Court declares arrest of man who swallowed heroin is Charter violation
Canadian Lawyer's Magazine
Gabrielle Giroday
June 18, 2018

A judge with the Ontario Superior Court of Justice has ordered that evidence obtained by border officers at Pearson International Airport cannot be used in a case against a Tanzanian man, because it violated his Charter rights.

In a pretrial application in R. v. Juma, counsel for Issa Juma successfully argued that evidence collected by officers should not be included in a trial scheduled for September, over Juma's alleged role in importing heroin into Canada.

The ruling states that Juma was carrying nearly 1.5 kilograms of heroin within his body when he arrived at the airport. However, the legal arguments around Juma's case rested on whether Juma was legally detained when a border officer asked him if he had swallowed drugs and he replied that he had.

"In this case there is no dispute that the arrest and search of Juma rely on his utterance that he had swallowed drugs. Put another way, if the utterance is excluded, there are no grounds for his arrest or subsequent search," says the ruling.

"The parties therefore agree the pivotal issue in this case is whether Mr. Juma was legally detained at the point where Jolly asked him whether he had swallowed drugs. If not, no constitutional concerns are raised. However, if he was detained at that point, then he was deprived of his right to silence and right against self-incrimination (s. 7), as well as his right to be promptly informed of the reason for his detention and to consult counsel (s. 10 (a) and (b))," said the ruling.

Justice Deena Baltman states in the decision that Juma arrived in Canada in April 2017 on a flight from Ethiopia that originated in that country.

Juma raised suspicions among border officers when he gave vague responses about where he was staying and why he was in the country.

Border officers searched Juma's luggage and found nothing of concern, and one continued interviewing him with the help of a Swahili interpreter.

Eventually — after concluding that Juma couldn't be admitted to the country under the Immigration and Refugee Protection Act — a border service supervisor did a Google search on Uganda and drugs, which turned up a search result with a World Health Organization report that traced drug trafficking routes, according to the ruling. After that, the supervisor sat down with Juma and asked if he had swallowed drugs — and he was stunned when Juma said he had.

"[The border service supervisor] testified this was the first time in over ten years on the job (and thousands of interviews) that he had ever conducted such an internet search or asked that question, and he was 'shocked' by the answer," said the ruling.

"That said, he admitted that he knew before meeting with Mr. Juma that depending on the answer, it could become a criminal investigation. He also agreed that in keeping with his standard practice, Mr. Juma was likely told before this meeting that he was obliged to answer all questions put to him."

Based on these details, Baltman said she was "satisfied the inquiry [of the border officers] went beyond routine questioning toward a more intrusive form of inquiry based on a suspicion that was both strong and particularized.

"Any utterances made by the accused before [the border officer's] question would be admissible in evidence as the accused was not yet 'detained'; however, when [the border officer] conducted a particularized and unprecedented search online and found ominous information that matched the accused's travel trajectory, the questioning changed from routine inquiries to a focussed investigation of an offence," said the ruling.

Craig Zeeh, the lawyer who represented Juma, says he was hopeful a judge would rule in his client's favour. Zeeh says an acquittal has since been entered on the charge against Juma, with the right reserved to appeal.

"I think the big takeaway is that the law that we know of Charter, once it's engaged at the border, it still applies [at] full force," says Zeeh, an associate with Lockyer Campbell Posner LLP. "Really, the test is different of when it applies, but once it does, we treat it the same as anyone else, that 10 (b) breaches are still 10 (b) breaches, and they are taken seriously by the court."

Kevin Westell, partner with Pender Litigation in Vancouver, says the main takeaway from the ruling is that border officers need to expect there will be strict scrutiny of their actions in investigations they conduct.

"They certainly do have a broad leeway, much broader than in any other investigative context, but this case speaks to the border lines and the extent of that legal justification they have to continue to questioning in circumstances where there really isn't room for a particularized suspicion to arise," he says.

Little comment was provided by the Public Prosecution Service of Canada in the wake of the ruling. "This was a decision specific to the facts of this particular case and [the justice's] decision speaks for itself," a spokeswoman said in a statement.

Amanda Lindhout's kidnapper sentenced to 15 years
The Globe and Mail
Jim Bronskill
The Canadian Press
June 18, 2018

A judge has sentenced a Somalian man to 15 years in prison for the kidnapping of Amanda Lindhout, saying hostage-taking is a threat to the international community that deserves significant punishment.

Ali Omar Ader sat silently in the prisoner's box as Ontario Superior Court Justice Robert Smith handed down the sentence Monday.

It could be the final chapter in a nightmarish odyssey that began a decade ago in East Africa.

Smith ruled in December that Ader, 40, was a "willing participant" in the 2008 hostage-taking of Lindhout, who was working as a freelance journalist near Mogadishu at the time.

The judge found much of Ader's testimony unbelievable and did not support his claim that he was forced into serving as a negotiator and translator on behalf of a gang which threatened to harm him and his family.

Lindhout, raised in Red Deer, Alta., and photographer Nigel Brennan of Australia were snatched by armed men while pursuing a story, the beginning of a terrifying 15-month ordeal. They were released in November 2009 upon payment of a ransom.

The RCMP later lured Ader to Canada on the pretext of signing a lucrative book-publishing deal, leading to his arrest in Ottawa in June 2015.

Ader acknowledged to undercover officers that he had received $10,000 for his role in the kidnapping.

Although they testified at Ader's trial, neither Lindhout nor Brennan — both severely scarred by events — were present on Monday.

Ader's lawyers said at a March sentencing hearing that 10 to 12 years in prison would be appropriate. The Crown was seeking a term of 15 to 18 years.

In sentencing Ader to 15 years, Smith said he would receive six years' credit for time already spent in custody.

The "horrendous circumstances" of Lindhout and Brennan's confinement were an important factor in deciding the punishment, the judge said.

While Ader was not involved in physical or sexual assaults that Lindhout suffered, he was motivated by greed and did threaten to kill the hostages on several occasions if the ransom was not paid, Smith said.

Crown lawyer Xenia Proestos told reporters the sentence sends a strong message that Canada takes its international commitments very seriously, “and that we will pursue justice when these kinds of offences are committed against Canadian citizens anywhere in the world.”

As negotiator for the gang, Ader held many long-distance telephone conversations with Lindhout’s mother, Lorinda Stewart, who told him the family was selling possessions and scrambling to raise ransom money.

At one point Lindhout was driven at night into the desert, where a knife was held to her throat. While Ader was not present, he helped the gang connect a phone call to Stewart so she could hear her daughter’s hysterical screams.

Delivering a prepared statement at the sentencing hearing, Lindhout said the confinement in squalid conditions left her with severe post-traumatic stress disorder, depression, the inability to sustain friendships, insomnia, nightmares, digestive problems and broken teeth.

“For years after my release I couldn’t really believe I was free.”

Brennan also read a victim impact statement, saying he, too, has suffered from post-traumatic stress, panic attacks and nightmares. Being forced to hear Lindhout’s screams from torture in an adjoining room is “a memory that will mentally stay with me for the rest of my life,” he said.

Ader expressed remorse at the March hearing, saying he was human and therefore flawed.

“I am sorry, I apologize and ask you for forgiveness,” he said, requesting freedom so he could care for his family in Somalia.

Les avocats de l'aide juridique manifestent
Première d’une série d’actions : les avocats de l’aide juridique réclament la parité salariale avec les procureurs de la Couronne
Droit Inc
Apolline Caron-Ottavi
18 juin 2018

Une manifestation des avocats de l’aide juridique a eu lieu le 14 juin devant le Palais de justice de Montréal.

Leur convention est échue depuis mars 2015 et peine à être renouvelée : depuis trois ans, les négociations avec le gouvernement Couillard bloquent sur la seule question de la parité salariale avec les procureurs de la Couronne.

«Le travail que nous faisons n’est pas moins important, ni moins exigeant que celui de la Couronne, insiste la présidente du Syndicat des avocates et avocats de l’aide juridique de Montréal, Berna Tabet. Il

s’agit tout simplement d’un principe d’équité : le gouvernement ne peut pas payer davantage l’avocat qui poursuit que celui qui défend».

Selon elle, refuser la parité est une attaque directe à l’intégrité et à la pérennité du système juridique.

D’autres manifestations se sont déroulées à divers endroits au Québec (comme à Rimouski) mercredi ainsi que jeudi.

Et le mouvement devrait se poursuivre dans les prochaines semaines : «Il s’agit de la première d’une série d’actions» peut-on lire dans le communiqué de la Fédération des professionnèles (FP-CSN).

Cheers erupt as Federal Court judge approves historic gay purge settlement
Settlement entails reconciliation and remembrance measures, including a national monument
CBC News
Jim Bronskill
The Canadian Press
June 18, 2018

A federal judge has approved a landmark deal to compensate members of the military and other agencies who were investigated and sometimes fired because of their sexual orientation.

Cheers of joy and celebratory hugs greeted the decision of Federal Court Justice Martine St-Louis after hours of testimony Monday from class action members.

"This is vindication after years of the persecution that I personally experienced as part of the military," said Lt-Col. Catherine Potts. "It's truly a human rights victory for all of us."

Gay military veterans told St-Louis they were interrogated, harassed and spied on because of their sexuality.

Sobbing could be heard from onlookers as a steady stream of men and women took turns at a microphone to lament how being gay or lesbian made them enemies of their own country.
The discriminatory policies that often ruined careers and lives had their roots in federal efforts that began as early as the 1940s to delve into the personal lives of people who were considered security risks.

Potts, a 37-year veteran who still serves with the air force, says she lived in the shadow of the anti-gay policy for years, watching how she spoke and dressed to avoid attracting attention.

"I lived with fear, I was consumed by it," she told the court. "When would the game be up and would I be found out?"

Potts was followed by military police and her phone was tapped.
"I was hunted and now, sadly, it haunts me. I want to be able to put all that behind me."

'Canadians can be proud'
An agreement in principle in the court action was drafted last November, just days before the government delivered a sweeping apology for decades of discrimination against members of the LGBTQ community.

The final settlement includes at least $50 million and up to $110 million in total compensation, with eligible individuals each expected to receive between $5,000 and $175,000, depending on the gravity of their cases.

The vast majority of those who appeared in court Monday spoke in favour of the settlement.

"I'm absolutely ecstatic. It's a great day for justice in Canada," said lawyer Doug Elliott, who represented the members.

"I think Canadians can be proud that our country has not turned its back on these victims of a bad era in our history when people were treated like lesser human beings because they were gay."

A national monument
If the next steps unfold as expected, people will start receiving cheques in the fall, Elliott said.

A total of about 1,000 people are expected to sign on to the class action, he said.

