers and witness in a significant sex-assault trial I am covering — microphones that amplify are a rarity in Ontario courts — and being stymied in my efforts to even physically get the permission form for exhibits to the judge.

In the end, I stood up and addressed Her Honour in court, and she settled the whole business with her usual efficiency, fixing what she could.

Still, I was luckier than members of the public, who endure the same time-wasting lunacy and often also must engage in the courting of lesser clerks in order to ascertain the correct counter, room and staff in front of whom to perform the full grovel.

And I was certainly luckier than the lawyer in line before me.

Six hours earlier, as she reminded one of the clerks, she had won bail for her client.

Alas, he was still languishing locked up in the cells, there being not enough staff to process the paperwork to get him released and no justice of the peace to sign his bail in any case.

There was only one J.P. in that day, the lawyer was told. And he was a half hour late so was running behind.

Around her were distraught family members of her client.

It is with this recent anecdote that I segue to the long report released Wednesday by the Standing Senate Committee on Legal and Constitutional Affairs.

It's this committee's final report on the crisis of delay, and what the Supreme Court of Canada famously called the "culture of complacency" that infects Canadian courts.

Complacency is exactly what happened in my court two days ago, at the clerk's office, and most outrageously, to the poor S.O.B. who should have been feeling the sun on his face well before he did, if that is, he ever got his bail signed and was sprung.

Far be it for me to engage in wanton praise of anything that comes out of the Senate, but this report is one of the smartest things I've read about justice and the system in Canada.

I give credit for that, at least in part, to senators Bob Runciman, a level-headed veteran former Ontario Conservative MPP who was the committee chair, and George Baker, who I don't know but who is a Newfoundlander and therefore entitled to be presumed wise and pragmatic both.

It takes far too long to get to trial in this country, a situation recognized by the Supreme Court last July in a case called R v Jordan. The court set strict new time limits for addressing the delay

and ever since, as cases that exceeded those generous limits were granted “stays” and accused people walked free, the courts have been in their genteel way, crying that the sky is falling. All the while, the various participants in the system have been throwing proposed solutions at the federal justice ministry, often with an eye to protecting their slices of turf or advancing their particular agendas.

The Senate committee heard them all — 138 witnesses, including sitting and retired judges, prisoner advocates, Crown prosecutors and defence lawyers — over the past 16 months.

Not everyone will agree with all of their 50 recommendations. I don’t myself.

But the thrust of the report is fabulous, because it tackles the system as a whole and recognizes certain big truths.

The first is, there are too many people in jail. Prison is not the place for drug users, the mentally ill, the impoverished aboriginal offender and the poor bugger who is granted bail, with hopelessly unrealistic conditions (e.g., to the alcoholic shoplifter, don’t drink or steal stuff), and then finds him or herself criminalized because of administrative offences.

And jail is certainly not the place for the unlucky sods who don’t qualify for bail solely because they are homeless, indigent, addicted or mentally ill and there aren’t bail programs that will accept them.

This report is one of the smartest things I’ve read about justice and the system in Canada
As one of my favourite contributors to the discussion, Saskatchewan deputy justice minister Dale McFee, told the committee, “It’s time to change the conversation, folks, from debating soft on crime or hard on crime — ‘hard on crime’ being arrested and incarcerated, ‘soft on crime’ being prevention and intervention — to one that is smart on community safety…”

And if a country is smart on community safety, the first order of business is to acknowledge that most offenders don’t belong in prison except for those who commit violent crime — convicted murderers, rapists, child abusers, etc.

The committee never explicitly says that prison should be for the few, not the many, but it’s that principle that drives its cry for reform – for better ways to handle impaired driving offences, for more restorative justice, for alternatives to jail.

The courts have to recognize their core business is providing fair and speedy justice, and that justice doesn’t always equate to appearing 25 times before a judge.

And, oh yeah, the committee urges modern justice — with computers and a national electronic system that even accused people and their lawyers could access, the whole shebang — and an

end to the Dickensian sort, with its paper files, shucking and jiving before functionaries and people rotting in the cells below.

Good work, Senators; who would have thunk? It's online for free.

Feds promise regional balance on Supreme Court, with western seat up for grabs in December

Bilingualism will still be mandatory for judges on the top court, according to the federal justice minister.

The Hill Times
Peter Mazereeuw
June 14, 2017

The Liberal government has pledged to "emphasize" the importance of regional representation on Canada's top bench, with its top judge set to retire in December and open up a spot traditionally filled by a western Canadian.

The government "commits to clarifying the qualifications and assessment criteria to emphasize the importance of maintaining regional representation over time" on the Supreme Court, according to a letter by Justice Minister Jody Wilson-Raybould (Vancouver Granville, B.C.) to the House Justice Committee that was tabled in the House earlier this week.

Chief Justice Beverley McLachlin announced Monday that she would retire on Dec. 15, nine months before she would reach the mandatory retirement age of 75. Her retirement will leave just one judge from Western Canada on the top bench, down from the customary two judges, and is already raising questions about who will be picked to replace her, and from which part of the country that replacement will hail.

Liberal MP Anthony Housefather (Mount Royal, Que.), who chairs the House Justice Committee, told The Globe and Mail Tuesday that regional representation "should not be secondary" when the government and considers naming a replacement for Ms. McLachlin.

Traditionally, judges had automatically been replaced by peers from the same region, ensuring each part of Canada was represented on the Supreme Court. Western Canada has typically been given two seats on the bench, and Ms. McLachlin's departure will leave Justice Russell Brown as the only western Canadian among Supreme Court judges.

Ms. Wilson-Raybould's letter was written as a response to a report by the House Justice Committee on the government's new appointment process for Supreme Court judges.

The committee's report had called for "the qualifications and assessment criteria for appointment to the Supreme Court of Canada [to] be amended to include a statement regarding the importance of maintaining representation from each region of Canada in historically proportionate numbers."

The government caused a stir last year when it brought in a new appointment process for Supreme Court judges, through which an independent board develops a short list of nominees for seats on the top court, based on merit.

That process, and in particular a requirement that the board, chaired by former Progressive Conservative prime minister Kim Campbell, place a premium on bilingualism, caused anxiety among some in Atlantic Canada that it would lose representation on the bench after Nova Scotia Justice Thomas Cromwell retired.

The PMO declined to commit to following that tradition after Mr. Cromwell retired, telling the CBC at the time that applications were being accepted for the position from across Canada.

The government eventually settled on Newfoundland's Malcolm Rowe, who is bilingual in French and English, to replace Mr. Cromwell.

Ms. Wilson-Raybould's response to the committee also said said the government would "reaffirm its commitment…to only appoint functionally bilingual candidates to the Supreme Court."

Statement by Minister Wilson-Raybould on Senate Committee report on delays in Canadian court system
CNW
June 14, 2017

OTTAWA, June 14, 2017 /CNW/ - The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, has issued the following statement:

"Our Government is committed to keeping communities safe and to ensuring that the criminal justice system protects victims and holds offenders to account. As part of this commitment, we recognize that the issue of court delays is an important one.

Today the Senate's Legal and Constitutional Affairs Committee released a report on delays in the criminal justice system. I would like to thank the committee for their work and study of this important issue. We will take time to review the report as part of our ongoing work, and I look forward to reading it and responding to the Senate on its recommendations.

On July 8, 2016, the Supreme Court issued its decision in R v Jordan, which created a new framework for determining when an accused's right to be tried within a reasonable time has been infringed. As Minister of Justice and Attorney General, I am committed to ensuring the efficiency and effectiveness of the criminal justice system and I am working with my provincial and territorial counterparts to secure lasting reforms. We recognize the Supreme Court's call for a shift in culture from all criminal justice actors, including governments, Crowns, defence counsel, and courts.

Our Government is making significant progress in addressing these issues. I met with my provincial and territorial counterparts in April to focus on the role all our governments can play in shifting the culture of delay. We identified mandatory minimum penalties, bail, administration of justice offences, preliminary inquiries, and reclassification of offences as priorities for legislative reform. We also agreed to discuss progress on giving shape to proposals for legislative reform mid-summer and to hold the next in-person meeting in September to seek consensus on a legislative program.

Since October 2015, I have announced 77 judicial appointments across Canada, and will continue to make these appointments a priority. The new judicial application process, announced in October 2016, emphasizes transparency, merit, and diversity, and will continue to ensure the appointment of jurists who meet the highest standards of excellence and integrity.

We continue to consult broadly with stakeholders and Canadians on delays as part of our ongoing review of the criminal justice system. I am looking forward to continuing this work with our partners to better align our criminal justice system with the evolving needs of all Canadians."

SOURCE Justice Canada, Department of

La Cour suprême détermine quand commence le délai de prescription

Droit-Inc
Julien Vailles
15 juin 2017

Ce qui est devenu l'arrêt Pellerin Savitz était au départ une simple histoire d’action sur compte. La seule question qui se posait était de savoir si celle-ci était prescrite. La décision de la Cour suprême est donc fort importante pour les avocats.

Résumé des faits

L’intimé, Serge Guindon, a fait appel aux services d’un cabinet de Brossard : Pellerin Savitz (aujourd’hui scindé en Veilleux Savitz, d’une part, et Pellerin Avocats, d’autre part). La convention d’honoraires conclue entre les avocats et le client était la suivante : toute facture envoyée devenait payable dans les 30 jours, à défaut de quoi des intérêts seront calculés et facturés au client.

Dans ces circonstances, le cabinet a envoyé cinq factures à M. Guindon entre octobre 2011 et mars 2012, que celui-ci n'a pas acquitté. Fin mars 2012, celui-ci cessait d'être client de Pellerin Savitz. Le 21 mars 2015, soit presque trois ans après que M. Guindon ait cessé d'être client, le cabinet intente une action sur compte.

La Cour du Québec rejette l'action sous prétexte que celle-ci est prescrite: en effet, elle a été intentée plus de trois ans après l'émission de la dernière facture. La Cour d'appel du Québec renverse la décision, mais seulement concernant la dernière facture, émise le 1er mars 2012. Dans un jugement unanime (7 juges), le plus haut tribunal du pays, sous la plume du juge Clément Gascon, rejette l'appel de Pellerin Savitz. Il scelle ainsi le sort du recours, confirmant la décision de la Cour d'appel.

Terme suspensif

La question qui se pose était donc de déterminer le point de départ de la prescription. Était-ce, comme le prétendait le cabinet, le moment où le client cessait de l'être? Ou au contraire, la prescription débutait-elle dès l'émission de la facture?

Ni l'un ni l'autre, en fait. La Cour a eu vite fait de rejeter la prétention selon laquelle la prescription ne courait pas tant et aussi longtemps que M. Guindon demeurait client. Elle a plutôt statué que comme le client avait 30 jours pour payer, alors le cabinet ne pouvait pas le forcer à le faire dans un délai moindre. Partant, la prescription ne courait pas. Celle-ci ne débutait que lorsque le client était en défaut, c'est-à-dire dès le 31e jour après l'émission de la facture!

Donc, la prescription de la toute dernière facture commençait à courir 31 jours après le 1er mars 2012, soit le 1er avril. En déposant un recours le 21 mars 2015, les trois ans n'étaient donc pas encore écoulés quant à cette dernière facture.

Que faut-il en conclure? Que la date à retenir en matière de prescription, lorsque la facture est assortie d'un terme suspensif, comme c'est le cas ici, est celle du terme, et non celle de l'émission.

La fin des enquêtes préliminaires ?

La Presse Canadienne
15 juin 2017

Un comité sénatorial, qui s'est penché sur les longs délais judiciaires, recommande notamment d'éliminer le recours aux enquêtes préliminaires, de prévoir une réparation en cas de délai déraisonnable et de remplacer les juges des cours supérieures le jour même de leur départ à la retraite.

Le Comité permanent des affaires juridiques et constitutionnelles rappelle d'entrée de jeu que les décisions récentes des tribunaux d'ordonner l'arrêt des procédures dans des procès pour meurtre

ou pour agression sexuelle de personnes mineures « heurtent la conscience des gens et minent la réputation du système judiciaire au Canada ».

Dans son désormais célèbre arrêt Jordan, la Cour suprême du Canada a estimé, l'été dernier, que les délais déraisonnables étaient dus notamment à une « culture de complaisance dans le système judiciaire, qui tolère et banalise les procédures et les ajournements inutiles, les méthodes inefficaces et la pénurie des ressources institutionnelles », rappelle le comité sénatorial.

Le plus haut tribunal du pays avait alors imposé une limite de 30 mois aux procès devant une cour supérieure, et de 18 mois aux procès en cour provinciale, sans quoi les droits des accusés seraient bafoués.

Rejeter les requêtes d'ajournement inutiles

Or, le comité sénatorial déplore dans son rapport que l'arrêt des procédures constitue actuellement la seule façon de respecter l'arrêt Jordan. Entre autres solutions, il recommande d'améliorer le bilinguisme de la magistrature - notamment dans le choix des nouveaux juges - et d'insister auprès de la magistrature pour que les juges « améliorent la gestion des instances, dont l'imposition d'échéances et le rejet de requêtes d'ajournement inutiles ».

Les sénateurs suggèrent aussi à la procureure générale du Canada, Jody Wilson-Raybould, de renvoyer à la Cour suprême les changements proposés pour s'assurer qu'ils respectent la Constitution.

Nouveaux juges et abolition de certaines peines minimales

La ministre Wilson-Raybould a indiqué mercredi qu'elle avait déjà évoqué certaines solutions lors de ses discussions avec ses homologues des provinces et territoires.

Pour respecter l'arrêt Jordan, les libéraux de Justin Trudeau ont commencé à nommer de nouveaux juges et jonglent avec l'idée d'abolir certaines peines minimales obligatoires. Ils songent aussi à modifier les conditions de remise en liberté sous caution, les procédures d'enquêtes préliminaires et la classification des délits.

Illingworth: Alternative fixes for court delays a must for the good of victims of crime
Ottawa Citizen
Heidi Illingworth
June 15, 2017

The Standing Senate Committee on Legal and Constitutional Affairs has been studying delays in Canada’s criminal justice system since February 2016 and released their final recommendations on Wednesday.

The Canadian Resource Centre for Victims of Crime (CRCVC) agrees there is urgent need for reform. “Not only must Justice be done; it must also be seen to be done.” Public trust and confidence is critical to the functioning of the criminal justice system. T

The justice system requires members of the public, as victims or witnesses, to report crime and to participate in successful prosecutions by offering evidence. Victims and witnesses will only co-operate and participate if they have confidence in the justice system as a whole.

Delays in criminal proceedings, lengthy trials and multiple adjournments are particularly hard on victims and their families and add to a lack of faith in the administration of justice. Victims feel ongoing stress and anxiety the longer the case remains before the court; they experience significant financial and emotional implications; and they feel less connected to their lives.

While the criminal justice process is ongoing, the victim is constantly reminded of the crime. They may have to take time off work again and again if they wish to be present in court. Many survivors do not feel psychologically and emotionally safe during criminal proceedings. They lose sleep, lose focus and lose faith that justice will be served. Accused persons sometimes use delay tactics to gain an advantage. They fire their lawyers repeatedly or try to represent themselves.