"It could go higher, but I don't think so. First, a lot of the gay men are dead, either from suicide or AIDS. And also there is a certain group within our class (for whom) the psychological barriers are so great, that they're just not going to come forward," Elliott said.

"And that's a shame because it shows that the purge is still having a negative effect on people in Canada in a way that's really sad."

The settlement entails several reconciliation and remembrance measures, including a national monument, a Canadian Museum for Human Rights exhibition, declassification of archival records and a citation akin to a medal for affected people.

The Liberal government has also introduced legislation that would allow people to apply to have their criminal convictions for consensual sexual activity between same-sex partners erased from the public record.

Column: Lawyers get a bad rap
Buffalo Law Journal
Stephanie Adams
June 19 2018

Lawyers get a bad rap in our society and, given our tendency to flock around tragedy, controversy and pain, it makes sense. People associate lawyers with opportunism and negativity. The fact that we appear

to advise, guide and advocate, governed by a strict code of ethics, doesn't matter; people often see us as the harbingers and benefactors of pain.

How can we fight this bad rap? On a grand scale, it is fought by maintaining that rigorous code of ethics and making sure we are living up to our obligations as legal professionals.

But the small scale matters, too. We live in a world where small mercies can become grand gestures, and every little thing we do matters. So for every lawyer joke, there should be what I call "lawyer gratitude."

I try to cultivate "lawyer gratitude," if the mood is right, by offering small life hints, informed by the law, to non-lawyers. This is not legal advice, per se, but the legal equivalent of what, in 2013, were called "life hacks."

- Given your areas of practice, your list might differ from mine, but here is my list of law-related hacks to make the world more fun, interesting and fair:
- Show people the real property tax mapping GIS for their neighborhood. I never met a person who was not fascinated by a tax map (or perhaps stunned into amused interest by my fascination with a tax map).
- On the same note, showing people how to look up corporations and LLCs on the New York Department of State website is like teaching them a magic trick. If this spurs enthusiasm, confirm that yes, corporations really are like fake people. Let that blow everyone's mind for a while.
- Let creative professionals know that it is wise – and affordable – to register their copyrights. Registration is not required to "have" a copyright but, in many cases, it entitles an underpaid artist to bring a stronger case. It is worth the $35 filing fee.
- If they are in the City of Buffalo, show them the website where they can verify that the guy fixing their roof is actually a licensed contractor (depending on what is found, this may or may not be met with gratitude).
- Casually let people know that in order to comply with state law, their bike should have a bell. This is both true and a charming excuse to buy a bell.

And most critically ...

Remind people, in this cellphone-loving age, that they should memorize two phone numbers: that of a loved one (because: love) and that of a bail buddy. Because anyone can get arrested, and once you're booked and the police have your phone in a locker, you can't use it to call for help.
Yes, lawyers get a bad rap in our society. But we do live in a world where small mercies can become grand gestures, and every little thing we do matters. And when someone you met at a party can still call their college roommate to bail them out at 3 a.m. because YOU told them to memorize the number, perhaps they'll feel "lawyer gratitude" and think a little more kindly about us. Even if the true hero of their story, in the end, is their criminal defense attorney.

Stephanie Adams of the Law Office of Stephanie Adams PLLC focuses her practice on issues relevant to creative professionals: info@losapllc.com.

Ottawa appointing more female judges, but bench still short of gender parity
The Globe and Mail
Sean Fine
June 19, 2018

The federal Liberal government has been naming women to the bench at an unprecedented rate this year, with nearly three women chosen for each man, government figures show. Of 37 judges named to federally appointed courts in 2018, 27 are women.
The boost in the appointment rate of women has been helped along by historic levels of female applicants, who make up 45 per cent of the 1,169 applicants since the Liberals established a new appointment process in October, 2016, according to the Office of the Commissioner for Federal Judicial Affairs, which collects data on the process. That's up from 30 per cent during the 10 years the Conservatives were in power. (Federally appointed courts include the superior courts of provinces, the Federal Court, Tax Court and the Supreme Court of Canada.)

The rapid rate of female appointments still leaves the bench well short of gender parity. The 866 full-time positions are now 39.6 per cent women, up from 36.6 per cent when the Liberals took office in November, 2015, according to figures supplied at the request of The Globe and Mail.

The government has put into effect its stated policy of having a 50-50 gender split in Cabinet. But it has never publicly stated a target for the appointment of women to the judiciary.

If it has set numerical targets for achieving a 50-50 split, it is not saying.

"All judicial appointments are made on the basis of merit, taking into account the needs of the court," Dave Taylor, a spokesman for Justice Minister Jody Wilson-Raybould, said in an e-mail. "As we move forward, we are confident that our Government's goal of a balanced, meritorious and diverse bench will be realized."

Members of the legal community interviewed for this story said they believe the Liberals are stepping up efforts to bring about gender parity on the bench. Several lawyers said they welcome that effort. "As a middle-aged white guy, I'm not concerned about what might be interpreted as a disproportionate number of women who are appointed to the bench," Halifax privacy lawyer David Fraser said in an interview. "If it takes a little bit of corrective action to get us close to a properly representative judiciary, I think it's fine."

During the Conservatives' period in office, from 2006 to 2015, women made up 30 per cent of judicial appointments. The Liberals made several changes to the appointment process in 2016, including asking applicants to fill out questionnaires describing what equity and diversity mean to them. And for the first time, they asked applicants their race, ethnicity, sexual orientation and disability status, promising to make the data public. (The judicial affairs office says it will make these more detailed figures for the

second year of Liberal appointments under this process public in October. Several of the 2018 appointees are members of racial minority groups.)

The appointment process has two main stages. Applicants are screened by one of 17 judicial advisory committees made up of federal and other representatives. Then the government chooses from the list of candidates recommended or highly recommended by the committees.

Some lawyers stressed the importance of merit in judicial appointments. “I certainly support gender equity but the overriding factor has to be choosing the best candidates, as far as I’m concerned,” Andrew Rouse, a litigator in Fredericton, said in an interview.

Federal Court approves class action settlement for LGBTQ Canadians
Total compensation for members of military, RCMP and federal civil service could reach $145 million
CBC News
Jack Julian
June 19, 2018

A Federal Court justice has approved a settlement for Canadians who were persecuted or fired due to their sexual orientation while in the Canadian Forces, RCMP and federal civil service between 1955 and 1996.

Alida Satalic of Dartmouth, N.S., who was dismissed from her post as a Canadian Forces postal clerk in 1989, was in Ottawa Monday for the federal court hearing.

"Happy, happy day," she said. "It's a way on to healing. The apology was one thing, but this is even more."

The 57-year-old was the lead plaintiff in a class action lawsuit on behalf of all LGBTQ Canadian Forces members who served in Atlantic Canada.

That lawsuit was merged with other class action claims on the road to today's settlement.

Satalic's lawyer, John McKiggan of the Halifax law firm McKiggan Hebert, said it is the largest LGBTQ settlement anywhere in the world and will involve between $85 million and $145 million in compensation.

McKiggan said the final amount will be determined by how many Canadians step forward to make claims. Beyond individual compensation, there is also money for education and reconciliation, he said.

Claimants can also request individual apologies and ask that their employment records be amended to reflect they were unjustly fired without cause. They will also receive the Pride Citation, to reflect that they served Canada while suffering discrimination.

McKiggan said today's hearing had to be held in the building housing the Supreme Court of Canada because so many class members wanted to attend.

He estimates there were between 50 and 100 people in the courtroom to hear former military and RCMP members testify about the harassment and disciplinary action they faced due to their sexual orientation.

Satalic did not speak, but filed an affidavit describing her treatment.

She said she was deeply touched by what she heard today in court.

"Different people were speaking about how they were persecuted in the military," she said. "I got teary-eyed so many times. You know, a lot of the stuff people are talking about I can relate to. The same thing happened to so many of us."

Satalic trained as a truck mechanic when she joined the military in 1983.

She nearly quit due to harassment and intimidation from her instructors and all-male classmates.

She later became a postal clerk in Trenton, Ont., and was investigated and interrogated by the military's special investigations unit in 1989.

Because she admitted to being a lesbian, she was denied the top-secret clearance she needed to advance in her post, and was denied access to all future training. Instead, she opted for a medical discharge.

Satalic rejoined the military in 1994 after the military's ban on homosexuality was officially lifted.

Phoenix pay system’s failure prompts call for increased power to fire public servants
The Globe and Mail
Michelle Zilio
June 20, 2018

Canada’s top public servant says Parliament needs to consider legislative changes that would give the government more power to fire public servants for poor performance amid a debate over who to blame for the Phoenix pay system failure that botched the pay of tens of thousands of civil servants.

Privy Council Clerk Michael Wernick said it is “extremely difficult” to fire someone in the public service below the deputy-minister level for poor performance, as they are protected by the Public Service Employment Act. He made the comments on Wednesday night during testimony to the Senate finance committee, where he faced questions about the Phoenix pay system failure, which has gripped the public service for more than two years.

“I think parliamentarians in both chambers might want to take a look at that and see if that’s creating the right incentives and disincentives for a high-performing organization. That’s a big project. It would be very messy and controversial,” Mr. Wernick said.

Under the Public Service Employment Act, Mr. Wernick said, public servants can be terminated only with “legal test of cause,” which is a “long, arduous, grueling” process. He said he would leave it to parliamentarians to propose changes to the act, but noted the importance of putting safeguards in place.

“In cases of serious misconduct, or serious poor performance or mismanagement, it should be possible to terminate people, but I don’t want that to become an instrument for harassment and bullying,” Mr. Wernick told reporters after the meeting.

Mr. Wernick said the termination issue has been a concern of his for years, denying that the Phoenix pay scandal put the matter on his radar.

In a scathing report last month, Auditor-General Michael Ferguson blamed three “executives” – senior public servants at Public Services and Procurement Canada (PSPC), which is responsible for Phoenix − for the failure. He said they did not tell the deputy minister at the time about the known problems with Phoenix, leading the department to launch it despite clear warnings it was not ready.

It was recently revealed that three Phoenix “executives” were not fired for mismanagement of the pay system.

Speaking to the House of Commons public accounts committee last week, PSPC deputy minister Marie Lemay said two of the three executives were shuffled out of their senior posts in pay administration and did not receive performance bonuses. But two of the executives still work for the department, while the third retired, she said.

Mr. Wernick’s comments on Wednesday are the latest in a back-and-forth between him and the Auditor-General, whose report called the Phoenix pay system an “incomprehensible failure” indicative of “pervasive cultural problems.” Last week, the PCO clerk called Mr. Ferguson’s chapter on the federal government’s cultural issues an “opinion piece” containing “sweeping generalizations.” He took that criticism further on Wednesday, suggesting Mr. Ferguson went beyond his mandate of making sure the government’s financial books are clean.