Some will delay until they can assert that their fair trial rights are infringed. This causes victims and members of the public to perceive and experience the criminal justice system as unbalanced, insensitive, and re-victimizing.

The Senate’s final report notes that when trial delays become very lengthy, courts may find that the accused’s constitutional right to a trial within a reasonable time has been breached. If this happens, the only judicial remedy available in Canada is an order for a stay of proceedings, which ends the process without a completed trial on the merits of the case.

A stay of proceedings is simply devastating for victims, survivors and their families. Never mind that someone deserving of being in jail walks free. The victims have been robbed of their day in court; they will never know what the outcome of the case will be.

They have done everything right by coming forward to the police, providing a statement, and even testifying at a preliminary hearing when the process ends abruptly with a stay due to a lack of available court time or judges. The victims feel powerless, distressed and experience secondary victimization.

The recommendations made by the Senate Committee are robust. We agree it is particularly urgent to find alternatives to stays of proceedings. Serious, indictable matters must have their day in court. To allow murder charges and child sexual assault charges to be stayed, as in recent cases, is unconscionable. The public expects that these serious crimes will be prosecuted.

It is both a matter of public safety and of public confidence. If we fail to prosecute the most serious cases, the reputation of our justice system is in peril.

The CRCVC echoes the call of the Senate to continue to build momentum for increasing services to victims and opportunities for their participation in our criminal justice system. We must not lose sight of the fact that achieving justice requires that victims' needs be respected and met.

Heidi Illingworth is executive director, Canadian Resource Centre for Victims of Crime.

Minister warns IBM's reputation is at risk over Phoenix pay debacle
Treasury Board President Scott Brison says IBM has a 'responsibility' to help fix Phoenix payroll system
CBC News
Katie Simpson
June 15, 2017

A senior cabinet minister is warning IBM that its reputation is at risk because of the troubled Phoenix pay system, and that it has a responsibility to help the government fix the program.

Treasury Board President Scott Brison made the pointed comments during an appearance at the Senate's finance committee, where he was asked for an update on the payroll program.

"IBM, as a sophisticated global company, needs to recognize that we as the government of Canada are not just an important client ... but there is reputational risk for IBM in not helping us fix this," Brison said Thursday morning.

"IBM needs to be an active partner working closely with us. They have, as the vendor of this technology, a responsibility to help us fix this," Brison added.

After the meeting, the minister downplayed the tone of his comments. When asked directly if IBM was not co-operating with the government, Brison said "we're working with everyone, all hands on deck... and as the provider we are working with IBM of course."

In a brief response to Brison's comments, IBM spokesperson Carrie Bendsza told CBC News in an email that "IBM continues to work in close collaboration with the Crown on this project."

No timeline for a fix

Since Ottawa implemented its new payroll program in February of 2016, tens of thousands of public servants have been underpaid, overpaid, or not paid at all.

Despite the federal government hiring dozens of new staffers and throwing more than $400 million at the issue, the Phoenix system still does not work properly.

There is no timeline as to when the system will function as intended.

"My message to all partners in this, including private sector players like IBM is that we need to work together, and we need to apply our resources to fixing this," Brison told the committee.

"IBM needs to recognize that they have a vested interest in working closely with the government of Canada and helping us fix this."

Blame game continues

Despite insisting this is not a time for finger pointing, Brison used his Senate appearance to blame the Conservative government for creating the Phoenix payroll mess.

"The previous government, in the attempt to create a surplus on the eve of an election, they tried to cut costs wherever they could," Brison said.

"You don't try to cut costs during an IT transformation. That goes for business or government."

In the lead up to the roll out of Phoenix, the previous government laid off 700 compensation advisors, as the new system relies heavily on self-serve automation.

The Conservatives have criticized the Liberals for rolling out the program when it was not ready.

SCC ruling could clarify trial delay rules
CTVNews.ca Staff
June 16, 2017

The Supreme Court of Canada will rule today on a case involving an accused criminal's right to a timely trial, and could help clarify rules about trail delay deadlines it set in a groundbreaking decision last summer.

The country’s top court will rule in the case of James Cody, an accused drug trafficker from Newfoundland and Labrador who argued his Charter rights were violated when he had to wait five years for what would have amounted to a five-day trial.

Cody was charged with trafficking marijuana and cocaine, possession of a prohibited weapon and breach of probation. But the charges were stayed because the judge decided Cody’s right to a fair and speedy trial had been violated.

The Crown appealed and the case went to Newfoundland and Labrador’s Court of Appeal, which considered the 2016 Supreme Court decision of R. v. Jordan.

That ruling noted a system-wide problem with trial delays, and set out a new framework for determining whether a criminal trial has been unreasonably delayed.
It said most cases in Superior Court should reach trial within 30 months from the time a person is arrested. In lower courts of justice, cases should go to trial within 18 months, it said.

But the court added there needed to be a transitional measure, for cases already in the system.

The Newfoundland Court of Appeal considered the Jordan ruling, but in a 2-1 decision, they decided the delays in Cody's case were mostly due to Cody's own defence team. The court set aside the lower court's stay of proceedings and sent the case back for trial.

Cody's defence appealed to the Supreme Court, which heard arguments in April. Friday's decision could offer more guidance on how to account for defence-caused delays
The Crown argued to the court that if the prosecutors in Cody's case had known that the Jordan decision was coming and that it would change the way the courts handle delays, they would have proceeded differently.

Cody's defence team, meanwhile, argued the delay would have still been considered unreasonable -- even before the Jordan decision.

Friday's decision could help clarify whether the SCC's trial deadlines apply in cases involving unusual or complex circumstances, such as Cody's.

Since the Jordan decision, several suspects have seen their cases tossed out for taking too long to reach trial.

Several provincial and territorial justice ministers have since held emergency meetings with federal Justice Minister Jody Wilson-Raybould to discuss ways to tackle court delays.
Wilson-Raybould has filled more than 50 judicial vacancies since the Jordan decision to help accelerate the system, but several vacancies still remain.

Earlier this week, the Senate committee on legal and constitutional affairs said trial judges needed to have more tools at their disposal to deal with cases that take too long to get to trial, beyond simply staying the proceedings.

They said allowing those accused of serious crimes such as sexual assault or murder to go free on technicalities brings the justice system into disrepute.

The committee recommended in its final report using reduced sentences or awarding court costs as other solutions beyond proceeding stays. It also called for more video conferencing to cut down on unnecessary court appearances, among 50 other recommendations.
With files from The Canadian Press

'Delaying justice is denying justice': Senate committee report
Canadian Lawyer Magazine
Elizabeth Raymer
15 June 2017

Delays in the criminal justice system have resulted in serious criminal charges and even convictions being stayed following the 2016 Supreme Court decision in R. v. Jordan, and change is desperately needed.

Senator George Baker says with 'very serious crimes,' such as first-degree murder and child sexual assault, there should not be a stay.

This is the finding of the Senate Committee on Legal and Constitutional Affairs, which yesterday released its 205-page report, "Delaying Justice is Denying Justice", outlining the problems in the criminal justice system post-Jordan, a drug case which set 18-month deadlines for trials in provincial courts and 30-month deadlines for trials in superior courts.

Offenders in serious crimes such as murder and sexual assault have had convictions quashed since then, and more than 4,000 stays have been instituted in Ontario alone, Senator George Baker, deputy chairman of the Senate committee, told Legal Feeds.

“You’ll see tens of thousands of cases thrown out” next year after the transitional provisions in Jordan are removed, says the senator. “We have a crisis on our hands unless necessary changes are made.”

In January 2016 the committee was mandated to review the roles of the federal government and Parliament in addressing court delays; its investigation involved public meetings from February to March 2016, and consultations with judges from Australia, the United Kingdom and other jurisdictions.

“We came to certain conclusions,” says Baker. One is that timelines should be established in the administration of criminal cases. For example, the senator says, the committee learned that it takes five times longer in Canada than in the U.K. to bring a criminal case to trial.

“In the U.S., and in every other comparable jurisdiction, they have timelines in the law; we don’t.” In the United States, no more than 100 days are allowed from the time a person is charged with a crime until the trial must begin, he says. “You have timelines in Europe, the U.S., the U.K., even Russia,” but not in Canada.

Most importantly, says Baker, “when you have very serious crimes,” such as for first-degree murder and child sexual assault, “there should not be a stay” — period. Travelling across the

country, committee members saw that “it shocks the conscience of the Canadian community” when charges are stayed for serious crimes. It brings the administration of justice into disrepute.”

The Committee made 13 priority recommendations, among them:

• That the federal government amend the Criminal Code to include alternative remedies to stays of proceedings.

The committee recommends that the remedy for unreasonable trial delay be found in sentencing and in awarding costs. “Let’s introduce costs into criminal proceedings” as they are in civil proceedings, says Baker.

• That Superior Court judges be appointed on the day of a known retirement of a judge.

Most replacements of superior court justices are due to their mandatory retirement at age 75; their replacements should be in place and “ready to take over the very minute someone retires,” says Baker.

• That the Minister of Justice emphasize the need for judges to improve case management practices.

The Senate report called “the lack of robust case and case flow management by the judiciary … perhaps the most significant factor contributing to delays.” Baker says the court system is often bogged down in cases that are administrative and regulatory in nature. “Thirty per cent of all court cases in Canada involve administrative offences” such as violating a minor condition of probation or release, while serious criminal cases are delayed,” he says. “Those things can be taken out of the court system, and put in a different system.” And prosecutors try to prove each count brought against an accused, even minor, summary counts, when they should simply drop the minor counts in the indictment and focus on the major ones.

• That judicial officers be used in the criminal justice system.

In the Federal Court system, prothonotaries — full judicial officers who exercise many of the powers and functions of judges — are employed, at a pay rate of about 70 per cent of what superior court judges make. They also make the system work more efficiently by determining pre-trial procedural matters, says Baker, such as disclosures and applications for Charter violations. “We’re suggesting prothonotaries be introduced into criminal law, with the agreement of the provinces.”

• That there be full disclosure prior to trial

All evidence to be produced at trial must be disclosed before trial, and “any evidence introduced thereafter will need to be justified based on due diligence or previous unavailability,” the committee says in its report.

“Every single case where s. 11 (b) arguments [of the Charter, which guarantees any person charged with an offence the right to be tried within a reasonable time] exists, one of the issues is disclosure,” says Baker. This was the case in Jordan, and in Cody v. R., which the SCC will deliver judgement in tomorrow.

In December, the committee called on the Attorney General of Canada to request clarification from the Supreme Court regarding the transitional provisions outlined in Jordan. The Supreme Court’s approach to those will be seen tomorrow in Cody v. R., a Newfoundland and Labrador drug case with similar facts to Jordan.

“It will be interesting to see [if] the Supreme Court will expand the transitional provisions,” he says. As of next year, the timeframes established in Jordan for moving criminal cases through the court system will remain, but without the transitional provisions for dealing with cases already moving through the system when the Jordan ruling was released — unless the Supreme Court expands on these provisions. If not, Baker says, “we’ll have tens of thousands of persons convicted of serious crimes having their charges thrown out.”

Cour suprême: après l'arrêt Jordan, place à l'arrêt Cody !
La Presse Canadienne
16 juin 2017

Moins d'un an après avoir infligé un véritable électrochoc au système de justice pénale, la Cour suprême du Canada s'apprête à rendre ce vendredi une décision qui devrait apporter certaines clarifications au fameux arrêt Jordan.

Les plafonds imposés par le plus haut tribunal au pays dans une décision partagée de cinq juges contre quatre ont mené à des centaines d'arrêts de procédures au cours des derniers mois, dont dans certaines causes de meurtre.

Les provinces ont peine à gérer les conséquences découlant de l'arrêt Jordan. D'ailleurs, cinq d'entre elles - le Québec, l'Ontario, l'Alberta, la Colombie-Britannique et le Manitoba - sont intervenues dans la cause Cody, que la Cour suprême a entendue en avril dernier.

James Cody, qui donnera son nom à cet arrêt Jordan 2.0, est un Terre-Neuvien qui attendait depuis 2010 un procès pour des accusations de possession de stupéfiants.

À peine deux mois plus tard, les juges sont déjà prêts à trancher. Sans trop vouloir s'avancer, Sébastien Grammond, professeur titulaire à la Faculté de droit de l'Université d'Ottawa, se risque tout de même à prédire « que la cour ne va pas reculer ».

« Je pense que jusqu'à un certain point, les conséquences de l'arrêt Jordan étaient voulues et que c'était la seule chose que la Cour pouvait faire pour forcer le gouvernement, ou les gouvernements, à agir et à augmenter les ressources consacrées au système judiciaire », a-t-il exposé en entrevue.

Par ailleurs, le professeur Grammond rappelle que les cinq magistrats qui composaient la majorité dans l'arrêt Jordan sont toujours en poste tandis que l'un des dissidents, le juge Thomas Cromwell, est depuis parti à la retraite (il a été remplacé par Malcolm Rowe).

La ministre de la Justice, Jody Wilson-Raybould, a signalé que peu importe la décision qui tombera vendredi, le gouvernement fédéral a l'intention de « continuer à mettre en place des initiatives et des réformes législatives » en partenariat avec les provinces et les territoires. « Dans l'arrêt Jordan, les juges ont recommandé un changement de culture. C'était un appel à l'action pour moi, pour mes collègues provinciaux et territoriaux (...) et nous travaillons très fort pour répondre à cet appel » a-t-elle dit en mêlée de presse.

Le gouvernement fédéral, a ajouté Mme Wilson-Raybould, est « impatient de prendre connaissance de toute orientation que la Cour suprême fournira en ce qui a trait aux délais judiciaires » dans l'arrêt Cody.

De son côté, le porte-parole conservateur en matière de justice, Rob Nicholson, a souligné qu'il aimerait voir dans l'arrêt Cody des pistes de solution afin de mieux baliser les procédures dans les causes où les chefs d'accusation sont des plus graves.

Le chef néo-démocrate Thomas Mulcair, pour sa part, ne semble pas être d'avis que le plus haut tribunal devrait reculer, soutenant « que la responsabilité incombe au gouvernement qui refuse d'agir avec célérité », comme l'ont fait d'autres gouvernements dans les années passées.

Du côté de Québec, la ministre de la Justice, Stéphanie Vallée, n'était pas disponible pour une entrevue cette semaine. Son attachée de presse a cependant rappelé que le gouvernement québécois a clairement articulé sa position dans le mémoire déposé en Cour suprême en avril.

L'arrêt Jordan, y lit-on, devrait être appliqué « de façon souple et contextuelle » dans les causes transitoires - c'est le cas de celle de James Cody.

Former RCMP officers to appeal Federal Court pension ruling, lawyer says
Lawyer’s Daily
Paula Kulig
June 16, 2017

The lawyer representing three retired female members of the RCMP who claimed that the police force's pension plan discriminated against them on the basis of sex and parental status said his clients will be appealing a Federal Court of Canada ruling that dismissed their application.

Ottawa lawyer Paul Champ of Champ & Associates said in an interview he's been instructed by the applicants to challenge the decision before the Federal Court of Appeal.