“The opinion pieces stray into just general advice, like a management consultant or a governance expert, and I just don’t think the office of the Auditor-General is the right place to do that,” Mr. Wernick said.

Mr. Ferguson has not backed down from his assertions, saying on Tuesday that his report has sparked a much-needed conversation about the public service.

The Public Service Alliance of Canada (PSAC), the country's largest civil-service union, wrote to Prime Minister Justin Trudeau last week requesting a public inquiry into Phoenix. The union says it has not heard from the Prime Minister's Office yet.

Phoenix: just another symptom of centralization of power in Ottawa
When opinions diverge between the PMO/PCO and the bureaucracy, the department head soon 'retires' or becomes a 'senior adviser' in a small office. Speaking truth to power isn't valued.
The Hill Times
Andrew Caddell
June 20, 2018

The recent scathing indictment ("incomprehensible failure") of the Phoenix pay system by the auditor general, Michael Ferguson, was heartwarming for me and others who have been "Phoenixed."

I was a victim of the Phoenix pay system in 2017. I reimbursed the government for more than $19,000 Phoenix overpaid me. Now I have joined the ranks of the underpaid: almost a year after retiring, I am being shortchanged about $7,000 from my pension. That pales in comparison to others: I know young recruits to the federal public service who are being paid $1,000 less per month than they should be receiving.

The whole mess relates to what Mr. Ferguson calls the "broken…culture" of the public service. For students of public administration in Canada, this is straight from author Donald Savoie's book Governing from the Centre, which focuses on the concentration of power in the Prime Minister's Office and the Privy Council Office. Predictably, the current PCO clerk, Michael Wernick, attacked Mr. Ferguson last week for his comments.

Former clerk Kevin Lynch, explaining his role to foreign service officers in Delhi in 2009, said the job changed under Jean Chrétien in 1993, when the position combined the head of the public service (once in Treasury Board) with the role of prime minister's deputy minister (once held by the principal secretary) and the secretary to cabinet.

It rang true to me: when I was an assistant on the Hill in the 1980s, the PMO had about 30 staff and PCO about 100. Today, the numbers are about 10 times that. I agree with Savoie that the role of the PCO has transformed the public service. I think it has encouraged a culture that is paradoxically both ambitious and obedient.

In the 1970s, the Ottawa Citizen published a survey comparing attitudes of senior public servants with managers in the private sector. It found public sector managers cared more about themselves and their career advancement than those in the private sector, who were inclined to be team players, working towards shared goals. The suggestion was that, in climbing the "greasy pole" of bureaucracy, it was every man (as it mostly was) for himself.

As a result, as Savoie has suggested, when power became centralized in the PMO and PCO, the message for the ambitious was that The Centre was the place to be. And so PCO became a sort of prep school for

aspiring deputy ministers, with predictable disasters, as PCO experts accustomed to managing five people were promoted to departments with 5,000 employees.

In later years, senior administrators were required to serve as associate deputies elsewhere if they aspired to be deputy ministers. This resulted in a "musical chairs" of deputies and a lack of institutional memory at the top of departments. Those competent, but less ambitious, senior administrators who refused to leave their home departments languished, or left government.

The residual effect of these changes, especially in the years under Stephen Harper, was deputy ministers and ambitious senior bureaucrats knew speaking "truth to power" or offering bad news was career limiting. When opinions diverged between the PMO/PCO and the bureaucracy, the head of department was soon "retired" or became a "senior adviser" in a small office.

Savoie wrote in 1999: "the importance attached to [senior public servants] 'knowing their way around the system' to their ability to avoid 'surprises'…[has] led some former and present public servants to doubt whether senior officials can now 'speak truth to power.' One former deputy minister, for example, wrote that "the honest public servant is being superseded by the courtier."

Flash forward a decade: here is how Treasury Board President Scott Brison replied to the AG: "Some of this needed culture change is simply a matter of unleashing the creativity, energy, and enthusiasm of Canada's world-class public service."

Good luck with that. For the culture to change, the structure of the public service has to change, and people should be promoted based on their capacity to be honest with those in authority.

It all begins with reducing the presidential-like system of concentration of power in the PMO and PCO. In the Westminster system, power is supposed to be shared by ministers in cabinet who are responsible to Parliament, and managed through the PMO/PCO. If the needed cultural changes do not take place to the public service, prepare for more "incomprehensible failures."

Andrew Caddell retired last year from Global Affairs Canada, where he was a senior policy adviser. He previously worked as an adviser to Liberal governments. He is a fellow with the Canadian Global Affairs Institute and a principal of QIT Canada. He can be reached at pipson52@hotmail.com.

Clerk's comments 'not providing leadership' to change public service culture, say opposition MPs
Liberal MPs blame a Harper-era atmosphere in the bureaucracy as they back PCO Clerk Michael Wernick in his war of words with the federal auditor.
The Hill Times
Emily Haws
June 20, 2018

Canada's top bureaucrat should have accepted comments made by the auditor general in his scathing report on the Phoenix pay system, say opposition MPs, as his refusal undermines the credibility of the

auditor general's work and shows that the systemic cultural issues noted are alive and well in the bureaucracy's upper ranks.

Liberal MPs, meanwhile, are more sympathetic to Privy Council Clerk Michael Wernick, saying the cultural issues contributing to Phoenix aren't systemic, as they resulted from Harper-era policies.

On May 29, Mr. Ferguson released a scathing report calling Phoenix an "incomprehensible failure." It looked at the design and build process of Phoenix from about 2009 until February 2016 when it launched, leaving thousands of bureaucrats with pay headaches.

A culture within the public service that encouraged meeting budgets by any means necessary was a root cause of the failure, said Mr. Ferguson in his report. The bureaucracy is risk-averse to the point where policies are followed as check-boxes, but their spirit isn't implemented, he previously told The Hill Times.

At a June 12 House Public Accounts Committee meeting, Mr. Wernick called the report's section on cultural issues an "opinion piece," saying it contained sweeping generalizations not supported by evidence. He also said Phoenix was a "comprehensible failure" and suggested looking at the incentive structure.

"It was avoidable, it's repairable, and it gives us all kinds of lessons about how to build a better public service," he told the committee. The civil service needs to be more willing to take risks, he said, but disagreed with Mr. Ferguson's insinuation that the bureaucracy is broken, as Phoenix was caused by multiple factors.

NDP MP Daniel Blaikie (Elmwood-Transcona, Man.), the vice-chair of the House Government Operations and Estimates Committee, said Mr. Wernick's comments signal the culture that auditor general Michael Ferguson detailed is thriving at the highest levels.

"Somebody has called out a cultural issue within his organization and instead of taking that on [Mr. Wernick] decided to say 'there's no problems here and you shouldn't say that.'" Mr. Blaikie said. "To me, that's not providing leadership to create a culture of accountability within government."

Mr. Ferguson and top officials from Public Services and Procurement Canada (PSPC) and the Treasury Board Secretariat (TBS) appeared before the Public Accounts Committee June 14 to discuss the report. Mr. Ferguson also appeared June 19 to discuss the bureaucracy's cultural issues more in-depth, but the meeting took place after The Hill Times' deadline.

PSPC is the main department responsible for Phoenix, but Treasury Board plays a supporting role, as the bureaucracy's official employer. PSPC is working to stabilize Phoenix, while TBS looks for a new pay system.

Public Accounts Committee vice-chair and NDP MP David Christopherson (Hamilton Centre, Ont.) said he was pleased with the approach that newly appointed Treasury Board secretary Peter Wallace took

during the June 14 meeting, which he described as accountable, adding he's had former bureaucrats contact him to say Mr. Ferguson's arguments are correct.

"It's not just shame and blame and 'gotcha,' it's also supposed to be about identifying what the problems are, why did this happen, and what's going to be done to make sure it doesn't happen again," he said of the parliamentary committee process. "The AG was doing exactly that, and I think he was accurate in saying there are [systematic] problems in the entire government and that's just a long way of saying 'culture.'"

"To have the clerk roll in and basically do a dog-and-pony show about how great the public service is… We all agree; but clearly there's problems."

When contacted for this story, Mr. Wernick's office directed The Hill Times to the video of his committee testimony. Treasury Board President Scott Brison (Kings-Hants, N.S.) was also contacted for comment, but pointed to an op-ed published June 11 in the Ottawa Citizen in lieu of a response to questions.

In it, Mr. Brison discussed how the government is restoring respect for the public service, un-muzzling scientists and instilling "a culture of experimentation, evidence-based policy and implementation."

"We agree with [Mr. Ferguson] that much more needs to be done, and Canadians can count on us and their public service to get it done," he wrote.

Liberals say culture issues a Harper-era holdover

Liberal MPs said they were more interested in talking about fixing Phoenix than taking sides in the dispute. Steven MacKinnon (Gatineau, Que.), parliamentary secretary to the public services and procurement minister, said he wasn't interested in debating semantics over whether Phoenix was a "comprehensible" or "incomprehensible" failure.

"What is obvious is that this is something that is a massive failure on the part of the government," he said. When asked if he thought there was a culture problem within the public service Mr. McKinnon said there were problems with the Phoenix project specifically, which are coming to light.

"The fact that… there's a debate going on inside the public service as to how this came to be is a healthy thing, that's what organizations must do in order to self-correct," he said. "I think we're all eager to make sure those things happen, but we're mostly eager to fix the problem."

Liberal MP Rémi Massé (Avignon-La Mitis-Matane-Matapédia, Que.) a member of the Public Accounts Committee and a former public service executive, said he was shocked by the introduction of Mr. Ferguson's spring reports which cite systemic cultural issues. He sides with Mr. Wernick.

When the Conservatives formed government in 2006, there was a noticeable shift in control, emphasizing "on time and on budget," he said, but the Liberal government, in power since 2015, has since loosened this control.

Mr. Massé said he personally saw executives who would speak truth to power, but upper management wasn't listening. He thinks this was the problem when in 2012, IBM said it would cost $275-million to build and implement Phoenix, but the 2009 budget was only $155-million.

Mr. Ferguson's report said the Phoenix executives didn't ask for more money, instead cutting out the system's key components. To increase funding, the minister responsible need to get approval from Treasury Board.

"I'm sure they told them 'we're sorry, we have identified that it probably costs $155-million, but when we looked at all the things that needed to be done now we realize it is close to twice the first [amount],'" he said. "I'm sure the minister must have said 'I don't care, make it happen.' So what do you do?"