He called the ruling a setback for women making similar claims in the public service. "Had we won, there certainly would have been precedent set for the other federal public service pensions," he said.

Champ noted that the case was supported by the RCMP's legal defence fund. "There was wide support across the RCMP for this action," including at the highest levels, he said. "Men and women were all supportive of this change to the RCMP pension legislation and this Charter challenge."

Gregory Tzemenakis, who represented the Crown, declined to comment on the judgment, adding that he had not been informed of the applicants' decision to appeal so was "not in a position to respond."

The retired officers, who at some point in their careers temporarily left their full-time positions to work part time in job-sharing arrangements, argued that they should have been entitled to make retroactive contributions to their pensions at the full-time rate, known as "buy-back," so they could receive benefits as if they had worked full time.

They noted that employees who took a leave without pay (LWOP) were allowed to buy back full-time pension benefits, and that without buy-back, they will receive a reduced retirement income when compared with officers with the same years of service.

The women submitted that provisions of the Royal Canadian Mounted Police Superannuation Act and its regulations "fail to provide the equal benefit of the law to women with child-care responsibilities," and violate s. 15(1) of the Canadian Charter of Rights and Freedoms.

In her June 8 decision in Joanne Fraser, Allison Pilgrim and Colleen Fox v. Attorney General of Canada 2017 FC 557, Justice Catherine Kane rejected their arguments, finding that the relevant provisions of the superannuation act "do not create a distinction based on the enumerated ground of sex or the analogous ground of parental status."

She added that if her finding is wrong and the act does create a distinction, "the distinction does not create a disadvantage by perpetuating prejudice or stereotypes and is, therefore, not discriminatory." Both components are part of a two-part test outlined by the Supreme Court of Canada in Withler v. Canada (Attorney General) [2011] 1 SCR 396.

Justice Kane acknowledged that, based on the available evidence, most members of the RCMP who job-share and work part time are women, and that at least 60 per cent of those women have child-care responsibilities.

But echoing arguments from the Crown, she wrote, “The impact on their pension benefits is not because they are women or because of their parental status. The impact on their pension benefits is because they worked part time. Their pension reflects their part-time status just as it would for anyone who worked part time at some point in their career.”

The court added, “The applicants chose to job-share to meet the challenges of balancing their family responsibilities and the demands of policing duties. While they note that this is an ‘economic hit’ and an adverse impact on their pension, this is only if the pension benefit is viewed in isolation from other economic and other factors and without regard to other possible advantages of job-sharing.”

Noting that “not all adverse impacts are discriminatory,” Justice Kane wrote, “The reality is that women continue to face barriers in the workplace, many of which are due to the daunting challenges of balancing family and career. That the applicants found a way to meet the challenges and later returned to full-time duties and had long careers in the RCMP is an example of more flexible arrangements that now exist to respond, to some extent, to these challenges.”

The applicants disagreed, in particular with the court’s finding “that working part time was simply a decision by the female RCMP officers,” said Champ. "We set out that this was really a legal obligation in some way. They had to balance their child-care responsibilities. And we also led evidence about the special circumstances that govern RCMP officers, particularly when they’re in isolated communities.”

He added: “We also didn’t agree with the characterization that they were simply part-time employees. ... What we were trying to argue was that obviously someone who’s a part-time employee doesn’t have a right to buy full-time pension credits. But in this case, these were full-time RCMP officers who were only temporarily reducing their hours to part time for a finite period of time. ... The agreements [between the police force and the officers] were for a fixed period of time.”

The issue came to light in 2000, when 14 members involved in job-sharing wrote to the RCMP commissioner stating it was unfair that they were barred from buying back full-time pension benefits.

The RCMP Pension Advisory Committee then considered the issue and retained an actuary. The court said the actuary acknowledged the “flexibility” provided through the Income Tax Act and its regulations, “which include provisions with respect to pension contributions for those on temporarily reduced hours, and noted that the RCMPSA could be amended to address periods of reduced work hours” by RCMP members.

Two of the officers filed grievances, which were referred to the External Review Committee, and in 2007, the committee found in their favour. But the decisions were not binding on the RCMP commissioner, and in 2010 the acting commissioner dismissed both grievances, finding that under the superannuation act, job-sharing is not the same as LWOP and that legislative changes to the act would be required for the members to buy back pension benefits.

In addition to Withler, Justice Kane referred to several cases in determining whether the pension plan constitutes discrimination and violates the s. 15 guarantee of equal protection and benefit of the law under the Charter, including Andrews v. Law Society (British Columbia) [1989] 1 SCR 143; Grenon v. Canada 2016 FCA 4; and Kahkewistahaw First Nation v. Taypotat [2015] 2 SCR 548.

“There is no qualitative nexus between the requirements of the RCMPSA and the consequences to women and women with parental status who job-shared,” wrote Justice Kane. “The underlying social consequences which led them to job-share and to work part-time do not turn the impugned provisions of the RCMPSA that base pension contributions on part-time or full-time status into discriminatory distinctions."

Champ, who was joined by Bijon Roy in representing the officers, noted that the Income Tax Act “allows pension plans to be designed to allow members to buy back pension credits for times when they just temporarily reduce their work hours to part time for up to 10 years. It’s the same type of benefit that we already see in so many pension plans, and it was introduced in the Income Tax Act because it was seen as a measure to enhance pension fairness and equity for women and parents.”

Justice Kane, he said “acknowledges that the Income Tax Act permits pension plans to be designed this way. But she says just because it’s permissible doesn’t mean it’s required, essentially. And that was the position of the government in the affidavit evidence.

"We say of course the Income Tax Act doesn’t require it, but when you can point to the fact that it does create a distinction for women or a disadvantage for women, it should be included as an aspect of all equitable pension plans,” said Champ.

Top court affirms decision to ensure timely trials
CTV News
Angela Mulholland
June 16th 2017

The Supreme Court of Canada has re-affirmed its groundbreaking decision on what constitutes an unreasonable time to await trial, by deciding a Newfoundland man accused in a drug trafficking case should not face prosecution because his case took too long to get to trial.

The case involved a man named James Cody, who was charged in January, 2010, with trafficking marijuana and cocaine, as well as weapons and parole violation charges. He argued that his Charter rights were violated when he had to wait more than five years for what would have amounted to a five-day trial on those charges.

In Friday's unanimous decision, the court said that the delay was unreasonable and a lower court's decision to stay the proceedings should be restored.

"The delay in this case was unreasonable and therefore, C's right under S. 11 (b) of the Charter was infringed," the court said.

Cody was charged with trafficking marijuana and cocaine, possession of a prohibited weapon and breach of probation. But the charges were stayed because the judge decided Cody's right to a fair and speedy trial had been violated.

The Crown appealed and the case went to Newfoundland and Labrador's Court of Appeal, which considered the July, 2016, Supreme Court decision of R. v. Jordan.

That ruling noted a system-wide problem with trial delays, and set out a new framework for determining whether a criminal trial has been unreasonably delayed.

It said most cases in Superior Court should reach trial within 30 months from the time a person is arrested. In lower courts of justice, cases should go to trial within 18 months, it said.

But the court added there needed to be a transitional measure, for cases already in the system.

The Newfoundland Court of Appeal considered the Jordan ruling, but in a 2-1 decision, they decided the delays in Cody's case were due in large measure to Cody's own defence team. The court set aside the lower court's stay of proceedings and sent the case back for trial.

Cody's defence appealed to the Supreme Court, which heard arguments in April.

The Crown argued to the court that if the prosecutors in Cody's case had known that the Jordan decision was coming and that it would change the way the courts handle delays, they would have proceeded differently.

Cody's defence team argued the delay would have still been considered unreasonable -- even before the Jordan decision.

The Supreme Court agreed, saying even after deducting all the delays initiated by the defence, the delay Cody faced was unreasonable.

“Under the Jordan framework, every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person’s right to a trial within a reasonable time,” the court said, adding that the Jordan framework “must be followed” and “cannot be lightly discarded or overruled.”

More to come…

Brison wants IBM to help fix faulty Phoenix pay system
THE CHRONICLE HERALD
June 16, 2017

A Nova Scotia MP is warning IBM that its reputation is at risk if it don’t work with the federal government to fix the failing Phoenix pay system.

Scott Brison, Treasury Board president, was asked for an update on the civil servant payroll system at Thursday’s finance committee meeting in Ottawa.

The senior cabinet minister and Nova Scotia MP says both the federal government and IBM have a responsibility to ensure this one “rises out of the ashes.”

“IBM, as a sophisticated global company needs to recognize we as the government of Canada are not just an important client for IBM, but there is reputational risk for IBM in not helping us fix this and doing everything they can to help us fix this,” he said.

Ottawa has been having issues with the payroll program ever since it was rolled out in February 2016.

Since then, more than 82,000 civil servants have been paid incorrectly, while hundreds say they have not been paid at all.

In May, the government announced a $142-million investment to hire more people to help fix the system.

This put the total repair bill above $400 million.

As the employer of IBM, Brison said the Treasury Board has a responsibility to fix this.

He urged IBM to work with the government.

“This is not a time for finger pointing. This is a time for getting it done,” he said.

The Chronicle Herald reached out to IBM for a response to Brison’s comments.

“We continue to work in close collaboration with the Crown on the project,” said spokeswoman Carrie Bendsza in an emailed statement.

At the committee meeting, Brison did jab at the previous Conservative government.

“The previous government, in its desire to create an illusory surplus on the eve of an election, was finding ways to cut costs wherever they could,” he said.

He said 700 pay experts were laid off in an attempt to save millions of dollars.

“These are the very people you need to maintain a system.”

He said there is greater clarity on the mistakes that were made during that time. They are currently engaging people who understand these systems so they can identify where the changes need to be made.

“In government, if you can’t do digital services well, your relationship with your citizens is imperilled. Your connection to your citizens is jeopardized.”

Vancouver workers mark public service week with Phoenix pay system protest
'We’d rather have a paycheck, not a hot dog,' says union leader
CBC News
Cory Correia
June 16, 2017

Federal public service workers rallied at the Vancouver Art Gallery Friday to voice their grievances about the problematic Phoenix pay system.

Nearly a hundred people gathered to call out the federal government for ongoing issues with their computerized payroll system, which has caused pay issues for tens of thousands of public servants.

"I would just like the government to fix this system, and/or get rid of it completely, because it's not working, it's not paying the members," said Virginia Vaillancourt, who represents members of Veteran Affairs Canada.

"They're going to find that one day those federal public service employees that provide public services are not going to be sitting in the desks."

Workers and union leaders have been holding rallies and demonstrations across Canada this week as it coincides with national Public Service Week.

"It's supposed to be an appreciation, and you know so they give you a piece of cake, they give you a hot dog ... And what we're saying is we'd rather have a paycheck not a hot dog, thank you very much," said Robyn Benson, national president of the Public Service Alliance of Canada.

"Unless you're going to pay my mortgage or you're going to put food on the table for my kids, you know, this isn't cutting it."

The new pay system was implemented in early 2016, and since then workers have had issues receiving their pay on time — or at all.

Benson says bugs in the software are the reasons for the pay issues, especially when workers have job changes, work overtime, or take maternity leave, to name a few.

Vaillancourt assists workers who have not received their pay for various reasons, and says workers are left in a lurch on a bi-weekly basis, wondering what will show up on their pay slip.

"Members' lives depend on it. We have lots of mental health issues, we have families that the conflict of financial difficulties is causing rift," she said.

"So the government is having a very unfortunate impact on members' mental health Canada-wide."

She says some members are being forced to apply for emergency payment assistance and access food banks, and some are in the process of losing their homes.

Benson says workers are appealing to their members of parliament for assistance, but if that fails they will pursue job action.

She says action by Canada Border Services workers could be the first step.

La Cour suprême confirme Jordan dans l'arrêt Cody
La Presse Canadienne
16 juin 2017

La Cour suprême du Canada persiste et signe. Dans une décision cette fois unanime, les juges du plus haut tribunal au pays ont envoyé vendredi un message clair: l'arrêt Jordan est là pour rester, et il doit être appliqué.

L'arrêt Cody vient renforcer celui tombé en juillet dernier avec Jordan. La décision signée « La Cour » -un geste que les magistrats posent pour envoyer un signal d'unité- exhorte les acteurs du système judiciaire et les gouvernements à se faire à l'idée, et à se relever les manches.

« C'est ce cadre qui régit dorénavant l'analyse requise pour l'application de l'al. 11b) (de la Charte canadienne des droits et libertés) et, à l'instar des prescriptions de tout autre précédent de la Cour, il doit être suivi et il ne saurait être infirmé ou écarté à la légère », y tranche-t-on.

Car les retards attribuables au fonctionnement de la machine judiciaire briment le droit constitutionnel de toute personne à être jugée dans un délai raisonnable. Ainsi, les plafonds établis dans l'arrêt Jordan doivent être appliqués, tranchent les sept juges.

« Correctement appliqué, ce cadre accorde déjà suffisamment de souplesse, en plus de prévoir la période de transition requise pour que le système de justice criminelle puisse s'adapter », est-il écrit dans l'arrêt relativement succinct de vendredi.

C'est la réponse qu'offrent les juges du plus haut tribunal au pays aux procureurs des provinces qui sont intervenus dans cette cause - le Québec, l'Ontario, l'Alberta, la Colombie-Britannique et le Manitoba - pour réclamer davantage de flexibilité.

Même si le choc a été dur à encaisser pour les gouvernements comme pour le système de justice pénale, cette « culture de complaisance » à l'égard des délais qui s'était installée menait à des situations préjudiciables, indique la CSC.

Et le cas de l'appelant dans cet arrêt - un Terre-Neuvien sous le coup depuis 2010 de chefs d'accusation liés à la possession de stupéfiants qui n'avait toujours pas subi son procès en 2015 - illustre parfaitement « pourquoi un changement est nécessaire », soulignent les magistrats.

« Entre le moment où l'appelant James Cody a été accusé d'infractions liées aux drogues et aux armes et la date à laquelle son procès de cinq jours devait commencer (date antérieure à l'arrêt Jordan de notre Cour), cinq années complètes se sont écoulées », écrivent-ils.

Le travail commence dans les tribunaux de première instance, indiquent les juges de la CSC dans une décision succincte qui tient sur 34 pages à laquelle souscrivent les deux magistrats québécois qui ne faisaient pas partie de la majorité dans Jordan, Richard Wagner et Suzanne Côté.

Les juges de première instance « devraient proposer des moyens d'instruire plus efficacement les demandes et requêtes légitimes (?) et ne devraient pas hésiter à rejeter sommairement des demandes dès qu'il apparaît évident qu'elles sont frivoles », lit-on.

Mais ultimement, il incombe à « toutes les personnes associées au système de justice criminelle » d'adopter « une approche proactive » afin de prévenir les délais inutiles, écrivent les magistrats de la CSC.

Car la réalité est qu'en vertu de l'arrêt Jordan, que vient confirmer et clarifier l'arrêt Cody, il ne peut s'écouler plus de 18 mois dans les cours provinciales et plus de 30 mois dans les cours supérieures entre le moment où une personne est accusée, puis jugée.