Liberal MP Nick Whalen, a former member of the House Government Operations Committee, said he sees Mr. Ferguson's comments as largely historical because the report examined Phoenix pre-implementation. The Conservative government's bureaucracy might have had cultural issues, he said, but now he hopes bureaucrats are no longer afraid to speak out against authority.

Phoenix is a residual problem, he said, and Mr. Wernick was trying to be more forward-looking.

"When the clerk is talking about Phoenix, he's not talking about it has a historical artifact, he's talking about it in the present tense," he said. "So I think it's possible to agree with both. The clerk is talking about Phoenix as it is, and the auditor general's report that just came out is talking about as it was two years ago."

Mr. Ferguson didn't give any indications that the culture had shifted under the Liberals in his report, but Mr. Whalen said the proof will be in the pudding, adding "we have to look at the problems of today to see whether or not the bureaucracy is speaking out against the problems."

Conservative MP Kelly McCauley (Edmonton West, Atla.) said the cultural problems are likely with the associate deputy minister and deputy minister levels within the public service, given that plenty of public servants came forward to say Phoenix was an issue, including people in line departments, and the heads of human resources, among others.

In order to change it, the government must set clear rules saying there will be consequences for massive failures, he said.

Mr. McCauley said he wasn't sure whether or not Mr. Wernick would agree or disagree with Mr. Ferguson before the testimony took place, but found it surprising that Mr. Wernick went against Mr. Ferguson as the auditor general's office has a non-partisan, data-based approach. Mr. McCauley sides with Mr. Ferguson on the dispute on whether or not the failure was incomprehensible, saying that it is.

“You look at it and you think there’s not possible way this could have happened, and it did. So I disagree that it’s comprehensible how it happened,” he said. “It’s not comprehensible when you look at it—with all the warning signs, all the time, everything there, that everyone knew, it’s incomprehensible how it happened.

Overall, Mr. Wernick’s comments will just make it more difficult for the committee to write its report as not everyone’s on the same page, Mr. Christopherson said.

“It’s just that much more difficult when the first thing you have to do is knock down, what I would consider to be almost silly cardboard arguments in defence of the problem,” he said. “But we’re still going to do our job.”

Et le Prix de la justice du Québec 2017 est attribué à…
Droit Inc
Céline Gobert
20 juin 2018

Me Casper Bloom a reçu le Prix de la justice du Québec 2017 des mains de la ministre de la Justice et procureure générale du Québec, Mme Stéphanie Vallée, lors de la 26e cérémonie du Prix de la justice qui s’est tenue mardi à l'hôtel du Parlement de Québec.

L'honorable Nicole Duval Hesler, juge en chef du Québec était la présidente du jury de sélection. Dans le jury, on trouvait également M. le juge David L. Cameron, de la Cour du Québec.

« Par ses initiatives visant à favoriser la compréhension de la terminologie juridique et, plus précisément, par son colossal travail de reformulation de la version anglaise du Code civil du Québec, Me Bloom laisse à jamais à notre système de justice un riche héritage, qui profite à tous les Québécois et Québécoises », a déclaré Mme Vallée.

Minorités culturelles et linguistiques

En plus de sa contribution à l'amélioration de l'accès à la justice pour les communautés anglophones, Me Bloom a été salué pour son engagement dans la promotion des droits des minorités culturelles et linguistiques au Québec et au Canada.

Ce Barreau 1967 s’est distingué en matière de droits linguistiques, droits des minorités, défense de l'ordre public et droit référendaire. Sa carrière s’est concentrée dans le domaine du droit de l'emploi et du droit du travail.

Il a été avocat et associé principal pour le cabinet Ogilvy Renault, maintenant Norton Rose Fulbright, où il a exercé jusqu'en 2003 à titre de conseiller juridique.

De 2002 à 2006, il a été consultant et conseiller en relations de travail pour l'Université Concordia. Il a ensuite présidé la Commission des relations de travail dans la fonction publique du Canada de 2007 à 2013.

Il a notamment fondé et présidé le Comité conjoint du Barreau du Québec et de la Chambre des notaires pour la vérification de la version anglaise du Code civil du Québec.

Me Bloom a également mis sur pied le Comité ad hoc du Barreau de Montréal sur l'accès à la justice dans la langue anglaise dans le district de Montréal.

L'intimidation en hausse dans les palais
Environ 17% des procureurs du DPCP auraient été victimes d'intimidation depuis 5 ans. Pour les juges, la proportion est de un sur 10
Droit Inc
Jean-François Parent
20 juin 2018

Ainsi, 99 procureurs du Directeur des poursuites criminelles et pénales et 51 juges des cours du Québec et supérieure sont victimes d'intimidation depuis 2013.

En outre, une soixantaine de dossiers de menaces, d'intimidation ou de harcèlement », sont traités par les services de sécurité du DPCP chaque année.

C'est la conclusion d'une compilation effectuée par le DPCP, qui a calculé le nombre de demandes d'intenter des procédures en matière d'intimidation.

C'est en calculant le ratio du nombre de procureurs par rapport à ceux victimes d'intimidation la proportion de 1 procureur du DPCP sur 6 est une victime.

Il y a environ 600 procureurs au DPCP, et sensiblement le même nombre de juges au total qui arpentent les couloirs des palais de justice au Québec.

Les données regroupent les victimes recensées de 2013 à mai 2018, et ont été rendues publiques par le DPCP à la suite d'une demande d'accès à l'information. Elles recensent « le nombre de demandes d'intenter des poursuites en matière d'intimidation d'une personne associée au système judiciaire colligées depuis 2013 par le responsable du Plan de lutte à l'intimidation du DPCP », explique le document.

Le double de dossiers

Diffusé le 30 mai dernier, le rapport statistique indique que le nombre de dossiers d'intimidation ouverts chaque année par le DPCP a presque doublé depuis deux ans. D'une centaine au début de la présente décennie, le nombre de dossiers ouverts était l'an dernier de 192.

Attention, les dossiers ouverts ne se limitent pas seulement aux procureurs du DPCP et aux juges, mais aussi à toute « personne associée au système judiciaire », précise le DPCP.

Les dossiers sont ouverts en vertu de l'article 423 du Code criminel sur l'intimidation est le harcèlement, qui dispose la « violence ou (les) menaces de violence », le vandalisme et l'intimidation, est un « acte criminel passible d'un emprisonnement maximal de cinq ans,
soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire ».

Au total, 1 135 dossiers ont été ouverts depuis 2010.

Par ailleurs, le service de sécurité du DPCP aussi est occupé. Bon an mal an, on dénombre une soixantaine de dossiers « traités par le service de sécurité du DPCP en matière de menaces, d'intimidation ou de harcèlement à l'égard des employés du DPCP ».

La première année du décompte, l'année financière 2011-2012, recense 47 dossiers traités par les services de sécurité du DPCP. En 2015-2016, l'année la plus occupée, on recense 75 dossiers. La dernière année financière, 2017-2018, affiche 59 dossiers.

Un Plan

Le DPCP compile ces données depuis plus d'une décennie maintenant, notamment relativement à l'intimidation de ses procureurs. Depuis la fin des années 2000, des conseillers en sécurité s'affairent auprès du DPCP pour gérer les situations de harcèlement.

La Politique relative à la sécurité du personnel du DPCP, entrée en vigueur en 2010, a également mené à l'adoption d'un Plan de lutte à l'intimidation.

Dans le rapport annuel 2012-2013 du DPCP, on peut ainsi lire que ce Plan « prévoit notamment des normes concernant l'habilitation sécuritaire, l'aménagement des locaux et la protection de l'information ».

On a par ailleurs sondé, à cette époque, les employés du DPCP ayant été victimes d'intimidation.

Le sondage « a révélé qu'ils étaient tous très satisfaits de la rapidité d'intervention des conseillers en sécurité, de leur disponibilité et de la qualité de l'information qu'ils leur ont transmise. Tous les procureurs en chef sont globalement très satisfaits ou plutôt satisfaits du travail effectué par les conseillers en sécurité dans les dossiers de menace, d'intimidation et de harcèlement visant le personnel du DPCP, de même que relativement aux habilitations sécuritaires et à la sécurité matérielle des bureaux ».

Au DPCP, on dit ne pas constater d'augmentation, nous écrit le porte parole Jean Pascal Boucher. « Malgré certaines fluctuations, le nombre de dossiers est relativement stable, dit-il. Le personnel du DPCP peut bénéficier du Programme d'aide aux employés ainsi que sur des mesures de protection déployées après avoir procédé à l'évaluation de la menace. »

Supreme Court of Canada considers holding hearings outside of Ottawa
The Globe and Mail
Sean Fine
June 21, 2018

The Supreme Court of Canada is considering taking its show on the road and holding hearings outside of Ottawa for the first time since it was created in 1875, as the court seeks to make itself better understood to the country.

Chief Justice Richard Wagner has publicly expressed concerns that people in many countries outside of Canada are losing their respect for democratic institutions and values. The Supreme Court, he says, must not take for granted the respect of Canadians, especially as the court's coverage by the established news media shrinks and strong views about the justice system are shared on social media.

"The idea is to be close to the people," he explained in an interview this month, on why the court is looking at sitting outside of Ottawa for "one or two" days of hearings. If it proves useful, the court would make it an annual event, he said.

"It's all in line with our policy to be present in each province, to make sure that every citizen feels that the Supreme Court is there for them. And to give the chance to those people who cannot be in Ottawa, to look at how it's done. How the arguments are made. How the judges are doing their thing."

Peter Russell, a professor emeritus at the University of Toronto's political science department, said the move would echo the centuries-old British tradition of itinerant courts. "The judges were on assizes to different towns to show the people justice. [...] It was also a way of laying down the law for a king who wasn't entirely sure he had the loyalty of his subjects. It strengthened the sinews of the court system."

If the idea goes ahead, Winnipeg would be the first location because it will be host to an annual conference of Canadian appeal-court judges in September, 2019, and the Supreme Court is holding its annual "retreat" there so it can meet the appeal-court judges.

Chief Justice Wagner cited the top courts of British Columbia and Quebec, which have already begun visiting small communities to hold hearings. He also pointed to Britain's Supreme Court, which has sat outside of London twice – in Belfast in April and in Edinburgh last June. Next year, it hopes to sit in Wales.

In 2014, B.C.'s appeal court announced that for cases originating in Kamloops, Kelowna or Salmon Arm, its hearings would be held in Kelowna or Kamloops, unless those involved in the case requested a Vancouver hearing. It also said it would go to Prince George if asked.

B.C. appeal court Chief Justice Robert Bauman says he shares Chief Justice Wagner's concern that public respect for the justice system will erode. "People are questioning institutions and their legitimacy all the time," he said in an interview. "And so it's our duty to reach out and say, 'this is who we are, this is how

we work. This is why we decide issues the way we decide them.' To demonstrate to the public and earn their trust and confidence."

Last year, Quebec's Court of Appeal held hearings in Rivière-du-Loup. The year before, it sat in Trois-Rivières. The court works with the local legal community to pick two cases – a criminal case and one other – that it thinks the public will find interesting.

"Criminal law is the draw," Chief Justice Nicole Duval Hesler of the Quebec Court of Appeal said in an interview. "Everything else people seem to think is pretty boring."

Before the judges sit, a judge who is not part of the hearing explains the case and the role of an appeal court to the audience in the courtroom.

"We explain that we need an error to be able to intervene. It's not a second kick at the can," Chief Justice Duval Hesler said. "We really explain the process to people so they better understand the right of appeal, better understand that the first judge, a lot of deference is due to his or her findings, particularly findings of fact. We try and keep it really like a conversation with neighbours."

The judges also take questions afterward about the process and do media interviews.

Both she and Chief Justice Bauman said the judges benefit from the experience, too.

"It brings us back to reality," she said. "It avoids the ivory tower syndrome."

Ceremony held to mark grand opening of Nova Scotia Indigenous court
The Globe and Mail
The Canadian Press
June 21, 2018

Nova Scotia has become the first province in Canada to open a superior court on a reserve that will incorporate Indigenous restorative justice traditions and customs.

"We can't just talk about reconciliation. We have to act on it," Mi'kmaq Grand Keptin Andrew Denny said Thursday during an opening ceremony at Wagmatcook First Nation in Cape Breton. "That's why this court is here today."

Nova Scotia Supreme Court Chief Justice Joseph Kennedy called the court "groundbreaking."

"We believe that this is the first time in the history of this country that a superior court has sat in this context," he told the crowd of Indigenous chiefs, judges, politicians and community members. "Nobody else has done this. No other province in Canada."

The court's opening, which fell on National Indigenous Peoples Day, is significant in a province with a dark history of failing Indigenous Peoples.

“Nova Scotia is the province that failed Donald Marshall Jr.,” Kennedy said. “Our justice system, this justice system, we did that great wrong. But it is Donald Marshall’s legacy that inspires us to do better.”

Marshall was a Mi’kmaq man who was wrongly convicted of murder. He served 11 years in prison.

“A justice system steeped in racism let Donald Marshall Jr. down at every stage,” Nova Scotia Chief Justice Michael MacDonald said.

“We cannot, judges, ever forget that. Those who work in our justice system can never forget that.”

The Nova Scotia Judiciary said the court in Cape Breton will house a provincial court and the family division of the Nova Scotia Supreme Court.

The creation of the court is in line with a 1989 Marshall Inquiry recommendation calling for more provincial court sittings on Nova Scotia reserves, as well as calls to action outlined in the federal Truth and Reconciliation Commission’s report.

“This is truly an historic day for the Mi’kmaq and the province of Nova Scotia,” Wagmatcook First Nation Chief Norman Bernard said.

“It’s an example of reconciliation with Indigenous people through the courts and will reflect Mi’kmaq values.”

The Wagmatcook courthouse inside the Wagmatcook Cultural and Heritage Centre offers programs including a Gladue court, which refers to a Supreme Court of Canada ruling that requires courts to take Aboriginal circumstances into account when handing down a sentence.

It also offers a healing and wellness court, dedicated to Indigenous offenders who plead guilty or accept responsibility for their actions and are at a high risk to reoffend.

“This court program will look at the underlying factors that contribute to the person coming into conflict with the law,” the judiciary said on its website.

“The sentencing process is delayed approximately 12 to 24 months to allow time for the offender to proceed through this healing plan.”

Judge Laurie Halfpenny-MacQuarrie, the presiding judge at the new court, said that in 2015 she became fed up with issuing non-appearance arrest warrants for people from the Wagmatcook area who were forced to travel to Port Hawkesbury for proceedings – an hour’s drive away.

She said she met with local Aboriginal chiefs in April 2016 to discuss solutions for the issue, and the idea for the Wagmatcook First Nation courthouse was born.

“We discussed what that would look like, and it would be a court that’s philosophy would be Indigenous law, and applying that here at a local level,” Halfpenny-MacQuarrie said in an interview before the ceremony Thursday.

Halfpenny-MacQuarrie said they wanted to ensure the court would be a full-service legal centre in the community, with spaces for legal aid, Crown attorneys, interview rooms and holding cells, as well as housing the Indigenous legal programs.

The court will sit once a week on Wednesdays.

EDITORIAL: We need to be able to fire bad public employees
The Globe and Mail Editorial Board
June 21, 2018

This is an awkward time for federal public servants.

Here they are in a legitimate uproar about failures in the Phoenix pay system that has created real hardship for thousands of them in recent years.

But while there is sympathy for their plight, the most obvious take-away from the fiasco has been that public servants should be easier to fire.

In a recent public letter to the Prime Minister, Chris Aylward, head of the Public Service Alliance of Canada, offered other solutions. He called for a public inquiry into the Phoenix scandal. He suggested the union should have been consulted more fulsomely. He hinted that having more civil servants would have ensured the job was done better.

These ideas shouldn’t be dismissed out of hand. Canada’s federal civil service is by and large excellent. Reputable British researchers ranked it the most effective in the world last year. The bureaucracy may have a cultural problem, as Auditor-General Michael Ferguson argued in a report on the Phoenix debacle, but it does not need to clean house.

Still, there is clearly cause to at least sweep out the stables a bit. Remember that it emerged in a parliamentary committee last week that none of the three senior civil servants Mr. Ferguson directly blamed for the Phoenix failure were fired. One retired and two were shuffled into different posts in the same department.

By way of partial explanation, Michael Wernick, Canada’s top civil servant, said it is “extremely difficult” to fire any civil servant below the rank of deputy minister, thanks to the legislation that governs their employment.

Mr. Wernick believes Parliament should amend the Public Service Employment Act to make dismissals for incompetence a real possibility. We agree. Grievous failure, if proven, ought to be cause for firing. That’s healthy: It weeds out bad workers and reaffirms the value of the good ones.

Government workers shouldn't be immune from these principles, even those in a high-performing civil service like Canada's. That is especially true if you believe in a strong public sector. If voters are to support big government, they must first see that it's possible to get good government.

Canada's top bureaucrat gets pushback over suggested changes to Public Service Employment Act
iPolitics
Kathryn May
June 22, 2018

Federal executives say managers don't use the power they have now to fire poor performers and changing the law to make it easier to get rid of them could backfire and breed more fear and silence in the public service.

Privy Council Clerk Michael Wernick stirred another hornet's nest this week when he told a Senate committee that Parliament should consider changing the Public Service Employment Act so it is easier to fire public servants for poor performance, mismanagement and misconduct.

Wernick's appeal came amid the debate over who's to blame for the Phoenix disaster that has ensued since Auditor General Michael Ferguson's concluded it was an "incomprehensible failure" that signalled a 'broken' culture in the public service. Wernick, however, says firing non-performers has been an issue long before the Phoenix debacle.

The Association of Professional Executives of the Public Service of Canada (APEX) were the first to respond with a tweet that executives already have the power to fire so why "legislate what we can already do."

Michel Vermette, APEX's chief executive officer, said the problem is the public service does a lousy job of performance management. He said making it easier to fire people could create an "arbitrariness" in management that could put a chill on the honest and fearless advice public servants are expected to provide.

"We can fire people now. We can fire them for cause and non-performance is cause, but it's not happening because managers have to document and some don't do it. We are just very bad at managing performance," said Vermette.

"But the fear of arbitrary dismissal would be quite chilling. We are professional, non-partisan public servants, who are expected to offer frank and forthcoming advice, but what if the feared consequence is termination because someone didn't like the advice you gave?"

Colleen Bauman, a labour lawyer at Goldblatt Partners agrees.

She said government should be looking at ways to "empower employees" so they speak up and tell the truth, not put their jobs at a greater risk. Such a move would feed the 'obedient' culture of not speaking truth to power that Ferguson flagged.

“Making it easier to terminate people in the public service will worsen the very problem they are concerned about,” she said.

“This is what the auditor general was saying. Senior public servants who should have spoken up when the political directive didn’t make sense. You give them less job protection and you will make people more fearful and afraid to criticize directives that come down from the government.“

Bauman said it’s a “huge myth” that it is nearly impossible to fire a public servant. She said the existing law makes” it easier to fire a public servant than in other unionized workplaces — as long as managers follow the process.

“There’s truly a myth out there how difficult it is to fire a public servant, but if managers don’t follow the process they don’t have the grounds.”

That means documenting employees’ performance. Appraising their work; giving them feedback and if they fall short then offering them coaching, training and time to correct or improve.

Wernick told senators the problem is the legal test to fire employees for cause. The process becomes so “long, arduous and gruelling” that many managers simply give up.

The three federal executives blamed by Ferguson for mismanaging the Phoenix pay system were not fired for the fiasco that has left thousands of public servants underpaid, overpaid or not paid at all for more than two years.

Two of the executives still work at Public Service and Procurement Canada (PSPAC) but no longer in the pay administration branch; one has retired. Marie Lemay, PSPC’s deputy minister, has said they were punished by not receiving any performance pay or bonuses for 2015-16, the year of the disastrous rollout.

Some speculate the Phoenix executives were not fired because there are no grounds for cause. They may have had glowing performance appraisals — based on the information they provided — and met all the milestones in delivering Phoenix on time and budget.

Debi Daviau, president of the Professional Institute of the Public Service of Canada, said the government has all the power it needs to fire those who “screw up as badly” as the Phoenix executives but the government simply refuses to act.

She said they could be fired now and the findings of the auditor general report used as the ‘foundation’ to fire for cause.

“They can fire them and they should,” said Daviau. “It should not have taken an auditor general’s report and to suggest the reason it got out of control, was it is too hard to fire people is utter bullshit.”

Daviau called the idea of changing the law a “weak response and highly disrespectful” to the public servants who keep doing their jobs well despite not being paid.

“Many public servants are waiting for them to be held accountable, not to hear that it is hard to fire them,” she said.

“Sounds like the clerk is defensively trying to deflect the blame for this, which may actually roll up to him.”

Vermette argues there should be more visible consequences for bad behavior so public servants and Canadians don’t think people go unpunished. The government has sanctions other than firing, such as demotions, reductions in salary and resignations that people don’t hear about.

The public service has long been criticized for doing a lousy job of managing poor performers. Over the years, critics have argued poor performance management is at the root of many problems dogging the public service, from rising costs and bad morale, to Canadians’ negative perception of the public service.