Supreme Court of Canada stands firm on timely trial rights
Vancouver Sun
Ian Mulgrew
June 16, 2017

The Supreme Court of Canada has refused to back away from hard trial deadlines imposed on lower courts last summer and reinforced its message that judges must manage proceedings.

In a decision Friday that revisited the landmark ruling known as R. v. Jordan, seven justices unanimously emphasized that the current culture of legal complacency must end.

“This appeal is yet another example of why change is necessary … every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person’s right to a trial within a reasonable time,” the nation’s highest bench insisted.

Five provincial Attorneys General intervened in the case, pleading with the court to modify the timelines and framework established last July to provide more flexibility in justifying delay.

The justices were unsympathetic — to underscore the point, the judgment was signed not by a single author but by the court.

“All justice system participants — defence counsel included — must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11 (b) of the Charter,” they wrote.

“To effect real change, it is necessary to do more than engage in a retrospective accounting of delay. It is not enough to ‘pick up the pieces once the delay has transpired.’ A proactive approach is required that prevents unnecessary delay by targeting its root causes. All participants in the criminal justice system share this responsibility.”

Jordan rocked the legal community and the status quo by criticizing current practices for causing “significant and notorious” institutional delays.

It set presumptive ceilings for a reasonable time to trial at 18 months in provincial and 30 months in superior court.

The old method of calculating a reasonable time to trial — a complicated formula established 25 years ago — was not appropriate in the 21st century, the court said.

Since Jordan, there has been great political hand-wringing that judges were being forced to set killers and child molesters free because the only remedy to a breach of the right to a timely trial was a stay of proceedings — a get-out-of-jail-free card.

The top court heard little evidence of such an amnesty for accused criminals, at least in English Canada — a study showed that six months before Jordan, 38 per cent of stay applications were granted under the old calculus and in the six months after its release, 50 per cent were granted, representing a modest increase.

In Quebec, though, there have been more than 800 applications for stays.

The provinces — B.C., Alberta, Manitoba, Ontario and Quebec — all argued defence counsel must be held more accountable and greater leeway given to prosecutors.

There are more extensive disclosures, more complex trials and technology has changed dramatically, they pointed out.

The court gave that short shrift, reiterating that judges were not idle spectators and must manage their proceedings.

“While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so,” the decision said.

“We reiterate the important role trial judges play in curtailing unnecessary delay and ‘changing courtroom culture’ … trial judges should use their case management powers to minimize delay.”

The big problem is the rules, procedures and the existing wheels of justice are creaking anachronisms.

In this case, a Newfoundland man charged in 2010 with drug trafficking and weapons offences waited more than five years for a trial in January 2015.

The trial judge stayed the charges but the Newfoundland and Labrador Court of Appeal overturned that decision and ordered him tried.

This case also would have been stayed even under the old rules, the supreme court justices noted, siding with defence lawyers who said shrinking its 60.5-month delay into only 18 months by some fancy wordplay and legal math was “ex post facto hocus pocus intellectually inaccessible to everyone but lawyers.”

The high bench restored the stay.

On Wednesday, the Senate released a report on court delays that called for sweeping legal reform and for the federal government to amend the Criminal Code to provide other cures for unreasonable trial delays such as reductions in sentence or financial compensation.

Top court upholds ruling on trial limits
The Globe and Mail
Sean Fine
June 16, 2017

The Supreme Court has taken a tough line on delay in the criminal courts, rejecting a plea from the provinces to be more flexible after a year-old ruling spread turmoil through the justice system.

In its first chance to revisit delay since its groundbreaking ruling in R v Jordan last summer, the court spoke bluntly to five provincial attorneys-general who intervened in the case of James Cody, an accused drug trafficker whose charges were thrown out for unreasonable delay. The provinces had asked the court to make it easier to justify delay.

“Jordan was released a year ago,” the court said in its written ruling upholding the original decision in the Cody case. “Like any of this Court’s precedents, it must be followed and it cannot be lightly discarded or overruled.”

However, the court provided a ray of hope for prosecutors and crime victims seeking to overturn the dismissals of serious charges because of the Jordan case, including murder and child abuse. While not softening the principles it set out last year – which established strict new time limits for criminal trials, including 30 months in superior court, where Mr. Cody was to be tried – the court stressed that serious offences that were already in the system before the Jordan ruling should be harder to dismiss.

The one area in which the court went further than in Jordan was in defining defence delay: that is, when the conduct of defence lawyers and the accused unnecessarily prolongs trials. The extra time does not count when the delay is calculated. Some provinces had asked the court to crack down on defence tactics, even when lawyers honestly intend to help their clients and not purposely add time to a trial. But the court appears not to have given them their wish, while reaffirming that the overall goal is to hold defence lawyers, prosecutors and judges to account for moving trials along.

Prime Minister Justin Trudeau referred to the delays in the Cody case as part of “a troubling pattern,” adding, “We need to make sure that we are working hard to ensure that justice is swift and properly meted out to anyone who commits crimes.”

Ontario Attorney-General Yasir Naqvi said in an e-mail to The Globe and Mail that the ruling “underscores the need for bold changes to make the criminal-justice system fairer and faster.”

The case highlighted the wide divergence among the judges who must apply the Jordan ruling. After Mr. Cody’s case had been in the system for five years, the trial judge dismissed the charges over unreasonable delay. An appeal court overturned the ruling by a 2-1 margin, saying the actual delay had been 16 months. The Supreme Court ruled 7-0 that the actual delay was 36.5 months, and was unreasonable. All seven judges supported the principles in the ruling, which was authored by “the court” rather than an individual judge, an attempt to give it more weight. In Jordan, the court had split 5-4 over the time limits.

Minister Wilson-Raybould Issues Statement on the Cody Decision

OTTAWA, June 16, 2017 /CNW/ - Today, the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, issued the following statement:

"Our Government is committed to keeping communities safe and to ensuring that the criminal justice system protects victims and holds offenders to account. As Minister of Justice and Attorney General, I am committed to ensuring the efficiency and effectiveness of the criminal justice system so as to address and avoid court delays.

"Today, the Supreme Court of Canada issued its decision in R. v. Cody, an important decision clarifying the Supreme Court's R. v. Jordan framework for when an accused's right to be tried within a reasonable time has been infringed. While we are reviewing the decision closely, the Supreme Court stressed that every actor in the justice system, including defence counsel, has a responsibility to ensure that criminal proceedings are carried out efficiently and effectively. It recognized that all actors must collaborate to shift the culture of delays and that it will take time to adapt. To this end, the Court emphasized that "a proactive approach is required that prevents unnecessary delay by targeting its root causes. All participants in the criminal justice system share this responsibility." This is a view which I share and support.

"I have been working hard with my provincial and territorial counterparts to secure the lasting reforms called for by the high court. We recognize the Supreme Court's call for a shift in culture from all criminal justice actors, including governments, Crown prosecutors, defence counsel, and courts. Our Government has and continues to make significant progress in addressing these issues. On April 28, 2017, I met with my provincial and territorial counterparts to focus on the role that all our governments can play in shifting the culture of delay. We identified mandatory minimum penalties, bail, administration of justice offences, preliminary inquiries, and reclassification of offences as priorities for legislative reform. We also agreed to discuss giving shape to proposals for legislative reform mid-summer and to hold the next in-person meeting in September to seek consensus on a legislative program.

"Furthermore, I have announced 77 judicial appointments across Canada since taking office, and I will continue to make these appointments a priority. The new judicial application process, announced in October 2016, emphasizes transparency, merit, and diversity, and will continue to ensure the appointment of jurists who meet the highest standards of excellence and integrity.