Former Treasury Board President Tony Clement took a run at cracking down on non-performers with a new ‘systemic’ way to track performance. At the time, he found it baffling that the dismissal rate for unsatisfactory performance in the private sector was between five and 10 per cent of the workforce compared to 0.06 per cent in the public service. In 2011, for example, the government sacked 54 employees for misconduct and 99 for incompetence.

It’s unclear whether Clement’s regime improved performance management. Treasury Board statistics show the number of public servants fired for misconduct nearly doubled to 92 by 2013–14 and have remained at those levels ever since. It had no statistics readily available for those terminated for mismanagement or poor performance.

Crown attorney accused of misleading judge to cover up for dirty cop
The Star
Betsy Powell
June 21, 2018

KITCHENER— A federal Crown attorney was accused Thursday of misleading a judge in order to cover up for a dirty cop and trap thorn-in-the-side Toronto defence lawyer Leora Shemesh into committing perjury.

Shemesh is charged with perjury and obstruction of justice for allegedly telling various lawyers that she had seen a “nanny cam” video of a Peel Regional Police drug officer stealing money from a safe in her client’s home, and then allegedly committing perjury by lying about it under oath.

The officer, Const. Ian Dann, initially denied stealing any money but later claimed he had taken some cash to convert Shemesh’s client into a confidential informant.

Her lawyer, Marie Henein, is arguing in pretrial motions that Shemesh's constitutional rights against self-incrimination were violated when she was forced into the witness box under subpoena.

She is asking Superior Court Justice Gerald Taylor to stay the charges before the trial begins in September.

On Thursday, Henein, for a second day, grilled Lois McKenzie, a Brampton-based Crown working for the Public Prosecution Service of Canada. McKenzie conducted the cross-examination of Shemesh that led to the perjury charge after persuading Justice Bruce Durno her testimony was needed to clear the air about the nanny cam video.

How government works
CBA National Magazine
Ann Macaulay
Summer 2018 Edition

The Diners

The former government lawyer: Before joining Miller Thomson as a partner, John Grant was Crown counsel for 15 years. He has also been a tax litigation expert with Canada's Department of Justice.

The in-house counsel: Eryn Fanjoy is an associate practising in Stikeman Elliott's Tax Group.

Tax litigators in private practice often assume the government is all-knowing and all-powerful, with "a massive amount of resources and manpower to throw at litigation," says John Grant, a former Department of Justice (DOJ) litigator. But that's simply not true. "Often, the government is the litigation side that's outmanned."

Now in private practice at Miller Thomson in Toronto, Grant is sharing his insights with second-year Stikeman Elliott tax associate Eryn Fanjoy, passing along what he learned over the course of more than 15 years at the DOJ.

Over a lunch of black cod at the very busy Drake One Fifty in Toronto's business core, Grant recalls that courtroom experience plus the opportunity to represent Canada on matters of national scope greatly appealed to him after he graduated from law school. "You're immediately on your feet" at the DOJ, he says, unlike private practice. "There's no better training ground than the government." During his time in government, John worked on hundreds of files, including about 100 reported decisions.

The aim of government counsel should not be to win, Grant says, but to get the just result. "And by and large, that was the passion and driving force of many Justice counsel." In comparison, in private practice, he says, clients want to win.

"It's tough to have that conversation with a prospective client and say to them, 'You know what? The law's not there for you; the facts are not there for you. It's not worth taking it forward.'"

Fanjoy asks about the most unexpected differences between government and private practice. Grant says a common misconception is that government litigators don't log as many hours: in reality, the hours needed to address the same litigation steps are identical to those required in private practice. The difference is in the time spent on client development.

"What would have been a nine-and-a-half or a 10-hour day during the week turns into a 12- or 13-hour day with the extra hours added for client development," says Grant.

Shifting to private practice involved making small changes, such as in timekeeping and document management, says Grant, but a bigger challenge was looking at cases from a non-Crown perspective. At the DOJ, Grant was involved in files that could affect Canada's gross domestic product (GDP) if something went wrong. In private practice, working mainly with small- to medium-sized corporations, he knew he wouldn't be directly involved in that type of file.

He says representing clients whose own money is at risk has been refreshing, challenging and rewarding. "You're actually protecting their livelihood, you're protecting what they've invested often the majority of their life in. Their contact with you is often heartfelt," he says. "When you do something appropriate, and do it well, it's a feeling you just don't get in government."

He has also observed that government lawyers are averse to risk, but not to settlement. In fiscal litigation, "they're usually juggling protecting the government and protecting a certain body of jurisprudence," he says. His takeaway from working with government officials? "If you want to attempt to settle, engage them early, because they're open to it."

One benefit of working in the government is that it's comfortable, Grant says. "If you need clients, you just turn on a tap and the files miraculously arrive on your desk." There is no such tap on the private side, of course.

Litigation at the DOJ tends to be team-oriented, adds Grant. "There's such a structured team, really a safety net, that's built around you," including mentors who are always readily available. "You don't feel bad about knocking on the door and wasting a seven-minute interval or a 14-minute interval. Their doors are always open."

When Fanjoy asks Grant's advice on choosing between tax planning or tax litigation, Grant's advice is to begin with tax planning. "Even with my passion for tax litigation, I would say go into tax planning first. Get a depth and breadth of experience and knowledge in tax, and then use that to build a tax litigation career."

Heading off to meet a new client after lunch, Grant shares a final observation: his new partners sometimes wonder if he's having a hard time taking off the white hat. But he doesn't see it that way. "Whatever the right answer or the right result is, it is right whether you're on the side of the government or in private practice."

Canada's new chief justice keen to drag Supreme Court into the light

Wagner indicated Canadians can expect more dissenting opinions than was the norm when McLachlin was chief justice. 'I like dissent. It's normal in an open society'

National Post
John Ivison
June 22, 2018

OTTAWA — The Gnomes of Ottawa may not be the secretive, underground creatures of modern fairy tales. But the men and women who have run Canada's great institutions have tended to be equally shy and enigmatic. Until now, that is.

Richard Wagner, the new chief justice of the Supreme Court of Canada, held a press conference Friday that lasted nearly twice as long as was originally intended.

This kind of proactive disclosure isn't quite unprecedented — apparently his predecessor, Beverley McLachlin, held a press conference when she was first appointed chief justice in 2000. But they have been rarer than hen's teeth since then.

The Wagner press conference came in the same week that Michael Wernick, the clerk of the Privy Council, appeared before a Senate committee and urged Parliament to consider changes to the law to make it easier to fire public servants for misconduct, poor performance or mismanagement — an opinion that will not endear him to many of his contemporaries.

What to make of this break into the sunlight by the leaders of institutions that have generally felt the media, and by implication the public, should mind its own damned business?

It appears that, quite separately, they have reached the conclusion that the global threat to democratic institutions could spread to Canada, unless those institutions can convince citizens they are relevant and responsive.

"I think we have an obligation to speak to the people and to make sure the people of Canada keep their faith in the judicial system," said Wagner. "Right now we see outside Canada some of our basic, fundamental and moral values seriously attacked by leaders of other countries who pretend to be democratic," he said, without mentioning the name Trump.

He said he believes Canadian institutions have a role to play in reinforcing support for the rule of law and those moral values. "We should build on that and say it," he said.

Wernick has appeared at two parliamentary committees in recent weeks, the first defending the public service against a charge by Auditor General Michael Ferguson that it is broken and guilty of "incomprehensible failure" in the case of the Phoenix pay system debacle.
Yet, while Wernick was outspoken in his defence of a "world-class" bureaucracy, he recognized the need for improvements in the culture of the public service, to make it less risk averse and more creative. Part

of the solution in his view is to reform the incentives and disincentives available — that is, make it easier to fire people if they are blatantly inept or badly behaved.

In an era of precarious work, Wernick knows the public service cannot be so protected from the storms buffeting the rest of society that it becomes the preserve of a privileged elite. It is discredited enough in the eyes of many Canadians, who feel they are paying over the odds for gold-plated pensions and feather-bed working conditions.

Both Wagner and Wernick are intent on continuing to open up their organizations to public scrutiny. Judges' expenses will be published under the new Access to Information bill before Parliament; plain English summaries of judgments are now released as "cases in brief"; the court has embraced social media, and there are plans to release a "modern, accessible" annual report.

Wagner said the entire court will travel to Winnipeg next year to meet appeal court judges. "I would like the court to hear cases in other Canadian cities," he said. "This is about bringing the court closer to Canadians."

He wouldn't comment on specific cases, such as last week's Trinity Western decision, that critics claimed seemed to put freedom of religion at the bottom of a hierarchy of rights.

But he indicated that Canadians can expect to see more dissenting opinions in the future than was the norm when McLachlin was chief justice. "I like dissent," said Wagner. "It's normal in an open society."

Emmett Macfarlane, an associate professor in political science at the University of Waterloo and author of Governing from the Bench: the Supreme Court of Canada and the Judicial Role, said McLachlin's leadership style was to seek consensus and unanimity, while under Wagner we may see more split decisions.

Macfarlane welcomed the trend towards transparency in a court he already believes is the envy of many of its peers.
The moves by both Wagner and Wernick to make their institutions more legitimate in the eyes of Canadians should be encouraged.

The American republic is in danger of following Ancient Rome by precipitating its own demise.

Two-thirds of Americans don't know they have three separate branches of government, so they don't know who to blame when things go wrong. That pervasive civic ignorance has created the right conditions for a strong man to come forward and corral power with the promise he will solve all problems.

The tragedy unfolding in the United States may yet fulfill Thomas Jefferson's prophesy that "an ignorant people cannot remain free."

These apparently unrelated initiatives in the Supreme Court and the federal bureaucracy are attempts to make sure Canada's institutions remain vibrant and act as a counterweight to a Trump or an Augustus.

Government of Canada announces judicial appointment to the Tax Court of Canada
PRESS RELEASE PR Newswire
June 22, 2018

OTTAWA, June 22, 2018 /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.

Ronald V. MacPhee, General Counsel with the Tax Law Services Division of the Department of Justice Canada in Ottawa, is appointed a judge of the Tax Court of Canada. He replaces Mr. Justice Gaston Jorré, who resigned effective October 1, 2017.

Biography

Justice Ronald V. MacPhee was born and raised in Cape Breton, Nova Scotia. He earned his B.B.A. (Honours in Accounting) in 1989 from St. Francis Xavier University in Antigonish and his LL.B. from the University of New Brunswick in Fredericton in 1994.

After his call to the Ontario Bar in 1996, Justice MacPhee ran a busy general practice in Ottawa, both on his own and with a small firm, focusing in the areas of civil and criminal litigation, family law, and wills and estates.

In 2002, Justice MacPhee joined the Tax Law Services Division of the Department of Justice Canada in Ottawa. As General Counsel since 2009, he has been lead counsel in the conduct of complex trial and appellate litigation relating to fiscal matters before the Tax Court of Canada, the Federal Court of Canada, the Federal Court of Appeal, and the Ontario Superior Court of Justice.

Justice MacPhee is an enthusiastic amateur athlete who enjoys cycling in the summer, downhill skiing in the winter, and playing weekly hockey. Justice MacPhee has spent several years as a volunteer basketball coach with a number of organizations in the Ottawa area. He is also an active member of the volunteer "hosers" of his neighborhood's outdoor rink, who work to ensure quality ice conditions for all skaters.

Justice MacPhee and his wife, Suzanne, are the proud parents of three wonderful daughters and owners of one crazy dog.

Government of Canada announces judicial appointments in Nunavut
PRESS RELEASE PR Newswire
Jun. 22, 2018

OTTAWA, June 22, 2018 /CNW/ - The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, today announced the following appointments 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.

Susan Charlesworth, senior review counsel at Queen's University Legal Aid, in Kingston, is appointed a judge of the Nunavut Court of Justice in Iqaluit. She replaces Mr. Justice E.D. Johnson, who resigned effective September 30, 2015.

Christian Lyons, general counsel with the Public Prosecution Service of Canada, is appointed a judge of the Nunavut Court of Justice in Iqaluit. He replaces Mr. Justice R.G. Kilpatrick, who resigned effective September 30, 2016.

Biographies

Justice Susan Charlesworth received both her B.Sc. in mathematics and her LL.B. from Queen's University. She articled with O'Hara, Cromwell and Wilkin in Kingston before joining the criminal practice of the Honourable T.G. O'Hara, who was later appointed to the judiciary. In addition to practising criminal law, Justice Charlesworth also represented children in Children's Aid Society matters and supported mental health clients and inmates at administrative hearings. In 1996, Justice Charlesworth joined Queen's University Legal Aid, supervising law students providing much-needed legal services to people in the Kingston area. Under her guidance, hundreds of law graduates have learned valuable ethical and professional lessons in a practical setting.

Between 2013 and 2015, Justice Charlesworth and her husband, David, lived in Iqaluit, where she was criminal defence counsel at Maliganik Tukisiniarvik Legal Services. During this time, they came to appreciate the beauty of the land and the character of the people of Nunavut.

In her free time, Justice Charlesworth is active in her community. She is the president of the recreational hockey league in which she has played for 20 years. She has also served in various roles on the board of the Independent Living Centre in Kingston for 10 years, including as treasurer. As the current chair of St. Andrew's-by-the-Lake United Church Council, she has adapted a United Church hymn for her new circumstances: "What does the World require of you? What does the World require of you? To seek justice, and love kindness, and walk humbly on the Land."

Justice Charlesworth and her husband are the proud parents of three children.

Justice Christian Lyons was born and raised in Ontario. He holds an LL.B. from Queen's University and a B.A. in philosophy from the University of Toronto. He was called to the Ontario Bar in 2003, the Nunavut Bar in 2006, and the Northwest Territories Bar in 2014.

Justice Lyons began his career as criminal duty counsel at the Scarborough Courthouse. In 2006, he accepted a position with the Maliganik Tukisiniarvik legal aid clinic and moved to Iqaluit, Nunavut. There he represented Nunavummiut – residents of Nunavut – and appeared before the Nunavut Court of Justice in communities across the territory. He was appointed senior counsel with Maliganik Tukisiniarvik in 2010, and worked in that capacity until 2014. He then joined the Public Prosecution Service of Canada (PPSC) in the Nunavut Regional Office.

At the PPSC, Justice Lyons first worked as a front-line prosecutor, travelling extensively on court circuits throughout Nunavut. He later assumed leadership and management roles, including that of senior counsel and general counsel, Legal Operations. He was active on PPSC national committees dealing with current legal topics. He also met regularly with the Legal Services Board of Nunavut, the Nunavut Court of Justice, and other Nunavut stakeholders to discuss administration of justice issues and potential improvements.

During his 12 years working and living in Nunavut, both as defence counsel and as a prosecutor, Justice Lyons has learned much about Inuit culture and traditional values. In his life outside the legal profession, Justice Lyons enjoys community life in Iqaluit, being on the land, camping, hiking, kite-skiing, and kite-surfing.

Chief justice says Supreme Court can be powerful voice for rule of law amid global tumult
Richard Wagner holds rare news conference six months after taking helm of high court
CBC News
Aaron Wherry
June 22, 2018

While sounding an alarm about the threats faced by democratic institutions abroad, Chief Justice Richard Wagner told a rare news conference in Ottawa on Friday that he is interested in ensuring the Supreme Court remains credible and connected with the Canadian public.

"I think that the Supreme Court and chief justice, in particular, have an obligation to speak to the people and to make sure that the people of Canada keep their faith in the judicial system. And that could be made by our presence, by our speeches," he said, pivoting from a reporter's question about whether the court has a leadership role to play on major social issues.

"Right now we see, outside Canada, that some of our basic values, fundamental values and moral values, are seriously attacked by other countries or leaders of other countries, who pretend to be democratic. I'm talking about democracy, I'm talking about the rule of law, I'm talking about respect for institutions and that makes me concerned, because I think we have to be very careful.

"And in those circumstances … I believe that Canadian institutions have a role to play ... You know, we are not a superpower, economically speaking. We're not a superpower in military terms. But we are a power in terms of the rule of law, in terms of the moral values. And I think that we should build on that, and say it.

"And there are people outside the country that are looking to us, to get our support because they need our support. Because we can speak on behalf of Canadians for those values."

The chief justice doesn't often take questions from the media, but Wagner's predecessor, Beverly McLachlin, also met with reporters after she took the helm of the high court in 2000 and again when she retired last December. Wagner was officially named chief justice last December.

Wagner announced that the court will visit Winnipeg next year to meet with appeals court judges, local lawyers and community members. He also said he hopes the court will be able to hold hearings outside Ottawa at some point.

"I think it would be a wonderful thing for the court and the public," Wagner said. "How we bring the court closer to Canadians is something I think about a lot."

He noted that the court has started releasing "plain language" summaries of its rulings that are short and easy to read, but he faced questions about the court's recent agreement with Library and Archives Canada to place a 50-year embargo on the public release of internal documents. Wagner defended the arrangement as a reasonable compromise between transparency and the need for judicial secrecy.

Indigenous incarceration rate 'unacceptable'
Wagner generally declined to comment on specific cases, but he did state an opinion on the value of dissent in court rulings ("I would be very worried if we were always unanimous") and offered thoughts on the disproportionate number of Indigenous people in Canadian prisons.

"The number of Indigenous people incarcerated, the proportion compared to the non-Indigenous people incarcerated, is unacceptable. The rate is too high. It reveals a serious problem. And so far as the judiciary is concerned, I think that the court has a role to play whenever the case is presented to the court to decide those issues," Wagner said, noting the court's recent finding that risk assessment tests performed by corrections officials might be discriminating against Indigenous inmates.

"We are in a process of reconciliation. It's going to be be a long process. It has to be done. It has to be done the right way. And it involves many stakeholders. And we are committed to do it, within our own jurisdiction."

Wagner, 61, was originally nominated to the high court in 2012 by then-prime minister Stephen Harper.

Before his appointment, he served on the Quebec Superior Court and the Quebec Court of Appeal. He also had a commercial litigation practice focusing on real estate and professional liability insurance.

High Indigenous prison rate 'unacceptable': Supreme Court chief justice
The Chronicle Herald
The Canadian Press
June 22, 2018

OTTAWA — The over-representation of Indigenous people in prison is "unacceptable" and reveals a serious problem, says Supreme Court Chief Justice Richard Wagner.

"That's a terrible situation, I must say," Wagner told a rare news conference Friday. "I mean, the rate is too high."

In 2015-16, Indigenous people represented almost one-quarter of the total federal offender population.

In addition, a lower percentage of Indigenous offenders have benefited from gradual release from custody than non-Indigenous ones.

The Liberal government has singled out the difficult relationship between Indigenous Peoples and the justice system as a priority for ministers, and various parliamentary committees have been busy studying the challenges and potential solutions.

Wagner said that while he'll leave the politics to others, the high court is making its voice heard on issues of Indigenous justice.

He pointed to a decision this month in which the court said the federal prison service had failed to ensure its psychological assessment tools were fair to Indigenous inmates.

The Supreme Court has a role to play in the national reconciliation with First Nations, Wagner added.

"It's going to be a long process. It has to be done. It has to be done the right way. And it involves many stakeholders," he said.

"And we are committed to do it, within our own jurisdiction."

The chief justice spoke to the media after being recently reminded that his predecessor, Beverley McLachlin, gave news conferences at the beginning and end of her tenure as top judge.

Wagner said he is trying to make the Supreme Court more open and accessible to Canadians. In recent years the court has embraced social media and it has begun issuing plain-language summaries of its decisions.

The Supreme Court's nine justices plan to visit Winnipeg next year for meetings and community events, and Wagner mused that he would love to see the court hold hearings outside of Ottawa "from time to time."

"I think it would be a wonderful thing for the court and the public. How we bring the court closer to Canadians is something I think about a lot," he said.

"Canadians should know that the courts are there for them when they need them. The public also has a right to know how our courts work."

Ignorance breeds many biases, he said, and the more people who know about the judicial system "the more they will keep faith in the system, and that's very important."

Cannabis à domicile : le juge en chef Wagner s'attend à devoir trancher
Le juge en chef du Canada s'attend à voir le litige opposant Québec et Ottawa sur la culture du cannabis à domicile atterrir sur son bureau.
Radio-Canada
22 juin 2018

Mais évidemment, on ne l'y prendra pas : Richard Wagner refuse de dévoiler dans quel camp il se rangera, a-t-il expliqué à la Presse canadienne.

« Moi, je vais attendre tout simplement que le dossier soit présenté devant la Cour, puis on verra à décider selon la preuve qui nous sera présentée, s'il y a effectivement matière à intervention », a offert vendredi le magistrat, lors de la conférence de presse marquant, avec un peu de retard, son arrivée en fonction.

Le juge Wagner a nié que la Cour suprême donne toujours gain de cause au fédéral. Le tribunal dont il a pris les commandes en décembre dernier « ne penche pas d'un côté ou de l'autre », a-t-il assuré.

« Je suis convaincu que les membres de la Cour qui sont là actuellement font leur travail de façon très professionnelle et sont dédiés à rendre la meilleure décision, moralement, professionnellement, selon la preuve qui est présentée », a assuré le juge québécois.