"We continue to work closely with stakeholders and Canadians on delays as part of our ongoing review of the criminal justice system. I am looking forward to continuing this work with our partners to better align our criminal justice system with the evolving needs of all Canadians. We are and have been meeting the Supreme Court call to address the roots of delay through evidence-based policy making."

Frivolous motions not the cause of court delays, Ottawa defence lawyers say
Delay tactics targeted in Supreme Court of Canada ruling on case of R. v. Cody
CBC News
Trevor Pritchard
June 17, 2017

Two Ottawa defence lawyers say frivolous motions made during criminal trials are not the main cause of the country's court system delays, despite the practice being targeted in a Friday ruling by the Supreme Court of Canada.

The court's strong words against the delay tactics formed part of a unanimous 7-0 ruling Friday that upheld an accused Newfoundland drug dealer's bid to have his case thrown out over a five-year wait for a five-day trial.
The ruling comes 11 months after the Supreme Court set strict new rules for an accused's right to be tried within a reasonable time, in what's come to be known as the Jordan decision.

On Friday, the Supreme Court found that both the Crown and the defence contributed to the delay in the case of James Cody. The court reiterated that a "proactive approach" was needed by both sides to speed up the pace of justice — one that included putting forward fewer motions that bear no relevance to the case being tried.

"Trial judges should suggest ways to improve efficiency, use their case management powers and not hesitate to summarily dismiss applications and requests the moment it becomes apparent they are frivolous," the ruling said.

"Irrespective of its merit, a defence action may be deemed not legitimate if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay," it added.

However, it's a directive that will affect the work of defence lawyers more substantially, according to Anne London-Weinstein, president of the Defence Counsel Association of Ottawa.

"The reality is that the defence — because our clients have constitutional rights — we're going to be bringing 90 per cent of the motions. So, it's going to be our work that's assessed in terms of whether or not something is frivolous," she said.

Ottawa cases

The Jordan ruling last July set strict limits for when a trial must be completed: 30 months for a case in Superior Court and 18 months for cases in lower courts.

In the nine months since the Jordan ruling, 76 cases in Ontario have been tossed out due to unreasonable court delays, according to the Ministry of the Attorney General. Eight of those cases were in Ottawa.

Last November, an Ottawa judge stayed a first-degree murder charge against 33-year-old Adam Picard, who had been accused of killing Fouad Nayel in 2012, and had been in jail awaiting trial for nearly four years.

That decision is currently under appeal.

'It's been hell': Ottawa family on edge as appeal begins in stayed murder case
Crown to appeal stay in Adam Picard's murder trial
The defence team for 21-year-old convicted murderer Devontay Hackett also attempted — albeit unsuccessfully — to argue that the 32½-month delay in bringing Hackett's case to trial violated his rights under the Canada's Charter of Rights and Freedoms.

Evidence 'much more complex'

Speaking in general terms about the pace of the legal system in Ottawa, London-Weinstein said defence motions often have very little to do with the problem of court delays.

"The laws of evidence have become much more complex. Trials have become longer because of the volume. Wiretap evidence is a classic example, where it just elongates the time it takes to litigate them and their admissibility," she said.

London-Weinstein also said that while defence lawyers have to provide reasonable evidence to the court as to why they're pursuing certain motions, they don't have to give their entire strategy away — and that the court's ruling could potentially affect that.

Both London-Weinstein and Ottawa defence lawyer Michael Spratt said frivolous motions or applications are rare, with Spratt noting they most often come about when an accused person inexperienced with the law ends up representing themselves.

"We do know that when there is competent defence counsel on a case, matters proceed more expeditiously," Spratt said.

"It's in no one's advantage — and it's certainly not in a client's advantage — to poison a judge or a trier of fact against your case by needlessly wasting time."

Engaging in delay tactics also doesn't endear lawyers to the judges who try their cases, he added.

"Reputation is everything in the court. And no defence counsel would ever contemplate throwing away their reputation for a motion that would not result in any difference."

Globe editorial: How to speed up Canada's stalled courts

The Globe and Mail

June 18, 2017

Never in Canadian history have so many taken so long to prosecute so few.

The Supreme Court says the criminal courts are suffering from a "culture of complacency," leading to constitutionally unacceptable trial delays. It may not be right about the remedy – last year's R. v. Jordan ruling means charges as serious as murder are being thrown out for exceeding the court's maximum allowable time to come to trial, thereby causing real harm to victims, and leading to another kind of injustice.

But the Court is right that Canada's system is broken. And it's worse than "complacency." The word implies stasis, but statistics suggest that our criminal courts are in fact evolving – backwards. Our too-slow courts are getting even slower.

Last week, the Senate released a bracing report on slow-mo justice, and how to speed it up. Federal Justice Minister Jody Wilson-Raybould and her provincial counterparts should read it, photocopy it, and put its recommendations into practice. The Senate committee on legal and constitutional affairs, led by Conservative Bob Runciman and independent Liberal George Baker, has done a superb job of documenting symptoms and identifying remedies.

Why are Canada's criminal courts so clogged up? It's not because their workload is increasing. On the contrary, it has been decades since there were so few crimes to deal with.

Between 2005 and 2015, the number of crimes committed, as reported by police, dropped by 20 per cent, according to Statistics Canada. And not only did crime numbers fall, so did the seriousness of offences. Over the last decade, StatsCan's "Crime Severity Index," which combines volume and severity of criminality, has dropped by nearly a third.

Thanks to declining crime, the number of criminal court charges fell by more than nine per cent between 2005 and 2015. But at the same time, the number of cases disposed of by Canada's courts dropped by 14 per cent.

The number of cases before the courts is steadily falling – but the number of cases the courts can handle is falling even faster.

That leaves the criminal courts, despite a falling workload, further behind than ever, and setting new records for inefficiency.

The statistics suggest the system is not merely stuck, but actually operating in reverse gear. Court inefficiency is in a race with falling crime. Court inefficiency is winning.

The Senate report points fingers at every part of the justice system. And it names judges as a big part of the problem. They are in charge of what happens in a courtroom, and many delays occur because, in the name of collegiality and not rocking the boat, judges allow them to occur. The Senate says judges must use better case management, "imposing deadlines and challenging unnecessary adjournments."

At the same time, however, courts, provinces and the federal government urgently need to change many aspects of court procedure. It has to be taken out of the era of vellum and stamped wax seals, literally and figuratively.

The court system is still poorly computerized, which means preparation and release of documents is inefficient. Related to that, many routine procedural matters are sucking up court time, because they must take place in front of judge, with defendants, lawyers and police having to appear in person.

The Senate recommends that lesser judicial officers, not judges, handle some routine procedural matters. It also says that "video-conferencing and computer systems should be developed to eliminate the need for many routine in-person court appearances and allow easier communications among courts, legal counsel, accused persons, victims, witnesses and offenders." Yes, please.

And then there's the shocking fact of how much court time is taken up by matters that either shouldn't be in court, or could be dealt with much more quickly. According to the Senate, 23 per cent of the cases completed in adult criminal court are so-called administration of justice

offences – namely breach of release conditions or failure to appear in court. There has to be a better, faster way to deal with an additional charge against someone awaiting trial.

The same goes for one of the most common offences: impaired driving. The Senate says it represents about 10 per cent of the most common offences tried in court. Some provinces deal with drivers with lower levels of blood alcohol through administrative penalties – immediate fines and license suspensions – rather than sending these cases to criminal trial. It makes sense. So does figuring out how to divert more people with mental health and addiction issues out of the criminal law system.

The goal of these reforms is not to short-change victims, or allow criminals to evade responsibility. It is to ensure that justice is done: speedy trials for defendants, fair and measured punishment for the guilty, rehabilitation for offenders – and more justice for all.