Le projet de loi C-45 sur la légalisation du cannabis a reçu la sanction royale de la gouverneure générale Julie Payette, jeudi, au Sénat.

La substance sera légale à compter du 17 octobre 2018. Le flou entourant la culture du cannabis à domicile, lui, subsistera.

Dans sa loi, le fédéral autorise à faire pousser jusqu'à quatre plants de cannabis à la maison. De leur côté, le Québec et le Manitoba l'interdiront.

L'affaire se retrouvera vraisemblablement devant les tribunaux, probablement par la voie d'une contestation citoyenne. La ministre fédérale de la Justice, Jody Wilson-Raybould, a allégué en février que « lorsque la compétence provinciale se substitue à la compétence fédérale ou que l'objectif de notre législation est contrarié par une autre loi, la prépondérance fédérale entre en ligne de compte ».

Le Québec, lui, est convaincu qu'il agit dans son champ de compétence, comme l'a maintes fois martelé le ministre responsable des Relations canadiennes, Jean-Marc Fournier, tout en accusant la ministre d'Ottawa de chercher à « encourager » les citoyens à contester la loi québécoise.

Compétence de la CQ : les juges de la CS changent d'approche
Dans l'affaire du renvoi concernant la compétence de la Cour du Québec, les juges de la Cour supérieure ont modifié leurs exigences... que demandent-ils ?
Droit Inc
Julien Vailles
22 juin, 2018

Alors que le renvoi sur la compétence de la Cour du Québec doit être entendu cet automne, les juges de la Cour supérieure, à l'origine de cette affaire, ont décidé d'amender leurs arguments.

Pour rappel, la Cour supérieure avait déposé il y a un an une poursuite contre le gouvernement québécois et le gouvernement fédéral. On contestait la compétence exclusive accordée à la Cour du Québec sous deux angles.

Premièrement, selon la Constitution de 1867, la Cour du Québec ne devait avoir qu'une compétence limitée à 100 $, ce qui, selon une méthode basée sur l'indice des prix à la consommation, vaut aujourd'hui 10 000 $. De plus, cette compétence ne serait pas exclusive, mais concurrente avec celle de la Cour supérieure. La compétence exclusive actuelle de la Cour du Québec pour les litiges civils de moins de 85 000 $ est donc inconstitutionnelle, plaidait-on.

Deuxièmement, on en avait contre le droit d'appel administratif à la Cour du Québec. On arguait que ce droit d'appel était un contrôle judiciaire déguisé. Or, constitutionnellement parlant, seule la Cour supérieure, tribunal de droit commun au Québec, a ce droit de contrôle judiciaire.

Cette poursuite a forcé la main au gouvernement provincial, qui a finalement décidé de faire ce qu'il avait d'abord refusé aux demandeurs : il a demandé à la Cour d'appel du Québec un renvoi sur la question.

55 000$ au lieu de 10 000$
Or, si le processus est changé, les questions constitutionnelles devant être débattues lors de ce renvoi sont les mêmes. Et les juges de la Cour supérieure ont choisi de changer d'approche, déclare l'ancienne bâtonnière Madeleine Lemieux, porte-parole du groupe.

Ainsi, sur la question de la compétence exclusive, on a décidé de se fonder non pas sur l'indice des prix à la consommation pour indexer les 100 $ de 1867, mais bien sur l'évolution du produit intérieur brut par habitant. Ce faisant, on obtient un montant non pas de 10 000 $ mais bien de 55 000 $. Ainsi, les juges ne s'opposeraient pas à ce que la Cour du Québec conserve une compétence concurrente pour les litiges de 55 000 $ ou moins.

De plus, le projet de loi 168, qui avait pour but d'amender la Loi sur les tribunaux judiciaires, est mort au feuilleton, la session parlementaire s'étant terminée avant son adoption. Ce projet de loi prévoyait conférer un véritable pouvoir d'appel administratif à la Cour du Québec, ce qui aurait suffi aux juges de la Cour supérieure pour trancher leur deuxième question. Dans l'état actuel des choses, il faudra donc plaider cet argument, sauf si la Procureure générale du Québec décide de concéder ce point.

Quoi qu'il en soit, l'affaire sera débattue au fond dans quelques mois.

Gladue Awareness Project seeks to educate, look for solutions
With continually disproportionate numbers of Indigenous offenders in jail, the project looks to better inform participants on Gladue.
Regina Leader-Post
Heather Polischuk
June 24, 2018

It's been close to two decades since a Supreme Court of Canada decision changed the way courts view and sentence Indigenous offenders.

But, for some, it seems 19 years has not been long enough to fully comprehend the Gladue case.

"There are varying degrees of knowledge, but there's still a need for awareness, that people are actually informed about this case and how it works and how it applies in various situations," said Regina lawyer Michelle Brass.

Brass is undertaking a series of seminars in her role as Gladue Project Research Officer with the University of Saskatchewan's Native Law Centre, attached to the College of Law.

With funding from the Law Foundation of Ontario, Brass is working on what's termed the Gladue Awareness Project, researching the landmark 1999 case (and the more recent, related Ipeelee case from 2012) and the way it's applied within Saskatchewan.

"The numbers keep rising about incarcerated Indigenous people within Saskatchewan," Brass said. "So I'm trying to get the discussion going and have people talk about this particular issue, talk about their experience, talk about their insight and expertise … It's to address the high number of incarcerated Aboriginal people in the province and to try and do something to bring those numbers down."

The Gladue case instructs lower courts to consider an Indigenous offender's background when deciding on sentence. Gladue — and the Ipeelee case which expanded upon the Supreme Court's previous findings — laid out the importance of a restorative justice approach, where possible, to help alleviate the disproportionate number of Indigenous offenders in Canadian jails.

The original case led to the implementation of Gladue reports, which look in-depth at an Indigenous offender's personal background, as well as his or her community. The reports detail what are known as "Gladue factors," which include issues springing from an offender's personal upbringing or larger

systemic problems, such as poverty, racism and the impact of residential schools. They then offer up restorative justice alternatives a judge can consider.

Brass said she studied 286 reported cases arising between 1999 and the spring of 2018.

As part of her one-year contract, she is now taking information about Gladue throughout the province, via seminars scheduled between June and November. The seminars will allow her to discuss her research, informational booklets and brochures she developed on Gladue rights, and the technical components of a Gladue report, and will enable a discussion with participants about their experiences and how the Gladue process might be made better.

She said the seminars are intended for tribal council justice staff, those who work in the court and corrections systems and the public.

“It’s not dismissing the work that’s ongoing, because there is a lot of work that various sectors of either government or Legal Aid or defence counsel, that they have worked on,” she said. “But (it’s) just trying to take everything together so we can just kind of move to a more positive way to hit this problem more head-on but together.”

At the conclusion, Brass intends to compile a report that may include recommendations.

While the Gladue case is frequently referenced in courtrooms, Brass said there are still instances in which an offender’s Indigenous background is not properly addressed.

“There still seems to be a tendency to sort of limit the application of 718.2 (the relevant Criminal Code section),” she said. “So whether that’s lack of awareness of what the case actually says, that might be one of the problems. In other ways, as well, offenders don’t know about it, don’t know about the case.”

So far, she’s hosted one seminar (in La Ronge) and found some people had limited knowledge about the case — illustrating the continued need for education.

She added the seminars also speak to resources that are currently available, including the U of S’s Gladue Rights Research Database.

Nearly half of youth incarcerated are Indigenous: Statistics Canada
The Times Colonist
The Canadian Press
Kelly Geraldine Malone
June 24, 2018

WINNIPEG — Nearly half of all youth who end up in custody across Canada are Indigenous, a statistic that a Manitoba activist says shows unacceptable and systemic racism.

Data released by Statistics Canada shows Aboriginal youth made up 46 per cent of admissions to correctional services in 2016-17 while making up only eight per cent of the youth population.

"It's not actually surprising to me to hear those numbers," said Michael Redhead Champagne.

"As a member of the Indigenous community, with First Nation, Metis and Inuit people around me, I see the overrepresentation of Indigenous people going into the justice system," he said.

Champagne founded Aboriginal Youth Opportunities in Winnipeg's North End neighbourhood in 2010 to support Indigenous youth. Working with kids in the inner city area, he has seen how "Indigenous people often get the short end of the stick."

"I see Indigenous and non-Indigenous people literally doing the exact same crime and not experiencing the same amount of jail time, probation, etc."

Incarceration of youth generally across Canada has declined slightly each year since 2012. But the Statistics Canada data from 10 reporting provinces and territories also showed the proportion of Aboriginal youth in custody has steadily increased.

It was 21 per cent in 2006-07, but 10 years later Aboriginal boys made up 47 per cent and Aboriginal girls accounted for 60 per cent of correctional admissions.

In the provinces, the numbers of Indigenous youth in custody were highest in Saskatchewan (92 per cent for boys; 98 per cent for girls) and Manitoba (81 per cent for boys; 82 per cent for girls).

Howard Sapers, an independent adviser to the government of Ontario on corrections reform, said the increasing numbers, particularly for girls, carries through to adulthood.

"We are getting so dangerously close to half of all adult women in custody being Indigenous," he said in a phone interview from his Ottawa office.

Aboriginal men accounted for 28 per cent of admissions, while Aboriginal women accounted for 43 per cent. At the same time, they represented about five per cent of the Canadian adult population.

"There is little way to escape the conclusion that there are some systemic biases built into the system that are contributing to this overrepresentation," Sapers said.

Policy decisions, such as mandatory minimum sentences, have had a disproportionate impact on Indigenous communities, he said.

But there is also movement in the other direction, said Sapers, pointing to bail reform, restorative justice efforts and culturally appropriate initiatives.

The justice system cannot stand alone in curbing the trend of incarcerating Indigenous youth, he suggested. Tackling poverty, unemployment or underemployment, poor housing, addictions and mental illness would make a large difference, he said.

Change is needed immediately, Champagne agreed, because right now there is a cycle of institutionalizing Indigenous kids.

It starts with children being taken into care where they are assigned a worker, curfews and strict rules, he said. When they become older, they graduate to the criminal justice system.

"When I see this kind of stuff I get frustrated with all the rhetoric around reconciliation."

Champagne has worked with youth who have experienced adversity, violence, addictions, homelessness and who are often in conflict with the justice system, but he sees their unique gifts and how much they can contribute to the community.

"We as a society have to get better at recognizing those good things when they are happening, celebrating them ,and telling those stories, so that our young people can see themselves reflected as successful, as helpers and as leaders, because that's exactly what they are.

"And that's why they give me such hope."